

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Criminal Action No.
v.)	10-00320-14-CR-W-DGK
)	
RAFAEL ZAMORA,)	
)	
Defendant.)	

**RAFAEL ZAMORA’S MOTION TO SUPPRESS
WITH SUPPORTING SUGGESTIONS**

The defendant, Rafael Zamora, by counsel, in accordance with Rules 12, 41, and 47 of the Federal Rules of Criminal Procedure, hereby respectfully moves this Court for an order suppressing (1) all evidence and all testimony relating to such evidence obtained by the government during a November 19, 2010, search of Mr. Zamora’s home, (2) all statements made by Mr. Zamora to law enforcement during Mr. Zamora’s November 19, 2010, arrest at his home on a federal warrant, and (3) all statements made by Mr. Zamora during his November 19, 2010, *Mirandized* interview.

SUPPORTING SUGGESTIONS

Summary

On November 19, 2010, at approximately 6 A.M., Mr. Zamora was arrested on the front porch of his home “without incident,” pursuant to a federal arrest warrant. Instead of taking Mr. Zamora away, law enforcement, without

permission, took Mr. Zamora back into his home and without first giving the indicated *Miranda* warnings, interrogated Mr. Zamora about his alleged illegal drug trafficking activities stated in the indictment supporting the federal warrant for his arrest. All of Mr. Zamora's statements during this interrogation should be suppressed.

During the compelled interrogation, Mr. Zamora gave consent to search his home. Mr. Zamora submits that the consent given was not voluntary nor consensual and therefore, the follow on search of Mr. Zamora's home was not a voluntary nor consensual search. All evidence seized during the search should be suppressed.

At approximately 8 A.M. on the same day, after having been transported to police headquarters, Mr. Zamora was given *Miranda* warnings and made incriminating statements in the follow-on interrogation. All of Mr. Zamora's statements during this interrogation should be suppressed (1) as a deterrence to law enforcement's immediately prior unreasonable search and seizure, (2) to ensure that any evidence introduced at trial will be voluntary and trustworthy, and (3) to prohibit the government from introducing uncorroborated confessions at trial.

Pertinent legal precedent

The Fourth Amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV.

Without a search warrant, police officers may not make an entry into or a search of a home unless justified by exigent circumstances. *United States v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996) (citations omitted). "The exigent circumstances exception to the warrant requirement is narrowly drawn. ... The exception justifies immediate police action without obtaining a warrant if lives are threatened, a

suspect's escape is imminent, or evidence is about to be destroyed.” *Id.* (citations omitted).

If police officers find themselves lawfully within a home, they still cannot make a warrantless search of the home absent exigent circumstances, with one such circumstance being the “voluntary” consent to search by the home owner. To determine whether there was voluntarily consent to search, the totality of the circumstances are to be considered. The specific circumstances to be considered include (1) the age of the person giving consent; “(2) his general intelligence and education; (3) whether he was intoxicated at the time; (4) whether he was informed of his *Miranda* rights before consenting; (5) whether any previous arrests would have informed him of his rights and protections; (6) the length of time he was detained; (7) whether the officers acted in a threatening manner; (8) whether the police made any promises or misrepresentations; (9) whether the police had [him] in custody or under arrest at the time; (10) whether he consented in public; and (11) whether [he] was silent during the search.” *United States v. Johnson*, 619 F.3d 910, 918 (8th Cir. 2010) (citations omitted).

In addition, in determining whether the consent to search was “voluntary,” the government ““bears the burden of proving voluntary consent by a preponderance of the evidence and must show that the defendant behaved in such a manner that the officer reasonably believed that the search was consensual.”” *United States v. Muhlenbruch*, No. 10-1396, slip op. at 11-12 (8th Cir. February 17, 2011) (quoting *United States v. Esquivias*, 416 F.3d 696, 700 (8th Cir. 2005)).

If there is no search warrant, exigent circumstances, or voluntary consent to search, then all evidence seized is subject to the exclusionary rule of the Fourth Amendment.

Turning to the protections of the Fifth Amendment to the United States Constitution, if police officers find themselves lawfully within a home and they

have placed the home owner in custody and they have begun asking questions, then an interrogation has been initiated and the police officers must first give the home owner his *Miranda* warnings. If not, then the Fifth Amendment to the United States Constitution “prohibits the prosecution from using [the] compelled testimony in its case in chief [which] ensures that any evidence introduced at trial will be voluntary and thus trustworthy.” *United States v. Fellers*, 397 F.3d 1090, 1095 (8th Cir. 2005) (relying on *Oregon v. Elstad*, 470 U.S. 298, 306-08 (1985)). This is “[b]ecause confessions or statements taken in violation of *Miranda* give rise to an irrebuttable presumption that they have been compelled,” and they therefore must be excluded from the prosecution’s case-in-chief. *Id.*, (relying on *Elstad* at 307).

Moreover, non-*Mirandized* statements determined to be involuntary, demand the suppression of the derivative physical evidence. *United States v. Flores-Sandoval*, 474 F.3d 1142, 1147 (8th Cir. 2007) (citing *United States v. Villalba-Alvarado*, 345 F.3d 1007, 1008 (8th Cir. 2003)). Whether a defendant's statement is voluntary, is determined by the totality of the circumstances surrounding the statement or the confession. *United States v. Hambrick*, No. 10-1096, slip op. at 10 (8th Cir. January 20, 2011) (citing *United States v. Ingle*, 157 F.3d 1147, 1150 (8th Cir. 1998)). That is, in the totality of the circumstances, have the pressures exerted upon the suspect, overborne his will? *Id.*, (citing *United States v. Cody*, 114 F.3d 772, 776 (8th Cir. 1997) (in turn relying on *United States v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989)). "Those potential circumstances include not only the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health," but also "the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." *Id.*,

(quoting *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (internal citations omitted)).

Underlying this requirement that a confession must be “voluntary,” is a healthy skepticism of the accuracy of confessions. *United States v. Kirk*, 528 F.3d 1102, 1111 (8th Cir. 2008).

A long history of judicial experience has shown that, under the "strain of suspicion," individual self-interest, enmity, or personal frailty "may tinge or warp" the substance of a confession. *United States v. Stabler*, 490 F.2d 345, 350 (8th Cir. 1974) (quoting *Wong Sun v. United States*, 371 U.S. 471, 489, (1963)). Thus, out-of-court confessions are always suspect, to some degree, because they — like hearsay — possess "neither the compulsion of the oath nor the test of cross-examination." *Id.*

Id.

Turning to the protections of the Sixth Amendment to the United States Constitution, “[t]he Sixth Amendment prohibits the use at trial of statements deliberately elicited from a suspect after he has been indicted and in the absence of counsel.” *Id.*, (relying on *Massiah v. United States*, 377 U.S. 201, 206 (1964)).

If a Fourth Amendment violation has occurred and the fruit of the violation is a confession, then the exclusionary rule is to be applied as a deterrent to unreasonable searches and seizures. *Id.*, (relying on *Brown v. Illinois*, 422 U.S. 590, 602-03 (1975)). “*Miranda* warnings do not obviate the need for the exclusionary rule in the Fourth Amendment context because the warnings cannot, ‘alone and per se,’ ensure that a voluntary confession taken subsequent to a Fourth Amendment violation was an act of free will sufficient to break the causal connection between the violation and the confession.” *Id.*, (relying on *Id.*)

If law enforcement has obtained a properly *Mirandized* confession, then those portions of the confession that are uncorroborated cannot, on their own, support a criminal conviction. That is, where “there is no tangible evidence of the crime confessed, the Government must introduce substantial independent evidence establishing the reliability or trustworthiness of the defendant's statement.” *United States v. Kirk*, 528 F.3d 1102, 1111 (8th Cir. 2008) (citations omitted).

Pertinent facts

The arrest and coercive in-home interrogation

Early in the morning of November 19, 2010 (the government’s investigative report (Bates # 000047-50) says approximately 6 AM, which would be very dark that time of year), Rafael heard loud noises coming from in front of his house. There was banging on the front door and on the front windows. Rafael was on one of the two couches in the front living room getting ready to go to work. When he first looked out the window, he saw several armed men with flashlights and guns pointed together at him. One of the men had what looked like a battering ram, or maybe it could have been a rifle. They were shouting very loudly and demanding loudly enough that Rafael’s wife and three kids (ages 16, 7, and 3) came running down the stairs. Rafael’s wife asked him who it was and what do they want, and Rafael said it was police officers.

The investigative report discloses that the reporting officer was SA Christopher M. Kline. The six other officers were SA Tim McCue, Det. Jim Swoboda, KCMOPD, Det. Vern Huth, KCMOPD, PO Dave Barbour, KCMOPD, PO Curtis Copinger, KCMOPD, and Deputy Brian Cutler, USMS.

Even though Rafael was surprised, shocked, and scared, he opened the front door and flashlights were shined into his face and someone asked him his name and when he told them “Rafael Zamora,” they immediately grabbed him and pulled

him out onto the front porch, surrounded him, and placed plastic cuffs on his wrists behind his back. The plastic cuffs broke and one of them said, "Those don't work well on big boys." Then, someone placed steel cuffs on Rafael's wrists behind his back, told him they had a federal warrant for his arrest, and arrested him.

From that time on, it was very clear that Rafael would not be free to leave; that is, Rafael was clearly "in custody." Once Rafael was placed under arrest, surrounded by the police on Rafael's front porch, the police had no reason to go back into Rafael's home. The police should have taken Rafael away. Instead, without Rafael's consent, one of the officers said, "Its cold outside so take him inside."

Once inside, they were going to put Rafael on one of the living room couches facing the other living room couch where Rafael's wife and three kids were. Rafael said please could he stand in the hallway so his kids, who were crying, wouldn't see him. The officers did allow this.

In the hallway, one of the officers had a folder and showed Rafael a picture of Rafael in the folder and then asked Rafael, "Do you know what this is about?" When Rafael said, "No," the officer explained it was a federal warrant for conspiracy and then the officer started asking Rafael about names on a list and if Rafael knew them. Rafael said, "No" to each of three names read to him.

Rafael could hear his kids crying and Rafael started crying a little bit because his kids were crying. In response, one of the officers said to Rafael, "Do you see what you are doing to your family? Do you want to cooperate? Everything will go easier for you if you cooperate."

The whole time Rafael and the officers were in the hallway, the officers repeatedly told Rafael that they knew what he had been doing and repeatedly told Rafael that he needed to think about his kids. The agents also told Rafael that if he would be cooperative, he could get off the hook. Rafael interpreted all of this to

mean that if he didn't cooperate, the agents were going to take his kids away from him and his wife. Never did any of the officers tell Rafael that he did not have to consent, nor was Rafael ever given *Miranda* warnings. The officers never told Rafael anything in these regards.

So, when the officers asked Rafael if he had anything in the house, Rafael said he had a little marijuana or weed and he showed them where it was under the basement stairs. One of the officers brought the plastic tub containing the marijuana upstairs, pulled the marijuana out of the tub, and asked, "Is this it?" When Rafael said yes, one of the agents (perhaps Swoboda) said, "We don't want that little bullshit, where are the pounds?"

Rafael responded that he didn't know anything about pounds, that what the officers had seized was all that Rafael buys to smoke. The officers asked Rafael if the seized marijuana was all that he had and Rafael told them that it was. The officers continued to ask Rafael if he would cooperate and help them find the pounds. Rafael agreed so the officers would get Rafael out of his home so his kids wouldn't see him hand cuffed.

Rafael remembers that while he was surrounded in the hallway, the officers did a swab test kit on him and maybe fingerprints. The whole time Rafael was surrounded in the hallway during all the questioning, the officers did not let Rafael put his clothes on. Rafael had to stand in the hallway in his tank top, undershirt, and undershorts.

While in the hallway, Rafael could hear the conversation in the living room. An officer was talking to Rafael's wife trying to calm her and the kids. The officer said that Rafael wasn't in any real trouble, he was just wanted for questioning -- they were going all over the city -- this was one of the nicer houses they had been in. Rafael's wife responded that their home was not a drug house; it was a family home.

The police station interview

Rafael was transported to the police station and at approximately 8 A.M. the same morning, Rafael waived his *Miranda* rights and submitted to an unrecorded interview by SA Kline and Det. Swoboda. Rafael's recollection of the contents and substance of the interview are substantially different from that reported by SA Kline. Also of note is the fact that the lion's share of the reported interview does not have anything to do with Rafael's alleged participation in the "Marron" conspiracy.

Argument

On November 19, 2010, at approximately 6 A.M., Mr. Zamora was arrested on the front porch of his home "without incident," pursuant to a federal arrest warrant. Instead of taking Mr. Zamora away, law enforcement, without a search warrant, without exigent circumstances, and without permission, took Mr. Zamora back into his home. These police actions were in violation of Mr. Zamora's Fourth Amendment constitutional rights to be secure in his home. Therefore, anything that was seized following the illegal entry should be suppressed.

Once illegally inside Mr. Zamora's home and without first giving the indicated *Miranda* warnings, the police officers interrogated Mr. Zamora about his alleged illegal drug trafficking activities in the alleged Marron drug conspiracy stated in the indictment supporting the federal warrant for his arrest. Mr. Zamora submits that his statements were elicited in violation of *Miranda* which in turn gives rise to an irrebuttable presumption that they were compelled. Therefore, all of Mr. Zamora's statements during the interrogation in his home, must be excluded from the prosecution's case-in-chief. Further, Mr. Zamora submits that the interrogation was coercive and in the totality of the circumstances, overbearing to his will. Therefore, on this additional basis, all of Mr. Zamora's statements during

the interrogation in his home, should be suppressed. And still further, Mr. Zamora's statements were deliberately elicited from him, after he had been indicted, without *Miranda* warnings, and in the absence of counsel; all in violation of Mr. Zamora's Sixth Amendment rights. Therefore, on this second additional basis, all of Mr. Zamora's statements during the interrogation in his home, should be suppressed.

During the compelled interrogation in his home, Mr. Zamora gave consent to search his home. Mr. Zamora submits that the consent given was not voluntary nor consensual and therefore, the follow on search of Mr. Zamora's home was not a voluntary nor consensual search. Further, Mr. Zamora submits that he behaved in such a manner that the officers could not have reasonably believed that the search was consensual. Therefore, all evidence seized during the search should be suppressed. Moreover, with Mr. Zamora's non-*Mirandized* statements being involuntary, caselaw demands the suppression of the derivative physical evidence seized.

At approximately 8 A.M. on the same day of November 19, 2010, after having been transported to police headquarters, Mr. Zamora was given *Miranda* warnings and made incriminating statements in the follow-on interrogation. Mr. Zamora submits that his entire statement was the fruit of the Fourth Amendment violation that he had been subjected to just moments earlier. Therefore, the exclusionary rule should be applied to all of Mr. Zamora's statements during this interrogation as a deterrence to law enforcement's immediately prior unreasonable search and seizure. Further, Mr. Zamora submits that the interrogation was coercive in and of itself and a continuation of the coercive treatment he experienced throughout, starting at 6 A.M. that morning. In the totality of the circumstances, Mr. Zamora's statements cannot be considered "voluntary," but instead statements made after his will had been overborne. Therefore, on this

additional basis, the exclusionary rule should be applied to Mr. Zamora's statements to ensure that any evidence introduced at trial will be voluntary and trustworthy. And still further, the exclusionary rule should be applied to prohibit the government from introducing uncorroborated confessions at trial.

WHEREFORE, Mr. Zamora respectfully prays that this motion be granted.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which electronically served all parties.

/s/

E. Eugene Harrison