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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

v.

MEMORANDUM OF LAW

████████████████████,

Indictment No. ██████████(GLS)

Defendant.

██████████████████ moves this court for an order prohibiting the government from using any and all statements extracted during two interrogations conducted by members of law enforcement. Specifically, any statements derived from an interview at a New York City holding facility “the Tombs” on or about May 23, 2003 and any statements extracted in a March 3, 2005 interrogation at Great Meadow Correctional Facility in Comstock, New York must be suppressed. The government has indicated its intent to use testimony elicited during both statements as discussed more fully below.

I. FACTS

A. Procedural Summary

On July 7, 2005 ████████████████████ was indicted on one count of possession of a firearm by a previously convicted felon. (18 U.S.C.A. §§ 922(g) and 924(a)(2)). He has pled not guilty to the charge and is detained. A Pre-Trial Order issued setting the case schedule. Original dates were extended by stipulation excluding from speedy trial calculations thirty days from and including October 28, 2005. Accordingly, discovery and motion deadlines were extended.

Motions were made returnable December 15, 2005, filed November 14, 2005 with response from the government due November 28, 2005.

B. Substantive Facts

On March 21, 2003 a police officer was wounded in a shooting in the 77th precinct in New York City. The shooter was alleged to be Martin Diggs. Two guns were recovered from the scene. Sergeant Dan Chiarantano was investigating this shooting when Albany ATF was contacted. *Exhibit A* (Officer Chiarantano's Notes). A trace on one of the guns, a Smith & Wesson .40 caliber handgun (S&W .40) was conducted. *Exhibit A* The investigation revealed the gun was purchased by Lawrence Grimmer on September 20, 1996 in Albany, New York. Mr. Grimmer reported this gun stolen on September 20, 2000. *Exhibit B* (Incident Report). Through further investigation Sgt. Chiarantano discovered Domiyon Taylor was convicted of Burglary for the theft of the S&W .40 Cal. September, 2000. *Exhibit A* Sgt. Chiarantano also learned that Taylor told law enforcement in Albany and Schenectady that the gun was taken from him by Charles McFarland. *Exhibit A* As a result of this statement numerous attempts to interview ██████████ ██████████ occurred over the next 2 years. Those attempts are more fully discussed below.

1. First Statement

On March 23, 2003, Sgt. Chiarantano, ATF Special Agent Chang, and a third unidentified officer interrogated ██████████ in the holding facility in New York City. *Exhibit A* The facility is commonly referred to as the "Tombs". *Exhibit A* ██████████ was being held in the "Tombs" at this time on a parole violation and new felony charges concerning possession of a switchblade knife. *Exhibit A*

According to notes taken by Sgt. Chiarantano the interview lasted an hour and a half.

Exhibit A ██████████ was questioned concerning his possession of the S&W .40 cal. handgun. Notes taken by Sgt. Chiarantano indicate, ██████████ stated he obtained the gun from Domiyon Taylor and his friend. Ultimately ██████████ stated that Kie Washington and Robert Evans took the gun from him in Schenectady, New York. During the course of this interrogation information concerning a murder on Judson and Second St. in the City of Albany was brought to light. According to the notes ██████████ instructed Sgt. Chiarantano to speak to Detective Wilcox with the Albany P.D. about this shooting. *Exhibit A* ██████████ was not advised of his Miranda warnings nor did he ever waive his rights prior to the interrogation by the NYC and ATF agents. (Government stipulated fact).

Within months, Detective Anthony Ryan, Detective Murphy, with the Albany Police Department, and Sgt. Chiarantano went back to get further information from ██████████. He declined to elaborate on his prior statements.

2. Second Statement

On March 2, 2005 ATF Special Agent Marc Maurino and New York State Department of Corrections, Office of Inspector General Investigator Christopher Martuscello conducted an interrogation of ██████████ at Great Meadows Correctional Facility in Comstock, New York. This interrogation was recorded by Special Agent Maurino. *Exhibit C* (Draft transcript and audio recording). ██████████ was handcuffed during this meeting. The interview was initiated by Special Agent Maurino. The purpose of the interview, according to reports generated by ATF was to gather information about ██████████ prior possession of the S&W .40 Cal. handgun. *Exhibit D* (Report of Investigation No. 16)

Special Agent Maurino read *Miranda* warnings to ██████████. *Exhibit C, p. 3* ██████████

██████████ attention was immediately directed to the prior meeting he had with NYC investigators (first statement). *Exhibit C, p. 3* ██████████ was reminded it was not the first time he spoke with ATF. *Exhibit C, p. 3* Mr. McFarland was told by SA Maurino and Inspector General investigator Martuscello they were questioning him as follow up for New York City. *Exhibit C, p. 4, 5, 6, 8, 9, 16* When asked if this was all familiar to him ██████████ responded he had nothing to do with the shooting in New York City. *Exhibit C, p. 4, 8* He then inquired again about the purpose of the meeting. ██████████ was again advised that the meeting was simply back up, follow up research for New York City. *Exhibit C, p. 4-8* Consistently, Special Agent Maurino drew ██████████ attention to the statement he already gave to Sgt. Chiarantano. *Exhibit C, p. 4, 5, 6, 8, 9-13, 16* At no time was ██████████ advised that the previous statement to New York City was likely not admissible against him because he was not Mirandized. *Exhibit C*

Special Agent Maurino continued to question, drawing attention to what ██████████ told NYC Detectives. ██████████ indicated he never took a gun from anyone. He further indicated that his replies to New York City Sgt. Chiarantano's questions were given in an effort to get the detectives "out of my face". *Exhibit C, p. 6* SA Maurino continued to allude to the previously given, unMirandized statement, indicating "you told them some stuff" and "I'm just here to back up everything that's already happened." *Exhibit C, p. 6* ██████████ was unwilling to provide any new information.

At this point the Inspector General Investigator Martuscello jumped in. Again he referenced to the first statement insisting they were just trying to build a time line for New York City. He then told ██████████ he was issued *Miranda* warnings, and assured him that even

though he was a New York State inmate he still has rights. He again assured [REDACTED], “that’s why I’m here to make sure your rights are taken care of.” *Exhibit C, p. 6-7* At this point questioning begins again; before [REDACTED] made any response, he asked Inspector General Investigator Martuscello, who just indicated he was there to take care of his rights, “are you sure about this”. *Exhibit C, p. 6¹* In response Martuscello responds, “I’m positive, I work for the Department of Corrections, ok, . . . this is what I do everyday, I’m a representative of Commissioner Gordon, I’m here to insure your rights are not violated, . . . no ones looking to get you in trouble. . . we’re just here to build a time line. I can see your getting a little bit of an attitude.” *Exhibit C, p. 7* He then talks over [REDACTED] reminding him, he already gave a statement to which he [Martuscello] was not privy. Again indicating this is just clean-up from whatever [REDACTED] told New York City Detectives. [REDACTED] again states he had nothing to do with a shooting and he did not have any gun. *Exhibit C, p. 8* [REDACTED] declares to SA Maurino, “this is your case”, to which SA Maurino replies, “no it’s a New York City case.” *Exhibit C, p. 8*

SA Maurino continues asking questions, [REDACTED] continues to deny involvement. He finally asks directly, “Am I going to be charged with having a gun?” Martuscello immediately responds “no”. *Exhibit C, p. 10²* SA Maurino responds it is not in my interest to charge you. *Exhibit C, p. 10* [REDACTED] then goes on to say he does not know what he told

¹The draft transcript indicates [REDACTED] said “You sure nobody is listening?” Upon review of the audio recording it is clear he states “Are you sure about this?”. The answer to his inquiry supports this reading.

²The draft transcript attributes the “no” response to SA Maurino. Upon review of the audio recording it is clear this statement is made by Investigator Martuscello.

New York City Detectives and indicates he has no new information. *Exhibit C, p. 10-16* SA Maurino offers and eventually reads the notes he has on the first statement to [REDACTED]. *Exhibit C, p. 11* [REDACTED] continues to deny involvement. He tells SA Maurino, he does not want to tell a story, he does not want to jam himself up. *Exhibit C, p. 15*

At this point, Investigator Martuscello again jumps in. He threatens to raise [REDACTED] [REDACTED] security designation within the DOC from medium to maximum if he refuses to tell them how the gun got from him to the murderer. *Exhibit C, p. 15-17*. He tells [REDACTED] if they can't make that connection they will treat him as the murderer. Martuscello ends by stating "its already stuff [REDACTED] talked about." *Exhibit C, p. 15-17*. "Whether you think you did or not, you already talked about it." *Exhibit C, p. 15-17*. "It's already stuff that he [ATF] knows about. It's all out there already." *Exhibit C, p. 15-17*. Without resolving any of [REDACTED] [REDACTED] concerns questioning continues. [REDACTED] then indicates, through confirmation of statements made by the Investigator and the Special Agent he had the gun and he threw it away. He also admits he jammed it up by loading 9mm ammo in the S&W .40 caliber gun. *Exhibit C, p. 17-21*. The interview ends with SA Maurino indicating that he does not intend to charge [REDACTED].

On March 24, 2005 Special Agent Maurino, Detective Anthony Ryan and Detective Murphy, with the Albany Police, attempt to interview [REDACTED] again. He refuses and invokes his right to counsel. (Stipulated Fact)

On May 25, 2005, counsel was assigned and after consulting with counsel, [REDACTED] [REDACTED] again declined to speak with SA Maurino and Detective Ryan. (Stipulated Fact) [REDACTED] was charged as a felon in possession following his refusal to cooperate.

II. ARGUMENT

A. Suppression of Statements

The government has indicated it intends to introduce numerous statements attributed to [REDACTED]. The government has indicated it intends to introduce [REDACTED] first statement to the extent he admits taking the gun from Domiyon Taylor and a friend as well as the statement admitting he had the gun taken from him by Kie Washington and Robert Evans.

The government intends to introduce the second statement in its entirety in both transcript form and audio recording.

The government does not intend to introduce any statements elicited during the three other attempted interviews.

1. Standard of Proof

In Fifth Amendment litigation, regardless of which party shoulders the ultimate burden, the standard of proof is constant, namely, proof by a preponderance of evidence. United States v. Miller, 382 F.Supp.2d 350, 361 (2005), *citing*, Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 627 (1972).

2. Burden Of Proof

As the party seeking to suppress, the defendant has the burden of production. United States v. Miller, 382 F.Supp.2d 350, 361 (2005), *citing*, United States v. Arboleda, 633, F.2d 985, 989 (2d Cir. 1980); United States v. Mathurin, 148 F.3d 68, 69 (2d Cir. 1998) (Fifth Amendment). Here, based on the government's stipulated facts and agreement to a hearing on the first statement and agreed upon facts and the recorded conversation on the second, [REDACTED] [REDACTED] has met his burden of production on the issues raised. The burden shifts to the

government, with regard to the first statement, to prove by a preponderance of the evidence, *Miranda* voluntariness, either because there was no custodial interrogation implicating *Miranda* or there was some exception to the *Miranda* rule. Second, the government must prove that the first statement was not the result of coercion or deception. In regard to the second statement, the government must prove that *Miranda* could be effective, that a voluntary waiver was obtained, that the statement was voluntary and that the statement was not tainted by the unMirandized or coerced first statement.

3. First Statement

██████████ moves to suppress the “first statement” on Fifth Amendment grounds. Specifically, Sgt. Chiarantano and ATF Agent Wang were required to give ██████████ *Miranda* warnings before they interrogated him while he was in custody in the “tombs” in New York City. They failed to give him such warnings and thus the statements that followed must be suppressed. In addition, based on ██████████ young age and education at the time of the interview, and uncontested and stipulated facts, the statement was the product of coercion and deception and as such was not voluntary.

a. Miranda Warnings Were Required

Sergeant Chiarantano was required to advise ██████████ of his *Miranda* warnings before commencing the custodial interrogation that took place at the holding facility in New York City. Pursuant to *Miranda*, the police must advise a defendant of his rights only if two preconditions are met: namely, custody and interrogation. United States v. Miller, 382 F.Supp.2d 350, 370 (2005) citing, Thompson v. Keohane, 516 U.S. 99, 102 (1995). Custody is established if, in light of the circumstances of an interrogation, a reasonable person would have felt that he or

she was not at liberty to terminate the interrogation and leave. Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 2149 (2004).

Interrogation requires express questioning or its functional equivalent, and includes:

“any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.”

United States v. Miller, 382 F.Supp.2d 350, 370 (2005), *citing*, Rhode Island v. Innis, 446 U.S. 291, 300-302 (1980).

Upon information and belief, [REDACTED] was handcuffed in an interview room in a secure facility. He was physically escorted to the room. He did not request to speak to the investigators. He was not free to leave. [REDACTED] was in custody for purposes of *Miranda*.

Likewise, the police questioning, as reflected in Sgt. Chiarantano’s notes, was reasonably likely to elicit an incriminating response from [REDACTED]. He was specifically asked about his alleged possession of the S&W .40 caliber handgun. At the time, the handgun was connected to an unsolved police shooting in New York City. All of the statements attributed to [REDACTED] during this interview were extracted through questioning. No responses were volunteered or spontaneous. Clearly, [REDACTED] statements were in response to interrogation.

The government concedes [REDACTED] was never advised of his *Miranda* warnings. The Court in Miranda concluded that “the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored,” Miranda, 384 U.S. at 467, 86 S.Ct. 1602. The failure to do so in a custodial interrogation, such as this, must lead to the

suppression of the statements elicited.

The government may seek to narrow the scope of the *Miranda* holding by making it applicable only to questioning of one who is in custody in connection with the very case under investigation. ██████████ was in custody on a parole violation. The Supreme Court has addressed this argument. In Mathis, the Court precluded the use of statements obtained as a result of custodial interrogation from a suspect in custody on a separate matter, obtained by an IRS agent investigating a separate case. United States v Mathis, 391 U.S. 1, 88 S.Ct. 1503 (1968). “There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to the Fifth Amendment rights.” United States v Mathis, 391 U.S. at 4, 5, 88 S.Ct. at 1505 (1968). ██████████ statements were made during a custodial interrogation and he was not Mirandized. For this reason the statements should be suppressed.

b. Traditional Due Process, Statements Not Voluntary

██████████ alleges that any statements obtained during the first interrogation (May 23, 2003) were obtained against his will. Statements determined to be obtained by coercion must be suppressed. Whether a suspects statements are voluntary or the product of coercion is determined after careful evaluation of the totality of the surrounding circumstances. *see, Green v. Scully*, 850 F.2d 894, 901 (1988), *citing, Fare v. Michael C.*, 442 U.S. 707, 726, 99 S.Ct. 2560, 2572 (1979); Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408, 2418 (1978).

In applying the totality of the circumstances test, those factors that a court should consider to determine whether an accused’s confession is voluntary center around three sets of circumstances: (1) the characteristics of the accused, (2) the conditions of the interrogation, and

(3) the conduct of law enforcement officials. see, Green v. Scully, 850 F.2d at 901, 902 (1988). The relevant characteristics of the individual who confessed are the individual's experience and background, youth and lack of education or intelligence. see, Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973). The conditions under which a suspect is questioned includes the place where an interrogation is held, and the length of detention. Mincey v. Arizona, 437 U.S. at 398, 98 S.Ct. at 2416 (1978) and Schneckloth v. Bustamonte, 412 U.S. at 226, 93 S.Ct. at 2047 (1973). The conduct of law enforcement officials includes long restraint in handcuffs, whether any physical deprivations occurred, whether psychologically coercive techniques were employed, such as promises of leniency or other benefits, repeated or prolonged questioning, or the failure to inform the accused of his constitutional rights. Green v. Scully, 850 F.2d 894, 902 (1988), citing Schneckloth v. Bustamonte, 412 U.S. at 226, 93 S.Ct. at 2047 (1973).

The assessment of voluntariness requires further factual development to appraise the conduct of law enforcement. The uncontroverted and stipulated facts that ██████████ was in custody; not provided his *Miranda* warnings; questioned by two or three different investigators; over the course of an hour and a half, given his young age and lack of education, satisfies the defense's burden of production on this issue. Further, the government stipulates a hearing is required to develop additional facts necessary to confirm or refute the alleged Fifth Amendment violations.

4. *Second Statement*

██████████ contends that the second statement should be suppressed on both *Miranda* grounds and traditional due process standards. Specifically, (a) the warnings given could not be

effective *Miranda* warnings. Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004); (b) [REDACTED] never made a voluntary waiver of his Fifth Amendment rights, as required by *Miranda*; (c) [REDACTED] exercised his rights and; (d) the statement obtained was not voluntary, as traditional due process standards and; (e) the second statement was tainted by the unMirandized, coerced first statement.

a. **Failure to Give Effective *Miranda* Warnings in Light of Missouri V. Seibert**

The second interrogation of [REDACTED], conducted March 2, 2005 was part of a coordinated and continuous interrogation designed to thwart *Miranda*. The warnings which preceded the statement, failed to serve their intended function, namely to advise the suspect he has the right to remain silent. Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004). Although not temporally close in time, as was the case in Seibert, the investigators immediate and constant declarations that they were present to conduct follow-up to the previous interview, were acting on behalf of the NYC Detectives, were working on the case for NYC, and that he already made the necessary statement, they were just getting clarification of shoddy notes all render the passing of time unimportant for the Seibert analysis. The second interview was a transparent attempt at obtaining the same statements [REDACTED] made during his first unMirandized encounter. Reference to the pre-warning statement was an implicit and false suggestion that the mere repetition of the earlier statement was not independently incriminating. Lastly, the concerted effort to join the previous statement to the current questioning compressed the two events into one drawn out interrogation. The *Miranda* rule is frustrated if the police are permitted to undermine its meaning and effect, as was done in this case.

Miranda addressed “interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice” about speaking. Missouri v. Seibert, 542 U.S. at 611, 124 S.Ct. at 2609 (2004) *citing*, Miranda, 384 U.S. at 464-465, 86 S.Ct. 1602 (1966). The question in cases with multiple interrogations becomes could the warnings, given the circumstances under which they are given, function effectively. The Seibert standard outlines the relevant facts important to determine whether or not *Miranda* warnings given after an unMirandized statement can be effective. Included on this list are: completeness and detail of the first round of questions; overlapping content of statements; timing and setting of the first and second statements; the continuity of the police personnel; and the degree to which interrogators questions treated the second round as continuous with the first. Seibert, 542 U.S. at 615, 124 S.Ct. at 2612 (2004). Each factor has direct bearing on the perception of the warnings by the suspect.

In [REDACTED] case, analysis of each factor, and the intended and actual effect it had on [REDACTED], renders the warnings given ineffective. The first statement, according to Sgt. Chiarantano’s notes was very complete and detailed concerning how [REDACTED] obtained the S&W .40 Cal. and how he lost possession of the handgun. The allegation that more detail was required for New York City was a ruse to entice [REDACTED] to go over his statement again once he was Mirandized, to “cure” the prior constitutional violation. The statements consisted of the same content. The purpose of the interrogation was to establish possession of the S&W .40 cal. handgun in [REDACTED] and to establish where it went from his possession. Special Agent Maurino, during significant portions of the interview, simply read portions of Sgt. Chiarantano’s notes and requested confirmation of what was said.

The timing of the statements, although separated by approximately a year and a half does

not diminish ██████████ argument in light of the statements made by the interrogators. By immediately and constantly referring to the original statements; consistently stating they were doing follow-up on the original statement; indicating that they were getting the case ready for New York City; that they were working on the New York City case (the topic of his original statement); resorting to reading the original statement and asking for confirmation when ██████████ refused to answer any new questions, all rendered the lapse in time insignificant.

The passage of time only weighs against ██████████ if it leads him to believe he actually has the right to remain silent. All attempts by the agents in referencing the original statement were to deceive ██████████ into believing that right could not be exercised in light of his previous confession.

The continuity of personnel is established by the words of the investigators, consistently leading ██████████ to believe they were working for the NYC Agents on the NYC case.

Finally, the degree to which interrogators' questions treated the second round as continuous with the first could not be greater. The investigators simply read much of the first statement and asked for responses. Constant reference was made to what ██████████ told the NYC contingent. On at least two occasions Investigator Martuscello reassured ██████████ that he already gave some statements, indicating "whether you think you did or not, you already talked about it. It's already stuff that he knows about. It's all out there already." All of the tactics employed by the investigators rendered the warnings ineffective. Thus, under Seibert, the second statement must be suppressed.

b. Failure To Obtain Voluntary Waiver

If the Court finds *Miranda* warnings were effectively given, the failure to obtain a

voluntary waiver of those rights should result in the suppression of the second statement. ■■■

■■■■ never affirmatively waived his *Miranda* warnings. Further, any waiver implied from him continuing to speak was the product of intimidation, coercion, or deception.

Miranda imposes on the police an obligation to follow certain procedures in their dealings with an accused. Moran v. Burbine, 475 U.S. 412, 420, 106 S.Ct. 1135, 1140 (1986). Beyond the duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings. Burbine, 475 U.S. at 420, 106 S.Ct. at 1140 (1986). A defendant may waive effectuation of the rights conveyed in the warnings provided the waiver is made voluntarily, knowingly and intelligently. Miranda, 384 U.S. at 444, 475, 86 S.Ct. at 1612, 1628. The relinquishment of the rights must be voluntary in the sense that it is the product of free and deliberate choice rather than intimidation, coercion, or deception.

Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986) Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. Fare v. Michael C. 442 U.S. 707, 725, 99 S.Ct. 2560, 2572 (1979), *as quoted in*, Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986). "Any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda, 384 U.S. at 476, 86 S.Ct. at 1628.

Application to the case at bar establishes that no waiver was ever voluntarily given. Following the administration of *Miranda* warnings Special Agent Maurino states to ■■■

██████████ “We’re in a facility, so I gave you your rights, do you understand that?” *Exhibit C, p.*

3. This was the extent of any attempt to insure that ██████████ understood his rights, or attempt to obtain an express waiver of any type. This is in stark contrast to the officers in the Burbine case. There the police followed the procedure delineated by the court by administering the required warnings, assuring that the [accused] understood his rights, and obtaining an express written waiver. Burbine, 475 U.S. at 420, 106 S.Ct. at 1140 (1986). Special Agent Maurino’s seemingly unrelated question concerning the administration of rights while in custody does nothing to ascertain ██████████ understanding and waiver of his rights.

From the start ██████████ expressed his desire not to talk about a gun or a cop shooting. The investigators turn to deception and threats to get a “Mirandized” statement. The first attempt at deception (chronologically in the audio recording) is advising ██████████ that the investigators are only doing follow-up for New York City, that they are working on New York City’s case and that they are not interested in charging him.

When this approach does not appear to be working, Investigator Martuscello jumps in. He indicates, “The reasons you were issued your *Miranda* warnings, even though you are a New York State inmate, you still have rights, okay? That’s why I’m here to make sure your rights are taken care of.” According to the audio recording, questioning begins again and ██████████ asks the Investigator “Are you sure about this?”. The investigator’s response is, “I’m positive. I work for the Department of Corrections . . . I’m here to insure your rights are not violated. That’s why he read you your *Miranda*, okay. Nobody is looking to give you any charges. . .” When the second deception fails and ██████████ still refuses to provide any information Special Agent Maurino returns to the fact that he is only doing follow up. ██████████ asks

directly whether he is going to be charged with the gun. Investigator Martuscello replies “No”. SA Maurino replies “It’s not my interest to charge you”.

Questioning continues and still [REDACTED] does not provide any information. He finally says, “I don’t know why I am talking to you”, and a pause in questioning occurs. Special Agent Maurino begins again, reading the notes. [REDACTED] again shows his reluctance and desire not to talk by stating “I don’t want to jam myself up.”

At this point, Investigator Martuscello jumps in and threatens [REDACTED]. He indicates that “if I can’t figure out how [the gun] got from you, to him, to the murderer, that leaves the Department of Corrections to believe that you were involved in the murder and needs to update you to a maximum security facility because now you might actually be a murderer.” *Exhibit C. p. 16* [REDACTED] replies “I’m not a murderer.” *Exhibit C. p. 16* To which Martuscello states, “But your unwillingness to talk to him about it, from where I’m sitting, I mean you already talked about it the notes are kind of shotty [sic.], whoever wrote those notes kind of left some details out. We just want the details cleared up. It’s already stuff you talked about. Whether you think you did or not, you already talked about it. It’s already stuff that he knows about. It’s all out there already.” *Exhibit C. p. 16, 17.* This final episode which combines threats, inference that he has already made incriminating statements, and referrals to the previous statement, finally overpowers [REDACTED] will and he confirms possession of the firearm. Shortly thereafter the interview ends.

Each tactic attempted by investigators rendered any implicit waiver of rights the product of compulsion. Investigator Martuscello’s comments negate the enumerated warnings concerning the right to counsel, that anything you say will be used against you and the right to

remain silent. [REDACTED] is led to believe, he does not need counsel, the Investigator is “taking care of his rights”, “ensure[ing] [his] rights are not violated”. His right to remain silent and the warning about use of his statements is contorted by advising him no one is looking to charge him telling him they know he did not shoot the cop. Further, inference that he already incriminated himself so he might as well talk again is misleading and interferes with a voluntary exercise of his right to remain silent. [REDACTED] was never advised that the first unMirandized statement could not be used against him. He was led to believe that a second statement would have no legal significance. To the contrary, he was threatened that if a statement was not provided he would be considered a murderer by the Department of Corrections and get all of the ‘perks’ that go with a maximum designation. The threat to treat Mr. McFarland as a murderer was a direct attempt to coerce a statement and renders any waiver or statement that follows involuntary.

Mr. McFarland did not voluntarily waive his Miranda warnings, therefore, the recorded statement in its entirety must be suppressed.

c. Questioning must Terminate When [REDACTED] Exercises His Rights to Remain Silent and to Not Incriminate Himself

Throughout the interview [REDACTED] attempts to exercise his right to remain silent and to counsel. Despite these attempts questioning does not stop. Any statements that follow must be suppressed.

Miranda requires that “the accused must be adequately and effectively apprised of his rights and *the exercise of those rights must be fully honored*,” Miranda, 384 U.S. at 467, 86 S.Ct. 1602.(emphasis added) “If the individual indicates *in any manner*, at any time prior to or during

questioning, that he wishes to remain silent, [or if he] states he wants an attorney, the interrogation must cease.” Miranda *id.* at 473, 474, 86 S.Ct. at 1627 (emphasis added). *See, Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981).

██████████ refusals to talk throughout the first twenty minutes of the interview, with constant reference to having nothing more to say, is a clear indication of the exercise of his desire to remain silent. Further, turning to his “self-proclaimed” counsel, Investigator Martuscello, and asking if he is “sure” (if he should talk) is a clear indication that he wishes counsel before he speaks. Questioning did not terminate, nor were ██████████ concerns addressed by the investigators. For these reasons, the second statement must be suppressed.

d. Traditional Due Process, Statements Not Voluntary

Based on the coercive, threatening and deceptive tactics undertaken by the investigators to secure a statement from ██████████ the actual statement given was not voluntary. If the court finds a valid waiver of rights, the same conduct outlined above concerning the threats, coercion and deception undertaken by investigators, must lead to the conclusion that the statement was not voluntary and therefore must be suppressed. The law outlined in paragraph II., A., 3., b. applies here with equal force.

e. The Second Statement Was Tainted by the UnMirandized, Coerced First Statement

If the Court finds, after a hearing, that the first statement was the product of improper tactics or coercion a presumption of compulsion attaches to the second statement. Oregon v. Elstad, 470 U.S. 298, 314, 105 S.Ct. 1285, 1296 (1985). Absent this coercion, if proper *Miranda* warnings are subsequently administered, those warnings cure the prior deficiency and the

suspect's choice of whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" United States v. Miller 382 F.Supp.2d 350 (2005) *citing*, Elstad, 470 U.S. at 311, 105 S.Ct. at 1294. "The relevant inquiry is whether, in fact, the second statement was also voluntarily made. [T]he finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." Elstad, 470 U.S. at 318, 105 S.Ct. at 1297-1298.

For the reasons set forth in paragraphs II, A, 4, a & b. dealing with the voluntariness of any alleged waiver and subsequent statement, the second statement was tainted by the unMirandized, coerced statement. Constant use of the unMirandized statement as a tool to convince ██████████ that he has already incriminated himself, so he may as well do so again, impermissibly tainted his free exercise of his enumerated right to remain silent. Wherefore for this reason and those stated above, ██████████ second statement was impermissibly tainted by the first and was the product of compulsion. The second statement must be suppressed.

III. CONCLUSION

For all the reasons set forth above, each statement the government indicates it intends to use must be suppressed. Finally, ██████████ moves for an Order reserving his right to make further motion, should further discovery of new information warrant such motions.

Dated: November 14, 2005

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Honorable Gary L. Sharpe
United States District Court Judge
U.S. District Court
Albany, New York

United States Attorney's Office
Richard Hartunian, Esq., AUSA
James T. Foley U. S. Courthouse
445 Broadway
Albany, NY 12207

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

v.

MEMORANDUM OF LAW

████████████████████,

Indictment No. ██████████(GLS)

Defendant.

_____, I, Paul J. Evangelista, Esq., attorney of record for the above named defendant, hereby affirm that on November 4, 2005 I filed electronically a Notice of Motion and Memorandum of law with Exhibits A through D in the Northern District of New York. By so filing notice was electronically provided to Richard Hartunian, Esq. of the United States Attorney's Office.

Date: November 14, 2005

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