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I.

ANY STATEMENTS MADE BY MR. CLIENTNAME SHOULD BE SUPPRESSED

A. The Government Must Demonstrate Compliance with *Miranda*.

In their report, Agents ____ and ____ claim that CLIENTNAME was read his Miranda rights and that CLIENTNAME executed a waiver form. Subsequently, CLIENTNAME allegedly made incriminating statements.

1. *Miranda* Warnings Must Precede Custodial Interrogation.

The Supreme Court has held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). The law imposes no substantive duty upon the defendant to make any showing other than that the statement was taken from the defendant during custodial interrogation. Id. at 476. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. at 477; see Orozco v. Texas, 394 U.S. 324, 327 (1969). In Stansbury v. California, the Supreme Court clarified its prior decisions by stating that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." 511 U.S. 318, 323 (1994). The Ninth Circuit has held that a suspect will be found to be in custody if the actions of the interrogating officers and the surrounding circumstances constrained the suspect's freedom of movement in such a way that a reasonable person in that situation would not have felt free to leave. See

United States v. Basher, 629 F.3d 1161, 1166 (9th Cir. 2011). In determining whether a person is in custody, a reviewing court must consider the language used to summon the defendant, the physical surroundings of the interrogation, and the extent to which the defendant is confronted with evidence of his guilt. See United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980). A court should also consider the duration of the detention and the degree of pressure used to detain the individual. See United States v. Bassignani, 575 F.3d 879, 883 (9th Cir. 2009).

Once a person is in custody, Miranda warnings must be given prior to any interrogation. Miranda warnings must advise the defendant of each of his or her "critical" rights. See United States v. Bland, 908 F.2d 471, 473 (9th Cir. 1990). The warnings must clearly convey these critical rights, and the agents may not undercut or contradict the purpose behind Miranda by offering their own explanation of the warnings' meaning. See Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011) (en banc). Furthermore, if a defendant indicates that he wishes to remain silent or requests counsel, the interrogation must cease immediately. See Miranda, 384 U.S. at 473-74; see also Edwards v. Arizona, 451 U.S. 477, 482 (1981).

2. The Government Bears the Burden to Demonstrate That CLIENTNAME's Alleged Waiver Was Voluntary, Knowing, And Intelligent.

For a defendant's inculpatory statements to be admitted into evidence, the defendant's "waiver of Miranda rights [during custodial interrogation] must be voluntary, knowing and intelligent." United States v. Binder, 769 F.2d 595, 599 (9th Cir. 1985) (citing Miranda 384 U.S. at 479), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) (en banc); see also United States v. Vallejo, 237 F.3d 1008, 1014 (9th Cir. 2001); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). When interrogation continues in the absence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently and voluntarily waived his privilege against self-incrimination

and his right to counsel. See Miranda, 384 U.S. at 475. In fact, the Ninth Circuit has held that "[t]here is a presumption against waiver." United States v. Garibay, 143 F.3d 534, 536-37 (9th Cir.1998) (citing United States v. Bernard S., 795 F.2d 749, 752 (9th Cir. 1986)) (other internal citations omitted); see also United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (stating that the court must indulge every reasonable presumption against waiver of fundamental constitutional rights) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, age, experience, and conduct of the accused. See Edwards, 451 U.S. at 482; Zerbst, 304 U.S. at 464; see also Doody, 649 F.3d at 1008; Garibay, 143 F.3d at 536; see also Bernard S., 795 F.2d at 751 (stating that "[a] valid waiver of Miranda rights depends upon the totality of the circumstances, including the background, experience and conduct of the accused"). A determination of the voluntary nature of a waiver "is equivalent to the voluntariness inquiry [under] the [Fifth] Amendment." Derrick v. Peterson, 924 F.2d 813, 820 (9th Cir. 1990).

A determination of whether a waiver is knowing and intelligent, on the other hand, requires a reviewing court to discern whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Id.; see also United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000); Garibay, 143 F.3d at 536. This inquiry requires that a court determine whether "the requisite level of comprehension" existed before upholding the purported waiver. Derrick, 924 F.2d at 820. Thus, "[o]nly 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." Id. (citations omitted).

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Unless and until the government satisfies its burden to demonstrate that sufficient Miranda warnings were given, and that CLIENTNAME knowingly and intelligently waived his rights, no evidence obtained as result of the interrogation can be used against CLIENTNAME. See Miranda, 384 U.S. at 479.

B. Mr. CLIENTNAME's Statements at the Border Patrol Station Must Be Suppressed As They Are The Result of A Deliberate Two-Step Interrogation in Violation of *Miranda* and *Williams*.

Even voluntary post-*Miranda* statements must be suppressed when they are the result of a deliberate two-step interrogation process to circumvent Miranda; that is, where the midstream *Miranda* warning was objectively ineffective in conveying to the accused his Fifth Amendment rights, even voluntary statements must be suppressed. United States v. Williams, 435 F.3d 1148 (9th Cir. 2006) at 1157; Missouri v. Seibert, 542 U.S. 600 (2004).

1. Determining Deliberateness

When an individual is in custody, there is "rarely, if ever, a legitimate reason to delay giving the Miranda warning." United States v. Williams, 435 F.3d 1148, 1159. In determining wether the delay in giving Miranda warnings was deliberate the Court should consider the following: 1) the timing, setting and completeness of the pre-warning interrogation, 2) the continuity of police personnel, and 3) the overlapping content of the pre and post-warning statements. Williams, 435 U.S. at 1158.

In Seibert, the interrogating officer candidly admitted that the two step interrogation strategy was deliberately used in conformity with advice from police training manuals advancing efficacy of the technique for obtaining confessions. Seibert, 542 U.S. at 609. Because, however, it would be a rare instance where the police officer would so candidly admit his intent to dilute the effectiveness of the Miranda warnings by giving them mid-stream, the Court noted

that district courts should look to the facts "apart from [the officer's] intent to show the question-first tactic at work." Id. at 616 n.6.

The facts here demonstrate nothing short of a deliberate two-step process. Mr. CLIENTNAME was interrogated without the benefit of Miranda warnings in Centinela State Prison. The very same agents transferred him from Centinela to the Chula Vista Border Patrol station where they re-interrogated him. This interrogation was video-taped. During the second interrogation the agents read Mr. CLIENTNAME his Miranda rights. The interrogation topics covered the very same issues as the previous un-Mirandized questioning. The agents repeated their previous questioning on the subject of Mr. CLIENTNAME's citizenship and immigration status as well as the circumstances of his alleged escape from immigration custody. This second round of questioning took place a mere two and a half hours later, and covered the same substance as the first un-Mirandized interrogation.

These facts support a finding that the Agents engaged in a deliberate two-step interrogation technique in order to circumvent the strictures of Miranda: the agents asked questions of Mr. CLIENTNAME once, without given him Miranda warnings, then, after getting the information they needed to charge him, they transferred him to the Border Patrol station for different officers to ask him substantially the same questions, this time with a warning. There is no justification for the agents' failure to administer the Miranda warnings to Mr. CLIENTNAME during their first contact and first interrogation.

2. Determining The Effectiveness of Warnings

The Miranda warnings were born out of the Supreme Court's recognition that custodial interrogation is inherently coercive. Miranda, 384 U.S. at 439; United States v. Dickerson, 530 U.S. 428, 435 (2000). "[T]he coercion inherent in custodial interrogation blurs the line

between voluntary and involuntary statements, and thus heightens the risk" that the privilege against self incrimination will not be observed. Missouri v. Seibert, 542 U.S. 600, 608 (quoting Dickerson v. United States, 530 U.S. 428, at 444). In deciding that Miranda's rule was of Constitutional dimension, the Supreme Court cited its concern that the custodial interrogation is so inherently coercive that the traditional test for voluntariness posed an "unacceptably great" risk that involuntary confessions would go undetected by the Courts. Seibert, 542 U.S. at 608; Dickerson, 530 U.S. at 442.

The Miranda warnings were created to adequately and effectively inform the accused of his 5th Amendment rights. Although the statements preceded by Miranda warnings have generally been given a "virtual ticket of admissibility," Seibert, 542 U.S. at 609, the mere "recitation of the litany" does not satisfy Miranda in every circumstance. Id. at 611. In fact, in the context of mid-stream warnings, Justice Souter noted that the accused could hardly believe that he had a right to remain silent after the police had already questioned him, then warned him and asked him to repeat the same admissions. Id. at 613. "A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for a knowledgeable decision." Id.

In determining the effectiveness of the warnings the Court must consider: 1) the completeness and detail of the pre-warning interrogation, 2) the overlapping content of the two rounds of interrogation, 3) the timing and circumstances of both interrogations, 4) the continuity of police personnel, 5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first, and 6) whether any curative measures were taken. Williams, 435 F.3d at 1160.

All of these factors support a finding that the Miranda warnings given by the agents were

ineffective. The agents covered the very same topics in both interrogations at Centinela State prison as later at the Border Patrol Station, namely Mr. CLIENTNAME's citizenship, immigration status and history as well as his alleged escape from custody. Both interrogations were conducted by the same agents. Agents Cacho and Aguilar took custody of Mr. CLIENTNAME pursuant to this court's arrest warrant, interrogated him, and transferred him to the Border Patrol station in Chula Vista for a second interrogation. Thus, the two interrogations were nearly continuous with the exception of the brief trip from the prison to the Border Patrol station. No curative measures were taken, such as informing Mr. CLIENTNAME that his prior un-Mirandized statements would not be admissible against him at trial.

C. CLIENTNAME's Pre-*Miranda* Statements Must Be Suppressed Because They Were Testimonial And Not Routine Booking Questions Under *Pennsylvania v. Muniz*.

In Pennsylvania v. Muniz, the Supreme Court acknowledged a limited exception to Miranda for routine booking questions necessary to "secure the biographical data necessary to complete booking or pre-trial services." Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990). The Court acknowledged that questions regarding the accused's name, address, height, weight, eye color, date of birth, and current age are related to administrative record-keeping only. Id. at 601-602. These particular questions were found to be exempted from the implications of the "cruel trilema" (a choice between self incrimination, perjury or contempt), which is the core evil against which the Fifth Amendment protects. Muniz, 496 U.S. at 596 (quoting Doe v. United States, 487 U.S. 201 (1988)). The Court did not acknowledge any exceptions for other questions and specifically noted the position of the United States as *Amicus*, "recognizing a booking exception to Miranda does not mean, of course, that any question asked during the booking process falls within that exception." Muniz, 496 U.S. at 602 (quoting *Amicus Curiae* brief of the United States).

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In CLIENTNAME's case, the agents asked a litany of questions that were beyond the scope of biographical questions necessary to complete the booking process. Agent X asked if Mr. CLIENTNAME has used an alias, whether he has used other dates of birth, his social security number, if he has tattoos or scars. Then Agent X asked a series of questions regarding Mr. CLIENTNAME's employment: the name and address of his employer; his supervisor's name and telephone number, and his job description. Finally, Agent X asked about Mr. CLIENTNAME's family members, including his mother, father, children, and girlfriend. She requested contact information for a family member for emergency purposes. Mr. CLIENTNAME gave the names and telephone numbers of potential witnesses. Requests for contact information for family and employer do not serve any legitimate booking purpose, rather these are questions of an investigatory nature designed to elicit incriminating information**.** She also asked about the money he had on his person, before counting it with him.

All of these questions fall under the rubric of the "cruel trilema." If Mr. CLIENTNAME gave truthful answers they may have led to incriminating evidence, but if he lied he may have be found out–and at the time of questioning, he had yet to be told that he had the right to say nothing. Mr. CLIENTNAME's responses therefore must be suppressed, as they were the result of pre-*Miranda* questioning.

D. Agent 's Interrogation of CLIENTNAME Violated *Massiah*

The right to counsel attaches at the time adversary judicial proceedings are initiated against a defendant. See Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). The "Sixth Amendment right to counsel is violated whenever an agent of the Government deliberately elicits incriminating statements from an indicted defendant in the absence of counsel." United States v. Kimball, 884 F.2d 1274, 1278 (9th Cir. 1989). See also Massiah v. United States, 377 U.S.

201 (1964); Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (confirming that interrogation by the state is a critical stage of criminal proceedings, so Sixth Amendment guarantees the right to counsel at interrogation, and the state must procure a valid waiver of counsel if it wishes to interrogate after right to counsel has attached). The "deliberately elicits" test is met whenever the law enforcement officer or informant engages in "affirmative interrogation" of the accused. United States v. Henry, 447 U.S. 264, 271 (1980). In cases involving a violation of the Sixth Amendment, "the appropriate remedy for a violation of Massiah includes not only suppression of all evidence directly obtained through governmental misconduct, but also suppression of all evidence that can properly be designated the fruits of that conduct." Kimball, 884 F.2d at 1278-79.

Here, the indictment was returned on DATE. It is clear that Mr. CLIENTNAME's right to counsel attached when he made his first appearance in court on DATE, five days before Agent _____'s interrogation. Similarly, there is no question that Agent _____ undertook "affirmative interrogation" of Mr. CLIENTNAME, questioning him regarding FACTS. See Henry, 447 U.S. at 271. There is no evidence in the record that Agent _____ ever obtained a waiver of Mr. CLIENTNAME's right to counsel before interrogating him. See Montejo, 556 U.S. at 787. Consequently, Mr. CLIENTNAME's statements, and any fruits thereof, must be suppressed.

E. CLIENTNAME's Statements Were Involuntary.

Even when Miranda's procedural safeguards have been satisfied, a defendant in a criminal case is deprived of due process of law if his conviction is founded upon an involuntary confession. See Arizona v. Fulminante, 499 U.S. 279 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the burden of proving– by a preponderance of the evidence–

that a confession is voluntary. See Lego v. Twomey, 404 U.S. 477, 483-84 (1972).

A voluntary statement must be the product of a rational intellect and free will. See Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In determining the voluntariness of a confession, the Ninth Circuit has required consideration of "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." United States v. Bautista-Avila, 6 F.3d 1360, 1364 (9th Cir. 1993) (citations omitted); see also Bustamonte, 412 U.S. at 226. Factors a reviewing court should consider when determining voluntariness include the youth of the accused, lack of education, low intelligence, the absence of any advice regarding the accused's constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment (such as the deprivation of food or sleep), to determine if law enforcement officers elicited a voluntary confession. See Bustamonte, 412 U.S. at 226. Importantly, the Court must consider the totality of the factors and circumstances, and determine whether they cumulatively show voluntariness; it may not "tick[] off the list of circumstances" and consider each one "piecemeal." Doody, 649 F.3d at 1011.

In general, a statement is considered involuntary if it is "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)); see also United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981) (agent's express statement that defendant would not see her child "for a while" and warning that she had "a lot at stake," referring specifically to losing her child, were patently coercive and defendant's resultant confession held involuntary).

Here, CLIENTNAME's statement was involuntary. CITE FACTS.

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F. This Court Should Conduct an Evidentiary Hearing.

This Court must conduct an evidentiary hearing to determine whether CLIENTNAME's statements should be admitted into evidence. Under 18 U.S.C. § 3501(a), this Court is required to determine, outside the presence of the jury, whether any statements made by CLIENTNAME are voluntary. In addition, 18 U.S.C. § 3501(b) requires this Court to consider various enumerated factors, including CLIENTNAME's understanding of his rights and of the charges against him. Without an evidentiary hearing, this Court cannot adequately consider these factors.

Moreover, § 3501(a) requires this Court to make a factual determination. If a factual determination is required, courts must make factual findings by Fed. R. Crim. P. 12. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Since "'suppression hearings are often as important as the trial itself,'" id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in the government's pleading.