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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	**CR No. 07-477-RE**
Plaintiff,	
v.	**MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS**
EDGAR FARREL BOISE,	**ORAL ARGUMENT REQUESTED**
Defendant.	

INTRODUCTION

Edgar Boise is charged in a one-count indictment alleging assault on the Warm Springs Indian Reservation. The events purportedly occurred on September 17, 2007. The pretrial discovery provided to the defense indicates that there were two law enforcement contacts with Mr. Boise – on September 17, 2007, and September 18, 2007. Mr. Boise seeks to suppress statements he made during each of those encounters. The facts necessary for determination of the motion will require a motion hearing. The factual circumstances of the interrogations and the inculpatory statements

set forth in this memorandum are those known to the defense based on the reports of the Warm Springs Tribal Police Department and FBI Task Force.

FACTUAL BACKGROUND

Warm Springs police and the FBI Task Force both obtained statements from Mr. Boise during the course of their investigations of the aforementioned charges. Statements extracted by the tribal police took place on September 17, 2008, after Mr. Boise was detained in the back of a police car and during a strip search prior to being jailed. The statements made to the FBI Task Force took place on September 18, 2007, at the Warm Springs Police Department during a video taped interrogation.

September 17, 2007

On the evening of September 17, 2007, Mr. Boise used his neighbor's telephone to report that a stabbing had occurred at his residence. Mr. Boise returned to the house shortly after the Warm Springs Tribal Police arrived. As he approached the residence, Officer Dennis White ordered him to lay on the ground and proceeded to handcuff Mr. Boise's hands behind his back. As he was escorted to the patrol vehicle, Mr. Boise asked Officer White, "What's up Dennis?" Officer White told Mr. Boise that he was being detained for investigative purposes and detox. Mr. Boise said, "I fucked up Dennis." Mr. Boise was placed in the back of the patrol car and told to "sit tight." Officer White left Mr. Boise in the car while he investigated the scene.

After clearing the scene, Officer White transported Mr. Boise to the Warm Springs Correctional Facility where he was charged with stabbing his brother. Although he was not given his *Miranda* warning, he allegedly made incriminating statements in the police car during transport to the station and during a strip search at the station.

September 18, 2007

On September 18, 2007, Edgar Boise was interrogated at the Warm Springs Police Department by TFA Gary Samuel and SA Rhonda Townsend-Schantaz. The interrogation was video taped. After identifying himself, TFA Samuels explained that he had to read Mr. Boise his rights and that, because he could be prosecuted in tribal court and/or federal court, he would read Mr. Boise the *Miranda* Advice of Right Form and the Tribal Advice of Rights Form. He explained to Mr. Boise that he would explain the difference in the two forms.

First, TFA Samuel reviewed the *Miranda* advice of rights form with Mr. Boise. Mr. Boise acknowledged that he understood each of the rights. Mr Boise signed and TFA Samuel and SA Townsend-Schantaz witnessed the signature. TFA Samuel then began reviewing the tribal rights form with Mr. Boise. While reading Mr. Boise his tribal rights, TFA Samuel informed Mr. Boise that "you have the right at your own expense to have the presence of an attorney. You understand that? And that is the difference between the two forms, but I'll go back to that." He completed reading the rights and the parties signed the form.

TFA Samuel elaborated on the difference between the two forms:

> The difference between these two rights forms under the Indian Civil Rights Act which Warm Springs follows, for the purposes of tribal court, you would have to pay for an attorney at your own expense for a lawyer in tribal court. Should you be charged with a crime in the United States District Court, off the reservation, uh, one w- an attorney would be appointed for, for you at no expense to you. Do you understand the difference between these two?

Mr. Boise acknowledged that he understood.

ARGUMENT

Generally, statements obtained by law enforcement officers as a result of custodial interrogation are inadmissible unless the defendant received *Miranda* warnings prior to questioning.

United States v. Solan-Godines, 120 F.3d 957 (9th Cir. 1997). "Interrogation" for *Miranda* purposes is defined as conduct reasonably likely to elicit an incriminatory response. *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). A determination of "custody" requires the court to ascertain whether the defendant was "deprived of his freedom in any significant way" within the meaning of *Miranda*. *Orozco v. Texas*, 394 U.S. 324 (1969); *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982).

In this case, Mr. Boise was in custody and was being interrogated. The *Miranda* warnings provided by the agents were paired with and tainted by the lesser tribal advice of rights, and thereafter, any waiver by Mr. Boise was invalid. Lastly, Mr. Boise's statements were involuntary in light of the circumstances. The government bears the burden of proving both a valid waiver of *Miranda* rights and that any statements obtained were voluntary. *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004).

I. MR. BOISE WAS SUBJECTED TO CUSTODIAL INTERROGATION WITHOUT *MIRANDA* WARNINGS ON SEPTEMBER 17, AND ALL STATEMENTS MUST BE SUPPRESSED.

The circumstances surrounding the interrogation of Mr. Boise on September 17, 2007, make it clear that he was in custody for the purposes of *Miranda*. For the purposes of *Miranda*, a person is in custody only when "there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Norris*, 428 F.3d 907, 912 (9th Cir. 2005) (citing *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc)).[1]

To determine whether a person is in custody the Court must "examine the totality of the circumstances from the perspective of a reasonable person in the suspect's position." *Crawford*, 372 F.3d at 1059 (internal citations omitted). The relevant inquiry is "how a reasonable man in the

[1] Determination of "in custody" is a mixed question of law and fact, and review is de novo. *Thompson v. Keohane*, 516 U.S. 112, 113 (1995).

suspect's shoes would have understood his situation." *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). The Court will consider a wide range of factors to determine whether an individual is in custody, including whether the individual initiated contact with the police, whether the individual voluntarily accompanied the police, whether the individual was restrained or isolated, and whether the individual was free to leave, and safety concerns.[2] *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

By examining the totality of the circumstances, Mr. Boise was clearly in custody when questioned on September 17 for purposes of *Miranda*. Mr. Boise was told him to lie on the ground with his hands behind his back, handcuffed, and then led to the police car. Mr. Boise was not told that police merely intended to restrain him temporarily for safety concerns. He was restrained and was being led to the police car. When Mr. Boise asked what was going on, Officer Dennis replied that Mr. Boise was being held for investigative purposes and detox.

Additionally, the officer's subjective intent can be relevant to the inquiry of custody. "An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." *Stansbury*, 511 U.S. at 325. Officer Dennis's intent and suspicions were not undisclosed. He specifically told Mr. Boise that he was being held for investigative purposes. A reasonable person in Mr. Boise's circumstances would understand that not only was he in custody, but also that he was specifically in custody for purposes of investigating

[2] The Ninth Circuit has also outlined a set of factors relevant to determining whether the individual felt free to leave. *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002). These factors are: 1) the language used to summon the individual, 2) the extent to which the defendant was confronted with evidence of their guilt, 3) the physical surroundings during the interrogation, and 4) the degree of pressure the police apply to the individual. *Id*.

and interrogation. A reasonable person would believe that he was being taken into custody for the specific purpose of being questioned.

Certainly by the time Mr. Boise was put into the police car and transported to the correctional facility, there would be no doubt in a reasonable person's mind that they were not free to leave. The issue for the Court regarding the September 17 questioning in the police car will be whether Mr. Boise was subjected to "interrogation." Similar to the *Innis* case, the evidence here will demonstrate that the officers engaged in conduct reasonably likely to elicit incriminating statements. *Innis*, 446 U.S. at 300-301. Therefore, the un-*Mirandized* statements on September 17 must be suppressed. In *Muniz* the Supreme Court stated:

> [C]ustodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have . . . the force of a question on the accused," and therefore be reasonably likely to elicit an incriminating response.

Muniz, 496 U.S. at 600-01 (internal citations omitted).

II. STATEMENTS MADE ON SEPTEMBER 18, 2007, MUST BE SUPPRESSED BECAUSE, BY PROVIDING MR. BOISE CONFLICTING STATEMENTS ABOUT HIS RIGHTS TO AN ATTORNEY, THE INTERROGATING AGENTS PROVIDED INADEQUATE WARNINGS UNDER *MIRANDA*.

To be valid, *Miranda* warnings must *clearly* convey 1) a person has the right to have an attorney present prior to and during questioning and 2) if the individual cannot afford one, the government is obligated to appoint one at no expense to the client. *United States v. San Juan-Cruz*, 314 F.3d 384, 388 (9th Cir. 2002); *see Duckworth v. Egan*, 492 U.S. 195, 204 (1989); *California v. Prysock*, 453 U.S. 355, 361 (1981). Additionally, "*Miranda* requires [] meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act." *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989).

Valid warnings must be clear and "not susceptible to equivocation." *San Juan-Cruz*, 314 F.3d at 387). "[T]he combination or the wording of [*Miranda*] warnings cannot be affirmatively misleading." *Id*. (quoting *Connell*, 869 F.2d at 1352 (9th Cir.)). While *Miranda* warnings need not be perfect, they must clearly inform a defendant that "an attorney will be appointed if he or she cannot afford one." *United States v. Perez-Lopez*, 348 F.3d 834, 848 (9th Cir. 2003); *Connell*, 869 F.2d at 1353. *See, e.g.*, *United States v. Bland*, 908 F.3d 471, 474 (9th Cir. 1990). In *Perez-Lopez*, law enforcement agents provided *Miranda* warnings in Spanish that informed the suspect that if he wanted counsel but could not afford one, he had the "right to solicit the court." *Id*. at 847. The Court found these warnings to be inaccurate because of the implication that a person without funds was not automatically appointed counsel, but instead had to petition the court for one. *Id*. at 847-48.

Even when *Miranda* warnings themselves are accurate, if additional inconsistent warnings are administered that confuse the individual's rights, the *Miranda* warnings may not be valid. "When a warning, not consistent with *Miranda*, is given prior to, after, or simultaneously with a *Miranda* warning, the risk of confusion is substantial." *San Juan-Cruz*, 314 F.3d at 389. When warnings are given in addition to *Miranda* that are inconsistent with the rights advised in *Miranda*, the meaning of the warnings can become unclear. *Id*. at 388.

The Ninth Circuit addressed this precise issue, finding that conflicting warnings that made the meaning of the *Miranda* warnings unclear were invalid. *San Juan-Cruz*, 314 F.3d at 388. In *San Juan-Cruz*, officers informed defendant, who was taken into custody at a border patrol station, that under his administrative rights he had the right to counsel during questioning, but not at the expense of the government. *Id*. at 386. Soon after, officers read San Juan-Cruz his *Miranda* rights. *Id*. The Court stated, "when one is told clearly that he or she does not have the right to a lawyer free of cost

and then subsequently advised '[i]f you can't afford a lawyer, one will be appointed for you,' it's confusing." *Id*. As a result, conflicting warnings require the individual to sort out the meaning of his rights, placing an "unfair burden . . . on an individual already placed in a position that is inherently stressful." *Id*. The Court found that from San Juan-Cruz's perspective, the nature of his rights were entirely unclear, and he could not ascertain whether or not he had the right to counsel free of charge. *Id*. at 388.

The Court examines the totality of the circumstances to determine whether the warnings given were confusing. *Perez-Lopez*, 348 F.3d at 848. If, from the individual's perspective, the nature of the rights were entirely unclear and he could not reasonably ascertain what the rights entailed, then the warnings given are confusing. *Id*.

Although Mr. Boise was provided accurate *Miranda* warnings, he was immediately also given tribal warnings, and a subsequent oral explanation that was misleading about one of *Miranda*'s fundamental cautions. Like San Juan-Cruz, Mr. Boise was provided with a conflicting advice of his rights. *San Juan-Cruz*, 314 F.3d at 388 (arrestee provided with administrative warnings and then *Miranda* warnings which confused the right to have counsel at the government's expense). The tribal warnings were inconsistent with the rights provided in *Miranda*. On one hand, Mr. Boise was told he had the right to retain an attorney but at his own expense. On the other hand, Mr. Boise was told he had the right to counsel and one would be appointed if he could not afford one.

The oral explanation provided by TFA Samuel created further confusion. TFA Samuel led Mr. Boise to believe that the difference between the *Miranda* form and the tribal form was only triggered if Mr. Boise were indicted in federal court. This explanation failed to communicate that Mr. Boise had the right to have counsel, free of charge, present prior to and during the questioning that was about to begin. Instead, the agent's oral explanation left the impression that the right to

have counsel present and appointed free of charge would attach only if Mr. Boise were charged in federal court.

These conflicting warnings rendered the *Miranda* warnings invalid. The warnings together did not clearly convey Mr. Boise's rights and instead were misleading and confusing. From Mr. Boise's perspective, it was not clear at the time of questioning whether he had the right to have retained counsel present at the questioning or if he had to wait until he was charged in federal court to have an attorney appointed at no cost. Especially because Mr. Boise was sitting on tribal land, at a tribal police station, being questioned by a tribal officer, the agent's statement that Mr. Boise could have a lawyer appointed if charged "off the reservation" undermined the earlier *Miranda* warnings. The warnings and subsequent oral explanation placed a heavy burden on Mr. Boise to sort out the meaning of the warnings and the nature of his rights. As a result, Mr. Boise was not adequately advised of his *Miranda* rights, and his statements are not admissible because they were illegally obtained.

III. THE GOVERNMENT CANNOT MEET ITS BURDEN OF PROVING THAT MR. BOISE'S STATEMENTS WERE VOLUNTARILY MADE.

To the extent that Mr. Boise is found to have validly waived his *Miranda* rights, the government must also prove that any statements obtained from him were voluntarily given. Voluntariness is tested by the "totality of the circumstances." The Court is free to consider the accused's past history, his mental condition, age, the circumstances of the interrogation, and any psychological pressures, including those created by the police. *Mincey v. Arizona*, 437 U.S. 385 (1978); *Jackson v. Denno*, 378 U.S. 368 (1964). Voluntary means that the statement of the accused was the product of a rational intellect and a free will. *Blackburn v. United States*, 361 U.S. 199 (1960).

Although coercive police conduct is a prerequisite for a finding of involuntariness, *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), the coerciveness of an act cannot be assessed out of context. For that reason, the courts look to the totality of the circumstances, based on a number of identified factors, to determine whether a suspect's will has been overborne. The courts take account of both the actions of the police and the "vulnerable subjective state of the person being questioned." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Put another way, the courts must evaluate "the combined effect of the entire course of the officer's conduct upon the defendant." *Pollard v. Galaza*, 290 F.3d 1030, 1033 (9th Cir. 2002). A statement may be found to be involuntary if it is extracted by threats or violence or it is obtained by direct or implied promises, however slight, or by the exertion of any improper influence. *United States v. Bautista-Avila*, 6 F.3d 1360, 1364 (9th Cir. 1993) (quotation omitted).

Although the government may assert that Mr. Boise's statements were voluntary, the full coercive nature of the interrogation must be examined based on the totality of the circumstances, taking into account all the factors as developed through an evidentiary hearing on this motion.

CONCLUSION

For the foregoing reasons, Mr. Boise respectfully requests that the Court suppress all statements made by him upon arrest on September 17, 2007, and at the Warm Springs Police Department on September 18, 2007, and any evidence obtained as a result of those statements.

Respectfully submitted on September 2, 2008.

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