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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.

**REPLY TO GOVERNMENT'S
RESPONSE TO MOTION TO
SUPPRESS STATEMENTS**

EDGAR FARREL BOISE,

Defendant.

INTRODUCTION

To comply with *Miranda*, law enforcement officers must warn the suspect “that he has the right to an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). The suspect must be clearly advised of the unequivocal right to have counsel present both before and during the interrogation. *United States v. Noti*, 731 F.2d 610, 615 (C.A. Cal.1984). When an officer advises a suspect that the right is contingent on a future condition, the advice is constitutionally infirm and

the resulting statement must be suppressed. *United States v. Perez-Lopez*, 348 F.3d 839 (9th Cir. 2003). The government admits that TFA Samuels' advice to Mr. Boise was contingent upon a future condition: "*should* the defendant be charged with a crime in Federal District Court, off the reservation, an attorney would be appointed for him at no expense." See Government's Response, p. 4. Therefore, Mr. Boise's statements were obtained in violation of his *Miranda* rights and, furthermore, were involuntarily obtained.

A. Mr. Boise Was Not Informed That He Would Have The Right To Counsel Prior To Questioning If He Could Not Afford An Attorney.

When TFA Samuels stated that Mr. Boise would not have access to a lawyer unless he was charged in federal court, TFA Samuels failed to convey to Mr. Boise the government's *obligation* to appoint an attorney for indigent accused. *Perez-Lopez*, 348 F.3d at 848. In *United States v. San Juan-Cruz*, 314 F.3d 384 (9th Cir.2002), the Court stated, "[t]he warning . . . *must make clear* that if the arrested party would like to retain an attorney but cannot afford one, the Government is *obligated* to appoint an attorney for free." *Id.* at 388 (emphasis added). While "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures," *California v. Prysock*, 453 U.S. 355, 359 (1981), the warning must be clear and not equivocal. *San Juan-Cruz*, 314 F.3d at 387.

In *Perez-Lopez*, the officer read Mr. Perez-Lopez his rights from a *Miranda* card in Spanish. The Court translated the warning to mean, "you have the right to solicit the court for an attorney if you have no funds." *Perez-Lopez*, 348 F.3d at 848. The Court invalidated this warning because the warning was contingent on a future condition: Mr. Perez-Lopez "soliciting" the court. The word "solicit" implied the possibility of rejection. *Id.* at 848.

Similarly, in *United States v. Connell*, 869 F.2d 1349 (1989), the Court rejected warnings that gave the government power to control appointment of free counsel based on a future condition. In *Connell*, the defendant was first told that “you must make your own arrangements to obtain a lawyer and this will be at no expense to the government” and later that “a lawyer may be appointed to represent you.” *Id.* at 1353. The Court held that the warning was constitutionally inadequate, “using the word ‘may,’ leaves the impression that providing an attorney, if Connell could not afford one, was discretionary with the government.”

The present case is even more contingent. No right to counsel exists unless “the defendant is charged in federal court.” Therefore, he had no right to appointed counsel before and during the interrogation because Mr. Boise had not been charged. Accordingly, this Court should find the *Miranda* warning inadequate and suppress any statements made in conjunction with the warning.

B. The Flawed *Miranda* Warnings Were Compounded By Conflicting Tribal and *Miranda* Warnings.

The government relies heavily on *Duckworth v. Eagan*, 492 U.S. 195 (1989), to justify TFA Samuels’ reading Mr. Boise an inadequate *Miranda* warning. In *Duckworth*, the Court addressed a situation in which the defendant was properly read his *Miranda* rights, but police additionally stated that an attorney would be appointed to him if and when he went to court. The government contends that, although Mr. Boise was read conflicting statements as in *San Juan-Cruz*, TFA Samuels cleared up any confusion by giving Mr. Boise a *Duckworth*-type clarification.

In finding the *Miranda* waiver invalid in *San Juan-Cruz*, the Ninth Circuit noted with disapproval the fact that the defendant was read two conflicting versions of his rights (one version advised him that an attorney would be appointed free of charge if he could not afford one, the other one did not). *San Juan-Cruz*, 314 F.3d at 388. The Ninth Circuit went on to note that an “agent

could easily rectify any confusion by clarifying his statements or advising [a defendant] to disregard the [a]dministrative [r]ights in favor of those that [are] read to him under *Miranda*.” *San Juan-Cruz*, 314 F.3d at 389; accord *United States v. Garcia-Hernandez*, 550 F. Supp.2d 1228, 1233 (S.D. Cal. 2008). The statement made by TFA Samuels after reading Mr. Boise the two conflicting versions of his rights failed to clarify his explanation.

Indeed, TFA Samuels failed to clarify the conflicting statements twice. First, after reading Mr. Boise his *Miranda* rights and during the reading of the tribal rights, TFA Samuels explained to 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.”

TFA Samuels further confused the issue during a second attempt:

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, one, an attorney would be appointed for, for you at no expense to you. Do you understand the difference between the two?

This statement is very different than that made in *Duckworth*. In *Duckworth*, the statements made by the police were characterized as involving form and phrasing; however, the case here involves substance and omission. *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006).

First, in *Duckworth*, the relevant phrase – “we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court” – is reasoned by the Court to be a statement in addition to the *Miranda* that describes the procedure for appointment of counsel in Indiana. *Duckworth*, 492 U.S. at 205. In the present case, TFA Samuels clearly stated that the reason for his statement was to explain the two conflicting rights forms he had read Mr. Boise.

Second, in *Duckworth* the Court approved the “if and when you go to court” language when it immediately followed a full and complete reading of defendant’s *Miranda* rights. *Id.* at 198. Subsequent to Mr. Boise’s *Miranda* rights, he was read the tribal rights, which state “you have the right at your own expense, to have the presence of an attorney.” He was told by TFA Samuels 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.” Unlike *Duckworth*, by the time TFA Samuels began to erroneously explain the difference between the two rights forms, Mr. Boise had already been told a couple of times that he needed to hire his own attorney.

This Court should find that the conflation of these warnings without an adequate explanation was confusing. Mr. Boise was entirely unclear what the nature of his rights were under the Fifth Amendment. Specifically, Mr. Boise could not reasonably ascertain from the warnings provided to him by TFA Samuels whether he could or could not retain the services of an attorney for free. *San Juan-Cruz*, 314 F.3d at 333.

CONCLUSION

For the foregoing reasons and arguments made by Mr. Boise in his memorandum in support of his motion to suppress statements, Mr. Boise respectfully requests that this 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 26, 2008.

/s/ Harold P. DuCloux, III
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