IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. 11-CR-57-A

BERGAL MITCHELL, III,

Defendant.

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE DEFENDANT'S MOTION TO SUPPRESS HIS SEPTEMBER 10, 2008 STATEMENT TO SPECIAL AGENTS OF THE FBI

THE UNITED STATES OF AMERICA, by and through its attorneys, James P. Kennedy, Jr.[1] and Anthony M. Bruce, Assistant United States Attorneys, hereby files its "Supplemental Memorandum of Points and Authorities in Opposition to the Defendant's Motion to Suppress His September 10, 2008, statement to Special Agents of the FBI" on the ground that the statement was involuntary.

IN FURTHER OPPOSITION TO THE DEFENDANT'S MOTION, it is respectfully shown unto the Court as follows:

[1]The United States Attorney, William J. Hochul, Jr. has been recused from this case.

The Facts

At pages 1 through 11 of the Government's June 4, 2012, "Memorandum of Points and Authorities in Opposition to the Defendant's Motion to Suppress His September 10, 2008, Statement to Special Agents of the FBI" (Docket Item #69),[2] the government summarized what it viewed to be the facts of the interview in question. That summary is incorporated into this Supplemental Memorandum by reference. At pages 2-10 of its July 30, 2012 Report and Recommendation (#73), the Court discussed the facts and circumstances of the taking of the defendant's statement at length, concluding, at least, that defendant "was not in custody and Miranda warnings were not required." (#73, at 11). We likewise rely on the Court's summary in our discussion, *infra.* What follows is thus in response to that part of the Court's October 5, 2012, text order that directs the government to "respond to that aspect of defendant's pretrial motion (53, pp. 22-24; 68, pp. 12-16) seeking suppression of his statements on voluntariness grounds."

The Legal Standard for Voluntariness

At the outset, the government's acknowledges that, under Fifth Amendment jurisprudence, it has the burden of proving by a preponderance of the evidence that a statement was given

[2]References herein, unless otherwise indicated, are to Items contained on the case docket.

voluntarily. Lego v. Twomey, 404 U.S. 477, 489 (1972); United States v. Diaz, 891 F.2d 1057, 1057 (2d Cir. 1989).

Prior to the Supremes Court's decision in Miranda, the admissibility of an accused's in-custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause. See, e.g., Haynes v. Washington, 373 U.S. 503, (1963); Chambers v. Florida, 309 U.S. 227 (1940). If a suspect's statements had been obtained by "techniques and methods offensive to due process," Haynes v. Washington, 373 U.S., at 515, or under circumstances in which the suspect clearly had no opportunity to exercise "a free and unconstrained will," id., at 514, the statements would not be admitted. "The Court in Miranda required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment." Oregon v. Elstad, 470 U.S. 298, 304 (1985). "The Fifth Amendment, of course, is not concerned with . . . moral and psychological pressures to confess emanating from sources other than official coercion. Voluntary statements 'remain a proper element in law enforcement.' Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable..." Id., at 304-305 (citations and quotations omitted).

Voluntariness is "determined after a careful evaluation of the totality of all the surrounding circumstances, including the accused's characteristics, the conditions of interrogation, and the conduct of law enforcement officials." United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991). To be voluntary, a confession must be "the product of a rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960)(suppressing statement on voluntariness grounds where "evidence indisputably establishe[d] the strongest probability that [defendant] was insane and incompetent at the time he allegedly confessed.").

In disallowing involuntary statements on due process grounds, the Supreme Court has "specifically condemned police activity that 'wrings a confession out of an accused against his will.'" Colorado v. Connelly, 479 U.S. 157, 165 (1986)(quoting Blackburn v. Alabama, 361 U.S. at 206–207); see also, Townsend v. Sain, 372 U.S. 293 (1963)(finding that statement was involuntarily obtained where a police physician had given defendant a drug with truth-serum properties). While Blackburn and Townsend "demonstrate that [] mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." Colorado v. Connelly, 479 U.S. at 165.

In addition to an examination of the declarant's state of mind, the Supreme Court has also required that there be "some sort of 'state action' to support a claim of violation of the Due Process Clause." Colorado v. Connelly, 479 U.S. at 165. Significantly, the "state action" referred to in Connelly necessarily requires that police commit some sort of "wrongful act." Colorado v. Connelly, 479 U.S. at 165. As the Court concluded, "***coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause***." Colorado v. Connelly, 479 U.S. at 167 (emphasis supplied). Moreover, the use of deception, as preceded the interview in this case, does not constitute coercive conduct. Frazier v. Cupp, 394 U.S. 731, 739 (1969).

In Linnen v. Poole, 766 F.Supp.2d 427 (W.D.N.Y. 2011), Magistrate Judge Bianchini wrote that

> No single criterion controls whether an accused's confession is voluntary: whether a confession was obtained by coercion is determined only after careful evaluation of the totality of the surrounding circumstances." Green v. Scully, 850 F.2d 894, 901 (2d Cir.1988) (citing, *inter alia*, Fare v. Michael C., 442 U.S. 707, 726 (1979)). "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 interrogation, and (3) the conduct of law enforcement officials. The relevant characteristics of the individual who confessed are the individual's experience and background, together with the suspect's youth and lack of education or intelligence." 850 F.2d at 901–02 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).
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> Whether a statement was involuntarily obtained depends upon the totality of the circumstances under which it was made.

While all interrogations carry with them certain inherent pressures, the Supreme Court has consistently refused to recognize, "the right of a criminal defendant to confess to his crime only when totally rational and properly motivated". Colorado v. Connelly, 479 U.S. at 166. Absent such constitutional protection, defendant's claim should be rejected.

A finding of voluntariness does not require a finding that the defendant acted with full knowledge of the consequences of his actions. See, Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973); see also Oregon v. Elstad, 470 U.S. at 316–17 ("a defendant's ignorance of the full consequences of his decisions [does not] vitiate their voluntariness").

ARGUMENT

Using the standards set forth above, the credible testimony in this case establishes that, under the totality of the circumstances, Bergal Mitchell's September 10, 2008, statements were, as the Court has already found, non-custodial, and, as we point out below, voluntarily obtained. In the government's view, the evidence establishes that defendant, once at the FBI Office, was truthfully told exactly why he was there and knew exactly what it was that the law enforcement agents wanted to talk to him about. At that point, the defendant made a rational and voluntary, albeit ill-advised, decision to attempt to talk his way out of the situation. Such decision was simply not the product of any coercive police activity. That hindsight might now reveal that defendant's decision to speak with law enforcement may not have been "properly motivated" or "totally rational" simply does not render it involuntary. See, Colorado v. Connelly, 479 U.S. at 166.

1. The Totality of the Circumstances Demonstrate That The Defendant's Statement Was Voluntary

As previously noted, 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 interrogation, and (3) the conduct of law enforcement officials.

A) The Characteristics of the Accused

Considering first, the characteristics of the accused, the defendant makes no claim that he was suffering from any sort of a physical or mental condition at the time of her interrogation which rendered his statement involuntary. Indeed, there is no evidence in the record to suggest that defendant was suffering from any significant confusion or disorientation or extreme physical pain that would warrant a finding that his statement was involuntary. See Mincey v. Arizona, 437 U.S. 385, 398–99 (1978) (finding a defendant's statements involuntary where the defendant was in intensive care, lying on his back in a hospital bed, encumbered by tubes, needles, and breathing apparatus, and where the statements were not coherent). Despite the government's claim that they were false, the record demonstrates that the answers that defendant provided to the agents' questions were coherent and responsive and there is no indication that defendant was having any trouble comprehending what was being asked of him.

Indeed, courts in the Second Circuit have found that defendants have provided voluntary statements in circumstances in

which the defendant's condition was much more questionable than that of defendant. See, e.g., United States v. Khalil, 214 F.3d 111, 115, 121–22 (2d Cir. 2000) (finding a statement voluntary even though the defendant was in the hospital suffering from a gunshot wound and awaiting surgery); Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989) (finding statements voluntary where the defendant was in the intensive care unit and suffering from a knife wound and dizziness); United States v. Hsu, 590 F.Supp.2d 565, 570 (S.D.N.Y. 2008)(finding statements voluntary where the defendant was suffering from renal failure and had overdosed on over-the-counter sleeping pills).

Having seen the defendant testify at the hearing and read the indictment, the Court is aware that defendant is an educated and intelligent, middle-aged businessman who was a corporate officer and in good health. He engaged in a multi-million dollar business transaction, and he was married to an attorney. He knew Special Agent Brent Isaacson as he had talked to him in the past on other matters. (#64, p. 43). Clearly, he is not the sort of unsophisticated individual whose lack of experience, background, education, and intelligence would otherwise suggest that his statements to the agents were anything other than "the product of an essentially free and unconstrained choice by its maker... wh[ose]...will [w]as [not] overborne and his capacity for

self-determination [not] critically impaired." Schneckloth v. Bustamonte, 412 U.S. at 225. Clearly, the characteristics of the defendant weigh in favor of a finding of voluntariness.

B & C) The Conditions of Interrogation & The Conduct of Law Enforcement Officials

As noted in the government's post-hearing memorandum, (a) the agents told Mitchell that "that the doors were unlocked, that he was not under arrest, and that he was free to leave at anytime he was free to leave." (Tr. 13, 15 & 33);[3] (b) though a ruse was used to get Mitchell to come to the FBI office, once he was there the agents were truthful and up front with Mitchell, telling him that he was a suspect and that they thought he had committed a crime[4] (Tr. 35); (c) twice during the interview Mitchell asked for a bathroom break and in each instance, FBI Special Agent Brent Isaacson walked Mitchell to the exit door after which Mitchell left the FBI office space and went to the men's room located in outside the FBI's space alone demonstrating unequivocally that even when presented with a clear-cut exit strategy, Mitchell did not leave.

[3]References preceded by "Tr." are to pages in the transcript of the suppression hearing dated January 3, 2012, Docket Item #64.

[4]See, *e.g.* United States v. Bartlett, 856 F.2d 1071, 184(8th Cir. 1988) (finding voluntariness based in part on the fact that the defendant knew the nature of the offense for which he was suspected).

(Tr. 14 and 15). Beyond establishing that defendant was not in custody, these facts also demonstrate that not only did defendant voluntarily remain at the FBI Offices that day but also that he was voluntarily speaking with the agents. Indeed, the reason he did not immediately leave was because he remained determined to win the agents over to the story that he was telling them.

The defendant was, as he points out, not represented by an attorney (#68 at 1, p. 14). However, as the Court has already determined, the interview was non-custodial so there was no requirement that the defendant be advised of his right to counsel. Moreover, defendant has made no claim, other than the claim that he was "tricked" to coming to the FBI, that his statement was attributable to misconduct on the part of the agents. See United States v. Newman, 889 F.2d 88, 95 (6th Cir. 1989). And this would include evidence that he was "tricked" into not asserting his right to counsel.

The use of deception, as preceded the defendant's arrival at the FBI Office in this case, does not constitute coercive conduct. Frazier v. Cupp, 394 U.S. at 737–739. As Judge Arcara noted in United States v. Maney, ___F.Supp.2d___, 2006 WL 3780813 at *10 (W.D.N.Y. 2006), in rejecting a similar claim:

> First, no caselaw supports finding involuntariness based on an affirmative misrepresentation by law enforcement as to the purpose of the suspect's questioning, and [defendant] offers no authority to support this contention. Second, "[t]he Supreme Court has specifically declined to outlaw all investigative trickery, or even to reach the question of whether an affirmative misrepresentation by law enforcement officials as to the scope and seriousness of an interrogation is sufficient to render a confession involuntary." Ortiz v. Kelly, 687 F.Supp. 64, 65 (E.D.N.Y. 1988) (citing Colorado v. Spring, 479 U.S. 564 (1987)).
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> In Spring, *supra*, the Court stated that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Spring, *supra*, at 859. Further, in United States v. Anderson, 929 F.2d 96, 99 (2d Cir.1991), the Second Circuit stated that
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> > Regardless of whether the agent's statements were false, misleading, or intended to trick and cajole the defendant into confessing, specific findings must be made that under the totality of the circumstances-considering the three listed factors-the defendant's will was overborne by the agent's conduct.

Moreover, the fact that defendant may have sought, or even been promised, leniency if he cooperated with law enforcement officials does not render his statement involuntary. United States v. Guarno, 819 F.2d 28, 31 (2d Cir. 1987).

Notably, defendant has failed even to allege the sort of coercive police required to sustain a finding that his statements were involuntarily made. While the agents may have raised their voices at times and told defendant that they thought he was lying, such actions do not constitute coercive interview methods. United States v. Sanchez, 676 F.3d 627, 631 (8th Cir. 2012)(law enforcement official's "raised voice and his assertions that [defendant] was lying were not coercive interview methods."); see also, Jenner v. Smith, 982 F.2d 329, 334 (8th Cir. 1993) (when determining whether statements are voluntarily made, use of raised voice and challenge to suspect's veracity are noncoercive interrogation tactics).

2. **Government's Response to the Defendant's Arguments**

Although the government believes, for the reasons set forth above, that viewing, as this Court must, the totality of the circumstances, that the defendant's statement was voluntarily obtained, this Court has directed the government to respond to the voluntariness arguments raised both in the defendant's pretrial motion (#53, pp. 22-24; #68, pp. 12-16) and post-trial memorandum (#68, pp. 12-16). While the defendant's argument in his original motion (#53) was predicated exclusively on whether defendant was

"in custody" for purposes of Miranda,[5] in his post-hearing brief,

[5]The defendant cited two cases on this point in his original motion. The first, Yarborough v. Alvarado, 541 U.S. 652 (2004), deals with the "in custody" test under Miranda. To the extent that this Court has already determined that Mitchell was not in custody, that case is inapposite. In the second case, Withrow v. Williams, 507 U.S. 680 (1993), the Supreme Court concluded that where state prisoner's federal habeas claim raised only one claim going to admissibility of his statements to police, on the ground that police had elicited those statements without satisfying Miranda requirements, it was error for district court to go beyond habeas petition and find statements petitioner made after receiving Miranda warnings to be involuntary under due process criteria. In Withrow, the Court did appropriately set forth but not consider, those factors which must be considered under the due process approach to determine whether a confession was voluntary. As the Withrow Court stated:

> Those potential circumstances include not only the crucial element of police coercion, Colorado v. Connelly, 479 U.S. 157, 167 (1986); the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153–154 (1944); its location, see Reck v. Pate, 367 U.S. 433, 441 (1961); its continuity, Leyra v. Denno, 347 U.S. 556, 561 (1954); the defendant's maturity, Haley v. Ohio, 332 U.S. 596 (1948) (opinion of Douglas, J.); education, Clewis v. Texas, 386 U.S. 707, 712 (1967); physical condition, Greenwald v. Wisconsin, 390 U.S. 519, 520–521 (1968) (per curiam); and mental health, Fikes v. Alabama, 352 U.S. 191, 196 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. Haynes v. Washington, 373 U.S. 503, 516–517 (1963).

Withrow v. Williams, 507 U.S. 680, 693-94 (1993). Interestingly, the Supreme Court goes onto refer the traditional "custodial interrogation" inquiry as the "front door" to Miranda, while the "voluntariness" inquiry represents the "back" door. Id. Here, as the Court has already concluded that defendant was not in custody for purposes of Miranda, and thus, that the "front door" to suppression is locked, the government maintains that the defendant ought not be permitted to unlock the back door with the very same key.

defendant, for the first time, asserted the stand-alone Due Process argument that his statement was involuntarily made. (#68, pp. 12-16). In support of that claim, defendant cited a number of factors which he maintains rendered his statement involuntary. In the interests of completeness, the government will respond *seriatum* to the arguments raised in defendant's post-hearing brief.

The fact that no attorney was present is, to the government, a non-starter. As the court has already ruled, the interview was non-custodial, so no Miranda warnings were required. (In fact, the defendant did not mention an attorney until after the interview was over). Similarly, the fact that no Miranda warnings were given (#68 at 2, p. 14), in light of the Court's determination that the interview was non-custodial, is, at best, a neutral factor since no Miranda warnings were required.

That the interview took place "at FBI headquarters," we submit, is also essentially neutral. Indeed, the defendant cites United States v. Badamus, 325 F.3d 123, 139 (2d Cir. 2003) for the proposition that a defendant "was not in custody when questioned at his own residence." (#68, at p.14, n.18). However, a close reading of Badamus will demonstrate that the conditions under which the defendant was questioned, although in his home, were far more coercive than any of the conditions in this case, but the Court

nevertheless found that the defendant was not in custody. Id. United States v. Panak, 552 F.3d 462, 466 (6th Cir. 2009), which the defendant also cites presents facts much like those here, with the only exception being that the interview was in the defendant's home. Moreover, numerous cases have upheld the voluntariness of statements given by suspects at police stations. *See, e.g.,* California v. Beheler, 463 U.S. 1121 (1983) (holding that interrogation at police station was non-custodial, and Miranda was therefore inapplicable, where suspect voluntarily accompanied police officers to the station); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam)(no "custodial interrogation" where defendant questioned at police station as defendant had come to the station voluntarily upon the police's request; he was told that he was not under arrest, that he was free to leave, and he actually left after the questioning); United States v. Cota, 953 F.2d 753 (2d Cir. 1992) (holding that interrogation at police station was non-custodial after police stopped suspect's car, ordered her out of the car at gunpoint, briefly handcuffed her, told her that her car had been seized but that she was free to leave, and asked her to voluntarily accompany them to the police station).

Next, the defendant's claim that he "unequivocally expressed doubt about talking about the matter" (#68 at 5, p.15) once informed his half-brother was involved is entirely unsupported:

> Barry is my brother, and I'm not sure I should be answering any questions and that I shouldn't be answering any questions or should I basically – it was kind of asking, do I answer these questions or do I not because he is my brother and I don't want – (Tr. 45 – 46)

The defendant's own testimony on this matter defines equivocation.[6]

The "confiscation" of the defendant's cell phone was fully addressed by the Court in #73: "Defendant's reliance on the fact that [his] cell phone was taken at the outset of the interview is not persuasive, as nothing in the record indicates that defendant requested, but was denied, access to the phone."

The argument that the agents questioned the defendant simultaneously creating a confusing and intimidating atmosphere and the agents were visibly armed[7] would appear to have been disposed of by the Court's statement in #73 at p. 10 that the defendant's "willingness to continue the conversation . . . also indicates that

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[6]At Tr. 64, the defendant, in giving what appears to be an unresponsive answer to a question by Mr. Cambria said "when I said I didn't want to answer questions about my brother." This is inconsistent with what he said at Tr. 45 - 46.

[7]There is no evidence in the record that the agents ever displayed their weapons, let alone unholstered them, pointed them at the defendant, or put them on the table in front of defendant. Indeed, the testimony is to the contrary. See Tr. 53. Moreover, it stands to reason that FBI agents, like all other police officers, carry firearms.

he did not experience significant constraint on his freedom" (citation omitted). As noted, *supra*, this same "willingness to continue the conversation" demonstrates that Mitchell was not intimidated or coerced by the agents into giving his statement.

As the defendant correctly asserts, during the course of the interrogation, the agents did raise their voices to him. Their purpose in doing so, however, was to accuse him of lying to them, not as part of an effort to "coerce" a statement from him. Moreover, the record is equally clear that when things became a little heated, Mitchell also raised his voice back,[8] demonstrating once more that even if the raised voices of the agents were capable of intimidating Mitchell, he was not intimidated by them. As already noted, raised voices and assertions that defendant is lying do not constitute coercive interview methods. United States v. Sanchez, 676 F.3d at 631; Jenner v. Smith, 982 F.2d at 334.

During the suppression hearing, the defendant told the Court, "I believe near the end they mentioned that I -- if I would fall on a sword for Rachel or something to that sense, if I confess, they

[8]See Tr. 32: by Isaacson: "I think it's accurate to say [Mitchell's] voice was raised at times as well." Later, Mr. Cambria asked Mitchell, "You heard testimony that you raised your voice to them?" and Mitchell responded, "I don't remember raising my voice, but if I did, it was because three men were yelling at me and I was trying to answer some of the questions and, to the best of my knowledge, you know, I answered --". (Tr. 45-46).

wouldn't prosecute [his wife] Rachel." (Tr. 46). Defendant uses this testimony to fashion a "Hobson's Choice" argument. "An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements." United States v. Miller, 450 F.3d 270, 272 (7th Cir. 2006). "But a factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates differs from taking hostages." Id. Here, Isaacson testified that he told Mitchell that his wife was "a target" and was "under investigation." (Tr. 32-33). As such statement was factually, accurate, there is nothing improper about it. Moreover, even assuming *arguendo* that the agents did make the statement defendant attributes to them, such statement, which by defendant's own admission "came near the end" of their meeting, clearly did not cause defendant's will to be overborne as he never confessed to anything that day. Here, there is no evidence that "the police extracted the confession by threats, violence, or direct or implied promises, such that the 'defendant's will [was] overborne and his capacity for self-determination critically impaired.). In applying this test, we must consider the totality of the circumstances, including law-enforcement officials' conduct and the defendant's capacity to resist pressure.'" United States v. Gannon, 531 F.3d 567, 661 (8th Cir. 2008) citing United States v.

Kilgore, 58 F.3d 350, 353 (8th Cir.1995). Here, again, we invite the Court's attention to it's own finding in #73 at p. 10 that the defendant's own "willingness to continue the conversation . . . also indicates that he did not experience a significant constraint on his own freedom," which, as we have said, *supra,* demonstrates that Mitchell was not intimidated or coerced by the agents into giving his statement.

The defendant's claim that he had no previous experience in the criminal justice system appears to be accurate. However, the record is silent as to any direct evidence of whether this lack of experience made him more susceptible to intimidation. Additionally, and at the risk of appearing in print as a broken record, this Court has already determined that defendant evinced a "willingness to continue the conversation."

The defendant makes two final arguments: that by sitting between him and the door, the agents essentially blocked his exit from the office and that the interview occurred in a secure office with a buzzer and a secure door. This is essentially a reiteration of the defendant's third argument that the interrogation occurred at "FBI headquarters." On the first count, while this does describe the relative positions of Mitchell and the agents during the interview, even if this argument had some merit, it overlooks

the fact that the defendant twice left the office to go to the men's room and there is no evidence that agents impeded Mitchell's egress from the office on either occasion and the fact that the defendant spent a considerable amount of time in the doorway after the agents had literally tried to throw him out of the office, a position that put him beyond the other side of the table. On the second count, we note that in this day-in-age, most offices contain some security measures thus depriving the defendant of any meritorious argument that these security measures created a coercive atmosphere.

Again, coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment. Colorado v. Connelly, 479 U.S. at 167, 170. Here, under the totality of the circumstances test, there simply is no evidence supporting the defendant's claim that the agents' actions in questioning the defendant were coercive. Thus, there is no basis upon which this Court may find that the defendant's statements of September 10, 2008, were involuntarily made. To the contrary, the totality of the circumstances, including (1) the characteristics of the accused, (2) the conditions of interrogation, and (3) the conduct of law enforcement officials, overwhelming establish that defendant's statement was voluntarily made.

CONCLUSION

WHEREFORE, it is prayed that the defendant's motion to suppress his September 10, 2008, statement to Special Agents of the FBI be denied in all respects.

DATED: Buffalo, New York, October 24, 2012.

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Attorney for the United States
Acting Under Authority Conferred
by 28 U.S.C. § 515

s/Anthony M. Bruce

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