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JOSE INEZ GARCIA-ZARATE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO VENUE

UNITED STATES OF AMERICA Plaintiff, vs. JOSE INEZ GARCIA-ZARATE, Defendant.	No. 3:17-CR-609-VC DEFENDANT'S NOTICE OF MOTION AND MOTION TO SUPPRESS STATEMENT OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA AND THE FIFTH AMENDMENT Date: December 18, 2019 Time: 1:30 p.m. Courtroom: Hon. Vince Chhabria

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as this matter may be heard, defendant JOSE INEZ GARCIA-ZARATE, by and through counsel, will and hereby does move this Honorable Court to suppress the statement elicited by law enforcement from Mr. Garcia-Zarate. The defendant asks for an evidentiary hearing should evidentiary issues come into question.

This motion is made pursuant to Federal Rule of Criminal Procedure section 12, the Fifth and Fourteenth Amendments of the United States Constitution, Miranda v. Arizona and the authorities presented in the accompanying Memorandum of Points and Authorities.

Dated: December 4, 2019

/s/ Maria Belyi
J. TONY SERRA
MARIA BELYI
Attorneys for Defendant
JOSE INEZ GARCIA-ZARATE

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Mr. Garcia-Zarate was arrested at gunpoint by San Francisco Police at approximately 7:25 p.m. on July 1, 2015. At approximately 1:04 a.m. on July 2, Mr. Garcia-Zarate was escorted, in handcuffs, into a small, windowless interrogation room. The interrogation room had a small table and one chair in the corner, opposite the door.

Mr. Garcia-Zarate was seated in the corner chair and handcuffed to the chair. He then fell asleep. Forty-nine minutes later, San Francisco Police Department Sergeants Ravano and Canning came in, waking him, and asked him how he was and if he spoke English. See Exhibit A[1] 1-5 They inquired if Mr. Garcia-Zarate wanted food or to use the bathroom. Mr. Garcia Zarate said that he was a little cold. Id. One of the officers uncuffed him and suggested that Mr. Garcia-Zarate zip up his jacket and put his hands in his pockets. Id. at 5.

Sergeant Ravano asked him, "Want to have a conversation a little bit?"

Mr. Garcia-Zarate replied, "No."

Sergeant Ravano replied, "You know, we'll, we'll just talk in a second." The officers told him that they would be right back and left. Id. at 7.

At 2:34 a.m., two officers returned, and brought in chairs. One sat across the table from Mr. Garcia-Zarate, and another sat at the head of the table. Mr. Garcia-Zarate declined offers of water, but repeated that he was cold. The officers asked him which language he preferred to speak, English or Spanish, and Mr. Garcia-Zarate said, "the same in Spanish and English." Id. at 10.

Another officer, Officer Covarrubias, was asked to join the interrogation so as to speak Spanish to Mr. Garcia-Zarate and sat at the table. Id. at 13.

Per instruction from Sergeant Ravano, Officer Covarrubias read the Miranda advisement to Mr. Garcia-Zarate in Spanish off a card. Id. at 13-15. However, as would become a pattern throughout the interview, Officer Covarrubias's Spanish was not adequate for the task of a custodial interview and Miranda advisement.

[1] There are two sets of transcripts, A and B. Excerpts from transcript A are attached in Exhibit A; excerpts from transcript B are attached as Exhibit B.

For example, Officer Covarrubias advised Mr. Garcia-Zarate that he had "the right to wait for silence," rather than the right to remain silent. See Exhibit C, Translator's Notes by Fanny Suarez, and accompanying declaration of Ms. Suarez. Officer Covarrubias also did not seem to know the word for interrogation, and advised that Mr. Garcia-Zarate had the right to have an attorney present "before and during any 'enterrogation,'" and, if he did not have the means to do that, one would be appointed before he is "interegoeh." Id.

None of the officers inquired if Mr. Garcia-Zarate wanted to proceed with the interrogation and if he waived his rights. Mr. Garcia-Zarate never affirmatively waived his rights.

Though Mr. Garcia-Zarate answers in the affirmative when asked if he understands the rights, it is unclear if he does. At that point, it is the middle of the night; he has been in custody for over seven hours. He is literally cornered in a small, cold room, flanked by three police officers. His answers to their various other questions indicate he has some problems fully comprehending what is going on at the time. For example, when asked about his birthdate, Mr. Garcia-Zarate repeatedly states that it was in 1863. Exhibit A, at 16:23-28.

Mr. Garcia-Zarate repeatedly denied being near Pier 14 and throwing the gun into the water. Exhibit A, 22-38.

When accused of lying, Mr. Garcia-Zarate became agitated and stated that he is going to get lawyers for himself, and tells the officers to "do what you need to do because that's the end of it." Id. at 58-64.

Sergeant Ravano confronts Mr. Garcia-Zarate with a photo allegedly showing him walking away from the scene at Pier 14, and says people saw him throw the gun into the water. Mr. Garcia-Zarate again invokes his right to counsel, and states, "I am going to pull all of it in lawyers because I do have proof, witnesses." Id. at 67.

He tells the officers that he "is not going to declare myself guilty," and that he will spend his money on attorneys. Id. at 63.

Sergeants Ravano and Officer Canning, leave the interrogation room, recognizing that Mr. Garcia Zarate "does not want to talk to us." Id. at 122:3-4.

Officer Covarrubias continued to interrogate Mr. Garcia-Zarate, presenting him with fabricated evidence; Mr. Garcia-Zarate, frustrated and agitated, exasperatedly told the officer that he had no money for them, that he would declare himself guilty and stop answering questions. Exhibit B: 10-24. He said, "I am not going to answer anything. Just bring me the papers so I can declare myself guilty of this." Id. at 18:3-7.

Officer Covarrubias does not respect Mr. Garcia-Zarate's invocation, and instead continues to ask the same question: "why did you throw the gun into the bay?" Id. at 18:17. Mr. Garcia-Zarate again says he has no more words for the officers, saying:

> "Just bring me the papers to sign them and that's it, it's over. What do I want to be there for saying so many words when I don't speak Spanish?"
>
> Id. at 20.

This dialogue continues. Officer Covarrubias repeatedly asks Mr. Garcia-Zarate why he threw the weapon into the water, and Mr. Garcia-Zarate responds by saying, among other things, he wants to sign the papers, declare himself guilty, and stop using words. He says, "[s]o many questions and answers, enough!" Id. at 26:12 Mr. Garcia-Zarate says, again:

> "That's why I am telling you: I am not going to keep answering you with words."
>
> Id. at 28:18-21.

Mr. Garcia-Zarate repeats:

> "You are not going to make me angry here. Nor am I going to say the words that you want me to throw out."
>
> Id. at 29:15-18.

In response to the question "why did you throw the gun?" later in the interrogation, Mr. Garcia Zarate says:

> "I already told you. I am not going to answer anymore of your words or anything because you are not cut out for those things. The only ones cut out for those things are the judges and the courts.""
>
> Id. at 61:20.

Garcia Zarate repeats, on twenty-six different occasions, that he simply wants to sign the papers, and declare himself guilty-each time suggesting his desire to stop the questions.

Id. at 10, 14, 16:7,15,20; 17:22, 24; 20:7,16; 23:6; 24:2; 25:8; 31:25;33:15; 40:10,23; 42:13;52:3,5; 70:5;74:12;81:20; 86:17,26; 101:22, 167:2.

At approximately 4:45 a.m., an hour after they had left the interrogation room, Sergeants Ravano and Canning re-enter the interview room. Sergeant Ravano, in an agitated state, then lies to Mr. Garcia-Zarate and tells him that five witnesses had seen him shoot the gun, they had recovered the gun from the water, and they had DNA and gunshot residue from Mr. Garcia-Zarate. Id. at 87-89; 107-109.

As a result of these manipulations, Mr. Garcia-Zarate falsely confesses to facts later conclusively disproven by the evidence. He states that he was about five feet away from Ms. Steinle when the weapon discharged, though it was later determined that he was approximately 90-95 feet away. Mr. Garcia Zarate also agreed with Sergeant Canning's suggestion that he walked past Ms. Steinle after she had been shot, which was impossible and untrue.

Every time Mr. Garcia-Zarate attempted to explain the accidental discharge of the weapon, the officers forcefully told him not to lie. Id. at 125, 133, 155, 161.

The whole of Mr. Garcia-Zarate's statement is involuntary and obtained in violation of Miranda and the Fifth Amendment. Thus, it must be suppressed in its entirety.

ARGUMENT

I.

Mr. Garcia-Zarate's Statement Must Be Suppressed As It Was Obtained in Violation of Miranda.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that in the context of "custodial interrogation," certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id. at 444. Those safeguards include the now familiar Miranda advisements requiring that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.
>
> Id. at 444-445 (emphasis added).

The Miranda Court specified that "[o]nce warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." Id., at 473-474.

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." Rhode Island v. Innis, (1986) 446 U.S. 291, 298, citing Miranda v. Arizona, *supra*, 384 U.S. at 444.

However, "interrogation" is not defined by the courts as just direct questioning of the defendant. In Innis, the United States Supreme Court expressed concern of an "interrogation environment created by the interplay of interrogation and custody" that "would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination. Rhode Island v. Innis, 446 U.S. at 299 (citations omitted). The Court further described "the use of psychological ploys, such as to [posit] the guilt of the subject, to minimize the moral seriousness of the offense and to cast blame on the victim or on society" as amounting to interrogation in a custodial setting. Id. In sum, an interrogation under Miranda "refers not only to express questioning, but also to any actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 300-301.

A. There Can Be No Question that Mr. Garcia-Zarate Was in SFPD Custody at the Time of the Interrogation.

By the time Mr. Garcia-Zarate was escorted, handcuffed, into the SFPD interrogation room, he had been in police custody for approximately six hours. He had been arrested, at gun point, and taken into custody. Then, six hours later, Mr. Garcia-Zarate was escorted by law enforcement to a cold, small, windowless interrogation room and was handcuffed to a chair in the corner. He remained there, alone, for approximately forty minutes before officers came in and began to question him. Everything, from whether he was able to move his hands to zip his jacket, go to the bathroom, have a drink of water, or understand the language spoken to him was within the control of the officers.

B. Mr. Garcia-Zarate Unequivocally Stated That He Did Not Wish to Be Interrogated and the Officers Overrode His Will and Continued to Question Him.

Mr. Garcia-Zarate explicitly and unequivocally said "No" when asked if he wanted to speak with the officers. Exhibit A. Instead of taking him out of the interrogation room, Sergeant Ravano told him that he would speak with him later, and left him, handcuffed and cold for forty minutes. Indeed, when questioned about the answer "No" in previous testimony, Sergeant Ravano admitted

that "No" is an unequivocal answer. See Exhibit D, previous testimony of Sergeant Ravano as to this exchange.

"If the individual indicates *in any manner*, *at any time prior to or during questioning*, that he wishes to remain silent, the interrogation must cease." Miranda v. Arizona, *supra* 384 U.S. at 473-74 (emphasis added).

In Garcia v. Long, the 9th Circuit Court of Appeals criticized a California court ruling that a "postinvocation" response rendered a defendant's prior "no" ambiguous. Garcia v. Long, 808 F. 3d 771, 778 (9th Cir 2015). The Court recounted the holding in Smith v. Illinois, where the officer, instead of terminating the interrogation after a suspect stated he would like to have a lawyer present, pressed the suspect on whether he would like to speak without counsel. Id. at 778, citing Smith v. Illinois, 469 U.S. 91, 97 (1984). Garcia explained that the suspect's equivocal response to the subsequent clarifying question "could not be used to cast retrospective doubt on the clarity of the initial request itself." Id., citing Smith.

Mr. Garcia-Zarate unequivocally invoked his right to not speak to law enforcement as soon as he was asked whether he wanted to have a conversation with them. It was very clear to the officers that he did not want to speak with them, which may be why, after finally reading Mr. Garcia-Zarate his Miranda rights, the officers did not ask whether he wanted to continue the interrogation.

Nevertheless, as indicated in the Statement of Facts, Mr. Garcia repeats his desire to not answer questions throughout the interrogation.

He also expresses a desire for counsel throughout the interview. "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis v. United States, 512 U.S. 452, 459 (1992). Here, Mr. Garcia-Zarate explicitly talked about using attorneys, and the officers understood Mr. Garcia's requests to mean that he wanted to speak to a lawyer. This is evidenced in their explicit inquiry as to why he wanted to speak with a lawyer. Exhibit A, at 65.

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C. Mr. Garcia-Zarate Never Waived His Miranda Rights.

"For inculpatory statements made by a defendant during custodial interrogation to be admissible in evidence, the defendant's waiver of Miranda rights must be voluntary, knowing, and intelligent." United States v. Garibay, 143 F. 3d 534, 536 (9th Cir 1998). The waiver depends upon the "totality of the circumstances, including the background, experience, and conduct of the defendant." Id.

In Garibay, the defendant, a native Spanish-speaker, indicated that he understood English and, after he was read his Miranda rights, indicated that he understood his rights, waived them, and made incriminating statements. Id.

The government bears a "great" burden in proving, by a preponderance of the evidence, that a defendant knowingly and intelligently waived his rights. Id. at 536-537. The Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Id. at 537. In Garibay, the defendant contended that his low IQ and failure to understand English precluded him from being able to knowingly and intelligently waiving his rights. Id.

The Court presented the following considerations as a guide for the totality of circumstances inquiry of whether a defendant waived his Miranda right: (1) whether the defendant signed a written waiver, (2) whether the defendant was advised of his rights in his native tongue, (3) whether the defendant appeared to understand his rights, (4) whether a defendant had the assistance of a translator, (5) whether the defendant's rights were individually and repeatedly explained to him, and (6) whether the defendant had prior experience with the criminal justice system.

Here, most importantly, Mr. Garcia-Zarate never made a waiver, written or otherwise. As briefed before, the only time officers inquired as to whether Mr. Garcia-Zarate wanted to speak with them, he said no.

Further, while he was advised of his rights "in his native tongue," the Spanish speaking officer made key mistakes that in essence deprived the advisement of any meaning. Mr. Garcia-Zarate was told that he "had the right to wait for silence" rather than to remain silent. See Exhibit

C. Further, the advisement regarding an attorney was nullified as he was told that if he did not have the "means to hire an attorney, one would be appointed free" if he wish[ed] before he is 'interegoeh'." Id. This complete mistranslation of the two most important advisements and the failure to give Mr. Garcia-Zarate an opportunity to acknowledge his rights and decide whether to invoke or to waive them weighs heavily against the prosecution's burden.

D. Mr. Garcia-Zarate's Statements Were Not Voluntary and Must Therefore Be Suppressed.

The requirement that statements must be voluntary have a basis in the Due Process Clause of the Fifth and Fourteenth Amendments. The requirement of voluntariness is separate from that of the compliance with Miranda.

The government bears the burden of proving that a statement is voluntary by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168 (1994). "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." Id. at 167.

As with the analysis of the Miranda waiver, the voluntariness of a statement is evaluated by a totality of circumstances inquiry. Misrepresentations by police is a relevant inquiry. Frazier v. Cupp, 394 U.S. 731, 739 (1969). "A deceptive practice that distorts the suspect's rational choice might, in the totality of circumstances, render the confession involuntary." United States v. Drake, 934 F. Supp. 953, 963 (N.D. Ill. 1996).

The proven lack of factual accuracy in Mr. Garcia-Zarate's confession demonstrates its involuntary nature and that law enforcement obtained his statement by overriding his will. His statements (or his agreeing with the factual scenarios posited by the officers) that he was five feet away from Ms. Steinle when the gun was discharged and that he walked past her body without helping her are now known to be completely disproven by the evidence.

Mr. Garcia-Zarate's involuntary statements, derived from a coercive interrogation, are unreliable and cannot assist a jury in assessing what transpired. These statements are an example of false confessions derived from coercive interviews by law enforcement. As these statements are in violation of the Fifth Amendment, they must be suppressed

CONCLUSION

The whole of Mr. Garcia-Zarate's statement is involuntary and obtained in violation of Miranda and the Fifth Amendment. Thus, it must be suppressed in its entirety. If, however, the Court deems there to not be any Miranda violation, Mr. Garcia-Zarate reserves the right to move to exclude portions of the statement on Rule 402 and 403 grounds.

Dated: December 4, 2019

Respectfully submitted,

_/s/_ *Maria Belyi*_____
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MARIA BELYI
Attorneys for Defendant
JOSE INEZ GARCIA-ZARATE