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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO VENUE

12 UNITED STATES OF AMERICA	)	No. 3:17-CR-17-609-VC
13 Plaintiff,	)	
14 vs.	)	DEFENDANT’S NOTICE OF MOTION AND
15 JOSE INEZ GARCIA-ZARATE,	)	MOTION TO SUPPRESS STATEMENTS RE
16 Defendant.	)	WARRANTLESS ARREST;
	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES
	)	Date: December 18, 2019
	)	Time: 1:30 PM
	)	Courtroom: Hon. Vince Chhabria

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

19 PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as this  
20 matter may be heard, defendant JOSE INEZ GARCIA-ZARATE, by and through counsel, will  
21 and hereby does move this Honorable Court for an order to suppress Mr. Garcia-Zarate’s  
22 statement to police as the fruit of a warrantless arrest.

23 This motion is made pursuant to Federal Rule of Criminal Procedure 12, the Fourth and  
24 Fifth Amendments of the United States Constitution, and the authorities presented in the  
25 accompanying Memorandum of Points and Authorities.

26 Dated: December 4, 2019

*/s/ J. Tony Serra*

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27 J. TONY SERRA  
28 MARIA BELYI  
Attorneys for Defendant  
JOSE INEZ GARCIA-ZARATE

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT FACTS**

3 The facts known to law enforcement at the time of Mr. Garcia-Zarate's arrest and  
4 interrogation have been presented in both a state court preliminary hearing and in a jury trial. The  
5 facts relevant to this motion, as set forth herein, are largely undisputed.  
6

7 ***A. Witnesses give description of a "possible suspect" to police: no one sees the shooting.***

8 On July 1, 2015, Kate Steinle was walking on Pier 14 in San Francisco at about 6:30 PM  
9 when a single gunshot rang out, striking and killing her. Witnesses on and around the Pier gave  
10 descriptions of a "possible suspect" to police as a homeless man walking away from the pier. No  
11 one saw the shooting or observed the homeless person with a weapon.  
12

13 Maria Moreno, from her hotel room, saw a person who looked "suspicious" walking  
14 away from the commotion on the pier. She saw a dark-skinned figure with a bald patch on the  
15 right side. Ms. Moreno brought this person to the attention of her girlfriend, Aryn Carpenter,  
16 who took pictures.

17 Shortly after 6:30 PM, Inspector Dong received, via email, pictures of a man walking  
18 away from Pier 14 taken by Ms. Carpenter from her hotel room. Around the same time, Officer  
19 Conway sent Dong a picture he had obtained from Michele Lo, of a person sitting on a chair on  
20 the pier, wearing black and a T-shirt with black lettering on it. Using the pictures, Dong created  
21 an email blast "of a possible suspect."  
22

23 At 6:33 PM, an individual called 911 and told the operator that he "didn't see what  
24 happened but somebody said it's this homeless guy that's walking away, I can see him in the  
25 distance." The caller never used the word "shooter" and reiterated that he "didn't see" the person  
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28

1 who shot the victim, “but somebody said” it’s this guy. “He just came out and he’s walking  
2 away... walking toward the Bay Bridge.”

3 ***B. Confusion about the suspect’s description at the time of the incident.***

4 The CAD printout reflects that, at 6:34 PM, a possible suspect was listed as a black male,  
5 unknown age, 5’5” with a medium build, wearing black hooded jacket and pants. Three minutes  
6 later, the CAD shows a report from a party who thought that the shooter might have shot across  
7 from the Embarcadero, possibly from the direction of Sinbad restaurant.  
8

9 On the police radio a call describes the suspect as a 30-year-old black male with black T-  
10 shirt with white writing, wearing black pants, and seen with a black bag. He is a homeless  
11 “type,” with no facial hair, short hair, and unknown height.

12 At 6:39 PM on the CAD printout, a reporting party said “you might want to look for a  
13 white female, blonde hair, teal coat” who got off the pier “but was standing right next to the  
14 person. She was right next to him. If you don’t know what happened, this woman was right next  
15 to the person.” Around the same time, calls came in about a woman committing suicide on the  
16 pier, and a woman fainting on the pier.  
17

18 At 6:43 PM on the CAD printout, the suspect is identified as black male, oversize black  
19 jacket, black jeans, white hoodie under the jacket, and black and white tennis shoes with a white  
20 emblem and white soles. The man was described as having a balding patch in the back. At 6:46,  
21 further description of the black shirt noted that it stated “CALI” in big letters and officers were  
22 advised that the photos reflected a suspect who was 5’10” and 185 pounds.  
23

24 ///

25 ///

26 ///

1 **C. Arrest.**

2 Based on the emails and the CAD tape, Officer Frye arrested Mr. Garcia-Zarate at  
3 gunpoint at 7:24 PM on the Embarcadero near Townsend. Officer Bryant also helped to  
4 effectuate the arrest.<sup>1</sup>

5 Mr. Garcia-Zarate was handcuffed, searched, and placed in the back of a squad car.  
6 According to the police report, at 7:30 PM, Sgt. Dittmer received a call about the shooting and  
7 was informed that “witnesses” had observed a black male leaving the area. He spoke with Lt.  
8 Conley and requested that officers swab the suspect’s hands for gunshot residue (GSR).  
9

10 Mr. Garcia-Zarate’s hands were thereafter bagged to be tested for GSR. At 7:51 PM, a  
11 call was made for any GSR trained officers.

12 **D. Cold shows: no one saw Mr. Garcia-Zarate with a gun.**

13 At 10:00 PM, cold shows were conducted on Mr. Garcia-Zarate at Townsend and  
14 Embarcadero. Ms. Carpenter identified Mr. Garcia-Zarate as the person she saw walking away  
15 from Pier 14 immediately after the shooting, whose movements she considered “suspicious.” Ms.  
16 Moreno also identified Mr. Garcia-Zarate as the person she saw walking away from the pier  
17 “hurriedly” after the shooting. Jeanne Adelo identified Mr. Garcia-Zarate as the person she saw  
18 leaving the pier. She saw another man walking away at the same time, but he sat on a nearby  
19 bench and did not leave.  
20

21 Shawn Heiser did not identify Mr. Garcia-Zarate as the man he saw leaving the pier. The  
22 person he saw had slightly different clothing and a different physical appearance. At 6:50 PM,  
23 Trevor Eaton told Sgt. Kelly that he thought he saw a black guy in black sweatshirt walk away  
24 from the scene at a quick pace.  
25

26 \_\_\_\_\_  
27 <sup>1</sup> At 7:24 PM, an officer commented “One in cuffs” and 40 seconds later another commented  
28 “this is related – bag him” and still another said “King / Townsend one at gunpoint.”

1 Michael Robben recognized Mr. Garcia-Zarate “100 percent.” He recognized the writing  
2 on his shirt – particularly the C – the hoodie, the white on his shoes, his balding hairline, patchy  
3 hair, and the white lining of the hoodie.

4 At 9:30 PM, Dimitry Petrovykh told Sgt. Kelly that he saw a homeless man (black man,  
5 black clothing) sitting close to the entrance of the pier when walking onto the pier earlier.

6 Dimitry heard a shot, turned, rushed to the victim, and then noticed the same homeless man  
7 about 25 yards away, facing him. He is 80 percent sure it was the same man. Dimitry looked  
8 back to the woman’s family and did not notice the homeless man leave.

9  
10 Henry Li saw a homeless black man spinning around on one of the chairs on the pier.  
11 Later, he observed a man with black hair and black clothing running from the pier near the  
12 entrance.

13 Michelle Lo saw a black man spinning on a chair. Ten minutes later, she heard a pop, saw  
14 a woman on the ground, and saw a man in dark clothes (not sure if same man) running from the  
15 pier.  
16

17 Meizhen Feng also saw the black homeless man wearing all black and commented that  
18 “the entire person was black.”

19 ***E. Interrogation in the middle of the night.***

20 Mr. Garcia-Zarate remained in the back of a squad car for 3 hours and 20 minutes (until  
21 10:55 PM), before he was transferred to another unit who took him to the homicide detail. He  
22 was sweating heavily in the back of the car, so Bryant offered him water and a bite of a granola  
23 bar.  
24

25 Mr. Garcia-Zarate was brought to the interview room at 1:04 a.m., or five and a half  
26 hours after his arrest. He was brought in, handcuffed, by two officers with two others following,  
27

1 and then handcuffed to a chair (the single cuff was apparently in response to his complaint of  
2 cold). He then was left alone (but videotaped) for 45 minutes before SFPD Sgt Ravano and his  
3 partner Sgt Canning introduced themselves. He slept while he waited and when there were  
4 breaks.

5 A Spanish speaking police officer was brought in to interpret and a *Miranda* waiver was  
6 given and waived before the statement. Sgt Ravano falsely told Mr. Garcia-Zarate that five  
7 witnesses had seen him, they had his DNA, and they had GSR. Mr. Garcia-Zarate eventually  
8 made various statements related to accidentally discharging the gun, including that he had found  
9 the gun on the pier, that he was aiming at a seal, that he didn't know what it was, and that when  
10 it went off he threw the gun into the bay so it would not discharge again.

## 12 ARGUMENT

### 13 **I. Law Enforcement Lacked Probable Cause to Conclude that Mr. Garcia-Zarate was** 14 **the Shooter at the Time of the Arrest.**

15 Given the totality of the circumstances, the government cannot prove that officers had  
16 probable cause to believe that Mr. Garcia-Zarate was the shooter at the time of his arrest.

#### 17 **A. Legal Standard**

18 “A warrantless arrest must be supported by probable cause to comport with the Fourth  
19 Amendment.” *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616  
20 F.3d 963, 969 (9th Cir. 2010), *citing Henry v. United States*, 361 U.S. 98, 102 (1959); *see also*  
21 Cal. Pen. Code, § 836(a)(3). Probable cause exists if “at the moment of arrest the facts and  
22 circumstances within the knowledge of the arresting officers and of which they had reasonably  
23 trustworthy information were sufficient to warrant a prudent man in believing that the petitioner  
24 had committed or was committing an offense.” *United States v. Jensen*, 425 F.3d 698, 704 (9th  
25 Cir. 2005); *see also People v. Kraft*, 23 Cal. 4th 978, 1037 (“An arrest is valid if supported by  
26  
27

1 probable cause. Probable cause to arrest exists if facts known to the arresting officer would lead  
2 a person of ordinary care and prudence to entertain an honest and strong suspicion that an  
3 individual is guilty of a crime.”). The probable cause inquiry examines the totality of the  
4 circumstances. *Gasho v. United States*, 39 F.3d 1420, 1427 (9th Cir. 1994). While conclusive  
5 evidence of guilt is not needed to establish probable cause, “mere suspicion, common rumor, or  
6 even strong reason to suspect are not enough[.]” *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th  
7 Cir. 1984); *see Gasho*, 39 F.3d at 1428 (“Probable cause is more than mere suspicion.”) It is the  
8 government’s burden to prove that a warrantless arrest did not violate the Fourth Amendment.  
9  
10 *United States v. Valencia*, 24 F.3d 1106, 1108 (9th Cir. 1994).

11 For purposes of the exclusionary rule, an arrest on the basis of a directive or request  
12 received through official channels is valid only if the originator of the request had probable cause  
13 at the time of issuing it. *Whiteley v. Warden* (1971) 401 U.S. 560, 568.

14 **B. The Witnesses’ Observations and Photographs of a Homeless Man Walking**  
15 **Off the Pier where Ms. Steinle was Shot Did Not Give Rise to Probable Cause**  
16 **to Believe that Mr. Garcia-Zarate was the Shooter.**

17 Under the totality of the circumstances here, law enforcement lacked the probable cause  
18 to arrest Mr. Garcia-Zarate as the shooter of Ms. Steinle.

19 Although witnesses observed Mr. Garcia-Zarate walking away from the pier after the  
20 shooting, no one saw Mr. Garcia-Zarate with a weapon. No one saw Mr. Garcia-Zarate shoot a  
21 gun. No one saw him interact with Ms. Steinle. And no one saw Mr. Garcia-Zarate yelling, or  
22 acting in a threatening manner, or engaging in a headlong flight from the scene.<sup>2</sup> Given the lack

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23  
24 <sup>2</sup> Although a “[h]eadlong flight” may be sufficient to give rise to reasonable suspicion (*Illinois v.*  
25 *Wardlow*, 528 U.S. 119, 124 (2000)), Mr. Garcia-Zarate’s “simple act of walking away” did not  
26 rise even to that level, much less to probable cause. *Moreno v. Baca*, 431 F.3d 633, 643 (9th Cir.  
27 2005); *see also Benitez-Mendez v. I.N.S.*, 760 F.2d 907, 909 (9th Cir. 1983) (flight insufficient to  
28 give rise to reasonable suspicion); *United States v. Beauchamp*, 659 F.3d 560, 570 (6th Cir.  
2011) (stating that “it is clear that walking away from an officer” is insufficient to give rise even  
to reasonable suspicion).

1 of evidence of Mr. Garcia-Zarate's involvement in the shooting, and the confusion regarding the  
2 suspect's description and the possible origin of the gunshot, there was no probable cause to  
3 conclude that Mr. Garcia-Zarate had committed the crime prior to his arrest.

4 Because officers lacked probable cause to believe that Mr. Garcia-Zarate was the shooter,  
5 his warrantless arrest violated the Fourth Amendment.

6 **II. Because Mr. Garcia-Zarate's Statement to Police was the Fruit of an Illegal Arrest,**  
7 **It Should be Suppressed.**

8 The United States Supreme Court has held that where admissions are made after an  
9 illegal detention, arrest, or search, a subsequent *Miranda* admonition does not, in itself, make a  
10 defendant's statements admissible. Instead, a confession that follows unlawful police conduct  
11 must be "sufficiently an act of free will to purge the primary taint." *Brown v. Illinois*, 422 U.S.  
12 590, 602 (1975), quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). Specifically, the  
13 Supreme Court has held that a confession obtained through custodial interrogation after an illegal  
14 arrest should be excluded unless intervening events break the causal connection between the  
15 arrest and the confession so that the confession is sufficiently an act of free will to purge the  
16 primary taint. *Taylor v. Alabama* (1982) 457 U.S. 687; accord *Brown*, 422 U.S. at 604-05.

17 No such facts exist here. Following his arrest by Officers Frye and Bryant at 7:24 PM,  
18 Mr. Garcia-Zarate remained handcuffed in the back of a squad car for 3 hours and 20 minutes.  
19 After being in continuous police custody for over five hours, Mr. Garcia-Zarate was brought, in  
20 handcuffs, to an interview room at the police station after 1:00 AM. He was then left alone for 45  
21 minutes, handcuffed to a chair, and thereafter interviewed by two police officers. Under these  
22 highly coercive circumstances, nothing attenuated the arrest from the statement -- there was no  
23 "act of free will" to "purge the primary taint" of the warrantless and illegal arrest. Accordingly,  
24 Mr. Garcia-Zarate's statement must be suppressed. *Brown*, 422 U.S. at 602.  
25  
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**CONCLUSION**

1  
2 Based upon the foregoing, the Mr. Garcia-Zarate respectfully asks that this motion to  
3 suppress be granted and that his statement to police officers after his arrest, and all other fruits of  
4 the illegal arrest that the prosecution seeks to admit at a hearing or trial, be suppressed.

5 Dated: December 4, 2019

Respectfully submitted,

6  
7 */s/ J. Tony Serra*

8 J. TONY SERRA  
9 MARIA BELYI  
Attorneys for Defendant  
10 JOSE INEZ GARCIA-ZARATE  
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