UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Crim. No. 09-158 (ESH)**
	:	
ANDREW WARREN,	:	
	:	
Defendant.	:	
	:	

GOVERNMENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS OPPOSITION TO DEFENSE MOTION TO SUPPRESS STATEMENTS

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully requests that the Court deny the defense motion to suppress statements. On January 22, 2010, after the government presented evidence in support of its opposition to Defendant's Motion To Suppress Statements, the Court requested that each party file a supplemental brief regarding the Garrity [1] issues in this case. The government relies upon the points and authorities cited herein and at any hearing on this matter to support the request to deny the defense motion to suppress and to permit the government the ability to use defendant's statements in its case-in-chief, cross examination and in its rebuttal case.

I. GOVERNMENT'S EVIDENCE

In September 2008, Department of State Diplomatic Security Special Agent Scott Banker (hereinafter referred to as "Banker"), received a report that two victims had alleged that Andrew Warren sexually assaulted them in Algeria. During the course of the investigation into the allegation, Banker submitted an affidavit in support of a search warrant to search Warren's government-supplied residence in Algiers. Since the search of Warren's residence was

---

[1/] Garrity v. New Jersey, 385 U.S. 493(1967)

imminent, and Mr. Warren remained in Algiers, Banker informed a Security officer at the Central Intelligence Agency (CIA) (hereinafter referred to as "SO") of the allegations and requested assistance from them to facilitate Warren's presence in the United States. On October 9, 2008, Chief Judge Lamberth approved the search warrant. The search warrant was subsequently executed on October 13, 2008 at the defendant's government-supplied housing in Algeria.

According to the SO, the Security Office at the CIA regularly acts as a "liaison" between outside law enforcement agencies and the CIA. In this case, SO explained, the State Department briefed him about criminal allegations against Mr. Warren and requested his assistance to facilitate the arrival of Mr. Warren to the United States[2]; and to arrange for interview space at the CIA. In response to that request, SO arranged to have one of Warren's supervisor's (hereinafter referred to as "Mr. X") request that Mr. Warren return to the United States and SO reserved an office space to be used for the interview. SO also arranged with Mr. X's boss, to meet Mr. Warren in Mr. X's office and then take him to the room where the State Department Agents were waiting.

Mr. X testified that he was one of Warren's supervisors. After receiving a request to assist, Mr. X telephoned Warren at his post in Algiers but was unable to reach him. Mr. X then

---

[2/]Banker testified that his intention was to cause Warren to be removed from Algiers so that the search warrant could be executed and that the interview opportunity was secondary. See January 22, 2010 transcript of Banker's testimony (hereinafter referred to as "TR") Page 55 lines 22 through 24. Banker explained, "[i]f he had stayed at post, the agents at post would have interviewed him. The main reason to bring him back was for the search. Whether he had been at post and we wanted to interview him or he had been back here, we had agents in both places ready to conduct the interview". TR at pages 55 and 56.

sent Warren an email stating that he wanted him to come back to Headquarters on October 10, 2008. Mr. X would describe his request as something more akin to an order.

On October 10, 2008, Warren arrived in the office of Mr. X. According to Mr. X, when Warren arrived, he was dressed in a business suit and appeared to be at ease. Once Warren sat down in his office, Mr. X explained to Warren that two women alleged that he had sexually assaulted them in Algeria. Mr. X testified that Warren appeared to be surprised. Mr. X told Warren that he should take care of this and talk to the Security Officer.[3] Warren stood up to leave and was met by SO.

SO introduced himself and immediately explained to Warren that agents from the Department of State wanted to talk to him. SO and Warren then walked to the office that had been pre-arranged for the interview. During the walk to the office, SO said that he asked Warren in what hotel he was staying. Warren told him. SO testified that he did not say anything else to Warren, and that Warren did not say anything to him. SO did not have any intention whatsoever of interviewing Warren. SO never told Warren that *he* was going to interview him. SO never said that if he didn't talk to State Department agents that he would be fired. SO testified that as a Security Officer, in any event, he would *never* conduct criminal investigations or interview a target of a criminal investigation. That job would be done by the FBI. The only interviews that he conducts are part of administrative investigations.

Once Warren and SO arrived in the interview room, the State Department Agents were waiting for Warren. Agents stood up and introduced themselves. At that point SO went to

---

[3/] Mr. X may have erroneously concluded that Warren was supposed to talk to the Security Officer rather than just walk with him to the interview room where State Department agents were waiting to interview him.

another office and waited until the interview was over. SO testified that he stayed in the suite of offices only because he intended to lock them once everyone had left the area. During the interview, SO could not see Warren or the agents while Warren was being interviewed. Neither SO nor any other employees of the CIA were in the interview room. SO could not hear anything from the interview room. SO has never been briefed on the substance of the interview nor has he ever received a written copy of a memorialization of the interview. SO did not accompany Warren and the agents to Warren's car. After the agents and Warren left the office space, SO locked up the offices. To the day he testified, he still does not know what Warren said, if anything, to the State Department agents.

The Interview

Banker testified that when Warren entered the office, Banker and his colleague, Danielle Pasqualle, introduced themselves as Diplomatic Security Agents with the Department of State. Banker and Pasqualle showed Warren their credentials.[4] Both Banker and Pasqualle were dressed in business suits, were not armed and did not possess handcuffs. After the introductions were made, Banker told Warren the following: [5]

Banker and his partner were present in a law enforcement capacity and not as representatives of Warren's employer. Warren was the subject of a criminal investigation. However, he was not under arrest and he had not been charged or indicted with any

[4/]The Court requested to see for itself how the credentials identified Banker. The Court noted that the credentials reflected that Banker was a Diplomatic Security Special Agent at the Department of State.

[5/]The Court explicitly requested for all counsel to brief the voluntariness issue within the context of *these* warnings memorialized in the written Memorandum of Interview which was entered into evidence as Government Exhibit One.

crimes. Warren was under investigation for sexual assault and that Banker would like to hear Warren's version of the facts. Warren's cooperation was strictly voluntary and that he could leave at any time.[6]

On cross-examination, Banker testified that there is a form "DS-7619" that "he should have given" since it was the policy of the State Department to give. Banker explained that DS-7619 had been created after the "Blackwater" case and according to State Department policy, should be given to any target who is a federal employee. The form, in substance, states:

This is a voluntary interview. Accordingly, you do not have to answer questions. If you decide to answer questions or make a statement, you may stop answering or discontinue the statement any time. No disciplinary action will be taken against you solely because you choose not to answer questions. You have the right to have a representative present during all interviews concerning this matter. Banker stated that he decided not to present that form to Warren, but that it probably would have been better to do so.[7] Banker

---

[6/] The Court commented that it thought that the substance of the introductory "warnings" which were memorialized in Government Exhibit #1 and the testimony about the substance of what Banker told Warren may be inconsistent. However, upon review of the transcript of Banker's testimony on January 22, 2010, it appears that if there are any differences, they are not substantive. Indeed, Banker testified that upon meeting Warren, he told him that "Agent Cole and I were there today in a law enforcement capacity.... that we were not there as representatives of his employer nor were we there as representatives of CIA internal security... that.... we were conducting a criminal investigation into the allegations of sexual assault..."See TR at Page 18, lines 6 through 11. Banker also explained that he told Warren that he was "not under arrest...[y]ou have not been charged with any crime. You've not been indicted with any crime. All we have is an allegation". See TR at Page 19, lines 1 through 4. Finally, Banker testified that he told Warren that " this [interview] is strictly voluntary, and that you are free to leave at any time". See TR at Page 19, lines 14 and 15.

[7/] The undersigned prosecutors were completely unaware that this form existed, what the underlying policy was or that it was something that was even considered to be given by Banker to (continued...)

testified that the reason that he did not give those warnings to Warren was because he thought that since Warren was not a State Department employee, there was no need to give them. Indeed, on cross-examination, Banker explained: "I was under the impression at the time, Judge, that since he was not *our* (italics added) employee and I had no authority to compel him to speak to me, that I didn't actually have to give him that form." TR at Page 38, lines 3 through 6. Banker admitted that there was and is an internal State Department policy which mandates the use of the form even if the subject of the interview is *not a State Department employee.* Banker further explained that he thought that the form was to be used, and that he had used that form for "State Department contractors....[and] ...for individuals who I believed had conducted some form of criminal or administrative misconduct." See TR at Pages 42 and 43.

Banker testified that he wanted to hear Warren's side of the story. Banker told Warren, "with these type of offenses, there are always two sides to every story, and that I would really like [Warren] to give me the opportunity to ask some questions so I could get [Warren's] side of the story so that I could go out and begin to attempt to find some evidence that would corroborate his

---

[7/](...continued)
Warren. After hearing about for the first time on cross-examination, the prosecutors inquired about the form to one of Banker's colleagues in the audience in the courtroom if he knew what Banker was talking about. That colleague presented one of the forms to the prosecutor, who immediately marked it as government exhibit 4 (attached) and moved it into evidence. On re-direct examination, Banker was asked whether, in accordance with State Department Policy, that form had to be read to ***every*** target who happened to be a federal employee. Banker answered, "yes". Banker explained that according to State Department policy, that form had to be read to any federal employees who were targets or subjects of an investigation before interviewing them. After Banker testified, the undersigned prosecutors requested that the State Department provide a copy of the internal Department of State policy. The prosecutors have since received the policy from lawyers at the Department of State which corroborates this testimony. Banker further stated that he did not know about his change of policy at the time he interviewed Warren on October 10, 2008.

version of what happened". TR at Page 19, lines 8 through 14. Warren then agreed to be interviewed, and proceeded to provide an exculpatory statement wherein he stated that although he did have sex with both women, the sex was consensual.[8] Mr. Warren further described, in detail the circumstances surrounding each encounter with each victim including their respective extreme alcohol use and that in both instances, the woman made advances toward Mr. Warren and explicitly asked for sex from him. Indeed, victim two (hereinafter referred to as "V2"), according to Mr. Warren, in his explanation to Banker, consumed "10-11" apple martinis. As the night went on, V2 took a shower and then joined Mr. Warren in his bed. Once in bed, according to Mr. Warren, V2 undressed Mr. Warren and then told him to "hurry" and "get inside me". Mr. Warren explained that V2 sent him a text message on the next day saying, "oh my God, you took advantage of me". Mr. Warren added that he also sent her text messages "where he denied" taking advantage of her. Mr. Warren also stated that V2, via text message, accused him of "drugging her". Mr. Warren offered to show Banker this phone which Warren explained was in his rental car in the parking lot. Mr. Warren also volunteered that he had actually told one of his colleagues at post in Algiers about the sex with V2 and that she had accused him of drugging her. Shortly after Warren gave Banker that information, Banker requested that Warren give consent to search his house in Algiers, his laptop computer, his camera and cell phone. Initially, according to Banker, Warren consented to the search of all items. However, once Banker produced a Consent To Search Form, in evidence at Government Exhibit # 2, attached, Warren changed his mind and declined to give consent for the search of the residence and the computer. Warren then signed the Consent to Search Form for the camera and the cell phone . Banker testified that after

[8/] All references to Warren's statement is in evidence as Government exhibit #1.

Warren withdrew his consent to search his residence in Algiers and his computer, Banker asked him about victim one (hereinafter referred to as V1). Banker observed that Warren's demeanor changed. Warren proceeded to describe V1 enter his bedroom and initiate sex by "cuddling up next" to him and "kissing him" after consuming over "a half a dozen drinks".

At the conclusion of the interview, the agents and Warren walked to Warren's car where Warren provided the cell phone and the camera to the agents. Banker shook hands with Warren, gave him a business card, and walked to his car. Banker did not see where Warren went after the interview was concluded.

Mr. X testified that Warren returned to Mr. X's office, and reiterated his position articulated to Banker, that the allegations were false and that the sex was consensual. Mr. X testified that he did not know what if anything was said in the interview to the State Department Agents.

II. Defense Evidence

The defense did not present any evidence at the January 22nd hearing. Although the defense announced that they would present testimony from a witness, they were unable to sufficiently proffer what his testimony would be since the substance may be classified and had not been cleared before the hearing.

III. THE CHALLENGED STATEMENT WAS COMPLETELY VOLUNTARY AND FREE FROM COERCION

The Objectively Reasonable Test Under Garrity

In this circuit, the Court has made clear that "the touchstone of the Garrity inquiry is whether the defendant's statements were coerced and therefore involuntary." United States v.

Cook, 526 F.Supp.2d. 1 (D.D.C. 2007), aff'd 330 Fed. Appx.1 (D.C.Cir. 2009)(unpublished). Moreover, defendants who claim the protection of Garrity must show that they subjectively believed that their statements were compelled on threat of loss of job and "this belief must have been objectively reasonable". Cook 526 F.Supp.2d at 7, (quoting United States v. Friedrick, 842 F.2d 382,395 (D.C. Cir. 1988)). The defendant has the burden of proving that he is entitled to the protections of Garrity by presenting evidence that he had a subjective belief that he would be fired if he refused to consent to an interview. Here, defendant has failed to meet his burden. This Court in Cook rejected defendant's claim that he had a subjective belief that he would be fired if he refused to file the 'use of force' report because another deputy claimed to have been told that he would be fired if he refused to submit same report, and described his claim as "at best, dubious"and concluded that the defendant had failed to "meet his burden." Id. at 7. Here, there is no evidence regarding defendant's subjective belief. For the purpose of this analysis, it will be assumed that there will be some evidence regarding Warren's subjective belief. Indeed, in Defendant's Memorandum in Further Support of His Motion To Suppress (hereinafter referred to as "Defendant's Motion", he *proffers* that, but there is no evidence of "the subtle pressures exerted on Mr. Warren fostered a reasonable belief that he had to submit to the interrogation, or he would face possible termination...[since Warren] was ordered to return to Washington...did not have discretion to ignore his superior's order, ...was escorted to the interview by a CIA security agent...and never informed of the fact that his job would not be jeopardized if he did not talk". Defendant's Motion at 3 and 7-8. Even if Warren actually presents evidence that supports this proffer, Warren's supposed subjective belief was not objectively reasonable. Not only is there no evidence that the statement was coerced, there is abundant evidence that Warren

embraced the opportunity to give his side of the story to the agents. Although a supervisor ordered him back to the United States, the interview itself was conducted by an outside agency, Warren was fully advised that Banker was acting in a law enforcement capacity and was not in anyway connected to the defendant's employer. Banker explicitly advised Warren that the interview was voluntary. Warren felt free enough to refuse to consent to the search of his government-supplied residence and computer. The statement itself was self-serving and exculpatory.

The circumstances before the interview, taken in their totality, establish that the interview was voluntary and free from coercion. By examining the testimony of Mr. X, SO, and Agent Banker together, in their totality, this Court should conclude that Agent Banker's interview of Warren was completely voluntarily and utterly free from coercion.

At the beginning of the evidentiary hearing, the Court heard evidence that Mr. X, one of Mr. Warren's supervisors, ordered him to come back to the United States and report to his office. Although it was an order, it was an order to return to the United States, not an order to consent to an interview. Once here, Warren appeared in the office of Mr. X, was told about the allegations against him and told to go with the Security Officer to take care of it. While Warren did walk with SO to the interview room, there was never an interview with the Security Officer. The Security Officer never told Warren that he had to speak with the agents. Indeed the only thing SO told Warren was agents from the State Department were there to interview him. Once SO and Mr. Warren arrived to the interview room, SO left the room, and Mr. Warren was in the interview room with the State Department agents only. There were no CIA employees in sight. Indeed, to this day neither Mr. X nor SO was ever informed of what said in the room.

At this point, even if Warren initially thought that he was being ordered to talk to the Security Officer, it would not be objectively reasonable for Warren to think that if he didn't agree to interview with Banker that he would be fired. Warren was not a rookie street officer. On October 10, 2008, Warren was a high-level intelligence officer, with many years at the CIA, with substantial management experience and training, facing very sophisticated and challenging situations on a day to day basis. Warren knew that the Department of State investigates crimes which occur overseas involving government employees. Moreover, even if Warren thought that he was being ordered to talk to the Security Officer, Warren didn't make any statement to him.

Banker introduced himself right away as a State Department agent. Banker showed Warren his credentials which further corroborated his status as a State Department agent. Banker told him explicitly that he was not there representing Warren's employer. Banker clearly told him that the interview was voluntary, and that he was free to leave. Banker told Warren that he was investigating sexual assault allegations involving two women overseas and that this was a criminal investigation. Banker told him that Banker wanted to hear "his" version of the facts. At that point Warren agreed to interview and gave a detailed and comprehensive rendition of his defense. Banker testified that Warren appeared to be very relaxed.[9] Warren and Banker even talked about a mutual friend. After the interview, Warren along with Banker and Pasqualle walked to Warren's car where he provided the cell phone and camera to the agents. The evidence shows that Warren then returned to Mr. X's office and reiterated his strong denial to the allegations.

[9/] Banker testified that the only time he wouldn't describe Warren as appearing relaxed was when Banker asked Warren about V1. Interestingly, Mr. X had already told Warren that there were two victims who alleged that Warren had sexually abused them.

The fact that Warren was not read the State Department form, government exhibit # 4, does not make Warren's alleged subjective belief that he would be fired reasonable. Banker explained that he tried to get the substance of the form across to Warren. As Banker explained, "I made sure that he knew I wasn't here as an employee–a member of his employer who could force him to talk to me. That's what I really wanted to get across to him, that I was there simply as a police officer with no authority to compel". TR page 39 at lines 6 through 10. The essence of the warning was given anyway even though it wasn't what the State Department policy, word for word, proscribed. See California v. Prysock, 453 U.S. 355, 359(1981)(Miranda warnings not inadequate simply because of the order in which they were given--"no talismanic incantation [is] required to satisfy Miranda's strictures."); Duckworth v. Eagan, 492 U.S. 195, 203(1989)("The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda".)

Moreover, the fact that there is indeed a policy at the State Department that requires the reading of this form to *any federal employee*,[10] does not give rise to Warren's argument to exclude the statements. The Supreme Court addressed this issue in United States v. Caceres, 440 U.S. 741, 755(1979) when the Court declined to adopt any rigid rule requiring federal courts to exclude any evidence as a result of a violation of an agency's internal policies. In that case, the defendant was charged with bribing an Internal Revenue Service agent. The IRS agent failed to obtain the authorizations required by IRS electronic surveillance regulations for recording conversations between the taxpayer and the agent. The Court stated that because IRS was not

---

[10/] Indeed, according to this State Department policy, federal government employees get *more* rights than ordinary citizens.

required by the Constitution to adopt its regulations governing electronic surveillance, violation of agency regulations did not raise constitutional questions." Id. at 748-750. The Court also added that the agency action, while later found to be in violation of the regulations, reflected a reasonable, good-faith attempt to comply in a situation which would have been otherwise authorized by the Justice Department. "In these circumstances, there is simply no reason why a court should exercise whatever discretion it may have to exclude evidence obtained in violation of the regulations."Id at 757.

The Supreme Court and Federal Courts have continuously refused to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of internal policy rules. *See, e.g.,* United States v. Condon, 170 F.3d 687, 689 (7th Cir.1999) ("we doubt that a local rule can require the exclusion of evidence."); United States v. Leonard, 524 F.2d 1076, 1089 (2d Cir.1975) (refusing to invoke the exclusionary rule as remedy to agency non-compliance with its internal procedure), *cert. denied,* 425 U.S. 958, (1976).

Most significantly, there is simply no evidence of coercion here. As this Court observed in Cook "[a]lthough the Supreme Court has not recently revisited the Garrity line of cases, a number of the circuits have focused on the 'coercion' issue emphasized by the Court in those cases, making it a claim dependent on such a showing". Cook at 6 (quoting United States v. Trevino, 215 Fed. Appx. 319, 321 (5th Cir.2007)(finding no coercion when an off-duty officer was ordered into the police station for questioning and was escorted into the interrogation room by the Chief of Police).

There must be some showing that the defendant was put between "the rock and a whirlpool", Garrity at 498, before defendant's constitutional rights are implicated.

Here, there is simply no evidence which supports that. The evidence shows that the defendant wanted to tell his side of the story. Not only does he deny the offense and go to great lengths to detail his version of events, Warren even offered Banker the name of a witness who would corroborate his version of the story (a witness who Banker and Warren knew in common), and Warren offered physical evidence (his camera and phone) which he said would corroborate his version that there could be text messages which corroborated his account.

Moreover, he refused to give his consent for Banker to search his house in Algiers. Warren's house in Algiers was supplied for him by his employer. Warren's refusal to give his consent for Banker to search his government-supplied housing in Algiers and his laptop is overwhelming evidence that Warren's statement was not compelled. Surely if Warren felt that he was being coerced, and the interview was not voluntary, if he were between the "rock and the whirlpool" he would have felt compelled to give his consent to search his government-supplied housing in Algiers. Not only is this not a situation where an employee felt compelled to give a statement, under threat of job loss, this is a situation where the employee embraced his opportunity to clear the air, to tell his side of the story, to set the record straight, to corroborate his defense. Compare United States v. Veal, 153 F.3d 1233 at 1243(11th Cir. 1998) (subjective belief was reasonable when defendant's lawyers had informed the [defendants] that they "must give statements and answer every question put by investigators, that they could not invoke the 5th amendment, and that they had Garrity immunity"), but see United States v. Camacho, 739 F. Supp 1504, 1515 (S.D.Fla.1990)(belief not objectively reasonable where defendant was not advised by FOP counsel that he was compelled to give a statement, nor was he advised that if he

refused to speak that he would fired, no evidence that on-scene statements were product of fear of job loss); United States v. Vangates, 287 F.3d 1315, 1321-22(11th Cir. 2002)(belief not reasonable where state employee who was subpoenaed to appear to testify at a civil trial even though she was told to "cooperate" during civil proceedings, it did not rise to the level of compulsion to forgo her 5th Amendment protection even though she showed up at trial wearing uniform) and United States v, Indorato, 628 F.2d 711(1st Cir. 1980)(subjective belief not reasonable even though state police departmental rules provided for the dismissal of any officer who refused to obey the lawful order of superiors since there was no evidence in record that the rules have been interpreted to mean that a state police officer who refuses on Fifth Amendment grounds would be dismissed).

Assuming *arguendo*, that Warren's statement on October 10, 2008 was in fact induced by a threat of employment termination, the appropriate legal consequence is suppression of the statement as a coerced confession. In Garrity, the police officer's statements were suppressed as involuntary. 385 U.S. 496-98. The Garrity Court expressly determined that the threat of removal from a job likewise amounted to "[c]oersion that vitiates a confession …" *Id*. To vindicate the Fifth Amendment, the Court held that coerced statements were inadmissible at trial against the employee. *Id*. at 497-99 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

Properly understood then, the Garrity standard is an after-the-fact exclusionary rule applicable to coerced confessions by public employees who are forced to either lose their job or waive their right not to have their incriminating statements used against them. Compare Oregon v. Elstad, 470 U.S. 298 (1985)(statements taken in violation of Miranda, while directly inadmissible, may be used to impeach) with New Jersey v. Portash, 440 U.S. 450

(1979)(testimony compelled by a grant of immunity cannot be used to impeach).[11] The legal consequence of a coerced confession requires that any evidence admitted at trial be purged of the primary taint. See Elstad, at 310; and United States v. Davis, 617 F. 2d 677, 688 (D.C. Cir.1979). In Davis, the D.C. Circuit held that a defendant's illegally coerced confession did not taint a subsequent voluntary statement that was admitted into evidence against him at trial. 617. F.2d 688-89. When a confession is coerced, a defendant is entitled only to suppression of the confession and its direct fruits. United States v. Blue, 384 U.S. 251, 255 (1966).

Therefore, if this Court were to determine that Banker violated Warren's Fifth Amendment rights by compelling him to answer questions or lose his job, then the government would be precluded from introducing Warren's October 10, 2008 statement to Banker in it's case-in-chief. Further, the government would be precluded from introducing any primary evidence directly flowing from information that Warren provided to Banker. In this case, there is no primary evidence flowing from the statement, because Warren gave Banker an exculpatory, self-serving statement in which he denied raping the two women and he provided detailed information that he thought bolstered his denial of criminal misconduct. Effectually, nothing that the defendant provided to Banker in his statement led to the discovery of any new information or evidence. Specifically, with regard to each category of evidence, the government proffers the following information:

[11/] Treating a statement obtained in violation of Garrity by any other standard would create the inconceivable result that a confession secured by physical assault or even torture would receive less Fifth Amendment protection then a statement compelled from a federal employee upon the threat of loss of job.

Residence: Investigators obtained a warrant to search Warren's residence in Algeria on October 9, 2008 - a day before Warren was interviewed by Banker. The probable cause outlined in the affidavit in support of the residence search was derived entirely from independent sources and was in no way tied to information obtained by Banker through his interview of the defendant. Thus, the drugs, the sexual assault investigation manual, and all other evidence obtained from the defendant's residence are completely independent from, and is in no way linked to, the defendant's October 10, 2008 statement.

Camera: V2 informed investigators in September 2008 that the defendant asked to take a photograph of her with his camera immediately before he gave her a drink, which she drank and then passed into unconsciousness. Investigators included this information in the October 9, 2008 affidavit submitted to Chief Judge Lamberth, so that investigators had authority to seize and search any electronic devise, computer or digital media devise that they encountered when executing the search of Warren's residence. Thus, probable cause to search the defendant's camera existed before he was questioned by Banker on October 10, 2008. In the October 10th statement, Warren told Banker that he took photos of V2 with his camera, and provided Banker with consent to search his camera (which was in the defendant's car at the time of the interview). A resulting forensic search of the camera revealed images of V2. Although Warren mentioned the camera and the picture during the interview with Banker, probable cause to search the camera existed independently from and previous to, the October 10th statement by the defendant.

Cell Phone: In his October 10, 2008 statement, the defendant told Banker that V2 accused him of drugging her and taking advantage of her, and that he denied these allegations via several text messages on his cell phone the day after V2 states she was raped. Warren provided

Banker with consent to search his cell phone (which was located in the defendant's car at the time of the interview). A forensic search of the cell phone Warren provided to Banker revealed that the removable SIM card in Warren's cell phone had been replaced sometime in the summer of 2008, and thus did not contain any information spanning the relevant time period when V2 wrote to the defendant and accused him of drugging her. Again, probable cause to search the phone existed previous to, and independent from any information that Warren provided to Banker on October 10, 2008.

Laptop computer: In the October 9, 2008 affidavit to support a search of the defendant's residence, investigators established probable cause to search any electronic devise, computer or digital media devise that they encountered when executing the search of Warren's residence. On October 14, 2008, investigators used virtually identical information in the affidavit to support the search of the defendant's laptop computer to that which established the probable cause to search computers in the defendant's residence. The only information in the laptop affidavit referring at all to Warren's October 10, 2008 statement to Banker was that the defendant admitted only having consensual sex with both victims[12]. This additional paragraph regarding the defendant's denial did nothing to add to the probable cause that Judge Lamberth already deemed to exist on October 9, 2008 regarding the defendant's electronic, digital and computer devises and media. And more importantly, it does not alter the independent probable cause that existed in the affidavit in support of the search of the laptop on October 14, 2008. In providing full candor to Judge Lamberth, the additional paragraph 31 simply advised that the

[12/] See Affidavit in Support of a Search of the Laptop Computer, paragraph 31.

defendant denied sexually assaulting the victims. The only potentially useful information that Banker obtained from Warren during the October 10, 2008 interview, was that the location of the laptop computer. Specifically, Warren told Banker that the laptop was located in his hotel room at the Washington Hilton. If the laptop was indeed where the defendant stated - in his hotel room at the Hilton - then information about the location of the laptop if it were found in the hotel room could potentially be considered information which directly flowed from the defendant's October 10, 2009 statement, and consequently, may be within a fruit of the poisonous tree analysis. However, that is simply not the case in this instance. When the defendant told Banker that his laptop was at his hotel room - he lied. In fact, the laptop was not in the hotel room, but was with Warren the entire time. Banker immediately posted agents at the hotel, to prevent the defendant from returning to his hotel room and destroying evidence on the laptop. When the defendant arrived at the hotel approximately and hour after the interview with Banker on October 10, 2008, and the agents approached Warren before he could enter his hotel room. They requested that Warren give them his laptop while they obtained a warrant, and Warren reached into his shoulder bag and produced his laptop, before stepping foot into his hotel room. Thus, investigators did not use any of the information that the defendant provided in his October 10, 2008 statement regarding the laptop. The probable cause permitting a search of the laptop existed before the defendant's statement was taken, and any information that the defendant provided to Banker about the location of the laptop was not used by investigators, because the information that the defendant provided was false. As such, the images of the victims; the internet and Google searches; the internet history; the child pornographic images; and the information identifying the defendant of the user of the laptop computer - which were discovered after a forensic analysis of

the laptop computer - are independent from, and are not linked or derived from anything the defendant said to Banker during the interview. The laptop computer evidence is not tainted by the October 10, 2008 statement (in the event that the Court deems the statement was compelled) and should be admissible in the government's case-in-chief.

Thus, in the event that the Court determines the statement to Banker was compelled, the government would be precluded from introducing the statement in its case-in chief.

IV CONCLUSION

WHEREFORE, for the reasons stated above, the United States respectfully requests that the Court deny the defense motion to suppress his statement.

Respectfully Submitted,

RONALD C. MACHEN JR.
United States Attorney
Bar No. 447-889

BY: /s/
JULIEANNE HIMELSTEIN
Assistant United States Attorney
Federal Major Crimes Section
555 4th Street, N.W., Room 4826
Washington, D.C. 20530
(202) 514-8203
Julieanne.himelstein@usdoj.gov

/s/
CHRISTINE DUEY
Trial Attorney
Domestic Security Section
United States Department of Justice
950 Pennsylvania Ave, N.W.,
Washington, D.C. 20530
(202) 305-9333
christine.duey@usdoj.gov