UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. CR 09-939-GW Date April 1, 2013

Present: The Honorable **GEORGE H. WU, UNITED STATES DISTRICT JUDGE**

Interpreter None

Javier Gonzalez	Anne Kielwasser	Jeff P. Mitchell; Nicholas A. Trutanich
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
10. Roberto De La Cruz	✔	✔		10. Jill K. Ginstling, DFPD	✔	✔	

Proceedings: **DEFENDANT ROBERTO DE LA CRUZ'S MOTION TO SUPPRESS STATEMENTS (Dkt No. 2912)(filed 07/16/12)**

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, Defendant De La Cruz's motion is continued to **April 25, 2013 at 9:30 a.m.** Joint Supplemental Brief will be filed by April 12, 2013.

: 40

Initials of Deputy Clerk JG

cc:

United States v. Aguirre, et al., Case No. CV-09-0939
Tentative Ruling on Defendant Roberto De La Cruz's Motion to Suppress Statements (Docket No. 2912)

I. Background

Defendant Roberto De La Cruz ("Defendant") has been indicted on racketeering charges which include his alleged role in the August 2, 2008 murder of Los Angeles County Deputy Sheriff Juan Escalante. *See* First Superseding Indictment, Docket No. 1907 at 9:6-9, 10-20-27, 101:26-102:17. Currently before the Court is Defendant's Motion to Suppress Statements. Docket No. 2912.

On December 5, 2008, Defendant was sentenced to time served in the San Bernadino Superior Court for a probation violation that is unrelated to the issues at hand. Docket No. 3132, Ex. V. After the sentencing, Defendant was held in a San Bernardino Jail pursuant to a warrant issued by the Los Angeles Superior Court (*i.e.* BA3306600) for a different crime and also pursuant to an immigration hold. *See* Docket No. 3172-2, Ex. G. The Los Angeles Sheriff's Department ("LASD") took custody of him on December 7, 2008, and transported him in a van containing undercover officers ("UCs") to the Los Angeles County Jail. During that trip, various statements were made to Defendant by the UCs . *See* Docket No. 2912-2, Ex. A (transcript of conversations that occurred in the van). After arriving at the jail, he was placed in a holding cell with UCs, one of whom said LASD authorities beat him because they believed he was involved in the Avenues gang. *See generally* Docket No. 2912, Ex. C. UCs explained to Defendant that if he were confronted with evidence of his fingerprints being on the bullet casings found at the scene of the murder, he should confess that he touched them. *See id.*, Ex. D. The LASD booked Defendant pursuant to an immigration detainer and an incorrect state criminal warrant (*i.e.* TA0424420). Docket No. 2912-5, Ex. S at 1208-09. The Government admits that Defendant was mistakenly booked on the state charge, as the warrant was for a different Roberto De La Cruz. Docket No. 3054 at 4:20-22.

On December 9, 2008, Defendant pled guilty to and was sentenced to time served for the state warrant charge (TA0424420) – even though he was apparently not the Roberto De La Cruz who was actually involved in that crime. Docket No. 2912, Ex. T. The Los Angeles Police Department ("LAPD") then faxed that sentencing court to indicate Defendant should not be

released because of the immigration detainer. *See* Docket No. 3504, Ex. L at 9. That court claimed that the DA said the detainer was not valid, and that Defendant could not be held under it. *See id.* LAPD informed DEA Task Force Officer ("TFO") Roberto Albarran that Defendant was about to be released from custody. Albarran Decl. ¶ 3, Docket No. 3054. TFO Albarran, who had been investigating the Avenues gang and De La Cruz, directed a subordinate to "prepare to charge" Defendant under 8 U.S.C. § 1326. *Id.* ¶ 4-7. However, another immigration hold was filed on that day instead. Docket No. 3095-2, Ex. D. The detainer was the only reason Defendant was held under LASD's custody. *See id.*; Docket No. 3504 at 6:1-2; Docket No. 3504, Ex. L at 10-11.

On December 10, 2008, LAPD received a court order to take temporary custody of Defendant to question him about the murder of Deputy Escalante. Docket No. 3095, Ex. F. On December 11, 2008, Defendant was interrogated for about seven hours. *See* Docket No. 2912 Exs. H-K. Near the beginning of the interrogation, Defendant was read his *Miranda* rights. Docket No. 2912 Ex. H at 22:10-23:2.[1] He indicated that he understood them, and then agreed to talk with the detectives. *Id.* During this interrogation, Defendant alleges that he invoked his right to remain silent on a number of occasions. *See generally* Docket No. 2912 at 21-51. He also claims that various interrogation tactics, combined with the December 7 threats of violence from the LASD, overbore his will, thus making his confession involuntary. During an unrecorded break in the December 11 interrogation, Defendant allegedly reinitiated the interrogation with detectives. *See generally* Mathew Decl., Docket No. 3095-1; Martinez Decl. ¶ 4, Docket No. 3095-1; *see also* Docket No. 2912 Ex. K at 6:8-23 (explaining that during a "little break" Defendant explained what kind of gun was used to shoot Deputy Escalante and other details about the murder). He then confessed to his involvement in the murder of Deputy Escalante, and provided information about others' involvement as well. *See generally* Docket No. 2912 Ex. K.

Also on December 11, 2008, Defendant was also charged in federal court with violating 8 U.S.C. § 1326. Docket No. 3132, Ex. W at 1. He appeared before a Magistrate Judge on that charge the following day and was ordered detained. Case No. CR-09-0019-WBF; Docket Nos.

[1] Defense counsel has represented that the Government informed her that it will not seek to admit any of the statements Defendant made on December 11, 2008 before being read his *Miranda* rights. Docket No. 3539 at 17:4-6. The Government's reply brief does not challenge this. *See generally* Docket No. 3549. Accordingly, these statements will not be analyzed for *Miranda* purposes.

3, 5. Defendant entered a plea on the immigration felony charge and on April 15, 2009 was sentenced to a 9 month prison term. *Id.* at Docket No. 26. On September 22, 2009, Defendant, along with a number of other defendants who were charged in this case, was arrested and interrogated. Docket No. 2912 Ex. P (transcript of interrogation). Defendant argues that law enforcement ignored his invocation of his *Miranda* rights and that his September 22, 2009 confession was involuntary. *See generally* Docket No, 2912 at 53-56.

Defendant contends that: (1) his December 7, 2008 statements to the UCs should be suppressed because he was not being held pursuant to a valid arrest, (2) that his statements during his December 11 interrogation should be suppressed for being involuntary and in violation of his *Miranda* rights, (3) that his post-interrogation December 11 statements to UCs should be suppressed as fruit of the poisonous tree, (4) that all of his December 11 statements should be suppressed in accordance with the *McNabb-Mallory* rule, and (5) that his September 22 confession should be suppressed because it was involuntary and violated his *Miranda* rights. The Court's tentative ruling would: (1) DENY suppression of the December 7 statements, (2) GRANT suppression of the December 11 interrogation on *McNabb-Mallory* grounds, (3) GRANT suppression of portions of the December 11 interrogations because they were in violation of Defendant's *Miranda* rights and because they were involuntary, (4) request supplemental briefing on the December 11 statements to the UCs, and (5) GRANT suppression of the September 22 confession on *Miranda* grounds, but DENY it on voluntariness grounds.

II. Analysis

A. Defendant Was Held Pursuant To A Valid Arrest

Defendant claims that he was improperly arrested, and therefore his December 7 and December 11 statements must be dismissed as fruit of the poisonous tree. *See generally* Docket No. 2912 at 11-14. On December 5, 2008, Defendant was sentenced to time served in the San Bernardino case. Docket No. 3132, Ex. V. At that point, there was evidence that he had an outstanding warrant for a state crime in case no. BA3306600 and also an immigration detainer. Docket No. 3172-2, Ex. G. After being sentenced to time served, Defendant was not released. Defendant claims law enforcement was unaware of the outstanding warrant and detainer, and that therefore his detention was unlawful. Docket No. 3132 at 3:4-8; *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005) ("[K]nowledge that a man was subject to an outstanding bench warrant, which he acquired only after unlawfully seizing the man, did not retroactively render the seizure

of that man 'reasonable' under the Fourth Amendment."). However, the evidence here indicates otherwise. After the sentencing on December 5, 2008, the San Bernardino County Sheriff's Office sent a teletype to the Los Angeles Police Department, informing them that the Defendant was being held pursuant to the warrant in case no. BA3306600. Docket No. 3504-1, Ex. M at 1-2. The Court, thus, finds that law enforcement knew about that warrant.

The LAPD informed Mark Lillienfield of the Los Angeles Sheriff's Department that Defendant was being held in the San Bernardino Jail. *See* Lillienfield Decl. ¶ 4, Docket No. 3504. Lillienfield does not recall being told the warrant number on which Defendant was held. *Id.* He arranged for Defendant to be picked up from the jail by the LASD on December 7, 2008.[2] Munoz Decl. ¶ 3, Docket No. 3504. Defendant's rap sheet indicates that LASD detained Defendant pursuant to two items: one for warrant no. TA04244021 and one for a civil immigration violation of 8 U.S.C. § 1325. Docket No. 2912-5, Ex. S at 1208-09.

The Government admits that Defendant was improperly booked under warrant no. TA04244021, as it was issued for a different individual with the same name as Defendant. Docket No. 3054 at 4:20-22. He was not booked under the valid BA3306600 warrant. Nevertheless, there is evidence that: (1) during all relevant times herein, the BA3306600 warrant was outstanding; (2) the LASD was informed of the existence of a warrant issued by the Los Angeles Superior Court (*see* Liffienfield Decl. ¶ 4, Stewart Decl. ¶ 3, Docket No. 3504); and (3) there was a mistake as to the correct warrant/case number at the point when Defendant was booked on December 7, 2008. Thus, the present situation is not one where law enforcement was unaware of the existence of a warrant at the time it was maintaining its seizure of the Defendant. It simply a mistake as to the correct warrant number. Therefore, this case would not fall within the *Moreno* decision. Additionally, Defendant does not claim that the immigration hold was insufficient to detain him, only that it cannot serve as the basis for detention unless law enforcement had a valid reason for holding him from December 5 until December 7. Docket No. 3132 at 4:14-16. As

[2] Defendant once claimed that his rights were violated under *County of Riverside v. McLaughlin*, where the Supreme Court held that defendants are generally entitled to a probable cause hearing within 48 hours of a warrantless arrest. 500 U.S. 44, 56 (1991). It seems Defendant has abandoned this argument, as it has not made an appearance in his recent briefs. Regardless, as discussed above, Defendant was arrested on December 5, 2008 pursuant to a warrant for his arrest, thus taking him outside the scope of *McLaughlin*. *See id.*; *Gerstein v. Pugh*, 420 U.S. 103, 118 n.18 (1975).

stated earlier, the warrant in case no.BA3306600 provided that valid purpose.[3]

B. The December 11 Interrogation Violated *McNabb-Mallory*

Defendant claims the December 11 interrogation violated the *McNabb-Mallory* rule and must be suppressed. In "exercise of its supervisory authority over the administration of criminal justice in the federal courts," the Supreme Court held in *McNabb v. United States* that a confession given seven hours after arrest was inadmissible for "unnecessary delay" because authorities did not present the suspect to one of the "numerous committing magistrates," who were in the vicinity. *McNabb v. United States*, 354 U.S. 449, 455 (1957). The Supreme Court has explained *Mcnabb*'s purpose: "[T]he plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to secret interrogation of persons accused of crime." *Corley v. United States*, 556 U.S. 303, 308 (2009) (internal quotation marks and citations omitted). In *Mallory v. United States*, the Court held that all confessions obtained by way of an "unreasonable delay" in presentment are inadmissible, even if not designed "to elicit damaging statements." 354 U.S. 449, 455 (1957). *McNabb* and *Mallory*'s holdings are referred to as the *McNabb-Mallory* rule. Federal Rule of Criminal Procedure 5(a) codified *McNabb-Mallory*: "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer . . . ." Fed. R. Crim. P. 5(a); *see also United States v. Torres*, 663 F.2d 1019, 1023 (10th Cir. 1981) ("The *McNabb-Mallory* rule has been codified in Rule 5(a) of the Federal Rules of Criminal Procedure.").

In 1968, Congress enacted 18 U.S.C. § 3501 ("§ 3501"), which the Supreme Court held modified *McNabb-Mallory* in the following way:

> § 3501 modified *McNabb-Mallory* without supplanting it. Under the rule as revised by § 3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the

[3] Defendant once argued that the *McNabb-Mallory* rule mandated suppression of his December 7, 2008 statements, but seems to have abandoned that argument as his last brief only argues that *McNabb-Mallory* requires suppressing his December 11, 2008 statements. *See generally* Docket No. 3576 at 2-5. The *McNabb-Mallory* rule is discussed *infra*. However, the Ninth Circuit has never held that the *McNabb-Mallory* rule applies to a civil immigration detention, when there is no looming federal criminal charge. It has suggested otherwise. *United States v. Cepeda-Luna*, 989 F.2d 353, 358 (9th Cir. 1993) (holding that "[t]he provisions of Rule 5 . . . are inapplicable to civil deportation arrests," but noting such a holding might not be compelled when there are "delays in a federal criminal arrest.")

> nearest available [magistrate judge]") . . . . If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, *the confession is to be suppressed.*

Corley, 556 U.S. at 322 (emphasis added).[4] "[T]he clear effect of §§ 3501(c) is to create a six-hour safe harbor during which a confession will not be excludable solely because of delay." *United States v. Garcia-Hernandez*, 569 F.3d 1100, 1105 (9th Cir. 2009) (internal quotation marks and citations omitted.).

The Ninth Circuit has held that once "a person is arrested and held on a federal charge by 'any' law enforcement officer – federal, state, or local – that person is under 'arrest or other detention' for purposes of § 3501(c) and its 6–hour safe harbor period." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994). Arrest is not necessary to trigger § 3501, detention also suffices. 18 U.S.C. § 3501 ("arrest or other detention"); *Alvarez-Sanchez*, 511 U.S. at 358.

The difficult question in this case is when the protections of *McNabb-Mallory* and § 3501 were triggered. The Government contends it was December 11, 2008, when Defendant was formally arrested for a federal crime. Defendant contends it was December 9, 2012, when he was held pursuant to an immigration detainer after pleading guilty to and receiving time served for a state crime that he did not commit. The Ninth Circuit has suggested that civil immigration detentions do not implicate Rule 5(a). *United States v. Cepeda-Luna*, 989 F.2d 353, 358 (9th Cir. 1993) (holding that "[t]he provisions of Rule 5 . . . are inapplicable to civil deportation arrests," but noting such a holding might not be compelled when there are "delays in a federal criminal arrest."). After receiving time served, Defendant was held pursuant to a civil immigration detainer, which did not require state authorities to detain Defendant. Docket No. 3095-2 Ex. D at 42. It only requested that they notify federal authorities before releasing him. *Id.* If there were no other relevant facts the Court would not find that *McNabb-Mallory* was triggered on December 9.

However, in *Garcia-Hernandez* the Ninth Circuit has suggested that when an individual is detained pursuant to a civil immigration matter, and is later charged with a criminal matter, the

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[4] The emphasized portion undercuts the Government's argument that *McNabb-Mallory* is discretionary in certain circumstances. Docket No. 3549 at 7:24-8:23. Although the Government seems to cite relevant cases to support its point, none of them are post-*Corley*, which clarifies that after six hours, an unreasonable delay requires suppression. The Court may, nevertheless, request supplemental briefing on this issue.

protections of *McNabb-Mallory* and § 3501 apply. *See United States v. Garcia-Hernandez*, 569 F.3d 1100, 1102 (9th Cir. 2009); *see also United States v. Sotoj-Lopez*, 603 F.2d 789, 790-91 (9th Cir. 1979) ("Nothing in section 1357(a)(2) purports to deprive an alien who is detained on a criminal charge, *or against whom criminal charges are going to be lodged*, in addition to any deportation proceedings that may be conducted against him, of his rights secured by Rule 5(a) of the Federal Rules of Criminal Procedure and the *McNabb-Mallory* Rule.") (emphasis added). In *Garcia-Hernandez*, an illegal alien was detained at the border at 4 a.m. *Id.* at 1101. At 5 p.m. he was administratively processed. *Id.* at 1102. At 6 p.m. "an officer advised Garcia of his procedural rights under the immigration regulations." *Id.* "At 11:43 p.m., after reviewing Garcia's file, a supervisor determined that Garcia was subject to criminal prosecution. Officers then told Garcia that his administrative procedural rights no longer applied and informed him of his *Miranda* rights. Garcia then admitted to being a citizen of Mexico." *United States v. Garcia-Hernandez*, 569 F.3d 1100, 1102 (9th Cir. 2009). The Ninth Circuit easily determined that "Garcia's confession of alienage falls outside the § 3501(c) safe harbor," as he confessed "more than six hours after he was arrested." *Id.* at 1105. The timeline outlined earlier clearly suggests that Garcia confessed shortly after the 11:43 p.m. determination that he had committed a crime. Thus, the six- hour clock started at least six hours before his civil immigration detention transitioned into a criminal one. While the Ninth Circuit unfortunately did not clarify when the six-hour countdown commenced, as will be discussed *infra*, Defendant's interrogation occurred two days after federal authorities determined he had committed a federal crime. Thus, even if the countdown began at the point of this determination – and *Garcia-Hernandez* indicates it started beforehand – Defendant's December 11 th interrogation was well-beyond the six hour safe harbor provision of § 3501.

If presentment takes longer than six hours, the Court must consider whether the delay was reasonable. *Garcia-Hernandez*, 569 F.3d at 1105. This analysis requires critical attention to the purpose of the *McNabb-Mallory* rule, which "was designed to deter police from engaging in lengthy prearraignment detentions for the purpose of further interrogating a defendant." *Id.* Courts must be "careful not to overextend *McNabb–Mallory's* prophylactic rule in cases where there was a reasonable delay unrelated to any prolonged interrogation of the arrestee." *Id.* However, "delay for the purpose of interrogation is the epitome of unnecessary delay." *Corley*, 556 U.S. at 308 (internal quotation marks and citation omitted). In *Garcia-Hernandez*, the delay

was reasonable because it "was caused not by a desire to interrogate Garcia further but by a shortage of personnel necessary to process Garcia and determine whether he should be criminally charged." *Garcia-Hernandez*, 569 F.3d at 1106.

There is no comparable excuse for delay in the instant case. The Government argues the delay was reasonable because it did not want to charge Defendant with the crime of violating 8 U.S.C. § 1326(a), until it could compare a photograph of the individual state authorities were holding and the Roberto De La Cruz they suspected of violating that crime. Docket No. 3549 at 5:10-20. There are several problems with the excuse. First, it appears to be a *post hoc* rationale. There are no declarations to corroborate this excuse. More specifically, on December 9, 2008, TFO Albarran directed another federal officer to prepare a §1326 charge against Defendant. *Id.* ¶ 7. That officer instead filed the instant detainer. Docket No. 3095, Ex. D; *see* Docket No. 3504 at 5:18-23. Neither Albarran's declaration, nor any other declaration that the Government has directed to the Court's attention, indicates any doubt that state authorities had the right man. To the contrary, Officer Albarran expressed only confidence about this issue: "After I learned that the LASD and/or the Compton Court would not honor a previously filed immigration detainer for De La Cruz, I instructed ICE SA Stephen Fyhrie to investigate and prepare to charge De La Cruz with a violation of 8 U.S.C. § 1326(a) to prevent De La Cruz from being released . . . ." Albarran Decl. ¶ 7. Additionally, although Special Agent Stephen Fyhrie stated that on December 11, 2008, he showed a picture of Defendant to another Special Agent to confirm Defendant's identity, nothing indicates that such an action was necessary or, for the reasons discussed below, a reasonable grounds for delaying charges against Defendant. *See* Docket No. 3539, Ex. W at 5 ¶ 6.

Second, as Defendant points out, there was no need to wait several days for a photograph. Docket No. 3576 at 4:1-5:7. No evidence suggests that an emailed or faxed photograph would not have sufficed, nor that such methods were unavailable, nor that authorities were so busy that sending a photograph should take two days. Other methods to confirm De La Cruz's identity were also readily available. The LASD file on De La Cruz noted a date of birth and FBI number that matched his federal immigration file. Docket No. 3539, Ex. X; Docket No. 3576, Ex. Y. Additionally, Special Agent Fyhrie's affidavit does not indicate when he received the photograph of Defendant, nor does he indicate why he showed it to another Special Agent on December 11, 2008, instead of earlier. Docket No. 3539, Ex. W at 5 ¶ 6. He only states that December 11 was

the date that he presented it to that Special Agent. *Id.* With so many easy methods to identify Defendant, and no evidence that law enforcement was too busy to utilize them, there is no reason to think the multi-day delay was reasonable. Notably, unlike the defendant in *Garcia-Hernandez*, Defendant was interrogated for seven hours for a crime on which he would later be federally charged and indicted.[5]

The result the Court reaches today is not only in accord with *Garcia-Hernandez*, it also makes common sense and adheres to the purpose on *McNabb-Mallory*. If the Court were to find that *McNabb-Mallory* and § 3501 were not triggered until Defendant was charged with a crime, it could give law enforcement the perverse incentive to hold defendants on civil immigration offenses, before filing criminal charges, in order to interrogate them at length. This danger would be particularly prone to abuse in the context of immigration detentions, as individuals are often held for prolonged periods. Such an effect would turn *McNabb-Mallory*'s concerns about secret, extended interrogations on its head. *See Corley*, 556 U.S. at 308.

Finally, the Court does not view the fact that the immigration detainer did not require state authorities to actually detain Defendant as significant. Docket No. 3054 Ex. D. Regardless of whether the detainer required detention, it was the only reason Defendant was held in custody. *See id.*; Docket No. 3054 at 6:1-2. Additionally, context shows that the purpose of the detainer was to ensure detention. State authorities called TFO Albarran because Defendant was about to be released, and Albarran's actions and orders were directed to make sure that did not happen. *See generally* Albarran Decl. ¶¶ 3-7. As a detective told Defendant in his December 11 interrogation, "[y]ou were getting released from court yesterday [in Compton]. And we scrambled, made our phone calls, did what we had to do. And we put a ice [sic] hold on you. You were supposed to be on a bus last night to be get deported." Docket No. 2912, Ex. I at 82:9-15. Later in that interrogation, one detective stated: "Everything that's happened with you in the last few, has been very calculated." *Id.* at 93:6-8. The detainer was designed to detain, and that is what it

[5] In other contexts, courts are willing to find *McNabb-Mallory* violated when authorities "collaborate[] to deny [a defendant] his federal procedural rights." *See United States v. Doe* ("*Doe I*"), 155 F.3d 1070, 1078 (9th Cir.1998) (*en banc*). Here, the federally lodged detainer, the LASD detention, and the delayed filing of criminal charges cumulatively allowed the LAPD to interrogate Defendant at length about a crime on which he would later be federally charged — all before Defendant was presented to a federal magistrate. Although these actions were not necessarily perpetrated for the purpose of denying his federal procedural rights, they give the Court pause in evaluating the reasonableness of Defendant's prolonged detention. Such pause is especially justified in light of remarks detectives made to Defendant during his interrogation that evince his detention was the product of federal-state collaboration to hold and interrogate him.

accomplished.

C. Defendant Eventually Invoked His Right To Remain Silent During The December 11 Interrogation

Defendant argues he invoked his right to remain silent on numerous occasions during his December 11 interrogation, and his confession must be suppressed because law enforcement did not honor those invocations. *Miranda v. Arizona* established that "at any time . . . during questioning, that [a suspect] wishes to remain silent, the interrogation must cease." 384 U.S. 436, 474 (1966). However, once a suspect "knowingly and voluntarily waives" his fifth amendment rights against self-incrimination after the government advised him of his *Miranda* rights, the burden is on the suspect to subsequently invoke his privilege. *See Davis v. United States*, 512 U.S. 452, 460-61 (1994). Once a defendant waives his right, law enforcement may continue an interrogation until the defendant "clearly requests" to invoke his right. *See Davis,* 512 U.S. at 462. A "clear" invocation is "facially unambiguous" and unequivocal. *Anderson v. Terhune*, 516 F.3d 781, 787-88 (9th Cir. 2008). An invocation is unambiguous if it is "open to only one valid interpretation." *United States v. Rodriguez*, 518 F.3d 1072, 1077 (9th Cir. 2008). Until there is a clear invocation, law enforcement has "no obligation to stop questioning." *Davis*, 512 U.S. at 461-62. After a Defendant validly waives his *Miranda* rights, the Ninth Circuit does not require officers to ask clarifying questions if only an ambiguous invocation of those rights is made. *Rodriguez*, 518 F.3d at 1080. However, "a suspect need not speak with the discrimination of an Oxford don." *Davis,* 512 U.S. 452, 459 (1994). "Thus, in applying *Davis,* neither the Supreme Court nor this court has required that a suspect seeking to invoke his right to silence provide any statement more explicit or more technically-worded than 'I have nothing to say.'" *Arnold v. Runnels*, 421 F.3d 859, 865 (9th Cir. 2005); *but see United States v. Shi*, 525 F.3d 709, 729 (9th Cir. 2008) (holding defendant's statement "I don't want to talk about the accident" was ambiguous, and thus insufficient to invoke right to remain silent.). Context is often important to determine whether a possible invocation is unambiguous. *Rodriguez*, 518 F.3d at 1077. However, "[u]sing 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law." *Anderson*, 516 F.3d at 787.

It is not disputed that Defendant initially waived his *Miranda* rights. Docket No. 2912, Ex. H at 22:10-23:2. However, he alleges that he later invoked his right to remain silent:[6]

[6] Henceforth, all alleged invocations in the quoted passages in this section will be emphasized with italics font.

> DETECTIVE MATHEW: You were—you—there's no—there's no doubt were you there.
> ROBERT DE LA CRUZ[7]: Okay. Well, prove me that in court, then. You know what I mean?
> DETECTIVE MATHEW: I am—I will prove that in court, Robert.
> ROBERT DE LA CRUZ: *Okay. Then—then that's it, then. I got nothing else to say.*
> DETECTIVE MATHEW: But you –
> ROBERT DE LA CRUZ: I just told you my story.
> DETECTIVE MATHEW: I—I'm trying to get
> ROBERT DE LA CRUZ: You can never prove anybody—you can never—nobody could ever say that I was there, they seen me doing it. Never.

Docket No. 2912, Ex. H at 90:5-18 (emphasis added).[8] In the above, the word "else" is important, and it makes Defendant's alleged invocation ambiguous. Further, even before the detective can finish a further question, Defendant continues to offer statements. This is a close call, but his words and conduct are open to the interpretation that he told the detective the whole story, and that there was nothing else to add. Defendant, then, could reasonably be seen as trying to cement his story with the detective, not cut off communication.

Next, Defendant contends he invoked his right below:

> DETECTIVE MATHEW: I'm going to get some water. Ask you a few more questions. And we do what we have to do. Okay?
> ROBERT DE LA CRUZ: *I already told you.*
> DETECTIVE MATHEW: I know. I believe you.
> ROBERT DE LA CRUZ: *And that's all I got to tell you. That's all I got to say*
> DETECTIVE MATHEW: OK
> ROBERT DE LA CRUZ: *you know what I mean? I'm not talking about nobody else.*
> DETECTIVE MATHEW: No.
> ROBERT DE LA CRUZ: I don't… I don't…
> DETECTIVE MATHEW: I don't want you to talk to anybody else.
> ROBERT DE LA CRUZ: I don't care if you show me a 100 pictures.
> DETECTIVE MATHEW: No.

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[7] Throughout the transcript of the interrogation Defendant is identified as "Robert," instead of his actual name, "Roberto."

[8] There appears to be time markings on each page of the referenced transcript of the December 11, 2008 interview. If those markings are correct, the interview transcript begins at "02:32" (*see* Docket No. 2912, Ex. H at 3); the *Miranda* warnings are given at "17:05," (*id.* at 22); and the first cited instance of Defendant's invoking of his *Miranda* rights appears at "1:01:38" (*id.* at 90) – roughly 84 minutes after the warnings were given to him.

Id. at 177:6-22 (emphasis added).[9] Read in context, Defendant appears to be clarifying himself in the final italicized sentence. He seems to be saying he does not want to talk about other people, not end communication with the detective. However, again, the exchange is open to some ambiguity as to its interpretation.

Next, Defendant claims the following was another invocation:

> DETECTIVE RODRIGUEZ: But see, and – and we can't stress it enough your linked to a murder weapon.
> ROBERT DE LA CRUZ: Well, I know that.
> DETECTIVE RODRIGUEZ: And you have an opportunity right now – and I know it's not easy this is like – it's not an easy thing. It's a terrible thing . . . . But this is your chance. 'Cause we're going to forward and we're going to talk to people. But I rather hear it –
> DETECTIVE MARTINEZ: Oh, God, yes.
> DETECTIVE RODRIGUEZ: Out of your mouth. I rather hear –
> DETECTIVE RODRIGUEZ: Because when somebody comes back around and says, we go, whoa wait a minute. And Phil and I we're not going to tell them obviously what you said. But at least now we
> can look at each other and say, no, no, Bosco [Defendant] had cleared that up.
> . . . .
> ROBERT DE LA CRUZ: *I'm not going to -- look, I know that that I'm not involved in anything. And that's all I got to tell you. That's all I got to answer. I wasn't there. I wasn't in the car. And I didn't do the – I'm not the shooter. And I wasn't there.*
> DETECTIVE RODRIGUEZ: As Phil and I –
> ROBERT DE LA CRUZ: *And that's all I got to tell you guys.*

Id. Ex. I at 65:12-67. Defendant here does not appear to be indicating a desire to be silent. Because of his words "all I got to tell you. All I got to answer . . . And that's all I got to tell you guys," Defendant could reasonably be interpreted as merely re-emphasizing his side of the story. Again, his words suggest that he is not trying to cut off communication, but attempting to convince the detectives that he is telling the truth, because he is adamant about not changing his story. However, one should not separate each exchange in isolation, but should consider the cumulative effect of the statements which appear to invoke *Miranda* rights.

Defendant then claims that the following was an invocation:

> ROBERT DE LA CRUZ: I'm saying, if you don't believe me then

[9] This exchange apparently occurred at the "1:55:04" mark. *See Id.* at 177.

> how can I – I can't make you believe.
> DETECTIVE MARTINEZ: Who did it?
> ROBERT DE LA CRUZ: I don't know who did it.
> . . . .
> DETECTIVE MARTINEZ: Right. But you—again, it's like, me being in a station and somebody gets in a shooting. I'm going to know who got into a shooting. I might not know all the particulars, all the little inny/outs and unless I'm really close to that deputy or . . . my partner. Short of that, I'm going to know about it. . . .
> DETECTIVE RODRIGUEZ: Are we on the right track?
> ROBERT DE LA CRUZ: *I don't know. I'm just not going to answer you guys no more because*
> DETECTIVE MARTINEZ: You already said we were.
> ROBERT DE LA CRUZ: I'm trying—I'm telling you guys what I know. And you guys keep on asking me, no, but this and that. No, but this and that. You know what I mean?
> DETECTIVE MARTINEZ: Uh-huh
> Robert De La Cruz: And when you go back to wherever you're going to go, you're going to have sit and think about that. Because you don't know what everybody is saying. I can pretty much remember a lot of significant events in my life and I can pretty much explain them in detail not in being vague.
> DETECTIVE MARTINEZ: Celeste in her own way is going to lay you out. That's guaranteed. And that's just 'cause something I received right now. Technology. . . .
> ROBERT DE LA CRUZ: How can I make you believe that I don't know who I gave that clip too. Or if I put the bullets inside the clip.

Id. at 131:2-132:7. Although in isolation Defendant's words might seem to invoke his right to remain silent, in context they are ambiguous. The initial statement "I can't make you believe," combined with the italicized words, combined with the statement "I'm trying to–I'm telling you guys what I know," could reasonably indicate that Defendant is communicating that he already told the detectives everything he knows, and that it is time for them to accept his story as the truth. Indeed, Defendant could reasonably be understood as merely expressing frustration that he keeps getting the same questions.

Defendant asserts that he invoked his right in the following exchange:

> DETECTIVE RODRIGUEZ: Sitting where you're at right now, one of your son's. Okay. Was sitting there right now. And you know everything that you know on this side and everything you know on this side; right. As a father, not as Bosco from the

> Avenues, as Robert the father; right.
> What – what advice would you give him?
> . . . .
> ROBERT DE LA CRUZ: Not to ever get involved in gangs.
> DETECTIVE RODRIGUEZ: And take everything into consider – everything you know, not everything you told us, everything you know. What besides getting involved in gangs. Your son is sitting here right now, what advice do you give him? If you can be a little bug in your son's ear what advice do you give him?
> ROBERT DE LA CRUZ: *I don't know. I can't even – I can't even think right. I can't. I can't. I don't feel like I'm of my right mind right now to answer your questions of that or to talk about stuff.*
> DETECTIVE RODRIGUEZ: Like that?
> ROBERT DE LA CRUZ: Yeah.

Id. at 75:22-76:10. Defendant's italicized words are ambiguous. When Defendant says "I don't feel like I'm of my right mind right now to answer your questions of that . . ." it is unclear whether he is saying he does not want to talk to the detective generally, or whether he does not wish to talk about "that" (i.e. his son). Additionally, Defendant's answer of "Yeah" to the detective's clarifying question "Like that?" suggests the latter is the better interpretation of Defendant's words. On the other hand, a defendant's statement that he does not feel that he is in his "right mind . . . to answer . . . questions" surely is a red flag in regards to further questioning.

Defendant correctly claims he invoked his right below:

> DETECTIVE RODRIGUEZ: If you're in our shoes, when we walk out of here, would you say you're eliminated as a suspect?
> ROBERT DE LA CRUZ: No.
> DETECTIVE RODRIGUEZ: No. Exactly. But you have an opportunity to do that and you're not doing it. Which tells me a couple of things. What do you think it tells me?
> ROBERT DE. LA CRUZ: I don't know.
> DETECTIVE RODRIGUEZ: You don't know.
> ROBERT DE LA CRUZ: Huh-uh
> DETECTIVE RODRIGUEZ: You tired?
> DETECTIVE MARTINEZ: They're going to – I guess, they're still going to talk to you. But get ready for some stuff, that's all I got to stay [*sic*].
> ROBERT DE.LA CRUZ: *I don't [gotta] do [that]— [I got] nothing else to say.*[10]
> Detective: Okay. I mean, but they –I think, they need to talk to you

[10] The bracketed words do not appear in the transcript, but Defendant contends they are audible in the interrogation's recording. Docket No. 2912 at 23 n. 17. The Government's brief quotes Defendant as having said the bracketed words as well. Docket No 3095 at 25:4-5.

> about some stuff. Your thing that you said – whatever. Your thing that you said right now that it was an accident, in other words, they didn't know he was a deputy. Remember when you told me that?
> ROBERT DE LA CRUZ: That's from what I heard.

Id. at 160:21-161:20. Defendant unambiguously invoked his right to remain silent here. In the excerpted portion above, the detectives are engaged in a conversation with Defendant about the main point of the interrogation – his status as a suspect in the murder of Deputy Escalante. Defendant appeared tired to at least one of the detectives. He is told that others will be talking to him, presumably about the instant point of the conversation – his involvement in the murder. If Defendant were to have only said "I got nothing else to say," the Court perhaps would find that the statement was ambiguous for reasons discussed *supra*. However, this quoted clause is immediately preceded by Defendant stating "I don't gotta do that," with "that" referring to continuing the interrogation. Defendant cannot be seen as merely sticking to his story, as the Government suggests. Docket No 3095 at 25:16-19.

Defendant is clearly referencing his right to remain silent, as that is the reason why he does not have to continue with the interrogation. It is as if Defendant said: "I do not have to continue because I have the right to remain silent. I have nothing else to say." This is a clear invocation. The Government attempts to create ambiguity in these words by referencing a part of the interrogation that occurs about a page-and-a-half *after* the excerpted portion above. But context cannot "transform an unambiguous invocation into . . . ambiguity . . . ." *Anderson*, 516 F.3d at 787. Additionally, it is not as though the detectives continued the interrogation to clear up any perceived ambiguity. The first thing they seem to do after Defendant invoked his right is to talk him out of it: "Okay. I mean, but they –I think, they need to talk to you about some stuff . . . ." Docket No. 2912 Ex. I at 161:14-16. Thus, context actually suggests Defendant invoked the right to remain silent. The alleged ambiguity that occurs a page and a half later is irrelevant, as the detectives were required to "*scrupulously honor* a suspect's right to remain silent by immediately ceasing questioning when the suspect invokes this right." *Anderson*, 516 F.3d at 788 (citation and internal quotation marks omitted) (emphasis in original).[11]

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[11] The Court notes that Defendant subsequently invoked his right to remain silent two additional times. Defendant raised it in the following exchange:

> ROBERT DE LA CRUZ: Man, I just told you guys what...I know, man.
> DETECTIVE SLCA: That's not what – I told you – but I'm not asking—I'm not asking about the case. But . . .

D. Defendant's December 11 Confession Was Involuntary

Defendant claims his December 11 confession was involuntary. Extracting an involuntary confession violates the Due Process Clause. *Lego v. Twomey*, 404 U.S. 477, 478 (1972). The test for determining voluntariness is "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "Post-*Miranda* confessions which are found to be involuntary may not be admitted for any purposes, including impeachment." *Henry v. Kernan*, 197 F.3d 1021, 1026 (9th Cir. 1999). Several factors bear on

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> ROBERT DE LA CRUZ: I have a headache and I can't – I can't be –
> DETECTIVE SLCA (interrupting): I have a headache too and I can appreciate that.
> ROBERT DE LA CRUZ: *Okay. I can't – I'm not going to – I'm not going to be answering.*
> DETECTIVE SLCA: That's a defense mechanism again.
> ROBERT DE LA CRUZ: *Yeah. I'm not going to be answering. I'm not.*
> DETECTIVE SLCA: See, that's a defense mechanism on your part. Are you afraid that if you say what you know that something's going to happen to you? Are you afraid that if you say what you know, something's going to happen to Celeste or your children?

Docket No. 2912 Ex. J at 15:9-16:4. The Government claims Defendant was merely indicating he did not want to talk about personal issues. Docket No. 3095 at 26:21-24. Defendant, however, is not saying that he does not want to participate in the instant topic of conversation, but rather that he is not going to talk anymore because he has a headache. Again, context suggests that the detective understood Defendant as invoking his right, as the detective appears to try to talk him out of invoking it—calling his invocation a "defense mechanism." This was a clear invocation. For similar reasons, the following was also a clear invocation:

> ROBERT DE LA CRUZ: *I'm going to tell you this. I can't—you know what I mean, right now—right now, I can't—I can't say nothing. I'm stuck. I'm fucking confused. I have a headache, and I don't understand. Like, I do understand a lot of shit, but you know, I can't talk about this right now. I'll talk about it some other day, but not right now.*
> DETECTIVE SLCA: Okay. Fair enough.
> ROBERT DE LA CRUZ: All right.
> DETECTIVE SLCA: Fair enough
> ROBERT DE LA CRUZ: Because you know it's like you guys are bringing to other stuff—
> DETECTIVE SLCA: What?
> ROBERT DE LA CRUZ: You guys are bringing my kids, Celeste, and you know it's like I don't want to talk about this right now.
> . . . .
> ROBERT DE LA CRUZ: I'm telling you I'm not—this is not the time—
> DETECTIVE SLCA: This is not the time.
> ROBERT DE LA CRUZ: --for me to answer your questions.
> Detective: Okay.
> ROBERT DE LA CRUZ: You know what I mean? And there's a lot of things that I still—okay-- that I know that you got to ask me and that I got to ask you. But this is not the—this is not the time.
> Detective: Okay.

Id. at 21:16-23:7. The recording stopped soon after this exchange for a break. *See generally id.*; Mathew Decl., Docket No. 3095-1; Martinez Decl., Docket No. 3095-1.

whether earlier coercive tactics will be seen as contaminating a later confession: "[T]he time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Oregon v. Elstad*, 470 U.S. 298, 310 (1985). The Government must prove by a preponderance of the evidence that a defendant's statements were voluntary. *Lego*, 404 U.S. at 489.

First, as explained *supra*, Defendant on three occasions invoked his right to remain silent at the December 11, 2008 interrogation. Repeatedly violating *Miranda* rights goes at least some distance in overcoming a defendant's will. *See generally Henry v. Kernan*, 197 F.3d 1021, 1026-29 (9th Cir. 1999) (finding that deliberately and repeatedly violating *Miranda* rights, along with other factors, had the effect of "generat[ing] a feeling of helplessness"). As shown in footnote 11, *supra*, by the time of Defendant's second and third invocation, his will appears to be wearing down. He complains of a headache, being confused, and in an obsessive-like ramble indicates that he cannot continue answering questions. His unheeded invocations weigh in favor of finding involuntariness.

Second, during Defendant's interrogation, law enforcement frequently referred to false evidence about his fingerprints being found on the casings of the bullets that killed the Deputy Sheriff. *See generally* Docket No.2912 (citing numerous excerpts from the interrogation). At the beginning of Defendant's interrogation, and before he was read his rights, law enforcement faked a scene where a detective wondered aloud how long "O'Donnell" was going to take to complete the fingerprint analysis. *See* Docket No. 2912 at 20:6-9. A woman claiming to be O'Donnell then appeared and gave documents to the detective that she said was a "hot priority." *See id.* at 20:20-24. The detective congratulated her for doing an outstanding job. *Id.* at 20:22-21:4. Defendant alleges, the Government does not challenge, and the transcript of the interrogation appears to indicate that law enforcement showed Defendant the fake report that claimed his fingerprints were found on the casings. *Id.* at 24-26; Docket No. 3095 at 33:26-34:9.

The Ninth Circuit has found a confession voluntary even though law enforcement misrepresented evidence. *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001). Regardless, the Circuit has only held that "misrepresentations made by law enforcement in obtaining a statement, while *reprehensible*, does *not necessarily* constitute coercive conduct." *Pollard v. Galaza*, 290 F.3d 1030, 1034 (9th Cir. 2002) (emphasis added). Here, the false evidence goes some distance in showing Defendant's confession was involuntary for two

reasons. First, law enforcement staged a dramatic handing over of false, written fingerprint analysis.[12] Second, during the interrogation, law enforcement appeared to reference the fingerprints on the casings, and then falsely tell Defendant, "[a]nd come on, with this here that's dead bang. I mean,—I mean, Robert, *I can't lie to you about that.* Okay." Ex. H at 234:11-235:4 (emphasis added). This last emphasized statement is especially important, as the detective seems to imply he is legally forbidden from lying to Defendant about the evidence against him, which is false. *Clanton v. Cooper*, 129 F.3d 1147, 1158 (10th Cir. 1997) ("[C]ourts are much less likely to tolerate misrepresentations of law.") (citation omitted). At some point false evidence may be presented in a way that overbears a defendant's will. *Moran v. Burbine*, 475 U.S. 412, 432 (1986) (holding in a case that did not involve presenting false evidence to the defendant "that on facts more egregious than those presented here police deception might rise to a level of a due process violation."). False evidence, if presented forcefully and effectively enough, can lead a defendant to believe he must make some sort of confession if he wishes to maintain credibility with his interrogators and help his case. This concern implicates not only voluntariness, but also the reliability of the interrogation system.

The Los Angeles Sheriff's Department implicitly threatened Defendant with physical violence at various points on December 7, 2008. A confession will be found to be coerced if it is made under a "credible threat of physical violence." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). The LASD picked Defendant up from the San Bernardino jail in a van, which also transported a number of UCs posing as inmates. At the outset of this van ride, Deputy Munoz is heard saying that they are transporting an Avenues gang member, and that they would "have a welcoming party for him when we get back." Docket No. 2912 Ex. A at 1. Defendant heard this comment and expressed concern about it to one of the UCs. *Id.* at 3. At another point in the ride, the van stopped at Burger King, and one of the officers seemed to play on Burger King's "Whopper" burger by using the name to make a veiled threat of violence. Docket No. 2912 at 6. However, it is unclear if Defendant heard this threat. At the Inmate Reception Center ("IRC"),

[12] Some out-of-circuit courts have suggested that false evidence presented in document form, in contrast to orally presented false evidence, will likely make a confession involuntary. *See State v. Cayward,* 552 So. 2d 971, 974 (Fla. App. 2 Dist. 1989); *State v. Farley,* 192 W. Va. 247, 257 n.13 (W. Va. 1994).

Defendant was taken to a holding cell and UCs were placed in there with him.[13] One of the UCs indicated that law enforcement elbowed him "in the back," and drill[ed] the elbow into the back of his head while it was pressed up against a mirror. *Id.* at 6. Before recounting this story to Defendant, the UC made clear that the assaulting officer thought he was from the Avenues gang, and he seemed to warn Defendant: "Better watch out, homes, he got something in store for you, homes. They got something for you right now. Watch. [Unintelligible] just get in a little ball and shit." *Id.* at 5.

Threats of violence have no place in our criminal justice system. *See Fulminante*, 499 U.S. at 287. The LASD's conduct was improper. However, the threats occurred four days before Defendant's interrogation, which the LAPD performed, not LASD. The Court must take such factors into account. *Elstad*, 470 U.S. at 310. The Court notes that not only were such threats of physical violence absent from the LAPD's December 11 interrogation, they made clear they would not harm him. After telling Defendant he was "looking for trouble," the detective clarified that he was not threatening him with physical violence: "And, I mean, trouble. I mean, you know, obviously we'll be looking at – I mean, there's nothing that's going to happen to you, we're not going to do nothing to you. You know, nothing like that. It's just that you're looking for more questions to be raised." Ex. I at 128:7-24. Such factors diminish the impact of the LASD's threats. *Elstad*, 470 U.S. at 310. They do not, however, eliminate them.

The effect of the threats was not eliminated at the time of Defendant's confession because they were egregious. Officers not only made veiled threats, but they staged a scene designed to make Defendant believe they would hurt him. Additionally, the comments that the UCs made to him after recounting their alleged abuse at the hands of officers were directly related to the matters on which Defendant was interrogated. It is as though the UCs made Defendant fear for his safety, and while he was in that vulnerable state, planted in his mind what he should do to prevent being beaten.

A confession is involuntary if coerced either by physical intimidation or psychological pressure. *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (citing *United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir.1981) ("Law enforcement conduct which renders a

[13] The transcripts of the van ride and the holding cell does not indicate that certain individuals are UCs. Defendant frequently states that they are, and the Government does never disputes it. In Exhibit C, the transcript from the holding cell, Defendant is generally listed as "MV5," and the UC playing the victim of violence is sometimes listed as "MV4" but also on occasion as "MV5." Docket No. 2912 at 6 n. 4-5; Docket No. 2912, Decl. of Counsel ¶ 3.

confession involuntary does not consist only of express threats so direct as to bludgeon a defendant into failure of the will. Subtle psychological coercion suffices as well, and at times more effectively, to overbear a rational intellect and a free will.") (internal quotation marks omitted). One of the UC inmates in the holding cell on December 11 asked Defendant: "Yeah, but you think they're trying to put that deputy case on you." Docket No 2912 Ex. D at 4; *see also id.* at 7 (claiming to Defendant that law enforcement "might've made you on the case somehow you know . . . [l]ike that CSI shit you guys were talking about").[14] The UCs repeatedly reminded him that law enforcement was likely to find his prints on the bullet casings, just as his interrogators pretended to have done. *Id.* at 7-8, 14. The UCs repeatedly told Defendant that when confronted about the fingerprints, he would need to confess that the bullets were his, but to do so in a way that would make law enforcement think he was not the shooter. *See e.g. id.* at 28 (UC suggesting that Defendant admit that he loaded the gun that someone else gave him); *id.* at 10-11 (UC suggesting that Defendant say he thought the Deputy was actually a gang member). Of course, Defendant later did admit to having touched the bullets, and said someone else later took the gun that was used to murder the deputy:

> DETECTIVE MARTINEZ: Okay. This is important. At what point in time did you touch those bullets to that gun?
> ROBERT DE LA CRUZ: The same day – earlier.
> . . . .
> DETECTIVE MARTINEZ: How do you know that a .40 Glock was used to kill our deputy sheriff?
> ROBERT DE LA CRUZ: Because it was in the -- no. Because I was in the garage and I remember I seen it. I had grabbed it with my hands.
> DETECTIVE MARTINEZ: Uh-huh.
> ROBERT DE LA CRUZ: And I remember I looked at the bullets and I put it back down, and I just left it there. I think I put it in the – in the – one of the couches.
> DETECTIVE MARTINEZ: Okay.
> ROBERT DE LA CRUZ: There's [*sic*] two couches in the garage.
> DETECTIVE MARTINEZ: Okay.
> ROBERT DE LA CRUZ: And somebody went and got it after.

Docket No. 2912 Ex. K at 13:7-15:7. The threats of violence weigh in favor of finding involuntariness.

Other factors also warrant finding involuntariness. Although the officer at times stated

[14] Defendant is MV1 in Exhibit D. Decl. Counsel ¶ 4, Docket No. 2912.

that they could not promise him any leniency for cooperating, they also heavily implied the opposite. *Compare id.* Ex. I at 144 ("I guarantee you that [the] five percent [of suspects who cooperate in a murder investigation] they're a lot better off then [*sic*] if they took it to trial. A lot better off. I'm not making promises I'm saying."), *with id.* at 154:3-7 ("You give me that little part. You give me the caliber of the gun that you did, you gave it to, or whatever it was, you give me that, Roberto, *I'll guaranfuckingtee that's going to go miles for you, light years for you.* Roberto, look at me, it's going to go light years for you. I'm telling you. It's going to be huge, huge. It will be huge.") (emphasis added); *see also as Moore v. Czerniak*, 574 F.3d 1092, 1103 (9th Cir. 2009) (stating in dicta that an implied promise of leniency can overbear the defendant's will), *rev'd and remanded on other grounds sub nom. Premo v. Moore*, 131 S. Ct. 733 (U.S. 2011). Law enforcement also coupled implications of leniency how important it would be to Defendant to see his kids grow up. Docket No. 2912 Ex. I at 37:6-15 ("Or do you want light at the fucking tunnel? Somewhere down the line I have the opportunity to see my kids grow up . . . . 'Cause you will be reliving this day the rest of your life in jail looking at the ceiling, never feeling a woman again . . . ."); *see also United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981) (emphasizing the coercive impact emphasizing to a defendant that he will not see his children for a long time). A detective also appeared to misrepresent the law to Defendant, implying that the legal penalties are less severe for those who help the principal than they are for being the principal. Ex. I at 21:3-5 ("Aiding and abetting isn't shit compared to who killed [our]deputy or killed the gangbanger look-alike deputy."); *see* 18 U.S.C. § 2; *see also* Cal. Penal Code § 31. Misrepresenting the law to imply a defendant will receive a more lenient sentence is something the Tenth Circuit has suggested courts are "more likely" likely find coercive. *Clanton*, 129 F.3d at 1158 (10th Cir. 1997). Additionally, law enforcement implied that unless Defendant told them the whole truthful story, the DA would be informed about his lack of cooperation. *Id.* at 175 ("And we go there today and we tell [the DA], oh yeah, he said his fingerprints were on the casings. But he doesn't remember who he gave the gun. He doesn't remember what kind of gun it was. That – that ain't going to fly with the DA. You know that.").

Officers also told Defendant he could spend the next twenty-five years in prison or death, and they described the horrors of death row to him. *Id.* at 28:18 (explaining that cooperating with law enforcement was his "shot" at avoiding a sentence of "25 to life"), 162:22-25 ("Because if not, they'll -- oh, fuck, that's that's death. That's straight up, down the line, no if's, no buts, no

favors being handed in for anybody."), 36: 18-21 ("And if you want to go down swinging a bat, and you want to end up on death row, and you want to end up in a one-man cell 24 hours a day, two days a week with one hour out."). After the detectives mentioned they had reason to believe Defendant's girlfriend Celeste, who is also the mother of his child, was involved in the murder, they encouraged Defendant to tell them what they needed to hear, so that they could focus their attention on him and not his family. *Id.* at 32: ("We'll go after everybody, pal. Roberto, we'll go after – we will have no shame into get the murders in custody. *You're the one that's in the position to make it about me. And that's it. Leave them alone . . . . Let me be a man. I'll take care of this.*" (emphasis added).) Detectives later threatened: "We are going to rip your world apart . . . . [E]verybody that's around you is going to get ripped apart right along with it." *Id.*, Ex. J at 3:12-15.

The facts just discussed are not an exhaustive list of the reasons for the Court's finding of involuntariness. Nor are any of the facts in isolation necessarily sufficient for such a finding. Cumulatively, though, they are. Since these facts were all present at, or had occurred by, the time that Defendant made his final invocation of his right to remain silent, the Court finds that his statements made after that point were involuntary. The Ninth Circuit has found a confession involuntary for less:

> The warnings that a lengthy prison term could be imposed, that Tingle had a lot at stake, that her cooperation would be communicated to the prosecutor, that her failure to cooperate would be similarly communicated, and that she might not see her two-year-old child for a while must be read together, as they were intended to be, and as they would reasonably be understood. Viewed in that light, Sibley's statements were patently coercive.

Tingle, 658 F.2d at 1336.

E. Even If Defendant Reinitiated The December 11 Interrogation, His Confession Must Be Suppressed.

During a "little break" in Defendant's interrogation, he was given pizza and water, and was told that he would later be taken to jail. Mathew Decl. ¶ 5, Docket No. 3095-1; Martinez Decl. ¶ 4, Docket No. 3095-1; Docket No. 2912 Ex. K at 6:8-23. Defendant then offered to confess, so long as he could talk to his girlfriend. Martinez Decl. ¶ 4. Defendant then allegedly provided various details about Deputy Escalante's murder. *Id.* ¶ 5. Allegedly after realizing that

this confession had not been recorded, Defendant was asked to repeat what he said while being recorded. *Id.* He allegedly agreed, but requested to talk to his girlfriend first. *Id.* The request was granted, and the recording began again. *Id.* Defendant repeated the statements he purportedly made during the unrecorded break and provided additional detail. Mathew Decl. ¶ 6; *see generally* Docket No. 2912, Ex. K. The Government argues that even if Defendant invoked his right to remain silent, he reinitiated the interrogation, which makes everything stated after the reinitiation admissible.

The Ninth Circuit's *en banc* decision in *Anderson v. Terhune* precludes this Court from finding that Defendant's post-invocation confession is admissible under a re-initiation theory. 516 F.3d 781 (9th Cir. 2008). Generally, after an individual invokes his *Miranda* rights, he cannot be subject to further interrogation "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). *Anderson*, however, qualified this general rule. In that case, a defendant invoked his right to remain silent, but law enforcement kept interrogating him. 516 F.3d at 791. He then invoked his right to an attorney, and law enforcement cut off the interrogation. *Id.* at 786. After a "hiatus" for an undisclosed period of time, Defendant allegedly reinitiated the conversation. *Id.* The Ninth Circuit held:

> We cannot simply suppress the portion of the interrogation that occurred after the invocation of the right to silence and before Anderson's purported re-initiation of the interrogation. Doing so would eviscerate the mandate to "scrupulously honor[ ]" the invocation of *Miranda* rights. *We understand the phrase "scrupulously honor" to have practical meaning. For the "right to remain silent" to have currency, there must be some silence. The interrogation must stop for some period of time.* Although the Supreme Court has yet to tell us how long the break in questioning must last, in this case there was no cessation at all. Because the interrogation was continuous [up] to [the] point [when he requested an attorney][15], we need not determine whether Anderson waived his right to counsel after viewing a videotape of his alleged accomplice nor do we need to address his coercion claim.

Anderson, 516 F.3d at 792 (citations omitted) (emphasis added). The Government suggests *Anderson*'s holding was narrow, and that it applies only to situations in which a defendant has invoked both his right to silence and his right to an attorney. Docket No. 3504 at 10:19-21. The

[15] These clarifying bracketed words also appear in the Government's brief. Docket No. 3504 at 10:17.

clear language of *Anderson*, however, indicates that law enforcement's failure to "scrupulously honor" defendant's right to remain silent is what compelled its holding on the reinitiation issue. *Anderson*, 516 F.3d at 792.

The Government argues that *Anderson* cannot stand for the proposition that "if a *Miranda* violation occurs at any point, then the officers are barred forever from talking to defendant." Docket No. 3054 at 9:27-10:1. The Court agrees. *Anderson* said nothing about forever. Its facts, though, are very similar to the instant case. In both an invocation of the right to remain silent was made. In both, it was not honored. In both, law enforcement later stopped the interrogation. In both, Defendant allegedly reinitiated the interrogation during a "suspicious" unrecorded break. *Anderson*'s protections surely do not endure forever, but the facts of that case indicate they cover Defendant's alleged reinitiation during the "little break." Docket No. 2912 Ex. K at 6:8-23. Under *Anderson*, the confession is suppressed.

The Court would also find that the confession was involuntary. Again, the following factors bear on whether the taint from prior coercive actions will render a later confession involuntary: "[T]he time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Elstad*, 470 U.S. at 310. Here, it is unclear how long the break leading up to Defendant's alleged re-initiation lasted, but a detective described it as a "little break." Docket No. 2912 Ex. K at 6:8-23. Defendant suggested in it was only a few minutes, and the Government does not dispute that. Docket No. 3539 at 16:10-11. The affidavits of law enforcement who were present during the alleged re-initiation intimate that the break was short. Mathew Decl. ¶ 5; Martinez Decl. ¶ 4. The post-break interrogators also interrogated him earlier, and he was interrogated in the same location. *See* Mathew Decl.; ¶¶ 4-6; Martinez Decl. ¶¶ 3-6 (implying the entire interrogation took place in the same room); *see generally* Docket No. 2912 Exs. H-K (indicating detective Mathews and Martinez involvement in Defendant's interrogation). In light of these factors and those the Court analyzed *supra* in determining voluntariness, the post-reinitiation confession was not voluntary. *See Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (*en banc*) (holding as involuntary defendant's reinitiated confession, when reinitiation occurred three hours after the cessation of a coercive interrogation).

F. Supplemental Briefing Is Required To Address The December 11 Statements

After being interrogated on December 11, 2008, Defendant was placed in a holding tank

with UCs. He made various statements to them, and now seeks their suppression as fruit of the poisonous tree. In deciding whether evidence is fruit of the poisonous tree, a court must decide "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Brown v. Illinois*, 422 U.S. 590, 599 (1975).

Supplemental briefing is needed. There are two main issues in determining whether to suppress the December 11 Undercover recordings:

1. Whether *McNabb-Mallory* applies to undercover operations?
2. Whether statements made to undercover officers following a confession should be suppressed as fruit of the poisonous tree when the confession is being suppressed on grounds of *McNabb-Mallory*, *Miranda*, or involuntariness?

In the comparatively short space the parties devote to the December 11, 2008 statements to the UCs, neither cites any case analyzing either issue. *See generally* Docket Nos. 2912 at 51-53; Docket No. 3095 at 32-36; Docket No. 3132 at 26-27. Supplemental briefs of no longer than ten pages should be submitted on these two issues.

G. Defendant's September 22, 2009 Confession Violated *Miranda* But There Is a Question as to Whether It Was Nevertheless Voluntary

After his arrest on September 22, 2009, law enforcement asked Defendant to answer more questions. The Government has represented its intention not to introduce Defendant's statements on this date other than for possible impeachment purposes. Docket No. 3095 at 36:16-21. The Court, however, must analyze Defendant's argument that his confession was involuntary, as involuntary statements are inadmissible even for impeachment. *Henry v. Kernan*, 197 F.3d 1021, 1026. Essentially, Defendant argues that his confession was involuntary, because law enforcement referenced the false fingerprint report, because the confession occurred after repeated and unheeded invocations of his right to remain silent, and because law enforcement made false promises of leniency. *See generally* Docket No. 2912 at 53-56. Unlike his December 11, 2008 statements, the Court would find the September 22, 2008 statements were voluntary.

Defendant made several invocations of his right to remain silent. After being told his *Miranda* rights, Defendant stated: "There's nothing to talk about. I've been busted since last

year." Docket No. 2912 Ex. P at 6.[16] Then, after being asked "do you want to talk to us," Defendant responded, "No – . . . I don't have anything to say to you guys." *Id.*; *Arnold*, 421 F.3d at 865 ("[N]either the Supreme Court nor this court has required that a suspect seeking to invoke his right to silence provide any statement more explicit or more technically-worded than 'I have nothing to say.'"). An officer replied, "Are you sure?" *Id.* Defendant responded: "I'm positive . . . ." Docket No. 2912 Ex. P at 6. Law enforcement's tactics were unfortunate, but they did not overcome Defendant's will. Cases that heavily emphasize repeated invocations of the right to remain silent in their voluntariness analysis generally have starker facts than those present here. *See Henry,* 197 F.3d at 1027-28 (emphasizing that "[t]hroughout his interrogation, petitioner was shaken, confused, and frightened, crying in parts and frequently asking for forgiveness," and that the officer said "misleading comments [that] were intended to convey the impression that anything said by the defendant would not be used against him for any purposes").

Law enforcement also reminded Defendant that his fingerprints were found on the bullet cases. Docket No. 2912 Ex.P at 8. However, although this alluded to the false fingerprint analysis discussed *supra*, it did not recreate the force of the presentation of that false report: no false document was handed to Defendant, and no elaborate delivery from "O'Donnell" occurred. *See id.* Additionally, the fingerprints were not repeatedly referenced to the degree they were in the December 11 interrogation. *Id.*; *id.* at Exs. H-I; *see Orso*, 266 F.3d at 1039 (holding a confession voluntary even though law enforcement misrepresented evidence).

Defendant claims law enforcement made false promises of leniency. Law enforcement said: "I just want to get your side of the story. I don't think you want to get wrapped up in all of this bullshit. That's it. Get it over with, man. This is the time. You don't want to spend the rest of your life in jail." *Id.* Ex. P at7. However, such statements do not compare to those discussed in the December 11 interrogation, both in term\s of how close they come to promising leniency and how threateningly they describe Defendant's possible incarceration. "Inducements to cooperate are not improper and do not render a suspect's statement involuntary unless under the total circumstances it is plain that they have overborne the free will of the suspect." *United States v. Okafor*, 285 F.3d 842, 847 (9th Cir. 2002) (finding defendant's will was not overborn

[16] Unlike transcripts of other recordings that do not identify the name of the speaker, counsel appears not to have submitted a declaration attesting to which statements were Defendant's. However, the Government does not contest the identification Defendant made in his brief.

"when the customs agent told him that the agent would let the government know if Okafor cooperated, and that cooperation could help Okafor avoid a lengthy prison sentence"). Thus, under the totality of the circumstances, Defendant's September 22, 2008 statements were not coerced. *See Coleman*, 208 F.3d at 791.

III. Conclusion

The Court would DENY suppression of the December 7 statements. The Court would GRANT suppression of the December 11 interrogation on *McNabb-Mallory* grounds. The Court would also GRANT suppression of portions of the December 11 interrogations because they were in violation of Defendant's *Miranda* rights and because they were involuntary. The Court would request supplemental briefing on the December 11 statements to the UCs. The Court would GRANT suppression of the September 22 confession on *Miranda* grounds, but DENY it on voluntariness grounds.

Finally, because there may be some confusion between the parties as to the ultimate effects of this Court's ruling on what statements of the Defendant will ultimately be admissible, the Court would require the parties to present a list of the proposed Defendant's statements which the Government intends to use at trial either in its case in chief and/or for impeachment and whether the Defendant has any objections in light of this Court's rulings.