No. 13-20564

In the

United States Court of Appeals

for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JUSTIN ORTIZ,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 12-cr-580; Hon. Sim Lake, Judge Presiding

BRIEF OF APPELLANT JUSTIN ORTIZ

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CERTIFICATE OF INTERESTED PARTIES

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Defendant-Appellant.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Ortiz respectfully requests oral argument. In support of this request, Ortiz would urge the Court to note that this appeal presents an issue of first impression regarding which facts qualify to create reasonable suspicion of the straw-buy of a gun.

In addition, Ortiz's un-*Mirandized* statement was clearly taken during a custodial interrogation as evidenced by the fact that the arresting officers hemmed-in his car with numerous law enforcement vehicles and kept possession of his keys even after the questioning was supposedly completed.

The suppression issues in Ortiz's case were so contentious that the hearing transcript runs 125 pages and over a dozen exhibits were introduced as evidence.

Oral argument could assist this Court in putting the two different facets of Ortiz's Fourth Amendment challenge (and the plethora of exhibits appurtenant thereto) into perspective.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The district court entered its final judgment on September 30, 2013. RE.4.[1] Ortiz earlier filed his notice of appeal on September 25. RE.2.180; FED. R. APP. P. 4(b)(1)(A). This Court has jurisdiction over Ortiz's appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

[1] Docket entries 1-142 comprise the "Record on Appeal." Documents from the Record are referred to herein as R. [bates number]. Cites to the record excerpts are in the form RE.[tab number].[bates number].

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Facts

1. SOG Armory Thrives By Pushing Complementary Products on Its Customers

On July 27, 2010, former soldier Justin Ortiz, accompanied by Juan Diaz, went to the store SOG Armory on Beltway 8 in Houston, Texas. ROA.248-49. To stimulate sales of complementary products such as ammunition, SOG sells all manner of anti-government regalia such as camouflage and racially themed t-shirts with images of President Obama over the words "Lying African." ROA.257.

Like many gun stores, SOG Armory saw a surge of sales during the hysteria before the 2010 elections that the federal government was coming to confiscate guns. ROA.256 ("A: We believe it was in particular due to elections and rumors of certain laws being passed.").

One salesman at SOG Armory, Joshua Hernandez, was particularly umbrageous when customers declined to buy complementary produces on which his store enjoyed a higher profit margin.

2. Justin Ortiz Chose to Buy Two Guns But Declined Hernandez's Sales-Push To Buy Additional Merchandise

On July 29, 2010, Ortiz walked into SOG Armory and began browsing the merchandise contained in glass cases and displays in the showroom. ROA.250.

Diaz entered the store approximately five minutes later, and began engaging in banter with the sales staff as he and Ortiz both looked at different guns for sale. ROA.266.

After much deliberation,[2] Mr. Ortiz eventually chose to purchase an Alexander Arms Beowulf, model AAR15, .50 caliber assault rifle – a $2100.00 purchase. ROA.253-54. A standard criminal background check was run on Ortiz, which found that Ortiz had no criminal history, nor was he otherwise a prohibited person, and therefore there was no impediment to his purchase. ROA.248.

Thereafter, Ortiz decided to purchase a second rifle, and briefly[3] left the store with Diaz to get cash. ROA.247; Gov't Ex. 14 (two receipts side-by-side showing identical sales prices for guns with a purchase of ammunition appended to the first sale). Demonstrating the unremarkable nature of his purchases, Ortiz left his newly purchased gun in the SOG Armory:

> Q: Now, when Mr. Ortiz left the store, did he leave the gun he just purchased there, or did he take it with him?
> A: I believe he left it with us.
>
> Q: He left to the gun at your store?
> A: Yes.

---

[2] Store surveillance video shows the two men looking over merchandise for nearly thirty minutes before making a purchase. ROA.268

[3] "Q: They were gone all of 15 minutes, right? A: Yes." ROA.269.

Q: So pretty safe to assume he was coming back; right?
A: Correct.

ROA.269. Ortiz and Diaz returned at noon and purchased the second rifle, once again paying $2100 in cash. *Id.*

For some largely unexplainable reason, Hernandez speculated that Ortiz's conduct was a "straw purchase" and phoned ATF Investigator Tommy Gray. ROA.226, 242-43. Investigator Gray, who was unable to respond to the situation by himself, instructed two Special Agents, Phan and Milligan, to set up surveillance. The two agents arrived in between the time when Ortiz left to get the cash for the second gun and when he returned soon thereafter. ROA.272.

3. Surveillance and the Subsequent Stop

a. After Following The Blue Blazer, ATF Agents Stopped Ortiz's Car With Their Lights Flashing

Agent Milligan photographed Ortiz's Chevrolet Blazer and waited for both men to leave the store. ROA.273. Phan and Milligan, driving separate vehicles, followed Ortiz for nearly an hour before Phan stopped the Blazer at a Shell gas station with his lights flashing on. Agent Milligan joined soon thereafter:

> A: At that time Agent Phan entered the parking lot, pulled up along the rear left quarter panel, with I believe the pump in between his car and their car, activated his emergency lights and got out of the vehicle with his weapon.

Q: What did you do? Did you pull your car in the park lot?

A: I did. I got caught up in a little bit of traffic or red light. I don't recall which it was, but I pulled into the gas station seconds behind Agent Phan, and I went to the front driver's side quarter panel and did the same as Agent Phan.

ROA.280 (Agent Millgan's testimony on direct examination).

THE COURT: Is that where you parked?

Agent Milligan: Yes. Along the driver's side fender, sir.

ROA.314.

b. At the Suppression Hearing, Agent Milligan Had A Miraculous Revelation That He Had Seen Ortiz Making A "Heat Run" Through A "Residential Neighborhood"

Agent Milligan testified that one hour elapsed from the time he left SOG until the stop at the Shell Station. This Shell Station is all of 11 miles from SOG Armory; the only way to go is down US-59 and then on Highway 6. Defense Exhibit 5 (map of the distance from Mapquest). One can only wonder how it takes an hour to go 11 miles in the middle of the day on two major freeways.

At the suppression hearing, the Prosecutor led Agent Milligan into saying that this incredible length of time was due to the fact that Ortiz had been driving in circles.

Q: Let me stop you for a minute. Do you know the term "heat runs"?
A: I am familiar with that, yes, sir.

Q: Have you conducted surveillance when people have conducted heat runs?
A: Yes, sir, I have.

Q. Was there -- was -- who was driving between the two, was it Mr. Ortiz or Mr. Diaz?
A. Mr. Ortiz was driving.

Q: Was his pattern of driving consistent -- well, let me ask you this: Did he go into neighborhoods?
A: Yes, sir, he did.

Q: Did he make U-turns and head in opposite directions?
A: Yes, sir, he did.

ROA.277.

On cross, Agent Milligan admitted that he had somehow forgotten to mention this in any of his previous reports or grand jury testimony:

Q: Okay. And, agent, can you please show me in your reports where you wrote down about Mr. Ortiz driving through residential neighborhoods?
A: That's not in the report, sir.

Q: But you testified to it?
A: Yes.

Q: Okay. You never wrote down that down a single time; right?
A: I do not believe so, sir, no.

Q: Okay. Agent, did you testify before the grand jury in prosecution of this case?
A: Yes, sir.

Q: And when you testified before the grand jury, did you say a word about heat runs?
A: About what, sir?

Q: Heat runs.
A: I would have to look at my testimony, sir.

Q: Okay. Did you say a word about driving through residential neighborhoods?
A: Again, I would have to look through my testimony.

Q: I have a copy here.
A: I have a copy as well.

Q: Feel free to read the whole testimony agent, but I've opened to Page 21 where you talk about the driving. Feel free -- please show me, agent, where you used the term "heat runs"?
A: It doesn't say it, sir.

Q: Does it say anything in there about driving through residential neighborhoods?
A: It does not, sir.

ROA.303-304.

4. ATF Agents Remove Diaz and Ortiz From the Vehicle With Their Guns Drawn And Hold Them At Gunpoint

The ATF agents hemmed-in Ortiz's vehicle with their own vehicles and, guns drawn, removed Diaz and Ortiz from their vehicle:

Q: So when the two agents were out with guns drawn, what did you do or say?

A: When the guns were drawn on the vehicle, we directed the driver to kill the ignition on the vehicle. The driver was Mr. Ortiz. We had Mr. Ortiz step out of the vehicle and walk out toward the front.

Q: Okay. And did Mr. Diaz and the passenger get similar directions?
A: After Mr. Ortiz got out, yes, sir, but he was directed to go to the rear toward to Special Agent Phan.

Standing at the front of Ortiz's Blazer, Agent Milligan took a picture showing clearly that Ortiz's car was blocked in the back by a black pickup and on his left by gas pumps he had parked next to:

Agent Milligan further explained that Ortiz was even further pinned in because he had parked at a gas pump in the middle of the row of gas pumps:

Q: So which pump did Mr. Ortiz pull up his car into? Can you show me that on Exhibit 6 that I have on the overhead right now?
A: Is that 6?

Q: It's a 6. Can you tell -- I guess is it on the far left, far right, somewhere in the middle?
A: It was closer to the left middle, I believe – from what I recall, yes, sir.

ROA.314-315.

During the Government's direct examination, it became clear that the Prosecutor was trying to obfuscate the fact that ATF agents' guns remained drawn for far longer than it could possibly have taken to safely affect a *Terry* stop. The District Court, noting this issue, inquired *sua sponte*:

> THE COURT: Approximately how long were the weapons drawn at this time?
>
> Agent Milligan: I don't recall the exact time. It would be minutes.
>
> THE COURT: For both of you?
>
> Agent Milligan: Yes, sir, I believe so.

ROA.282.

5. Ortiz Utters A Statement While At Gunpoint And Is Held, Handcuffed, Searched, and Not Released For Several Minutes.

Agent Milligan inveighed upon Ortiz to say he bought the firearm for another:

> A: He told me that he had purchased the firearms on behalf of somebody else.

ROA.284.

Regarding the chronology, the District Court inquired:

> THE COURT: Let me stop a second. How long, how many minutes had elapsed between the time you pulled up next to the defendant's vehicle and the time he made the statement that he bought the weapons for someone else?
> A: I would say five to 10 minutes.

ROA.285. Within minutes, a total of seven different agents in six different cars had arrived:

> Agent Milligan: There were six agents and maybe one task force officer that I was driving I believe with, if my memory is correct, with group supervisor Aguirre.
>
> Q: So we have seven people, and six different cars?
> A: That's correct.

ROA.312. A new agent on the scene, Special Agent Ben Smith, then instructs that Ortiz be frisked. ROA.285-286. The search determined there was nothing on Ortiz's person but the ATF agents kept Ortiz in cuffs for a total "five to ten minutes," including a substantial period after determining Ortiz had nothing on his person.

> AUSA Kusin: Did you ask him before frisking him, did he have any guns or anything sharp, pointed, anything of those normal questions?
> A. [Agent Smith] did.
>
> Q: So then he frisked him?
> A: Yes, sir.
>
> Q: Did he take off the handcuffs when he finished frisking him?
> A: I wouldn't say right immediately after he finished the frisk. We were coordinating together. I don't believe that there was any conversation between me and Mr. Diaz during the time he was in cuffs.
>
> THE COURT: How long was Ortiz in cuffs?

> THE WITNESS: Based on the recollection between all the agents—we didn't have a stopwatch -- timing on these events, based on the recollection between myself and the other agents that were involved with us on scene, we came up five to 10 minutes.

ROA.286. Apparently, Agent Smith had the authority to order Ortiz cuffed but lacked the authority to have him un-cuffed even though the frisk was long since complete:

> AUSA Kusin: Now, did another agent come up and ask what resulted—what caused you guys to uncuff him?
>
> A: Another agent came, Special Agent Roland Balesteros, came over to myself and Special Agent Smith was standing there with Mr. Ortiz. I gave him a quick gist of our brief conversation that I had with Mr. Ortiz,and he asked Mr. Smith, Special Agent Smith ***to remove the handcuffs from Mr. Ortiz so we could go into the car and discuss further.***
>
> Q: Okay. So it was Agent Balesteros who said take off the cuffs, and you guys did it, and then you got inside the car?
>
> A: Yes, sir.

ROA.287 (emphasis added).

In other words, the ATF was directing Ortiz's custodial interrogation such that even when he was un-cuffed he was never free to go but rather manhandled directly into one of the half-dozen ATF vehicles surrounding his Blazer.

6. Several Different Agents Took Possession of Ortiz's Keys and Passed These Keys Back and Forth Amongst One Another

In response to a question by Judge Lake, Agent Milligan originally pretended not to know what happened to Ortiz's keys while he was in the custody of the ATF:

> THE COURT: Who had the keys to the blazer during this period of time?
> THE WITNESS: I do not recall, sir.

ROA.293. But Agent Milligan's story soon changed. When asked how he took a picture[4] of the two guns removed from the hatch of the Blazer, Milligan volunteered that Ortiz's keys had been confiscated when he was first taken from the car and passed amongst the agents:

> AUSA KUSIN: Did you need the keys to open the hatch?
> A: I did.
>
> Q: Did you—from whom did you get the keys?
> A: I do not recall exactly who, but I do believe it was from a law enforcement official.
>
> Q: Okay. So it was from one of your fellow agents?
> A: I believe so.
>
> Q: You don't recall getting the keys from Mr. Ortiz to do that?
> A: I do not.

[4] "Q: Which officer or officers were taking these pictures? A: I was, sure. Q: You took all the pictures? A: I believe so." ROA.316.

Q: Do you recall what you did with the keys after you finished opening and closing that up?
A: I do not, no.

ROA.298.

The picture of Agent Milligan ***AFTER*** he let Ortiz out of Agent Ballesteros's vehicle, and ***AFTER*** all the supposedly non-custodial questioning occurred, with the guns in the hatchback (and the confiscated keys) is reproduced below:

7. Ortiz Is Placed in the Back of Agent Balesteros's Car For As Long As Forty Minutes

Agents Milligan and Balesteros put Ortiz in the back of Balesteros's car and kept him there for up to forty minutes.

> THE COURT: How did it come to pass that Mr. Ortiz entered the vehicle? What was said to him?
>
> THE WITNESS: We asked him if he would get in the vehicle with us.
>
> THE COURT: Did you tell him, "Get in the vehicle"? Or did you say, "Would you please get in the vehicle"? Recall the words as best you can that you used.
>
> THE WITNESS: It would have been something along the lines of, "Can you get in the vehicle so we can further discuss what we've already talked about."

ROA.288-289. In attempting to explain the extraordinary length of time the two Agents questioned Ortiz in the car, Agent Milligan testified:

> Q: Now, approximately how long were you in -- the three of you in the car?
> A: Again, based on the recollection of the agents when we got together and spoke about this, we were able to come up with a timeframe from half-hour, give or take 10 minutes.

ROA.288.

8. Ortiz Signed An Un-*Mirandized* Statement He Did Not Write.

Agent Milligan took it upon himself to write an inculpatory statement. Ortiz signed this statement about one hour after he was first taken from his car at gun

point. (*See* immediately foregoing sections where Agent Milligan explains that Ortiz was in his car for 'up to forty minutes', following several "5-10 minute" intervals in which a gun was pointed at him, he was questioned, then frisked, then left in cuffs until a supervisor could allow him to be un-cuffed, then placed in a car, all the while having had his keys taken and not returned for some period of time thereafter as evidence by the fact that Milligan subsequently took pictures with the keys in the hatchback). In addition to signing a statement he did not write, Mr. Ortiz was never *Mirandized*.

Agent Miligan admitted on cross examination that he never read Ortiz his *Miranda* rights:

> MR. KRETZER: You never read Mr. Ortiz his Miranda rights, did you?
> AGENT MILLIGAN: I did not, sir.

ROA.329. In contrast, Mr. Diaz, who was removed from the Blazer at the same time as Ortiz, was Mirandized:

> Q: And do you know that Agent Phan read Mr. Diaz his Miranda warning?
> A: Did who?
>
> Q: Did Agent Phan read Mr. Diaz his Miranda rights?
> A: I believe so, yes, sir.
>
> Q: Did Mr. Phan give Mr. Diaz a consent form?
> A: Yes, he did.
>
> Q: Did Mr. Diaz sign that consent form?

A: Yes.

Id.

9. Ortiz's Detention Was A Custodial Interrogation Because He Was Never "Released" From The Agents' Control

After Ortiz was "released" from Agent Balesteros's car, Agent Milligan continued to exert control over Ortiz by, for example, telling him where he could and could not smoke a cigarette. In fact, Agent Miligan testified that he never told Ortiz that he was "free to go" thereby confirming the existence of and extending the length of Ortiz's custodial interrogation:

THE COURT:	Let me backup. What happened to cause the three of you to exit the vehicle? Did you tell him the interview was over? Did he ask to leave the vehicle? What precipitated that event?
THE WITNESS:	The interview was complete, sir.
THE COURT:	I mean, did you tell him, "You're free to go"? What did you say?
THE WITNESS:	***We never uttered the words "You're free to go."***
THE COURT:	Did you say, "Let's all get out of the vehicle because it's cold inside"? What did you say?
THE WITNESS:	We wanted to get out of the vehicle so we could see what was going on, as far as the other interview.
THE COURT:	Do you basically told him to get out of the vehicle?
THE WITNESS:	Yeah. We all three then exited.

ROA.290-291 (emphasis added).

Further demonstrating the control the ATF continued to exert over Ortiz's movements, Agent Milligan explained how he granted limited permission for Ortiz to smoke a cigarette in an area the meter of which the ATF determined:

> A: Mr. Ortiz asked if he could smoke a cigarette.
>
> Q: At what did you say? Where did he go?
> A: I replied, "Yes, ***you can***. Obviously we're in the middle of a gas station. You're ***going to have to*** go away from the gas." And when he did, he went closer to Highway 6.
>
> Q: So he walked out toward the highway?
> A: I wouldn't say he reached the sidewalk, but, yes, he did.

ROA.291. Refusing to let Ortiz and Diaz go, the agents then procured food for Ortiz and Diaz from an eatery nearby, for Ortiz and Diaz to eat in the agents' presence:

> AUSA Kusin: Who paid for Mr. Ortiz and Diaz-Meza's lunch?
> Agent Milligan: I don't recall who paid for Mr. Ortiz. I know for a fact that I paid for Mr. Ortiz.

ROA.298. On cross, Agent Milligan expounded on how he directed Ortiz and Diaz as to where they could eat:

> Q: Let me ask the question this way: Did you say, "Would you like to have lunch with me?"
> A: I can't say I asked that question, no.
>
> Q: Did you say, "Let's go inside"?
> A: Possibly, yes.

ROA.329. Finally, the agents took Diaz For a drive while Ortiz was left stranded at the Shell Station, unable to leave: 1) an agent remained with him at the restaurant, 2) he did not have his keys, and 3) he could not have left without leaving his friend, Diaz, stranded.

> THE COURT: The blazer and Mr. Ortiz remained at the Shell station?
> THE WITNESS: That is correct.

ROA.300. All in all, Ortiz remained unable to leave, i.e. held in custody, for XXX minutes/hours.

B. Indictment

About three years after the event occurred, the US Attorney's Office realized it had a stale case and the statute of limitations was coming up. On July 1, 2013 Justin Ortiz was charged in a Superseding Indictment with three counts of making a false statement during acquisition of a firearm, in violation of 18 U.S.C. §§922(a)(6) and 922(a)(2).

C. Motion to Suppress

On January 11, 2013, Ortiz filed a motion to suppress the statement made and evidence seized as a result of his vehicle stop on July 29, 2010. The gravamen of this motion was that ATF agents stopped Ortiz without reasonable suspicion that

crime was afoot and that such a detention constituted a custodial interrogation requiring a *Miranda* warning that Ortiz never received.

D. Evidentiary Hearing

A suppression hearing was held on July 2, 2013. ROA.222.

E. Motion Was Denied in an Oral Order

The District Court denied the motion from the bench. ROA.343-45.

F. Conditional Plea

On July 11, Ortiz pled guilty to the Indictment with a conditional plea having been assented to by the Prosecutor.

G. PSR

The PSR issued September 25, 2013. The offense level computations begin at Paragraph 45.

1. Controlling Guideline

Violations of 18 U.S.C.§§922(a) are scored under U.S.S.G. §2K2.1.

2. Base Offense Level

The Base Offense Level of 18 is found in subsection (b)(6)(A) and applies because Ortiz was held accountable for two firearms. *Id*. at ¶47.

3. Specific Offense Characteristics

There are no adjustments for specific offense characteristics.

4. Role Adjustment

There are no adjustments for role.

5. Acceptance of Responsibility

Probation removed two points for acceptance. *Id*. at ¶27.

The Offense Level was therefore 16 (18-2).

6. Criminal History

Zero criminal history points established a criminal history category of I. *Id*. at ¶59. The Guidelines range was therefore 21 to 27 months. *Id*. at ¶¶ 81-83.

H. Objections

Ortiz objected that the PSR did not credit him with the third acceptance point only because he refused to waive his appellate rights. In addition, Ortiz filed an opposed motion for downward departure on the grounds of his military service. Neither of these objections was well taken, and the District Court did not afford relief under either theory.

I. Sentencing

Sentencing was held on September 25, 2013. ROA.366. Ortiz was sentenced to 21 months, a $2,000 fine, two years of supervised release, and a $100 special assessment. ROA.370.

SUMMARY OF THE ARGUMENT

A. Motion to Suppress Evidence

The District Court erred by denying Ortiz's motion to suppress the firearms found in his vehicle pursuant to the Fourth Amendment because the agents did not have reasonable suspicion to stop the vehicle and did not have a warrant, consent, or probable cause to search the vehicle.

B. Motion To Suppress A Statement

The District Court erred by denying Ortiz's motion to suppress the statement made in the vehicle pursuant to the Fourth Amendment because the agents did not advise Ortiz of his *Miranda* rights and even though the agents allegedly told Ortiz his interrogation was non-custodial, the totality of the circumstances would not have led a reasonable man to believe that he was, in reality, free to leave.

STANDARDS OF REVIEW

A. Motion to Suppress Evidence

To assess a district court's ruling on a motion to suppress evidence under the Fourth Amendment, the Court reviews the district court's factual findings for clear

error and the ultimate Fourth Amendment conclusions *de novo*. *United States v. Menchaca-Castruita*, 587 F.3d 283, 289 (5th Cir. 2009). The Court views the facts in the light most favorable to the government as the prevailing party. *See United States v. Raney*, 633 F.3d 385, 389 (5th Cir. 2011). In addition, where the peace officer acted without a warrant, the burden is on the Government to prove that the search was valid. *United States v. Vickers*, 540 F.3d 356, 360 (5th Cir. 2008) (citations omitted).

B. Motion to Suppress Statement

This Court reviews *de novo* a district court's conclusion as to whether statements were obtained in violation of Miranda. *United States v. Harrell*, 894 F.2d 120, 122-123 (5th Cir. 1990). In particular, the determination of whether a suspect was in custody for purposes of *Miranda* is a mixed question of law and fact which is reviewed *de novo*. *See Thompson v. Keohane*, 516 U.S. 99 (1995). The district court's findings of fact should be accepted unless clearly erroneous. *Harrell*, 894 F.2d at 122-123.

ARGUMENT

A. What Facts Credibly Elicit A Reasonable Suspicion of a Straw-buy on the Part By A Civilian?

The District Court's analysis suffered a false legal premise that any information conveyed by a witness must have constituted *per se* reliable facts rising to probable cause:

> THE COURT: Doesn't that undercut your argument, if everybody buys multiple guns, there must have been something suspicious about this one, because this one, unlike all the other thousands, alerted them to call the ATF?

ROA.335. The problem is that nothing about the facts which made Hernandez take umbrage suggest anything suspicious. *See State v. Eady*, 249 Conn. 431, 733 A.2d 112 (1999) (probable cause based on firefighter's observation of what he though was marijuana, "a green leafy substance in a plastic bag in a cigar box in a locked bedroom" as "most people" observing such substance in such circumstances "would believe that it is marijuana" as "what other green, leafy substance would one keep" in this fashion?). More specifically, each and every circumstance Hernandez complained of fail to suggest a straw buy. Virtually all of SOG Armory's customers buy more than one gun. Bullets are very cheap; it is not at all uncommon for the purchaser of a new gun to have some already. Cash purchases are common at SOG Armory; Ortiz could not have paid with an ATM card if he wanted to as the size of the purchase exceeded his daily limit. There is nothing wrong with buying a new gun without wanting a new scope; Hernandez conceded

that these parts are interchangeable and that a good marksman could bore-site a new gun with only one packet of ammunition:

> Q: So if someone knew how to bore sight a gun, they might need fewer numbers of bullets to sight that weapon in one second?
> A: Theoretically.
>
> Q: What does "theoretically" mean, sir?
> A: Sometimes that's not the case.
>
> Q: Does that mean sometimes it is the case?
> A: That's correct.
>
> Q: So if you're really good with guns and you know how to bore sight a gun, you wouldn't need as many bullets?
> A: That's correct.

B. Hernandez's Stated Bases for Suspicion of a Straw Man Purchase Fail To Withstand Any Level of Scrutiny

Special Agents Milligan and Phan violated the Fourth Amendment by seizing Mr. Ortiz without articulating a reasonable suspicion that criminal activity was afoot. *Terry*, 392 U.S. at 30. SA Phan was initially alerted to Mr. Ortiz and Mr. Diaz when ATF Industry Operations Investigator Tommy Gray, who received a tip regarding a potential straw purchase, contacted him. ROA.301. Governed by 18 U.S.C. 922(a)(6), a 'straw purchase' occurs when the actual buyer uses another person (the straw purchaser) to execute ATF Form 4473 purporting to show that

the straw purchaser is the actual buyer. *See*, *e.g.*, *United States v. Moore*, 84 F.3d 1567, 1571 (9th Cir. 1996).

1. SOG Armory Knew Ortiz Was Not A Prohibited Person

During the hearing on the Motion to Suppress, Joshua Hernandez, Investigator Gray's informant and employee of SOG Amory, testified to the fact that he ran a criminal background check on Mr. Ortiz that found no prior criminal history. ROA.248.

> Q: And did you do a criminal background check on Mr. Ortiz?
> A: We did.
>
> Q: Okay. And he didn't have any criminal history, did he?
> A: That's correct.
>
> Q: He wasn't prohibited from buying a gun, was he?
> A: That's correct.

Id.

2. Hernandez Solicited The Sale of the Second Gun The Purchase of Which Somehow Immediately Morphed Into Suspicion of A Straw Buy

Hernandez's testimony established that Mr. Ortiz did not act suspiciously during either of his two visits to the gun store. For example, Ortiz expressed interest in buying a second gun only ***AFTER*** Hernandez showed Ortiz that very gun in a salesman's attempt to sell more merchandise:

A: I showed Mr. Ortiz a second rifle that I had found that was in a different display, and he seemed eager to buy that one as well. And then he said that he was going to the ATM to get more cash out.

ROA.240.

ISSUE RESTATED: No reasonable suspicion was engendered in Mr. Hernandez when, Hernandez having accepted cash payment for one gun saw Mr. Ortiz go get an identical amount of cash to buy a second (identical) gun that Hernandez himself had inveighed upon Ortiz to buy.

3. Hernandez's Position That Aggregate Safety Is Increased Only If He Sells More Bullets, Or That Ortiz Did Not Buy Enough of His Merchandise to Shake Suspicion of A Straw-Buy, Is Preposterous

Hernandez expressed concern that Ortiz only bought one set of ammunition but two rifles. ROA.242. The utter absurdity of this theory was explained by Hernandez's exhortation that the more bullets he sold, the more ambient safety would increase:

Q: If Mr. Ortiz had asked to buy seven, eight, nine, 10 boxes of ammunition, your suspicions wouldn't be raised, would they?
A: That wouldn't be as disconcerting.

Q: So the more ammunition he wanted to buy, the less disconcerted you would be?
A: Yes.

ROA.262.

ISSUE RESTATED: Unless too much of a good thing really is fantastic, no reasonable suspicion was engendered in Mr. Hernandez when Ortiz

declined to buy additional product which Hernandez separately felt was dangerous.

4. Hernandez Feels That A Straw Buy Is Suggested When A Customer Fails to Request To Buy An Interchangeable Part That Almost Everyone Gunman Already Owns

Hernandez's alternative rationale is that Ortiz should have wanted to buy a new sight to go on his new gun:

> Q: Well, are these rifles sold without any sights at all?
> A: That's correct.
>
> Q: That would make it virtually worthless as a firearm, wouldn't it?
> A: That's correct.

ROA.241. The problem is that, even if it is an ultimate truth that a sight is necessary to operate a gun such as the model Ortiz purchased, sights are an interchangeable part that can easily be moved from one gun to another:

> Q: Okay. And the gun that you sold Mr. Ortiz has a quick attach rail, does it not?
> A: The -- you mean the rail system?
>
> Q: Yes.
> A: Yes.
>
> Q: And, in fact, Mr. Ortiz already owned a sight, didn't he?
> A: That was -- that was not discussed –
>
> Q: Okay.
> A: -- to the point to where he he was saying that he had a sight.

Q: Okay. Let me ask it this way: Did you ask Mr. Ortiz if he already owned a sight?
A: We asked him if he would like to buy sights.

Q: Okay. Answer my question specifically, sir. Did you ask Mr. Ortiz if he already owned a gun sight?
A: No.

Q: The -- a good -- a good marksman, though, can take a sight from one gun and put it on another one, can't they?
A: It depends on the firearm, yes.

Q: Assume that you had a fire, assume it's an interchangeable part, you could take sight from gun number one and put it on sight for gun number two; right?
A: Yes.

Q: In fact, many of your customers do this; right?
A: Yes.

ROA.254-55 (emphases added).

> **ISSUE RESTATED: Had Hernandez asked Ortiz if he already owned a sight, and if he had responded "no", it *MIGHT* have somehow been suspicious that one would want a gun lacking this accoutrement. But it cannot elicit any suspicion that a customer would not ask to buy a sight absent some indication that he already owned this interchangeable part. This conclusion requires no conjecture as "many of [SOG's] customers do this."**

None of the facts Hernandez testified to come close to an "indicia of reliability" sufficient to offer a tip to Investigator Gray. Hernandez's veracity and basis of knowledge were purely speculative when applied to the actual facts of the

case. *See United States v. Roch*, 5 F.3d 894, 898 (5th Cir. 1993) (holding in a gun case that "[w]hile the information received from the informant in this case may have been derived from direct contact with Roch, the absence of significant details and a prediction of future behavior prevents us from holding that such information provided a sufficient basis for a reasonable suspicion finding."). The bottom line is that Gray's communication with Phan and Milligan did no more than propagate this error.

C. The "Fellow Officer Rule" Gives No Succor to Phan and Milligan Because Agent Gray Merely Conveyed a Conclusory Assertion That He Had Reasonable Suspicion Rather Than Facts Supporting That Assertion

Under the Fellow Officer Rule (also known as the *Whiteley* Rule or the *Ventresca*[5] Rule), police are in a limited sense "entitled to act" upon the strength of a communication through official channels directing or requesting that an arrest or search be made. *See Whiteley v. Warden*, 401 U.S. 560, 568 (1971); Wayne LaFave and Jerold Israel, *Criminal Procedure*, 2 Crim. Proc. § 3.3(e), "Information From Or Held By Other Police," (3d ed. 2012).

However, when the question arises in the context of an effort to exclude evidence obtained as a consequence of action taken pursuant to the communication, then the question legitimately is whether the law enforcement

[5]*United States v. Ventresca*, 380 U.S. 102 (1965).

system as a whole has complied with the requirements of the Fourth Amendment, which means that the evidence should be excluded if facts adding up to probable cause were not in the hands of the officer or agency which gave the order or made the report. *Id.* at 569 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

Even though the Fellow Officer Rule, as originally constructed, applies to issues of probable cause, it is not inconsistent to apply the same rule (albeit with a lesser standard) to reasonable suspicion. In *United States v. Hensley*, the Supreme Court applied *Whiteley* to a case involving an issue of reasonable suspicion. *See* 469 U.S. 221 (1985). In that case, the Court held, "If the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment." *Id.* at 232. Applied to facts of Ortiz's case, the Fellow Officer Rule precludes a finding of reasonable suspicion sufficient to perform a *Terry* stop of Mr. Ortiz and Mr. Diaz. As discussed *supra*, Hernandez's call to Investigator Gray did not have the request indicia of reliability required to find reasonable suspicion.

Moreover, Agent Milligan did not receive the call from Agent Gray, but rather Agent Phu did. Only Agent Milligan testified at the suppression hearing. Milligan did not put on the record WHAT information Phu conveyed to him, but rather only that he did so. Nor did Milligan tell us anything more about the Gray/Phu conversation:

Q: Did you receive a phone call from Tommy Gray?
A: I did not receive a phone call personally, no, sir.

Q: Did someone you were in touch with receive a phone call?
A: Yes, sir. My partner, Special Agent Phan, received a phone call.

Q: Could you state his name for the record and spell it?
A: Special Agent Vu, I think it's hyphen H-A-I, last name Phan, P-H-A-N.

Q: Did he receive a phone call from Tommy Gray?
A: He did.

Q: Did you learn the substance of the phone call?
A: Yes, I did.

Q: What was the substance of the phone call?
A: That Tommy Gray was contacted by an employee of SOG Armory, ***and that they had reported a suspicious purchase that was believed to be a straw purchase.***

ROA.272 (emphasis added). Based on this, Ortiz's major premise is that without reasonable suspicion himself, Gray could not have supplied reasonable suspicion to Special Agents Phan and Milligan. Ortiz's correlate proposition is that Gray did not convey to Phan and Milligan any ***FACTS*** establishing reasonable suspicion, as contra-distinguished from his conclusory assertion that reasonable suspicion was floating in the miasma.

In sum, the responding agents were not endowed with any tincture of reasonable suspicion with which the District Court could cleanse that Fourth Amendment violations.

D. The District Court erred in overruling Ortiz's motion to Suppress Ortiz's Statement Given at Gunpoint.

The written statement was written by Agent Milligan; the handwriting matches his signature at the bottom and he acknowledged this fact during his testimony. For ease of reference, this document is reproduced on the following page:

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Affidavit *(continuation sheet)*

I, Justin Ortiz (DOB: 8/3/1984 SS: 464-73-1052), state that I reside at, 1310 Miller Rd, Sealy TX. On July 29, 2010 I met with a friend Jose Diaz and he provided me money to purchase firearms for him. The plan was to meet with a contact or associate of Jose Diaz and transfer the weapons in the area of Rosenberg, TX or surrounding area. I was not sure exactly where the meet was going to occur I purchased ~~three~~ two (2) Beawold .50 caliber rifles and a box of ammo. During the trip Jose was on his cell phone with his wife and male. While on the phone with the male Jose was making arrangements to set up a place to meet. I believe that Jose is getting the firearms for dangerous people that are involved in both DRUG and firearms trafficking. Jose was setting up all the details of the meet, where, when, and how much money is involved. As I pulled into the Shell gas Station to get gas I was approached [redacted] by the police and talked to. I believe that the people we are going to meet with are from a residence in this area. The whole time Jose directed where to go. Jose has approached me in the past to purchase firearms for him to give to these people, but I didn't. I was asked by Jose in the past if I knew anyone that will

Signature of Affiant

Date 7-29-10

Page 1 of 2 pages SA Peter Martinez 7/29/2010

ATF Form 5000.2
Revised November 2006

1. Baseline Principles

In *Miranda v. Arizona*, the Supreme Court held that because custodial interrogation is inherently coercive a suspect must be advised of his constitutional rights to be silent and to have counsel and must voluntarily waive those rights prior to such interrogation. 384 U.S. 436 (1966). Where a suspect is not in custody, *Miranda* warnings are not required prior to interrogation. *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Berkemer v. McCarty*, 468 U.S. 420 (1984).

A suspect is "in custody" for Miranda purposes only when he is placed under arrest or when his, "freedom of action is curtailed to 'a degree associated with formal arrest."' *Berkemer*, 468 U.S. at 440 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)). In determining whether a suspect was in custody when interrogated, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 442; *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988) (en banc). As explained by this Court sitting en banc, "the reasonable person through whom the court view[s] the situation must be neutral to the environment and to the purposes of the investigation–that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." *Bengivenga*, 845 F.2d at 596.

The interviewing officers' subjective beliefs and the existence of probable cause to arrest do not trigger the requirement for *Miranda* warnings. In *Berkemer v. McCarty*, 468 U.S. 420, 435 n.22 (1984), the Supreme Court explained that, "[t]he threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." *See Stansbury v. California*, 511 U.S. 318, 319 (1994) (per curiam) (holding, "not for the first time, that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody"); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (holding that *Miranda* warnings not required even though officer advised suspect that the police believed he was involved in crime and falsely told suspect that his fingerprints were found at the scene). Similarly, the interrogating officer's intent to arrest the subject does not render the subject in custody for purposes of *Miranda*. *Berkemer*, 468 U.S. at 442 ("A policeman's unarticulated plan [to arrest] has no bearing on the question whether a suspect was 'in custody' at a particular time.")

In *Bengivenga*, this Court relied on *Berkemer* to overrule earlier circuit cases, which considered the existence of probable cause a factor in determining whether a suspect was in custody for *Miranda* purposes. 845 F.2d 593. The en banc Court held that, "[r]egardless of the presence of probable cause, until an

officer acts to exert some type of restraint a suspect cannot reasonably believe her freedom is restrained." *Id.* at 596-597.

Finally, a valid waiver of the right to have counsel present during custodial interrogation cannot be established by the fact that the defendant continued to respond to questions. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

2. The Fact That Ortiz Stopped at the Shell Station Before the Agents Boxed Him In Has No Valence in A Fourth Amendment Analysis

It is true that Ortiz was never placed under *formal* arrest. However, the only view of the evidence adduced through Agent Milligan at the hearing establishes that the interviewing agents seized and interrogated Ortiz in a manner establishing custodial interrogation. Ortiz was never "pulled over" in the typical definition of the phrase; instead, Agents Phan and Milligan followed him until he pulled into a Shell Station. But this fact does nothing to obscure the reality that after he pulled up next to the gas pump, he was immediately detained. Professor LaFave explains:

> Of course, the mere fact that the police "did nothing to cause the defendants to interrupt their journey does not mean that a seizure did not occur.

4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.4(a), p. 577 (5th ed. 2012) (citing *United States v. Buchanon*, 72 F.3d 1217 (6th Cir. 1995)).

The fact is that even before the agents took away his keys, Ortiz could not have pulled his car away. The hallmark Fifth Circuit case on this point of law is *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982) ("blocking an individual's path or otherwise intercepting him to prevent his progress in any way is a consideration of great and probably decisive, significance"). In addition to *United States v. Berry*, Ortiz offers the following persuasive authority in support: *United States v. Camacho*, 661 F.3d 718 (1st Cir. 2011) (seizure where officers "intentionally blocked Camacho's path" with their vehicle and then confronted him with "accusatory questions"); *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007) (stressing second officer "positioned himself between Washington and his car"); *Swift v. State*, 393 Md. 139 (2006) (stressing "the blocking of petitioner's path with the police cruiser."). Ortiz meets these tests: on his left was the gas pump, on his right was Agent Phan, and behind him were the parked ATF vehicles. We have pictures of all of these things because Agent Milligan took them from the front. Ortiz irrefutably *could not* leave.

3. Ortiz Was Seized When Agents Milligan and Phan Approached His Car from Both Sides with Their Guns Drawn

The seizure began when the agents' uttered verbal commands to exit the vehicle at gun point. *United States v. Wood*, 981 F.2d 536 (D.C. Cir. 1992) (submission by defendant after officer "ordered him to 'halt right there,', 'stop'"

was a seizure); *State v. Quezada*, 14 N.H. 258 (1996) (submission after officer "said to the defendant, 'Hey you, stop'- language indicating that compliance was not optional," was a seizure.); *State v. Bar-Jonah*, 324 Mont. 278 (2004) (seizure, as officer "demonstrated his authority over Bar-Jonah by immediately exiting his patrol car and ordering Bar-Jonah to stop"). Uttering an order while holding someone at gunpoint indicates that failure to obey the instructions will result in the person being shot. In other words, Ortiz had no choice but to obey because doing otherwise would have entailed either death or grave bodily harm.

On several occasions this Circuit has considered whether pointing firearms and handcuffing suspects during investigatory stops transforms such a stop into a *de facto* arrest. In its Reply to Defendant's Motion to Suppress, the Government noted two such cases where this Court found similar actions reasonable, *United States v. Sanders* and *United States v. Campbell*. In *Sanders*, the person detained by police was a convicted felon who attempted to flee a marked police vehicle in a high crime area. *Id.* at 201. The detainee fit the description of someone seen on the premises of a liquor store brandishing a gun and was found to have lied to the detaining officer regarding his possession of weapons on his person. *Id.* However, before denying Sanders' claims for appellate relief on the above grounds, this Circuit cautioned that its holding should not be applied automatically, "This holding is not to be interpreted as meaning that the police are automatically

authorized to employ these procedures in every investigatory detention. The relevant inquiry is always one of reasonableness under the circumstances." *Id.* at 206.

In *Campbell*, this Court added:

> In the course of [this] investigation, the officers had two goals: to investigate and to protect themselves during their investigation. The officers were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. This court asks case-by-case whether the police were unreasonable in failing to use less intrusive procedures to conduct their investigation safely.

178 F.3d 345, 349 (5th Cir. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 23 (1968); *United States v. Hensley*, 469 U.S. 221, 229 (1985)) (internal citations omitted)). While the safety of peace officers is a key consideration, the ultimate inquiry is still one of reasonableness.

The facts of the case *sub judice* are far removed from *Sanders* and its doctrinal progeny. Ortiz was neither a convicted felon nor the suspect of a committed crime. Indeed, he had just been ***approved*** via a criminal background check to purchase two firearms. At the gas station, Ortiz and Diaz were quickly outnumbered by ATF agents and had no viable means of escape – Ortiz's vehicle was immobilized, Ortiz's car keys were held by an agent and at various points during the encounter Ortiz and Diaz were handcuffed after showing neither aggression nor antagonism. Finally, the weapons purchased by Ortiz were located

in their cases in the rear of the vehicle, along with the lone box of ammunition. Because Agents Phan and Milligan followed and observed the Blazer for nearly an hour, they would have necessarily known if either Ortiz or Diaz had accessed the rifles or the limited quantity of ammunition.

E. Ortiz Was Seized When He Was Handcuffed

Alternatively**,** if the seizure did not begin at the time Ortiz was held at gunpoint and ordered to leave his vehicle commenced*,* Ortiz was definitely seized when he was handcuffed. *United States v. Wright*, 971 F.2d 176 (8th Cir. 1992) ("When Detective Carter placed Wright in handcuffs, a seizure occurred"); *United States v. Winfrey*, 915 F.2d 212 (6th Cir. 1990) (defendant "ordered to remain there until the DEA agents arrived"); *United States v. Santillanes*, 848 F.2d 1003 (10th Cir. 1988) (was a seizure, as defendant "physically restrained" by officer placing hand on defendant's shoulder). Of course, Agent Milligan did not write the statement he handed to Ortiz until after they placed Ortiz in the back of Agent Ballesteros's car.

F. Seizure Inculcated By the Presence of So Many Backup Officers

Agent Milligan testified as follows:

> Q: What style and color of car were you driving this day?
> A: I believe a white Ford Taurus, maybe.

Q: A white Ford Taurus. And Officer Phan, he was the one, if I understand correctly, who had met you at the SOG Armory parking lot?
A: We traveled down there in unison together.

Q. Were you in the same car?
A. No.

Q. He met you at -- you traveled with him, he was in a separate car?
A. Correct.

Q: And met at the SOG Armory parking lot?
A: Yes. In unison.

Q: Okay. And officer -- Agent Balesteros, do I understand that he was kind of a commander? Is he higher up?
A: He's a senior agent.

Q: Okay. Was he the senior agent on the scene here?
A: He was not.

Q: Okay. Who was the senior agent on the scene?
A: It would have been group supervisor Aguirre.

Q. So the group supervisor is under Aguirre?
A. Yes.

Q. And what is Agent Smith in all of this?
A. Smith is an agent.

Q. So he's just like you?
A. Correct.

Q. What type of car and color was Officer Balesteros driving?
A. At the time I don't recall what car -- actually, I believe he was driving a Buick.

Q. Okay. And Officer Smith, what make and color car was he driving?
A. I believe it was a Charger.

Q. Okay. A what?
A. Charger.

Q. What color, do you know?
A. Blue, dark blue.

Q. And Officer Aguirre?
A. Aguirre would have been in a pickup truck, black.

Q. In a black pickup truck? Am I missing anybody? Any other officers who stopped at the Shell gas station?
A. Special Agent Brown.

Q. Okay. So we have you, we had Agent Phan, we had Officer Balesteros, Officer Smith, Officer Aguirre, Officer Brown. Do I understand correctly there were six agents at that Shell station?
A. There **were six agents and maybe one task force officer that was driving I believe with, if my memory is correct, with group supervisor Aguirre.**

Q. So we have seven people total, and six different cars?
A. That's correct.

Q. Okay. And are all of those cars equipped with emergency lights?
A. They are.

ROA.310-312 (emphasis added).

Numerous courts have held that the presence of multiple officers inveighs strongly in favor of a finding of seizure. *United States v. Washington*, 387 F.3d 1060 (9th Cir. 2004) (seizure where defendant "confronted by six officers five of

whom were uniformed and visibly conveying weapons, and all six of whom were 'around him'"); *United States v. Riley*, 351 F.3d 1265 (D.C. Cir. 2003) (where defendant "sitting on a parked moped" and 3 police officers "surrounded him and ordered him to dismount", there was a seizure); *United States v. Berryman*, 717 F.2d 651 (1st Cir. 1983) (was a seizure; court stresses there was an agent on each side of defendant, and says the "number and position of officers have been recognized as important considerations for determining whether an atmosphere of restraint can be said to have existed"); *United States v. Villa-Gonzalez*, 623 F.3d 526 (8th Cir. 2010) (three officers "positioned themselves to as to limit [suspect's] freedom of movement").

G. The Stop Became Custodial When Agent Milligan Told Ortiz He Had Broken the Law and Memorialized This in a Written Statement Authored By the Very Same Agent

In *United States v. Berry*, this Court concluded that contact became a stop when officer told suspect he had violated the law by giving false information to a law enforcement officer:

> Appellants were 'seized' at the time Agent Markonni told appellant Berry that they had violated Georgia law by giving false identification to a law enforcement officer. Although appellants were not technically under arrest at this point in time, they reasonably could have believed they were not free to leave.

636 F.2d 1075, 1080 (5th Cir. 1981). The logic of *Berry* inveighs even more heavily when Agent Milligan 1) told Ortiz he had broken a law and then 2) wrote out a statement to that effect and handed it to the detainee to sign.

H. Change in Location of Interrogation Effected a Seizure

Agent Milligan testified that Ortiz spoke to him when removed from his Blazer. However, the written statement was not prepared until after Ortiz (and Agents Milligan and Ballesteros) had moved him into the ATF vehicle. This situation contrasts with this Court's holding in *United States v. Williams*:

> The government argues convincingly that the purpose of moving the location for questioning Williams into the baggage handling area was to get away from the loud noise made by the buses at the terminal. Based on testimony elicited at the suppression hearing, it was revealed that the extreme noise near the buses made it difficult to converse and would have made it necessary to yell, thus introducing an undesirable intensity to any conversation. Moreover, the layout of the bus station, particularly the location of the baggage handling area where the questioning was conducted, reveals that Williams was not subjected to a restrictive environment. Specifically, the baggage handling area opens directly out to both the open-air area of the terminal where the buses are parked and into the terminal waiting area. In addition, there were several baggage handlers in the room with Williams and the officers at the time of questioning.

365 F.3d 399, 404-405 (5th Cir 2004).

Unlike *Williams*, Ortiz and Milligan did not need to avoid any loud noises such as to be heard at a bus terminal. To the contrary, they were standing next to a

gas pump as a gas station/taqueria. Agent Milligan never testified that anyone present "yelled" or "had to yell." It is fairly obvious that the back of Agent Ballesteros's car is the antithesis of a location which "opens directly out to an open-air area." Nor could anyone analogous to *Williams*' baggage handler (such as an employee of the Shell station or Jalapeno Joes) come "into the room."

I. Regardless of When it Began, The Seizure Continued, Inexorably

The seizure, regardless of its starting point, only lengthened as Ortiz's keys were taken, passed between various agents, and then held until after embarkation from Agent Ballesteros's car as evidenced by the placement of these keys in the hatchback lock. This took place when Agent Milligan took picture and after he had removed the guns from their begging. Throughout this time, Ortiz's car was held hostage—and him with it.

There is no doubt that Agent Milligan put the keys into the hatchback lock in order to take the picture; the guns were out of their bagging and only Agent Milligan could have opened the trunk to so remove them. For ease of reference, this picture is reproduced below:

And Fourth Amendment doctrine has long recognized that a seizure is affected when law enforcement takes away someone's ability to drive: how else is the detained person supposed to freely leave? This is consistent with case law from all over the country, such as: *United States v. Villa-Gonzalez*, 623 F.3d 526 (8th Cir. 2010) (officer did not return defendant's identification card, without which "a reasonable person is much less likely to believe he can simply terminate a police encounter); *United States v. Tyler*, 512 F.3d 405 (7th Cir. 2008) (defendant seized where officer "took his identification from him and retained it while they ran a warrant check); *United States v. Chan-Jimenez*, 125 F.3d 1324 (9th Cir. 1997)

(driver was seized when officer "obtained and failure to return his driver's license and registration, and proceeding with an investigation).

In *United States v. Glover*, the Second Circuit held that seizure commenced when the officer failed to return identification papers and failed to tell defendant he was free to leave. 957 F.2d 1004 (2d Cir. 1992). On direct examination, Agent Milligan was clear that no one ever told Ortiz he was "free to leave":

THE COURT:	I mean, did you tell him, "You're free to go"? What did you say?
AGENT MILLIGAN:	***We never uttered the words "You're free to go."***

ROA.290 (emphasis added).

J. Conclusion

In *Berkemer v. McCarty*, the Supreme Court compared the context of the "ordinary traffic stop" to that of a more coercive investigation. The Court drew this distinction:

> [T]he typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda*. . . . However, if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*.

Berkemer, 468 U.S. at 421. From the perspective of a reasonable third party observing the situation, this stop may have initially appeared to be more-or-less "ordinary," but it quickly rose to the level of a "police dominated" seizure: five

agents versus two detainees, no means of escape, drawn firearms, handcuffs, and confiscated car keys. It is clear on these facts, the agents acted unreasonably in restraining Ortiz in a manner consistent with an arrest or custodial interrogation.

The *Miranda* rule requires the exclusion of unwarned statements resulting from custodial interrogation, in order to guard against the risk that the government will introduce a defendant's compelled statement to prove his guilt. There is no question in this case that Agents Phan and Milligan did not give Ortiz *Miranda* warnings before Agent Milligan asked Mr. Ortiz what his intentions were in purchasing the two rifles. Even Mr. Diaz, who had been separated from Ortiz at the outset of the detention was read his *Miranda* rights before giving a voluntary statement.

Because Ortiz did not receive a *Miranda* warning, but continued to answer Agent Milligan's questions, he did not waive his right to have counsel present at his interrogation. *See Edwards v. Arizona*, 451 U.S. 477, 484 (1981). For these reasons, Ortiz's statement should have been suppressed.

CONCLUSION

FED. R. CRIM. P. 11(a)(2) provides that "A defendant who prevails on appeal may then withdraw the plea." Ortiz's conviction must be reversed, and his case remanded with the evidence properly suppressed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 9,417 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 in 14-Point Times New Roman font.

/s/ Seth Kretzer
Seth H. Kretzer

Date: March 3, 2014

CERTIFICATE OF SERVICE

I certify that seven (7) copies of the Brief of Appellant were filed with the Court by U.S. Mail, and in electronic format via the ECF system, on the 3rd day of March 2014. I further certify that an electronic copy of the brief was served on all counsel of record by filing on the ECF System on the same date.

/s/ Seth Kretzer
Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that one copy of the Brief of Appellant was served on Justin Ortiz, Register Number 23785-379, on the 3rd day of March 2014, at the address below:

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