MOTION AND MEMORANDUM

TO: Paul F. Stainback, Esquire

FROM: National Legal Research Group, Inc.
Mark V. Rieber, Senior Attorney

RE: Florida/Criminal Law And Procedure/Search And Seizure/
Warrantless Search Of House—Sweep

FILE: 22-30421-252 August 18, 1999

YOUR
FILE: Dubose/Davis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 00-00429

UNITED STATES OF AMERICA,

Plaintiff,

v.

Roosevelt Diamond and
Greta Darby Dunlap,

Defendants.

MOTION TO SUPPRESS

NOW COME Defendants, Roosevelt Diamond and Greta Darby Dunlap, by and through their attorneys, and move this Court to suppress the evidence seized at their residence pursuant to the warrantless search by FBI agents. As the accompanying memorandum explains, the warrantless search was not supported by exigent circumstances or valid consent and, therefore, was illegal.

In addition, Defendant Dunlap moves this Court to suppress statements made by her during interrogation by FBI agents during the search of her residence. As the accompanying memorandum explains, the statements were made in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and, furthermore, were not voluntary.

Therefore, such statements should be suppressed.

DATED this ____ day of August 1999.

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO SUPPRESS

INTRODUCTION

Defendants Roosevelt Diamond and Greta Darby Dunlap have been indicted on federal drug charges as the result of evidence seized from Diamond's vehicle and from their residence pursuant to a warrantless search by FBI agents. As a result of an ongoing investigation, the residence occupied by both Dunlap and Diamond had been under surveillance by FBI agents for a lengthy period of time. On June 4, 1999, agents observed Diamond leave his residence at 1040 N.W. 108th Street, Miami, and drive to Grevey's Grocery Store, located at 6943 N.W. 106th Avenue, Miami. Diamond's vehicle was stopped

at the store, and a subsequent search of the vehicle located illegal drugs. Diamond was arrested at the scene and was transported back to his residence.

The FBI agents took Diamond's house key and, with guns drawn, unlocked the door to the screened-in porch of the residence. There were several agents present, along with Miami police officers. There is a dispute as to what happened at this point. Although the FBI version of events is unclear, it appears that the agents contend either that Dunlap responded to the police and opened the front door or, in response to Dunlap appearing at the front door, the agents used Diamond's key to also open the front door. In either case, once the agents were inside, they asked her if anyone else was at her residence, and she said she was alone. Nevertheless, the agents entered and made a "protective sweep" to "insure that no other individuals were present." A dog was used in the sweep. During the sweep, Dunlap was handcuffed to a chair on the porch. Following this search, Dunlap was taken inside to the dining room table and was advised that she was not under arrest and that she did not have to make any statements. Dunlap was then asked if she would consent to a search of her residence and her business (Grevey's Grocery). Dunlap consented and signed a written consent form. A subsequent search located drugs and other evidence which were seized by the agents.

According to Dunlap, the agents entered her residence as she was coming downstairs half-dressed after just getting out of the shower. She did not open the front door; rather, the agents, with guns drawn, entered on their own. The agents then searched her home using a drug-sniffing dog. Dunlap, who is 72 years old, did not understand what was happening. After the agents searched her house during the "sweep," she eventually signed a consent-to-

search form but did not do so voluntarily. Indeed, the agents told her that if she consented she would not have to go to jail.

After the agents entered the residence, they initially handcuffed Dunlap to a chair on the screened-in front porch while they conducted the protective sweep. They then took her inside to the dining room table and questioned her without giving her the *Miranda* warnings. According to the FBI, Dunlap made incriminating statements during the interrogation. Dunlap, however, denies making the statements.

ARGUMENT

I. THE INITIAL ENTRY AND THE PROTECTIVE SWEEP OF THE RESIDENCE WERE ILLEGAL.

Even under the FBI version of the events, the agents entered the residence and conducted a protective sweep without consent. This warrantless entry and search was illegal.

A. Protective Sweep Doctrine

In *Maryland v. Buie*, 494 U.S. 325 (1990), the Supreme Court recognized an exception to the traditional warrant requirement for officers making an arrest *inside* an arrestee's home, allowing them to conduct a "protective sweep" of the premises at the scene incident to the arrest to ensure officer safety. *Buie* held that a protective sweep is permitted if police have "a reasonable belief based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[s] the officer in believing that the area swept harbor[s] an individual posing a danger to the officer or others." *Id.* at 327 (internal quotations omitted). The limited intrusion is justified by the "interest of the officers in taking steps to assure themselves that the *house in which a suspect is being,*

or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." *Id.* at 333 (emphasis added). The search must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding," *id.* at 327, and may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to *complete the arrest and depart the premises*." *Id.* at 335-36 (emphasis added).

It is clear that the protective sweep doctrine under *Buie* only applies to arrests made within or just outside the residence. *See United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996) (doctrine may apply to arrest just outside the home if the standard set forth in *Buie* is otherwise met). The doctrine does not apply, however, where the arrest is made at a different location and the arrestee is brought back to the house at the direction of the police. *See Maryland v. Buie*, 494 U.S. at 335 (protective sweep may last no longer than is necessary to dispel the reasonable suspicion of danger and "in any event no longer than it takes to complete the arrest and depart the premises"). *Buie* only permits a narrow search *at the scene* of an *in-home* arrest (or possibly an arrest just outside the home) incident to the arrest in order "to dispel the reasonable suspicion of danger *at the arrest scene*." *Id.* at 334 (emphasis added); *see United States v. Arch*, 7 F.3d 1300, 1303 (7th Cir. 1993) (arrest of defendant in motel lobby, far from his second-floor room, did not permit a protective sweep of room under *Buie*). Clearly, then, the protective sweep doctrine set forth in *Buie* does not apply here to justify the initial sweep of the defendants' residence.

It is noted that, even aside from the fact that the arrest was made at a location away from the house, the standard set forth in *Buie* has not been met in any case. The house was

under surveillance, and the police had absolutely no information that anyone but Dunlap was at the residence. Lack of information cannot provide an articulable basis upon which to justify a protective search. *United States v. Colbert*. "'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place." 76 F.3d at 778. Moreover, the possibility that a 72-year-old woman may have been in the premises could not justify a protective sweep. Certainly, she posed no danger to police, and the agents had no reason to think that she did. *See United States v. Colbert* (no basis for sweep when defendant was in custody outside house and his girlfriend came running outside in a frantic and upset manner; agents knew girlfriend resided there and there was no indication that she posed a threat; and agents had no information that anyone else was inside the apartment); *United States v. Ford*, 56 F.3d 265 (D.C. Cir. 1995) (a visibly upset mother had nothing to do with determining whether some other individual posed a threat from inside the house); *United States v. Brodie*, 975 F. Supp. 851 (N.D. Tex. 1997) (protective sweep was not justified where defendant was arrested outside of his residence and officers did not articulate any specific facts which led them to believe that residence harbored individuals posing a danger to those at arrest scene).

Accordingly, the search of the residence cannot be justified under the protective sweep doctrine set forth in *Buie.*

B. Exigent Circumstances—Destruction Of Evidence

Nor can the search be justified on the basis of exigent circumstances, i.e., the fear that evidence might be destroyed. A warrantless entry of a person's home is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Tovar-Rico*, 61

F.3d 1529 (11th Cir. 1995). However, warrantless searches and seizures of evidence in residences are permitted when both probable cause and exigent circumstances are present. *United States v. Tovar-Rico.* The government has the burden of proof of showing exigent circumstances. *Id.* When the claimed exigency is the destruction of evidence, the underlying question is whether an experienced police officer would reasonably believe that those inside the house are likely to be alarmed and destroy evidence. *Id.* The test is necessarily objective, and the determination of exigent circumstances will vary from case to case, depending upon the inherent necessities of the situation at the time. *Id*.

In this case, the facts do not support a reasonable belief that evidence would be destroyed before a warrant could be obtained. Generally, exigent circumstances do not exist where the suspects are unaware of police activity. *Id.* Moreover, exigent circumstances will not justify a warrantless entry if the exigency was created by those conducting the search. *United States v. McGregor*, 31 F.3d 1067 (11th Cir. 1994), *cert. denied*, 512 U.S. 1211 (1995). For example, a warrantless search is not justifiable when police have probable cause and sufficient time to obtain a warrant but create an exigency to avoid the warrant requirement. *Id.*

In this case, FBI agents had been conducting an ongoing investigation, and they had the residence under surveillance on the day in question and for a long time previously. Neither Diamond nor Dunlap was aware of the investigation or surveillance. Diamond was arrested far away from the house and Dunlap was not, and could not have been, aware of the arrest. The agents could have easily obtained a warrant within a short time following Diamond's arrest. Instead, they chose to bring him back to the residence and confront

Dunlap. In light of these facts, it is clear that any exigent circumstances were created by the agents, and, thus, there was no justification to conduct a search without a warrant.

A similar situation was presented in *United States v. Lynch*, 934 F.2d 1226 (11th Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992). In *Lynch*, the court held that there were no exigent circumstances justifying the search of the defendant's house where the two suspects were arrested out of sight of the house and were not expected to return that night, and the persons inside the house were unaware of police surveillance. *See also United States v. Brodie* (no exigent circumstances where police could have waited for a warrant without creating any greater risks; also, officers did not have a reasonable concern that evidence was in imminent danger of destruction); *United States v. Tovar-Rico* (no exigent circumstances; while there was considerable activity by agents in and around the building prior to their entry into the apartment—including stop of vehicle outside building and arrests inside building,—the agents took efforts to conceal their presence from anyone in the apartment; moreover, agents could have secured premises pending a warrant).

As in *Lynch* and the other cases cited, no exigent circumstances existed to justify a warrantless search in this case. The house was, and had been, under surveillance. The agents had no reason to believe that Dunlap would destroy any evidence; she was unaware of the investigation or the arrest of Diamond; and the agents could have obtained a warrant while they kept the house under surveillance. Any exigencies were created by the agents. Accordingly, the warrantless entry and the search of the residence were not justified by exigent circumstances and, therefore, were illegal.

C. Taint Of Prior Illegal Entry, Search, And Seizure

Because the warrantless entry and the search of the defendants' residence were illegal, all evidence (including Dunlap's statements) obtained as a result of such illegal conduct must be suppressed. All of the evidence was tainted by this initial illegal conduct. During this illegal entry and search, Dunlap was seized by police—she was handcuffed to a chair and later has moved to the dining room. A "seizure" occurs when police restrain the liberty of a citizen by means of physical force or a show of authority. *Matheny v. Boatright*, 970 F. Supp. 1039, 1046 (S.D. Ga. 1997); *see United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostick*, 501 U.S. 409 (1991). Clearly, the police conduct in this case constituted a seizure of Dunlap. Just as clearly, this seizure was illegal since it was the result of the illegal entry into the residence by police. It follows that, under the circumstances presented, all evidence following the illegal entry, search, and seizure was the product of such illegal conduct and tainted by it, and, therefore, must be suppressed. *See Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963). Thus, the consent to search was tainted by this illegal conduct, as were the statements made by Dunlap. Both were the direct result of the illegal police entry, search, and seizure. *See United States v. Zertuche-Tobins*, 953 F. Supp. 803, 827-28 (S.D. Tex. 1996) (consent to search was tainted by prior illegal seizure; there were no intervening factors to dissipate the taint, and the consent followed closely after the seizure; therefore, consent was invalid); *Dunaway v. New York*, 442 U.S. 200 (1979) (illegal arrest tainted subsequent confession); *Brown v. Illinois* (similar). Therefore, all evidence seized subsequent to the illegal entry, search, and seizure must be suppressed.

II. DUNLAP'S CONSENT TO SEARCH WAS INVOLUNTARY.

Even assuming that Dunlap's consent to search was not invalid as being tainted by her illegal seizure and the prior illegal entry and search of the residence by police, her consent was still invalid because it was not voluntary but was coerced. The voluntariness of the consent to search must be judged in the light of the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Tovar-Rico.* In order for consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice. *United States v. Tovar-Rico.* The government has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by a mere submission to a claim of lawful authority. *Id.; see Florida v. Royer*, 460 U.S. 491 (1983); *Bumper v. North Carolina*, 391 U.S. 543 (1968). *Scheckloth v. Bustamonte* imposes upon the Government the burden of "assuring the absence of coercion." 412 U.S. at 227. Consent that is the product of police intimidation or harassment is not consent at all. *Florida v. Bostick.* Nonresistance may not be equated with consent. *United States v. Zertuche-Tobias.*

A situation similar to this case was presented in *United States v. Tovar-Rico.* In that case, agents had arrested other suspects in and around the defendant's apartment building. Following these arrests, at least five agents knocked on the defendant's apartment door, announced their identity, and requested permission to enter. The defendant opened the door, and the officers entered with guns drawn to do a protective sweep. After the sweep was completed, the agents asked the defendant for permission to again search the apartment. The agents told the defendant that she did not have to consent, but if she did not they would come

back with a search warrant. (The government had established probable cause for the search and could have obtained a warrant.) The defendant agreed to the search and signed a written consent form. The court found the consent involuntary, stating that the defendant had already observed the officers explore every room in the apartment and could not reasonably have known that she could still refuse a consent. 61 F.3d at 1536. The court "entertain[ed] no doubt that [defendant] opened the door in response to a 'show of authority' and cannot be deemed to have consented to the agents' entry or to have voluntarily consented to the search." *Id.*

Similarly, in *United States v. Maldonado Garcia*, 655 F. Supp. 1363 (D.P.R. 1987), a consent was found to be invalid where government agents, acting on a tip, told the defendant that they wanted to search his house and, if he did not consent, they would "obtain a search warrant." *Id.* at 1368. As the court explained:

> In the present case, it is hard to envision how plaintiff can be said to have freely and independently given his consent to a search. Here we have a man in a vulnerable subjective state, who is told by a police officer to open the door. He then is surrounded by government agents with drawn guns amidst a disarray of mail packages that appeared stolen and a discarded gun and bullets. These same uniformed, armored agents then tell him that they want to search his apartment and that if he does not authorize such a search they would get a search warrant (something they could not do as they had no probable cause prior to entry and whatever cause they gained at the scene was tainted by their fraudulent entry). Mr. Maldonado did not consent to the search, quite the opposite, he essentially gave in to the overwhelming, and, particular to him, disconcerting claims and manifestations of authority.

Id. The court also stated that submissions to declarations by officers that they want to search have long been viewed as coercive. *Id.* Furthermore, as the court stated, although the government does not have to prove that the defendant understood at the time of the seizure

that his or her consent could be withheld, the defendant's knowledge of a right to refuse is a factor to be taken into account. *Id.* at 1368-69.

> We cannot imply such knowledge from the fact that the government threatened the defendant with seeking a warrant if he did not consent. In the intimidating context in which that statement was made, it would be unreasonable to pretent [sic] that the defendant interpreted it as an option he could freely make. In other words, it would take quite some foresight and strength of character for this defendant to understand that he could rightly tell the armed men surrounding him, and spread out through his apartment, that they had to leave.

Id. at 1369. The court therefore concluded that a scrutiny of the totality of the circumstances "convincingly" showed that the consent gained was not voluntarily given but was "implicitly coerced" by the government. *Id.*

As in the foregoing cases, the consent to search given in this case was not voluntary. Dunlap was seized by several FBI agents and police officers with drawn guns. They had already entered her residence and searched it, using a dog, without her consent. Dunlap was told if she did not consent she would have to go to jail. Clearly, under such circumstances, Dunlap's consent was not voluntary but was coerced; it was mere acquiescence to a claim of lawful authority. Therefore, such consent was invalid and all the evidence seized pursuant to the search must be suppressed.

III. DUNLAP'S ALLEGED STATEMENTS WERE OBTAINED IN VIOLATION OF *MIRANDA* AND, MOREOVER, WERE NOT VOLUNTARILY MADE.

A. *Miranda*

It is not disputed that Dunlap was not given *Miranda* warnings before questioning and allegedly giving incriminating statements. (It is emphasized that Dunlap denies making the

statements at issue.) The facts show, however, that Dunlap was in custody at the time the statements were allegedly made and, therefore, *Miranda* warnings were required.

It is well established that the warnings set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), are required before "custodial interrogation." *See Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992). A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on freedom of movement associated with a formal arrest. *Thompson v. Keohane*, 116 S. Ct. 457 (1995). The issue is whether under the totality of the circumstances a reasonable man in the suspect's position would feel a restraint on his freedom of movement to such extent that he would not feel free to leave. *United States v. Moya*, 74 F.3d 1117 (11th Cir. 1996). The test is objective. *Id.*

Under this test, it is obvious that Dunlap was in custody when she was questioned by the agents. Diamond was under arrest in a police car outside the house. Dunlap was surrounded by several agents, with guns drawn, and was handcuffed to a chair on the porch. She was later taken to the dining room and questioned as her place was searched. It is ludicrous to contend that Dunlap would feel free to leave under these circumstances. Under similar but even less severe circumstances, the courts have found "custody" for purposes of *Miranda. See, e.g., Orozco v. Texas*, 394 U.S. 304 (1969) (defendant was in custody where he was interrupted in his bedroom by four officers and he was not free to leave); *United States v. Cruz*, 838 F. Supp. 535 (D. Utah 1993) (defendant was in custody during search of his residence where he was not free to leave, was restricted in his movements and, at one point, was handcuffed); *United States v. Colon*, 831 F. Supp. 912 (D. Mass. 1993) (defendant was subjected to custodial interrogation while being detained in apartment while

search warrant was being executed); *United States v. Alvelo-Ramos*, 945 F. Supp. 19 (D.P.R. 1996) (where defendant was handcuffed during search of his residence, he was in custody, and *Miranda* warnings were required); *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992) (defendant was in custody following car crash where, inter alia, officers had weapons drawn and one officer stated that he "grabbed her").

Therefore, the failure to advise Dunlap of the *Miranda* warnings requires suppression of her statements.

B. Voluntariness

Dunlap's alleged statements are also subject to suppression on the ground that they were not voluntary. The principles applicable to a determination of voluntariness were set forth in *Waldrop v. Jones*, 77 F.3d 1308, 1316 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 247 (1997), as follows:

> To determine whether a confession is voluntary, the court must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). The inquiry focuses on whether there has been any "police overreaching." *Colorado v. Connelly*, 479 U.S. 157, 163, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). Factors to be considered include the "[accused's] lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *Schneckloth*, 412 U.S. at 226, 93 S.Ct. at 2047 (citations omitted).

As the foregoing discussion of the other issues presented demonstrates, Dunlap's alleged statements were not made voluntarily. The overwhelming police presence, their conduct in entering and searching the house, and their treatment of Dunlap, as well as

Dunlap's age and mental condition, all amply demonstrate that her statements were not voluntary but were coerced by police. Therefore, the statements must be suppressed.

CONCLUSION

Based on the foregoing argument and authority, the evidence seized from the defendants' residence, as well as Dunlap's statements, should be suppressed.

Respectfully submitted,

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