CASE NO. 06-5223

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHEQUITA REVELS,
Appellee,
vs.
UNITED STATES OF AMERICA
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
District Court Case No. 06-CR-159-HDC
UNITED STATES DISTRICT COURT
THE HONORABLE H. DALE COOK

ANSWER BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED
THERE ARE ATTACHMENTS TO THIS BRIEF

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March 5, 2007

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The case at bar involves the Government's appeal from the suppression of evidence in a criminal case, pursuant to Fed. R. App. P.4(b). The District Court's jurisdiction was based on 18 U.S.C. Sec. 3231. The Court of Appeals' jurisdiction is based on 18 U.S.C. Sec. 3731.

ISSUES PRESENTED FOR APPEAL

The District Court did not err in granting the motion to suppress, as Ms. Revels was "in custody" and not given her Miranda warning prior to being questioned by law enforcement.

STATEMENT OF THE CASE

Nature of the case, the course of proceedings and the disposition below

Ms. Revels was indicted for possession with intent to distribute five grams or more of crack cocaine (Count 1), in violation of 21 U.S.C. Sec. 841(a)(1) and (6)(1)(B)(iii); for possession of cocaine with intent to manufacture crack cocaine (Count 2), in violation of 21 U.S.C. Sec. 841 and (b)(10(C); and for possession of a firearm in furtherance of a drug trafficking crime (Count 3), in violation of 18 U.S. C. Sec. 924(C)(1)(A)(i). Ms. Revels filed a Motion to Suppress certain statements made by her during a custodial interrogation of her by law enforcement officials,

without having been given a *Miranda* warning. At the close of a pre-trial hearing on the Motion, it was sustained by the District Court. The District Court also denied the Government's subsequent Motion for Reconsideration. The Government then filed this appeal, and the District Court stayed the trial pending a ruling on the Government's appeal.

STATEMENT OF FACTS

On August 2, 2006, at 0605 hours, law enforcement officers executed a search warrant at a residence located at 1353 N. 76th East Avenue, Tulsa, Oklahoma, which was that of the Appellee, Shequita Revels. Approximately 20 seconds after forced entry into the residence, the officers came in contact with Ms. Revels and another individual at the residence, Marco Murphy, and the two were immediately taken into custody by the officers, and the fact that Ms. Revels was "in custody" and remained so was testified to by one of the officers at the hearing[1] and is so stated in the "synopsis" section of the police report authored by Tulsa Police Officer Hickey (see photocopy of report attached hereto as Exhibit A.)

Subsequent thereto, at 0630 hours, following the search of the residence, three of the officers -- Officer Hickey, Officer Henderson, and Special Agent McFadden -- escorted Ms. Revels to the middle bedroom of the residence, closed the door to the room, and asked her if she would agree to cooperate with the

[1] See transcript of Motion Hearing held 11-17-06, testimony of Agent McFadden, Page 24, Lines 4-13, t.

investigation.[2] In response thereto, Ms. Revels made a number of testimonial statements.

Ms. Revels was not given a *Miranda* warning by the officers prior to their custodial questioning of her in the middle bedroom of the residence. She was alone in the bedroom with at least two or three officers at all times during the questioning. There was not a lot of furniture in that particular bedroom and there was no chair or bed on which Ms. Revels could sit, and she was standing the entire time that she was in the bedroom being interviewed by the officers.[3]

Ms. Revels filed a Motion to Suppress the testimonial statements that she made during the officers' custodial interrogation of her in the middle bedroom, on the basis that the officer's failed to give her a *Miranda* warning prior to questioning her, as required in the landmark Supreme Court decision of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The District Court held a hearing on the Motion to Suppress on November 17, 2006.

Two of the officers whom were in the middle bedroom and questioned Ms. Revels testified at the Motion Hearing, ATF Special Agent Brandon McFadden and Tulsa Police Officer Jeffery Henderson, both of whom gave different statements with respect to the amount of time spent interviewing Ms. Revels in the

[2] See transcript of Motion Hearing held 11-17-06, Page 28, Lines 9-11.
[3] See transcript of Motion Hearing held 11-17-06, Page 26, Line 25, and Page 27, Lines 1-22.

middle bedroom. For example, Agent McFadden testified that Ms. Revels was interviewed for "approximately five minutes".[4] But Officer Henderson testified that the period was "maybe 10 to 12 minutes" and "at least 10 minutes."[5]

In addition, at the hearing the officers acknowledged that they never gave Ms. Revels a *Miranda* warning prior to the custodial interview of her in the middle bedroom. But the officers contended that they did not believe that a *Miranda* warning was necessary, contending that they did not ask Ms. Revels any questions, although they admitted that Agent McFadden asked her if she would like to cooperate. The officers also at times contended that they did not interview Ms. Revels while they were with her in the middle bedroom.

However, the officers at other times during their testimony essentially admitted to custodial questioning or an interview of Ms. Revels.

For example, Agent McFadden was asked and answered the following:

"Q. [by Revel's counsel] How long did the questioning go on with my client.?

A. [Agent] Again, she was asked if she wanted to cooperate and we probably – she probably spoke to us for probably approximately five minutes."[6]

[4] See transcript of Motion Hearing held 11-17-06, Page 28, Lines 9-12.
[5] See transcript of Motion Hearing held 11-17-06, Page 55, Lines 5-20.

[6] See Transcript of Motion Hearing held 11-17-06, Page 28, Lines 9-12.

Agent McFadden also testified that after he asked Ms. Revels whether she wanted to cooperate, she effectively gave self-incriminating testimonial responses:

> **"Q. [by Revel's counsel] When you asked her if she wanted to cooperate she started cooperating, didn't she?**
>
> **A. [Agent] She began talking, yes, sir."**[7]

Although he contended that he did not ask Ms. Revels any questions, Officer Henderson testified that the officers had a "dialogue" with Ms. Revels after they escorted her to the middle bedroom:

> **"Q. [by Revel's counsel] And so there was a good 10 to 12 minute dialogue with Ms. Revels in there; right?**
>
> **A. [Officer] Yes."**[8]

And Officer Henderson also described the "dialogue" with Ms. Revels in the middle bedroom as a "conversation":

> **"Q. [by Revel's counsel] It would be accurate to say that you guys were engaged with a conversation with her during that 10 to 12 minute period; correct?**
>
> **A. [Officer] Yes it was a conversation."**[9]

Officer Henderson also testified that during the interview of Ms. Revels in the middle bedroom, he showed her a bag of cocaine, and that his intention was essentially to elicit an incriminating testimonial response from her:

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[7] See Transcript of Motion Hearing held 11-17-06, Page 44, Lines 22-24.
[8] See Transcript of Motion Hearing held 11-17-06, Page 55, Lines 19-21.

[9] See Transcript of Motion Hearing held 11-17-06, Page 56, Lines 13-16.

"Q. [by Revel's counsel] Well, when you left the bedroom to go get the [bag] of cocaine and brought it back in to show it to her, you were wanting to see how she would respond to that, weren't you?

A. [Officer] I guess there were intentions there. Obviously I was going to show her what we had found, too.

Q. You wanted to see how she would respond or what she might say after you showed her that, didn't you?

A. Sure.

Q. In fact, this entire 10 to 12 minute conversation you guys were trying to find out information; correct?

A. True, Yes.

Q. You were trying to gather information about a crime; correct?

A. I guess of the incident we were there, yes."[10]

Despite McFadden and Henderson's contention that they did not ask Ms. Revel's any questions while interviewing her in the middle bedroom, Officer Henderson acknowledged that when Agent McFadden asked Ms. Revels if she would like to cooperate, that a question of her was posed, and that no *Miranda* warning was given prior thereto:

"Q. [by Revel's counsel] Now, you would agree with me that Agent McFadden asked my client if she would like to cooperate, at that point that's a question right? You would agree with that?

A. [Officer] Yes.

[10] See Transcript of Motion Hearing held 11-17-06, Page 57, Lines 6-23.

Q. 'Would you like to cooperate' is a question; correct?

A. Yes.

Q. No Miranda warning was given to my client prior to that question being posed; correct?

A. Not in my presence.

Q. And according to your testimony, that particular question elicited about a -- a very long response from my client; correct?

A. Correct."[11]

At the conclusion of the officers' testimony and argument of counsel, the Honorable H. Dale Cook, United States Senior District Judge, immediately granted Ms. Revels' Motion to Suppress. Noting his prior research of precedent from the various Circuits applying *Miranda* and discussing the unique facts of the case at bar, the Court gave a thorough and well spoken explanation for his decision.

The Court stated the following:

> **"I'm not [in] big favor of the Miranda case, but it doesn't make any difference whether I am or not, that's still the law. And clearly what we've got here is was the suspect in custody, and secondly the questioning must meet the definition of interrogation. The question then comes in after the search has been completed, but is in its ending phase? Are those in the house still under the search warrant exception to restraining their freedom or do they then become in custody? Under the facts of this case it seems to the Court the incriminating evidence had been found. The officers knew. It's very unlikely, I think, that they would have ever been permitted to be released and that they were in**

[11] See Transcript of Motion Hearing held 11-17-06, Page 58 Lines 10-22.

> **custody. I agree with the government that the mere fact that the report, that the officer who made the report says in custody is not binding necessarily, but it is influencing at least as to what the officers themselves thought was going on at the time. And all and all, it would seem to the Court that after this is over the officers should first give the Miranda warning then say, do you want to cooperate. That is the safeguard that the Miranda court has given to us and that's what we have to live by. The government argues that these were voluntary statements, I think they were voluntarily [made] statements, but under Miranda they are involuntary if you have to give the Miranda statement first. They are voluntary in the sense other than the Miranda requirement, but in all of the factual situations here, as I have said, the search was over, this was an investigative inquiry being made in furtherance of what was found there and the Court is going to sustain the motions to suppress as to both defendants, and that's so ordered."**[12]

The District Judge also reflected on the *Miranda* precedent and case law that he reviewed prior to the suppression hearing, including that of the "in custody" requirement, and noted that the matter at bar was factually unique and distinct from previous Circuit decisions, especially considering that the search of the residence had been completed prior to the questioning of Ms. Revels, and therefore there was no precedent on point on which to base a decision.

The District Court stated the following:

> **"Well, this case presents a rather interesting and novel situation. Surprising to the Court, I haven't been able to find any cases to where it really fits just exactly what we've got here. I thought surely we would find some cases to where an officer had said, do you want to cooperate before he gave a Miranda warning. I can't find any. There may be some, but at least they have been elusive to the Court at this time.**

[12] See Transcript of Motion Hearing held 11-17-06, Page 64, Lines 5-25, and Page 65, Lines 1-8.

Together with another problem and that is in that most of the cases that have been cited and most of the cases we read the search is an ongoing matter, and that mixes the question of security of officers and security of the searching premises for the purpose of searching. In this case, the search had been completed."[13]

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN FINDING THAT MS. REVELS WAS IN CUSTODY FOR MIRANDA PURPOSES AND SUPPRESSING CUSTODIAL STATEMENTS

Standard of Review*:*

The Court reviews de novo the District Court's ultimate determination of whether a suspect is in custody for *Miranda* purposes, but with proper deference to the District Court's findings of historical fact and credibility determinations. See *U. S. v. Rogers*, 391 F.3d 1165, 1169 (10th Cir. 2004).

Discussion:

The record reflects that the District Court did not err in suppressing Ms. Revels' statements made during a custodial interrogation without a *Miranda* warning being given to her. And, contrary to the Government's assertion, the District Court certainly did not err in finding that Ms. Revels was "in custody" for *Miranda* purposes at the time of she made the statements during questioning by officers in the middle bedroom of the residence; the search of the residence was

[13] See Transcript of Motion Hearing held 11-17-06, Page 62, Lines 16-21 (emphasis added).

concluded, incriminating evidence (including a bag of cocaine) had been found and was shown to Ms. Revels during the interrogation. The interrogation was no different than that of typical police-precinct questioning, except in this case the officers (having completed their search of the residence) decided to start questioning the suspects just prior to driving them down to the precinct, and while they were still at the residence.

The Government is essentially contending that Ms. Revels' interrogation was not custodial solely because it took place at the residence just previously searched, and not at a police station. And the Government's assertion that the search of the residence was still ongoing at the time of the interrogation is not supported in the record, and the District Court, with all deference thereto as the finder of fact, clearly found otherwise. To find as the Government suggests would make a mockery and charade of and totally undermine *Miranda*, as law enforcement officers could (after executing a search warrant) avoid giving a *Miranda* warning to a suspect by simply interrogating the suspect at the residence or location searched instead of at the police precinct. This was obviously recognized by the District Court in reaching its decision to suppress Ms. Revels' statements.

1. Miranda

There is a plethora of Federal common law enforcing the duty of law enforcement officers to provide *Miranda* warnings prior to custodial questioning of defendants.

In *U.S. v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), state and local law enforcement officers executed a search warrant at a rural location in Jefferson County, Kansas. Two helicopters and fifteen to twenty law enforcement officers were involved in the search. Inside a metal building on the property, police found roughly 500 marijuana plants, weighing scales, containers and plastic bags with marijuana, and other paraphernalia. Inside the bedroom of the building, police found a loaded 9 mm. pistol lying on the bed and an unloaded 12-gauge shotgun with shells nearby.

While the officers were conducting the search, a car entered a dirt road leading to the property, and subsequently turned toward the metal building being searched. Once the occupants of the car observed the large gathering of police officers surrounding the shed, the car quickly stopped and reversed its direction. With weapons drawn, two of the officers stopped the car and ordered the occupants, the Defendant Perdue and his fiancée, to get out of the car and lie face down. With guns still drawn, and with Perdue lying face down on the road, one of the officers asked Perdue what he was doing on the property, and Perdue replied

that he was there to check on his stuff. The officer then asked Perdue "What Stuff?" and Perdue replied, "The marijuana that I know that you guys found in the shed." The officer further inquired whose marijuana it was, and Perdue replied that it was his and his fiancée's. A *Miranda* warning was not given to Perdue prior to his making those statements.

Perdue was indicted in the United States District Court of Kansas with possession of marijuana with intent to distribute and use of a firearm in relation to drug-trafficking offenses. At trial, Perdue challenged the admissibility of the above-statements, which was denied, and he was subsequently convicted by the jury. On appeal, the Tenth Circuit reversed Perdue's conviction, finding that the District Court erred in admitting the statements.

The Tenth Circuit stated the following:

> **"Mr. Perdue also asserts that his statements to Officer Carreno during the road stop were involuntary in violation of his due process rights and were not proceeded by the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The government counters Officer Carreno obtained the statements during a valid Fourth Amendment seizure of Mr. Perdue as authorized by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d. 889 (1968). The district court concluded that since Mr. Perdue was interrogated by Officer Careno during a valid *Terry* stop, the statements were voluntary and *Miranda* warnings were not required. We disagree."**

U.S. v. Perdue, supra, at 1461.

The Court of Appeals cited the following rule of law:

> **"*Miranda* requires that procedural safeguards be administered to a criminal suspect prior to 'custodial interrogation.' *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). Thus two requirements must be met before *Miranda* is applicable; the suspect must be in 'custody,' and the questioning must meet the legal definition of 'interrogation."**

U.S. v. Perdue, supra, at 1463.

As to the definition of "interrogation", the Tenth Circuit stated:

> **"The second requirement is that the suspect must have been subjected to 'interrogation.' The Court has explained that 'interrogation' includes 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980)."**

U.S. v. Perdue, supra, at 1464.

Applying the above rules of law cited in *Perdue* to the matter at bar, Ms. Revels was certainly in custody when she was questioned and made responsive statements, the police report clearly states that she was taken into "custody" prior to and well before her being escorted into the middle bedroom for questioning, and that fact was confirmed by the above-cited testimony of Agent McFadden at the suppression hearing, when he testified that she was in custody. And the questioning in the middle bedroom was definitely within the legal definition of an "interrogation", as the officers' questioning of Ms. Revels was well more than reasonably likely to elicit incriminating responses from her. Three officers were present and simultaneously asking questions, and the interview began with one of

the officers asking her if she would like to "cooperate". Accordingly, Ms. Revels statements during the interview in the middle bedroom had to be suppressed by the District Court, as they were custodial statements made during an interrogation.

In its Appeal Brief, the Government attempts to distinguish the factual situation in *U.S. v. Perdue* as discussed above from that of the matter at bar. Although the officers in the matter at bar did not draw their guns like the ones in *Perdue*, the circumstances surrounding the questioning of Ms. Revels' were just as coercive. She was separated from her children and boyfriend (whom was handcuffed) and forcibly escorted into a bedroom with no bed or chairs by three officers, and the door was shut behind them. She already had been taken into custody, and was alone in the bedroom with three officers whom were asking her questions, showing her a bag of cocaine found, and pressuring her to provide information, and she had to stand as there was nowhere to sit down. The factual similarities between the matter at bar and *Perdue* greatly outweigh any differences.

Another decision of import is that of *U.S. v. Orso*, 234 F.3d 436 (9th Cir. 2000), where Jody Orso approached a U.S. Postal letter carrier, Vicki Orr, and demanded that Orr produce her arrow keys, which were used to open Postal Service collection boxes and group mailboxes at apartment buildings. Orr gave Orso her keys and attempted to give Orso her mail satchel as well, but Orso refused the satchel. Orso then fled on foot. Subsequently, a Federal arrest warrant

was issued for Orso. More than two months later, Orso was arrested by municipal police officers on an unrelated charge and taken to the Redondo Beach Police Department. The officers notified the Postal Inspection Service that they were holding Orso, and two United States Postal Inspectors subsequently took her into custody and began transporting her to their office for an interview.

Orso was handcuffed (with her hands cuffed behind her back) and placed in the back seat of the vehicle for the length of the drive, which took 25-35 minutes. The Postal Inspectors questioned Orso about the crime during the drive, but did not give her a *Miranda* warning prior to questioning her. One of the Inspectors, Galetti, testified that they chose not to give a *Miranda* warning because, "we wanted to eventually speak with Miss Orso and thought that if we Mirandized her right away that she might not want to speak with us." Orso eventually made several self-incriminating statements to the Inspectors during the drive, and in one such statement she said "Well, if the letter carrier said it's me, then it must be me." *U.S. v. Orso*, at 439. And when told that an individual named "Main" was believed to have been the driver of her getaway car after the robbery, Orso said that she did not know anyone by that name; but after the Inspector subsequently described Main's appearance, Orso said "Oh, the gold-toothed boy." *U.S. v. Orso*, at 439.

Orso was indicted for robbery of a Postal letter carrier. She moved to suppress the statements that she made in the car prior to receiving the *Miranda* warning, and the District Court denied the motion. On appeal, the Government conceded that the Inspectors committed a *Miranda* violation, but argued that the statements were not self-incriminating. The Ninth Circuit disagreed with the Government's argument, and reversed Orso's conviction on the basis that her *Miranda* rights were violated.

The Ninth Circuit stated the following:

> **"Although the government concedes that the inspectors violated *Miranda*, it contends that Orso's statements were not actually incriminating. We disagree. Orso stated that if the letter carrier identified her, then 'it must be me.' Her other statements, while insufficient to constitute a confession, were certainly inculpatory as well. She states that she knew someone who had been implicated in the crime, expressed surprise at the possibility of receiving a long sentence for the crime, and opined that she could serve a shorter sentence for it. Statements are incriminating under *Miranda* as long as they 'incriminate [the defendant] in any manner,' because the privilege against self-incrimination 'does not distinguish degrees of incrimination.' *Miranda*, 384 U.S. at 476, 86 S.Ct. 1602. Therefore, we have no doubt that the statements in the car were incriminating."**

U.S. v. Orso, at 440.

Applying the Ninth Circuit's analysis to the matter at bar, Page Three of the Tulsa Police Officer's report list several statements made by Ms. Revels during the interview in the middle bedroom. A review of those listed statements reveals that most of them are undoubtedly self-incriminating.

Another Ninth Circuit decision of import is that of *U.S. v. Henley*, 984 F.2d 1040 (9th Cir. 1993). Following an armed robbery of a savings and loan, it was determined the gunman wore a cap and sunglasses, and the getaway car was a 1974 Plymouth Duster. Subsequently, police found that vehicle and arrested Henley. While Henley sat inside a police car, handcuffed, he was questioned by an FBI agent whom asked him whether he owned the automobile. Henley replied that he did. Following his conviction of armed robbery and firearm charges in the U.S. District Court of Arizona, Henley appealed, contending that the admission into evidence of his statement that he owned the car violated his *Miranda* rights. The Ninth Circuit agreed and reversed his conviction, stating that "[a]lthough the district court found that the statement was voluntary, . . .this finding does not alter our conclusion that Henley's admission of ownership should have been suppressed. *Miranda* presumes conclusively that all responses to custodial interrogation are involuntary unless preceded by the prescribed warnings." *U.S. v. Henley*, supra, at 1043.

Accordingly, in the matter at bar it is of no consequence whether or not Ms. Revels' statements during the interview were actually voluntary, as her statements are deemed involuntary since they were not preceded by a *Miranda* warning.

The Eleventh Circuit addressed the issue of failure to provide a *Miranda* warning in *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992). Jacobs was

sentenced to two concurrent life sentences for first degree murder in Florida State Court. She filed a writ of habeas corpus in the United States District Court for the Southern District of Florida, contending (among other assertions of error) that the state violated her Fifth Amendment rights by introducing post-arrest statements. The District Court denied the petition. On appeal, the Eleventh Circuit reversed, finding that the trial court's admission of Jacobs' statements were improper and prejudicial error under *Miranda*.

Jacobs had emerged from a crashed car that had attempted to run a police roadblock and that had been fired upon by law enforcement officials. All of the officers present had weapons drawn. One of the officers, Trooper Trice, testified that at that point he "grabbed her" and had placed her "in custody." Subsequently, without informing Jacobs of her *Miranda* rights, Trooper Trice asked her, "Do you like shooting troopers?" -- and Jacobs responded that "We had to." *Jacobs v. Singletary*, supra, at 1291. In her petition for habeas corpus, Jacobs contended that the trial court erred in admitting that statement into evidence.

The Eleventh Circuit agreed, and stated the following:

> **"We find that a reasonable person in Jacobs' position clearly would not have felt free to leave. Because she had not been informed of her *Miranda* rights before answering Trooper Trice, the trial court should have excluded this statement."**

Jacobs v. Singletary, supra, at 1291.

In the case at bar, Ms. Revels was in custody (as stated in the police report and testified to by the officers) and had not received a *Miranda* warning from the officers when she was interviewed/interrogated in the middle bedroom of the residence. Accordingly, her statements made during the course of the interview are not admissible under the Supreme Court decision of *Miranda v. Arizona*, supra, and the plethora of subsequent common law enforcing the requirement that officers provide a *Miranda* warning during custodial interrogations of suspects/defendants.

2. Revels in custody and objectively knew that she was not free to leave.

The record does not reflect nor support the Government's argument that Ms. Revels was not subjected to a degree of restraint that a reasonable person would associate with an arrest. After the search of the residence was completed and a plethora of incriminating evidence found (including a gun, $6,000 in cash, and drugs), Ms. Revels (aware of the seizure of the evidence) was separated from her boyfriend and children by three officers, forcibly escorted into a bedroom without a bed or a chair to sit down on. The officers closed the door behind them and began asking her questions designed to elicit incriminating answers. And one of the officers (Henderson) left the room and picked up a bag of cocaine and brought it back into the room and asked her about it, which by his own admission was designed to elicit an incriminating response. The officers confined her in the room for at least ten minutes. The atmosphere in the middle bedroom could not have

been more coercive, and it was the type of coercive atmosphere that necessitated a *Miranda* warning. The restraint on her freedom was tantamount to that of an arrest, irrespective of whether or not she had been formally placed under arrest.

This was not simply an investigative detention, the search had been completed, a plethora of incriminating evidence found, and Ms. Revels was forced by the officers to accompany them to a bedroom and the door was closed behind her. He boyfriend was still in handcuffs and in the living room with her infant son and young daughter. There was dramatic restriction on her freedom, especially when the three officers forced her into the bedroom with them and closed the door, the type of restriction on freedom mandating a *Miranda* warning prior to questioning, and a factor obviously well recognized by the District Court.

Most of the cases cited by the Government in its Appeal Brief also were cited in the Government's Response to the Motion to Suppress before the District Court. And the District Court noted (as cited above) that the key distinction between those cases and the matter at bar is that in those cases the search was still ongoing, but in the matter at bar the search of Ms. Revels' had been completed, all of the evidence had been recovered, and the next step in the process was to move toward questioning and interrogating the suspects. At the time Ms. Revels was taken into the room and questioned, she was not being detained simply for reasons of officer safety or an investigative detention, but she was being detained so that

the officers could place her under arrest, transport her to the precinct, and book her in. They simply chose to interrogate her right before they took her to the police station and onto the jail.

The Government has cited the case of *U.S. v. Erving*, 147 F.3d 1240 (10th Cir. 1998), but that case is dramatically factually dissimilar. In *Erving* the suspect gave a consensual interview at his residence, he was not arrested or taken into custody immediately before or after the interview (as the officers left the house without arresting him at that time), and he actually *was given* a *Miranda* warning prior to the interview. Accordingly, that case is void for comparison purposes.

The case of *U.S. v. Hudson*, 210 F.3d 1184 (10th Cir. 2000) is also factually dissimilar. In that case one of the officers obtained permission to perform a canine search on a truck and trailer, and informed a canine-handling officer that he obtained consent. And while they were waiting for the canine-handling officer to finish searching another vehicle before he could begin to search the subject truck and trailer, the officer started questioning the suspects, whom gave self-incriminating answers. Accordingly, not only had the search not even been completed, in *Hudson* the search had not even started.

Another factually dissimilar case cited by the Government is that of *U.S. v. Rogers*, 391 F.3d 1165 (10th Circ. 2004). The facts of that case did not involve the execution of a search warrant at a suspects residence, but was simply a situation

where police officers went to a man's (Rogers) residence to serve an *ex parte* protective order in a domestic situation, and to serve a "civil standby" while the woman (a former girlfriend of Rogers whom had recently lived with him) gathered her belongings from the residence. While the officers were there, and for safety purposes, they asked Rogers if he kept firearms, to which he responded in the affirmative. The officers did not arrest Rogers or take him into custody while they were at the residence; they simply later notified an ATF agent that Rogers had firearms. There was no coercive custodial interrogation of Rogers like there was of Ms. Revels in the case at bar.

The Tenth Circuit decision in *U.S. v. Bennett*, 329 F.3d 769 (10th Cir. 2003), another case cited by the Government, also is not factually comparable to the matter at bar. When the officers first went to the suspect's (Bennett) residence to execute a search warrant, *the officers actually gave Bennett* a *Miranda* warning. Bennett indicated that he understood those rights, and then agreed to be interviewed if they went to the police station for the interview; and after making self-incriminating statements at the police station, Bennett immediately went with those same officers (the ones whom had earlier given him a *Miranda* warning) back to the residence while they continued searching the residence, where he made subsequent self-incriminating statements. Accordingly, Bennett was given a *Miranda* warning by the police officers prior to making statements to those

officers. However, in the matter at bar Ms. Revels was not given a *Miranda* warning prior to being interviewed by the officers. *Bennett* and the matter at bar could not be more factually distinct.

In addition to the four factually dissimilar cases cited above, all of the other cases cited by Government are equally or more distinct factually and not comparable to the case at bar. And that distinction was well recognized by the District Court as cited above. As the District Judge stated, "I haven't been able to find any cases to where it really fits what we've got here."[14]

The most telling aspect of the fact that Ms. Revels was "in custody" during the interview is revealed by a review of the police report and the transcript of the two officers' testimony at the suppression hearing. Both in the report and at the hearing the officers stated that the first thing that they did was take Ms. Revels into "custody", and that is the word that they used, "custody". They never said that Ms. Revels was detained for officer safety purposes only or simply as part of an investigative detention. And while they testified that they let her out of handcuffs to tend to her infant son and young daughter, they did not testify that she was released from custody. She was in continuous custody from the time that the officers first arrived. In fact, at the suppression hearing the Government did not

[14] See Transcript of Hearing on Motion to Suppress held 11-17-06, Page 62, Lines 11-12.

argue that Ms. Revels was not in custody, but primarily argued instead that the questioning was not an interrogation, contending the officers did not ask her any questions while they were with her in the bedroom. The Government is primarily arguing something completely different on appeal than it did at the District Court suppression hearing.

To confirm the fact that Ms. Revels was in custody, and knew that she was not free to leave, is to simply review the testimony of Agent McFadden:

> **"Q. [by Revel's counsel] And you testified that she was immediately placed in custody and she was never taken out of custody the entire time at the house, was she?**
>
> **B. [Officer] No, she was never free to leave, never under the impression that she was going to be released.[15]**

Accordingly, Agent McFadden's testimony highlights the inaccuracy of the Government's statement (at pages 15 and 16 of its Appeal Brief) that Ms. Revels "was not placed under a degree of restraint associated with an arrest". The arresting officer himself has testified that "she was never free to leave", and "never under the impression that she was going to be released".

The whole "in custody" issue raised by the Government on appeal was clearly manufactured for purposes of appeal. That argument, as reflected by Agent McFadden's testimony, was not seriously argued by the Government at the District

[15] See Transcript of Hearing on Motion to Suppress held 11-17-06, Page 28, Lines 18-22.

Court level. Instead, at the District Court level the Government tried to argue that there was no questioning of Ms. Revels and therefore no interrogation. When the Justice Department's Appellate Division realized that such an argument would not prevail, on appeal the Government argues something completely different, that Ms. Revels was not "in custody" while interrogated by officers in the bedroom. A review of the officers' testimony, both of McFadden and Henderson, confirms otherwise, as Ms. Revels was certainly in custody.

CONCLUSION

Wherefore, for the reasons stated above, the District Court Order granting Ms. Revels' suppression motion must be affirmed. Ms. Revels was forced to undergo a custodial interrogation without the benefit of a *Miranda* warning.

STATEMENT REGARDING ORAL ARGUMENT

It is Appellee's belief that oral argument would not materially assist the Court in considering the appeal.

Respectfully submitted,

/s/ J. Lance Hopkins
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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,282 words.

I relied on my word processor to obtain the count and it is Miscrosoft Word, Times New Roman 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ J. Lance Hopkins
J. Lance Hopkins

CERTIFICATE OF SERVICE

I hereby certify that on March 5th, 2007, I mailed two true and correct copies of the foregoing Answer Brief to: Janet S. Reincke, Assistance U.S. Attorney, at 110 West 7th Street, Suite 300, Tulsa, Oklahoma, 741119; and, Stephen Knorr, Attorney for Marco Dewon Murphy, 4815 S. Harvard Ave, Suite 523, Tulsa, OK 74135.

/s/ J. Lance Hopkins
J. Lance Hopkins

CERTIFICATE OF DIGITAL SUBMISSIONS

I certify that all required privacy redactions have been made, and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the clerk.

I also certify that the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, Trend Micro OfficeScan NT/2000/XP/Server 2003. I further certify that according to the commercial virus-scanning program, these digital submissions are free of viruses.

/s/ J. Lance Hopkins
J. Lance Hopkins

EXHIBIT A

OFFICER NARRATIVE USE CHRONOLOGIAL/OUTLINE FORMAT

Report by: Detective S.E. Hickey,OGU/SID
Date: 080206
Case#: 2006-053752

INTRO: On 080206 at 0605 hours the Tulsa Police Department Organized Gang Unit and UDE uniform Officers executed an signed Tulsa County Search Warrant for 1353 N. 76th East Avenue. The target of his search warrant was Marco Murphy. The Judge that signed this search warrant was Judge Clifford Smith.

Prior to the execution of this search warrant Detectives conducted surveillance on 1353 N. 76th East Avenue. Surveillance was done at different dates and times over a week period. Detectives observed a Maroon Chevy Monte Carlo and blue Chevy Camaro parked at this residence. Detectives knew that these wo vehicles belonged to Murphy. Detectives also observed Murphy and his girlfriend come and go from his residence on several occasions.

SYNOPIS: The following Officers participated in the execution of this search warrant. Cpl. Nelson, Detective Henderson, Detective Khalil, Detective Hickey, AFT S/A Mcfadden, Officer Eddings (uniform) nd Officer Mallory (uniform). Officer Eddings knocked on the front door and announced "Tulsa Police earch warrant". There was no response and he made the same announcement again, still with no esponse. After approximately 20 seconds Detective Khalil then breached the front door opened using a am and Officers made entry. Once inside this residence Officers came in contact with Marco Murphy and hequita Revels coming form the southwest bedroom. They were taken into custody and Officers then ound two small children in the southwest and middle bedrooms. The children's names were E T , B/F, DOB: 99 (middle bedroom) and M M , B/M, DOB: 06 (Southwest edroom). The residence was then secured and searched.

The following items of evidence was recovered from inside this residence:

GAMEROOM:
tem#1, $6,014 dollars in U.S. Currency, found inside an opened safe. The safe was on the floor. Found y Det. Henderson and recovered by Det. Khalil.
tem#2, large clear plastic baggie with a large amount of white powder/Cocaine Hychloride (251 grams) ound in the same safe as item#1. Found by Det. Henderson and Recovered by Det. Khalil. Field-tested ositive Cocaine.
tem#13, Mens blue jeans and a white tee shirt with in loving memory Marco Oliver on it. Found by Det. Hickey in the laundry basket and recovered by Det. Khalil. It should be noted that Marco (Lamontco) Oliver was an associate of the Neighborhood Crips and killed in Tulsa.
tem#14, Auto Insurance Bill with Marco Murphy's name on it. Found right next to the safe, which ontained items #1 and 2. Found by Det. Henderson and recovered by Det. Khalil.

COMPUTER ROOM:
tem#3 &7, four clear plastic baggies each containing tan chunks/rocks (45.2 grams) hidden inside a Maxwell coffee can with a false bottom. Found and recovered by Det. Khalil. Coffee can was found lying n top of the counter by the microwave. Field-test positive Cocaine.
tem#4, two clear plastic baggies of Marijuana found lying on top of the computer table (9.92 grams). ound and recovered by Det. Khalil.
tem#8, Two empty containers with false bottoms found inside the cabinet. Found and recovered by Det. halil.
tem#9, box of empty clear plastic baggies found on top of counter. Found and recovered by Det. Khalil.
tems11 &12, working digital scales with white residue, large glass mixing bowl, one mixer with beater nd two Pyrex glass cups with white residue. All items found were in a box inside the counter drawer. ound and recovered by Det. Khalil

INCIDENT NUMBER 2006-53752 58

Item#14, five residency papers an , titles in the names of Marco M Shequita Revels and a photograph of both subjects. They list addresses of 807 N. Cheyenne and 1353 N. 76th East Avenue. The blue Chevy Camaro title and Oklahoma Tax Commission had Marco Murphy's name on them. Found inside a counter drawer and living room. Found by Det. Hickey and recovered by Det. Khalil.
Item#10, four cell phones found in different locations in the computer room. Found by Det. Hickey and recovered by Det. Khalil.

SOUTHWEST BEDROOM:
Item#5&6, chamber loaded chrome Jennings 9mm semi-automatic pistol with 11 live rounds in the magazine. Found lying on the headboard. This is the same area where Murphy and Revels came from. Found by Det. Henderson and recovered by Det. Khalil.

SHEQUITA REVELS STATEMENTS: At 630 hours Detectives Henderson, S/A Mcfadden and myself escorted Revels to the middle bedroom and asked if she would agree to cooperate with this investigation. She then volunteered the following statements:

- That she and Murphy moved into this residence around 060106. That they have a special needs child together whom has to be feed though a feeding tube and other health problems.
- That she knew Murphy was keeping drugs at the residence and that he was selling drugs.
- That Murphy got the handgun because some subjects came to their door in ski mask and tried to rob them. She further stated Murphy had the handgun for protection. Revels was very cooperative and agreed to give Detectives a written statement at UDE.
- That Shequita Revels told Officer Henderson that she knew the cocaine was in her home, but she didn't know how much. Henderson showed Revels the large bag of cocaine and Revels openly said, "Oh, my God I didn't know he had that much" I explained to Revels that her children were endanger as long as the cocaine and money were kept in her home. She agreed and said that she was already scared that they might get robbed. Revels said that there had been a possible attempt already at her house within the past few weeks. Revels told Henderson that she had observed a black male subject outside her door one evening wearing a mask. Revels said that she didn't open they didn't open the door in fear she might be robbed or her children might be harmed.

MARCO MURPHY'S STATEMENTS: At 645 hours Detectives Henderson, S/A McFadden and myself escorted Murphy to the middle bedroom and asked if he would agree to corporate with this investigation. He then volunteered the following statements:

You got me, what else can I do.
Murphy stated he would like an attorney.

At 0715 Detectives secured this residence and we transported Murphy and Revels to UDE. At UDE both subjects requested their attorneys. They both were later transported to TSCO booking (docket# 149161 & 149162).

Detective Khalil was the property recovery Officer and took custody of all evidence at the scene. At UDE Detective Henderson obtained a sample from items 2 and 3 and conducted a field test. The field test was a Cocaine reagent B and was presumptive positive Cocaine. Detectives Khalil and Henderson then turned in all property into UDE on property receipt #BB-0200.

From my training and experience it is my belief that Marco Murphy possessing cocaine HCL for the purpose of converting it to cocaine base. The items seized and the paraphernalia taken are essential tools needed to manufacture and convert cocaine hydrochloride to cocaine base.

Murphy is ex-con with two previous drug convictions. Murphy also has a weapon arrest on file. Murphy has been identified by the Tulsa County Multi-Jurisdictional Gang Task Force as a certified criminal street gang member with the 111 Neighborhood Crips. The large amount of Cocaine Hydrochloride (251 grams) and Crack Cocaine (45.2 grams) is well over the trafficking amount weight and Detectives did not find a tax stamp on any of the narcotics. Detective Hickey served Murphy and Revels a copy of this search warrant at the residence (kitchen table).

THE COURT: Mr. Hopkins.

CROSS-EXAMINATION

BY MR. HOPKINS:

Q. Agent McFadden, did you review Detective Hickey or officer Hickey's report prior to this hearing today?

A. Yes. Yes, I read it.

Q. And in the report it stated that pretty much right after you guys got there and went in the house, my client and Mr. Murphy were placed in custody; correct?

A. That's correct.

Q. And generally in custody is consistent with putting handcuffs on; correct?

A. Being detained in custody, yes.

Q. Was that -- at the time you say they were taken into custody, is that the point that they were placed in handcuffs?

A. Yes, they were detained at that point, yes.

Q. You would agree with me that nowhere in this report is it ever stated that they were taken out of custody?

A. That's correct.

Q. In fact, there's no reference in this report to them ever being taken out of handcuffs?

A. That's correct.

Q. And specifically no reference to my client ever being taken out of handcuffs?

A. That's correct.

A. Well, the decision was made that that would be an adequate place to try to interview a person because you could kind of be secluded from Mr. Murphy in that place. Other places, whether the living room or a game room or other things, you would be so close to them that if a person was cooperating, and talked about, you know, illegal activity with another person, that that person would either hear or see what that person was telling them, if that makes sense.

Q. How long did the questioning go on with my client?

A. Again, she was asked if she wanted to cooperate and we probably -- she probably spoke to us for probably approximately five minutes.

Q. Now you testified at a previous detention hearing that my client was not free to leave at any time; is that correct?

A. That's correct.

Q. And she certainly wasn't told that she was free to leave?

A. No, she was not.

Q. And you testified that she was immediately placed in custody and she was never taken out of custody the entire time at the house, was she?

A. No, she was never free to leave, never under the impression that she was going to be released.

THE COURT: I don't believe the that answered his question. What his question was did you testify to something.

Q. (By Mr. Hopkins) Did you recall testifying earlier at a

encounter these people either in their underwear or naked or whatever and they are allowed to get clothes on for obvious reasons of lawsuits or whatever, you know, they are allowed to do that, but it is not in the report.

Q. Now at the point that my client was escorted into the middle bedroom, at that point the search had been completed; correct?

A. A large amount of evidence had been recovered, but typically in a search warrant, I mean, still people are milling around looking at different things. But at that point the majority of all the evidence had been recovered at that point.

Q. In fact, a majority of -- most of the officers had stopped searching and were preparing for questioning; correct?

A. Yes. And there were still other officers in the residence besides those.

Q. Now so you go into this middle bedroom and the door was shut; correct?

A. It was open, we went in and it was shut yes, sir.

Q. So the only people in the bedroom are yourself, correct?

A. Yes.

Q. Officer Henderson?

A. Yes.

Q. And you testified that Detective Hickey was there as well?

A. Yes.

Q. Now all three of you weren't there the entire time

A. Well, the decision was made that that would be an adequate place to try to interview a person because you could kind of be secluded from Mr. Murphy in that place. Other places, whether the living room or a game room or other things, you would be so close to them that if a person was cooperating, and talked about, you know, illegal activity with another person, that that person would either hear or see what that person was telling them, if that makes sense.

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THE COURT: I don't believe the that answered his question. What his question was did you testify to something.

Q. (By Mr. Hopkins) Did you recall testifying earlier at a

MS. REINCKE: Nothing further, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HOPKINS:

Q. Officer Henderson, how long were you in the middle bedroom with my client or how long was my client in the middle bedroom?

A. Maybe 10 to 12 minutes. I'm guessing.

Q. At least 10 to 12 minutes?

A. At least 10 minutes.

Q. So and the only time you weren't in the bedroom was when you left to go get the bag of cocaine and bring it in to show it to her; right?

A. Yes, sir.

Q. And when she went to the middle bedroom that was at your or the other officer's direction; right?

A. Correct.

Q. You instructed her to go to the middle bedroom; right?

A. Yes.

Q. And so there was a good 10 to 12 minute dialogue with Ms. Revels in there; right?

A. Yes.

Q. And I mean when -- when Agent McFadden first asked her to cooperate, asked her if she would like to cooperate and she began talking, she didn't just talk continuously for 10 or 12 minutes, you guys talked some too; right?

A. Well, the decision was made that that would be an adequate place to try to interview a person because you could kind of be secluded from Mr. Murphy in that place. Other places, whether the living room or a game room or other things, you would be so close to them that if a person was cooperating, and talked about, you know, illegal activity with another person, that that person would either hear or see what that person was telling them, if that makes sense.

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THE COURT: I don't believe the that answered his question. What his question was did you testify to something.

Q. (By Mr. Hopkins) Did you recall testifying earlier at a

A. Yes, ma'am.

MS. REINCKE: Thank you. Nothing further, Your Honor.

RECROSS-EXAMINATION

BY MR. HOPKINS:

Q. Agent McFadden, did I hear you just testify that had my client just said the one syllable word "yes" when you asked her if she wanted to cooperate that you would have given her a Miranda warning?

A. Yes.

Q. But you did ask her if she wanted to cooperate and according to your earlier testimony she gave all kinds of information, continuously for about five minutes; correct?

A. That's correct.

Q. She started talking. In fact, do you recall reading Officer Hickey's reports where he specifically says my client was very cooperative?

A. Yes, she was.

Q. So when you asked her if she wanted to cooperate she pretty much effectively told you, yes, didn't she?

A. Again, she began to talk and again I did not stop her when she was speaking.

Q. When you asked her if she wanted to cooperate she started cooperating, didn't she?

A. She began talking, yes, sir.

Q. She didn't have to tell you yes, correct?

MS. REINCKE: Nothing further, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HOPKINS:

Q. Officer Henderson, how long were you in the middle bedroom with my client or how long was my client in the middle bedroom?

A. Maybe 10 to 12 minutes. I'm guessing.

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A. At least 10 minutes.

Q. So and the only time you weren't in the bedroom was when you left to go get the bag of cocaine and bring it in to show it to her; right?

A. Yes, sir.

Q. And when she went to the middle bedroom that was at your or the other officer's direction; right?

A. Correct.

Q. You instructed her to go to the middle bedroom; right?

A. Yes.

Q. And so there was a good 10 to 12 minute dialogue with Ms. Revels in there; right?

A. Yes.

Q. And I mean when -- when Agent McFadden first asked her to cooperate, asked her if she would like to cooperate and she began talking, she didn't just talk continuously for 10 or 12 minutes, you guys talked some too; right?

A. She spoke, I would call it on her own voluntarily. We shook our heads, we were obviously listening to her, what she was speaking to us, and she continued. There were no questions. If I understand what you are asking we did not --

Q. I didn't ask you if you asked any. What I asked you, sir, did you talk to her, did you make any statements to her?

A. Yeah, Officer Hickey at one point agreed with her and reiterated that it is dangerous to have that kind of activity at her house with those kids there. And we agreed -- I think at one point when she asked about -- or told us the details of the attempted robbery or of the subjects we spoke of her -- or spoke to her about that, that those things happen.

Q. It would be accurate to say that you guys were engaged in a conversation with her during that 10 to 12 minute period; correct?

A. Yes it was a conversation. There were...

Q. So your testimony to this Court today is that you and two other officers had a 10 to 12 minute conversation in the middle bedroom with my client, but outside of that initial question by Agent McFadden nobody asked her a question during that entire 10 to 12 minutes, is that your testimony?

A. That's my testimony.

Q. So you had a conversation; correct?

A. Yes.

Q. You had a dialogue; correct?

A. Yes.
Q. But neither you, nor Officer Hickey, nor Agent McFadden asked her a question during that 10 to 12 minute period?
A. Not that I recall any -- I can definitely say we didn't ask her any incriminating questions.
Q. Well, when you left the bedroom to go get the back of cocaine and brought it back in to show it to her, you were wanting to see how she would respond to that, weren't you?
A. I guess there were intentions there. Obviously I was going to show her what we had found, too.
Q. You wanted to see how she would respond or what she might say after you showed her that, didn't you?
A. Sure.
Q. In fact, this entire 10 to 12 minute conversation you guys were trying to find out information; correct?
A. The point of it was to find out if she was willing to cooperate.
Q. You were trying to find out about information, you were trying to gather information; correct?
A. True, Yes.
Q. You were trying to gather information about a crime; correct?
A. I guess of the incident we were there, yes.
Q. And any time you do that if a person cooperates with you, it's always probable that they're going to tell you about

unlawful activity of other people and/or unlawful activity by themselves; right?

MS. REINCKE: Objection, Your Honor, that calls for speculation when he asks probable.

THE COURT: I think we need to know what happened.

Q. (By Mr. Hopkins) Well, did you leave the room at any other time? Were you in there the whole time except going to get that bag?

A. I was.

Q. Now, you would agree with me that when Agent McFadden asked my client if she would like to cooperate, at that point that's a question; right? You would agree with that?

A. Yes.

Q. "Would you like to cooperate" is a question; correct?

A. Yes.

Q. No Miranda warning was given to my client prior to that question being posed; correct?

A. Not in my presence.

Q. And according to your testimony, that particular question elicited about a -- a very long response from my client; correct?

A. Correct.

Q. And according to your testimony that question elicited a very long narrative response; correct?

A. Yes.

things. I could go through the Fourth Amendment, the person's right to secure, unreasonable arrest, arrest or seizures that resemble formal arrest must be supported by probable cause, and then the Terry exceptions of what officers can do and then what they can't do, and then the Miranda warnings. I'm not a big favor of the Miranda case, but it doesn't make any difference whether I am or not, that's still the law. And clearly what we've got here is was the suspect in custody, and secondly the questioning must meet the definition of interrogation. The question then comes in after the search has been completed, but is in its ending phase? Are those in the house still under the search warrant exception to restraining their freedom or do they then become in custody? Under the facts of this case it seems to the Court the incriminating evidence had been found. The officers knew. It's very unlikely, I think, that they would have ever been permitted to be released and that they were in custody. I agree with the government that the mere fact that the report, that the officer who made the report says in custody is not binding necessarily, but it is influencing at least as to what the officers themselves thought was going on at the time. And all and all, it would seem to the Court that after this is over the officers should first give the Miranda warning then say, do you want to cooperate. That is the safeguard that the Miranda court has given to us and that's what we have to live by. The government argues that these were

voluntary statements, I think they were voluntarily statements, but under Miranda they are involuntary if you have to give the Miranda statement first. They are voluntary in the sense other than the Miranda requirement, but in all of the factual situations here, as I have said, the search was over, this was an investigative inquiry being made in furtherance of what was found there and the Court is going to sustain the motions to suppress as to both defendants, and that's so ordered.

Anything further in this case? Do we need to go ahead and pre-try it? This case is set for trial.

MS. REINCKE: Your Honor, we would ask you to hold your ruling in abeyance until I determine whether or not the United States is going to appeal.

THE COURT: Well, I'm not asking that. I'm asking whether we're going to go to trial or not.

MS. REINCKE: The government is ready to go to trial.

THE COURT: Very well. Is there any issue we've got here?

MR. HOPKINS: I discussed this with my client, Your Honor, we could be ready on the 4th.

THE COURT: When is it set for trial?

MR. HOPKINS: December 4th. Is it December 4th?

MS. REINCKE: December 4th.

THE COURT: Is there any special issues that we have that will come up at the trial.

unless preceded by the prescribed warnings. If we've got a Miranda situation and there's no warning, I think that the overwhelming --

THE COURT: I don't think there is any question that a custodial interrogation requires Miranda. I mean, I think even the government would admit that.

MR. HOPKINS: That's all I have, Your Honor. Thank you.

THE COURT: All right. Well, this case presents a rather interesting and novel situation. Surprising to the Court, I haven't been able to find any cases to where it really fits just exactly what we've got here. I thought surely we would find some cases to where an officer had said, do you want to cooperate before he gave a Miranda warning. I can't find any. There may be some, but at least they have been elusive to the Court at this time. Together with another problem and that is that in most of the cases that have been cited and most of the cases we read the search is an ongoing matter, and that mixes the question of security of officers and security of the searching premises for the purpose of searching. In this particular case the search had been completed. The drugs, the paraphernalia, the cash, the other things that are incriminating certainly are of a type that one would expect to find if there was criminal conduct going on in a place, it had already been discovered and it was known to the officers.