

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff,)	3:12-CR-134-L
)	
v.)	
)	
XXXX XXXX XXXX,)	
)	
Defendant.)	
_____)	

MOTION TO SUPPRESS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant, XXXX XXXX XXXX, hereby moves to suppress all statements she allegedly made to law enforcement officials on April 10, 2012 and, in support of this motion, sets forth the following facts and argument.

FACTUAL BACKGROUND

On April 4, 2012, FBI Agent Deborah Michaels obtained a warrant from Magistrate Judge Paul Stickney authorizing a search of 3413 Villanova Street, Dallas, Texas. The warrant authorized a search between the hours of 6:00 a.m. and 10:00 p.m. On April 10, 2012, at “approximately 6:05 a.m, nine armed FBI agents proceeded to execute that search.¹

The FBI agents banged on the door and announced their presence.² XXXX XXXX and her husband, Mark XXXX, had been asleep and ran to the door. Both XXXX and Mark were in their night clothes. XXXX had on her panties and a t-shirt and Mark had on shorts and a t-shirt. XXXX

¹The time of execution, “approximately 6:05 a.m.,” is taken from a report prepared by Agent Michaels, nevertheless, the XXXXs believe the search to have commenced earlier.

²The agents had a battering ram that they appeared prepared to use had the XXXX’s not responded quickly to the banging.

and Mark were immediately separated.

Mark was moved from the front of the house, to the back of the house to dining room table. Mark, who is an attorney, was interrogated by some of the agents. Mark was not *mirandized*. While being interrogated by two agents, Mark asked to speak with his wife but was not permitted to do so.

After he was interrogated, Mark was finally allowed to shower and dress. Mark was not told that he was free to leave either during or after the interrogation. Indeed, an agent stood guard over Mark and watched him both shower and dress. After getting dressed, Mark had to ask permission to use his mobile telephone to postpone court hearings since he did not believe he was free to leave his home to attend those hearings. After giving Mark his mobile phone, the agents listened to Mark's phone calls. Mark was able to talk to his wife for the first time after he had showered and dressed and agents finished interrogating her.

Likewise, after waking and separating Mark and XXXX, two agents proceeded to interrogate XXXX without *Miranda* warnings. The interrogation took place outside the house with XXXX still in her panties. Prior to the interrogation she was handcuffed by agents. After agents began interrogating XXXX about child pornography, she asked to speak to her attorney-husband. XXXX was told that she could see her attorney-husband only *after* agents finished "debriefing" her. Following the interrogation XXXX was told that she was being arrested.

The search allegedly concluded at approximately 9:00 a.m. according to the government agents, although Ms. XXXX submits it ended closer to 10:00 a.m.

DISCUSSION

United States v. Cavazos, 668 F.3d 190 (5th Cir. 2012)³, is a Fifth Circuit case decided just

³Attached hereto as Attachment A

last year and is exactly on point. In that case, several federal agents awakened Cavazos and his wife between 5:30 a.m. and 6:00 a.m. to execute a search warranted based on the allegation that Cavazos had been texting sexually explicit material to a minor female. *Id.* at 191-92. At various points during the search Cavazos was handcuffed and unhandcuffed, although he was permitted to change out of his night clothes. *Id.* at 192. Cavazos was isolated from his family in a bedroom for interrogation. *Id.* Cavazos was not *mirandized* but was told that the interrogation was a “non-custodial interview.” *Id.* At one point during the interrogation he was allowed to use the restroom, but an agent remained outside the door. *Id.* Cavazos was also allowed to call his brother who was his supervisor at work although agents listened to the phone call. *Id.* After Cavazos made damaging admissions and began writing a statement he was arrested and then read his *Miranda* rights. *Id.* Based upon these facts, Judge Junell of the Western District of Texas granted Cavazos’s motion to suppress the statements he made before he was given his *Miranda* warnings. *Id.* at 193.

In a unanimous opinion, the United States Court of Appeals for the Fifth Circuit upheld the suppression of Cavazos’s statements even though he was questioned in his own home and told he was not in custody. Significantly, the Fifth Circuit applied a *de novo* standard of review to Judge Junell’s legal conclusion that the facts required suppression. *Id.* at 193. Moreover, the Fifth Circuit applied a “totality of the circumstances” test to the question of whether a reasonable person in Cavazos’s circumstances would have believed he was free to terminate the questioning and leave. *Id.* at 193-95.

Here, the totality of circumstances, drawn from the record as seen in the light most favorable to Cavazos, indicates Cavazos was in custody at the time he made his incriminating statements. Just after 5:30 a.m., Cavazos was awakened from his bed, identified and handcuffed, while more than a dozen officers entered and searched his home; he was separated from his family and interrogated by two federal agents for at least an hour; he was informed he was free to use the bathroom or get a snack, but

followed and monitored when he sought to do so; and he was allowed to make a phone call, but only when holding the phone so that the agents could overhear the conversation. An interrogation under such circumstances, and those others discussed above, would lead a reasonable person to believe that he was not “at liberty to terminate the interrogation and leave,” notwithstanding the fact that the interrogation occurred in his home and he was informed the interrogation was “non-custodial.”

Id. at 194 (citations and footnotes omitted). The Fifth Circuit rejected the government’s argument that *Miranda* warnings were unnecessary because Cavazos was questioned in his own home and noted many of the same facts present in the instant case: (1) large number of officers involved; (2) entry pursuant to a warrant rather than Cavazos’s consent; (3) entry early in the morning; (4) monitoring of Cavazos’s movement in the home; and (4) handcuffing and unhandcuffing of Cavazos.

Id. at 194-95. The Fifth Circuit likewise rejected the government’s argument that telling Cavazos that the interview was “non-custodial,” as the agents claim they advised Ms. XXXX in this case, was dispositive. *Id.* at 195.

In sum, the facts of this case are indistinguishable from *Cavazos* except to the extent that Ms. XXXX was separated from her attorney-husband who could have provided her legal advice. Moreover, this Court is bound by the Fifth Circuit’s *de novo* application of the law to these type of facts from only several months ago. In sum, *Cavazos* requires that the statements Ms. XXXX made to law enforcement officials on April 10, 2012 be suppressed.

Respectfully submitted,

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Attorneys for Defendant
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CERTIFICATE OF CONFERENCE

Pursuant to the local rules of the Northern District of Texas, I, F. Clinton Broden, certify that I conferred with Camille Sparks, the Assistant United States Attorney assigned to the case and it was determined that the government is:

OPPOSED.

/s/ F. Clinton Broden
F. Clinton Broden

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on September 28, 2012, I caused the foregoing document to be served by the electronic case filing system (ECF) on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden

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XXXX XXXX XXXX,)	
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Defendant.)	
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ORDER

Defendant's Motion to Suppress is this ____ day of _____ t, 2012 GRANTED.

ORDERED all non-*mirandized* statements made by Defendant XXXX XXXX XXXX on April 10, 2012 are hereby suppressed and the government is precluded from introducing such statements at any trial in this matter.

SAM A. LINDSAY
UNITED STATES DISTRICT JUDGE