UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL CASE NO.**
	)	
Plaintiff,	)	**EP:14-CR-01825(1)-KC**
	)	
v.	)	
	)	
XXX YYY,	)	
	)	
Defendant.	)	
	)	

MOTION TO SUPPRESS DEFENDANT'S STATEMENTS AND ITEMS SEIZED AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant, XXX YYY, , hereby moves this Court to suppress all statements he made to law enforcement officials on or about September 19, 2014 and sets for the following facts and circumstances in support thereof.

I. PROCEDURAL BACKGROUND

As described below, Mr. YYY was arrested at approximately 7:40 a.m. on September 19, 2014. without a warrant. It was not until September 22, 2014, that DEA Agent Charles Flockhart filed a criminal complaint before Magistrate Judge Robert Castaneda. Nevertheless, following a probable cause hearing on the morning of Friday, September 26, 2014, Magistrate Judge Castaneda found "no probable cause" to hold Mr. YYY. *See* Transcript of September 26, 2014 Preliminary Hearing at 63.

Rather than release Mr. YYY, the government illegally detained him for three days and presented another complaint to a different Magistrate Judge the following Monday. Then, two days after filing the second criminal complaint and clearly to avoid another probable cause hearing, it obtained the instant indictment against Mr. YYY and two co-defendants.

II. FACTUAL BACKGROUND REGARDING DETENTION AND ARREST

On or about September 19, 2014, at approximately 7:00 a.m., Mr. YYY was traveling by Greyhound bus from El Paso, Texas to Montgomery, Alabama via San Antonio, Texas. The bus was scheduled to leave El Paso for San Antonio at 7:20 a.m.[1]

Government agents arrested two women, one boarding the bus and one sitting on the bus, both of whom were in possession of substances that appeared to be methamphetamine. At that point, the agents appear to have detained the bus to conduct a further investigation.

While the bus was delayed, it was learned that Mr. YYY was allegedly the only other passenger on the bus traveling to Montgomery. Then, several minutes after the bus was scheduled to have left El Paso, an agent approached Mr. YYY while he was sitting on the bus and ordered that he gather his belongings and speak to him outside the bus. The way DEA Agent Charles Flockhart described this request at the probable cause hearing in this matter is telling:

> Went back and *pulled Mr. YYY off the bus*. As a consensual encounter, we requested that he exit the bus to talk to us.

See Transcript of September 26, 2014 Preliminary Hearing at 8 (emphasis added). [2] In sum, when Mr. YYY was "pulled off" the bus, all the agents knew is that he had the same final destination as the two women they believed were carrying methamphetamine.

After pulling him off the bus, government agents requested Mr. YYY to show them his bus ticket. The bus ticket was in the name of Adrian Carrillo and was purchased with cash on the same

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[1]A copy of the bus station surveillance video will be submitted under separate cover as Attachment A hereto.

[2]It is Mr. YYY's position that he was ordered off the bus and that the encounter with the agents was *not* consensual.

date and time as the tickets purchased by the two women previously arrested. Mr. YYY allegedly denied knowing the two women and stated he was traveling to Alabama to see a family member. Agents then checked bus terminal surveillance video. The video showed Mr. YYY arriving at the Greyhound terminal in the same taxi as the two women and Mr. YYY appearing to pay for the taxi fare. Moreover, in the original complaint, Agent Flockhart swore to Magistrate Castaneda that it appeared from the bus terminal video that Mr. YYY paid for all three bus tickets. Nevertheless, Agent Flockhart would have to later admit that the video, in fact, showed that both Mr. YYY and one of the women paid for the tickets and that one of the women paid by credit card.

The agents then returned from watching the video to outside of the bus where Mr. YYY had been detained and arrested Mr. YYY. At this point, the bus was delayed approximately twenty minutes past its 7:20 a.m. departure time, however, the bus departed immediately after Mr. YYY was arrested.

After his formal arrest, Mr. YYY was transported to the Central Regional Command Center by authorities after allegedly being *mirandized*. There is a factual dispute as to whether Mr. YYY requested a lawyer after being *mirandized*.

III. THE EVER CHANGING STATEMENTS

According to his September 22, 2014 criminal complaint, Agent Flockhart alleges that, upon being questioned at the Central Regional Command Center, Mr. YYY simply admitted that he was traveling with the two women and knew they were transporting methamphetamine.

At the September 26, 2014 probable cause hearing, the alleged confession became more detailed. Agent Flockhart testified that Mr. YYY told the agents, when he was questioned at the Central Regional Command Center, that he met the two women in California and was asked to come

to El Paso to locate them. While in the hotel room rented by the two women, he allegedly "observed the girls strap on the drugs" and then they took a taxi to the Greyhound station. He also allegedly stated that he knew the women were going to Montgomery and volunteered that he was a member of the California Surenos gang. Transcript of September 26, 2014 Preliminary Hearing at 14. Significantly, the following exchange took place at the probable cause hearing:

> Q. [Mr. YYY] did not admit to any involvement with the meth, did he?
>
> A. Besides knowing it was on the person and that he was traveling with them to Montgomery, no sir.

Id. at 37. Agent Flockhart also acknowledged that Mr. YYY "never admitted being involved with the criminal conduct with [the two women.]" *Id*. at 38.

In the September 29, 2014 criminal complaint, signed by Agent Flockhart the confession became even more detailed. Agent Flockhart alleged that, when questioned at the Central Regional Command Center, Mr. YYY told him (1) he met the two women in California; (2) the women drove to El Paso separate from him; (3) "People" told him to find the woman in El Paso at a specific hotel; (4) He located the women at the hotel and followed them to their hotel room where he watched them strap on methamphetamine; (5) they then departed for the Greyhound station; (6) he paid for the taxi; (7) he paid for his bus ticket and the women paid for their bus tickets;[3] (8) he knew the women were transporting methamphetamine to Montgomery; and (9) he was to ensure that the women made it to Montgomery.

Finally, in a detention hearing held on October 16, 2014, Mr. YYY went from confessing to knowing the women were transporting methamphetamine to Alabama to being the "owner of the

[3]Curiously, however, Agent Flockhart alleged in the September 22, 2014 compliant that the bus station video showed Mr. YYY paying for all of the tickets.

methamphetamine."[4] Of course, this claim flies in the face of Agent Flockhart's testimony at the September 26, 2014 hearing that all Mr. YYY admitted was seeing the women strap on the methamphetamine and traveling with them to Montgomery and his acknowledgment that Mr. YYY did not "admit to any involvement with the meth." *See* Transcript of September 26, 2014 Preliminary Hearing at 37-38.

IV. ARGUMENT

A. Mr. YYY Was Illegally Detained When He Was "Pulled Off" the Bus, After the Bus Was Scheduled to Depart.

As noted above, at the time Mr. YYY was "pulled off" of the bus for questioning, government agents had delayed the departure of the bus by several minutes. Moreover, Mr. YYY was kept off the bus (a bus that would have otherwise departed the bus station at 7:20 a.m.) until approximately 7:40 a.m. before he was arrested. Immediately upon Mr. YYY's arrest, the bus was allowed to depart.

The factual question of whether Mr. YYY was ordered off the bus, "pulled off the bus" or requested to answer questions by the agents off the bus is ultimately irrelevant to whether he was "seized" for Fourth Amendment purposes at the time he debussed.

> As a general matter, we note that most courts which discuss these issues focus on the officer's position on the bus, and the extent to which he might have inhibited a passenger's movements. In our view, however, an officer's location has little to do with the question of consent. *The real problem, as we see it, is that the officer is delaying the progress of the bus, and interfering with the public's right to travel, a right long recognized in this country as fundamental*. *See e.g., United States v. Guest*, 383 U.S. 745, 757, 86 S.Ct. 1170, 1177, 16 L.Ed.2d 239 (1966). We also note that although the officers may view themselves as militants in a new "war on drugs," (*see, e.g. Bostick*, 554 So.2d at 1159, (McDonald, J., dissenting)), the Fourth

[4]The testimony at this hearing was given by the government's "co-case agent" reading verbatim from a report prepared by Agent Flockhart.

> Amendment continues to limit their conduct. Any suppression rule, of course, excludes probative evidence which helps courts-and juries-determine the truth. Courts, on the other hand, by nature prefer to establish the truth. Although we understand the reluctance with which they relinquish this familiar function, we cannot permit that same reluctance to effectuate the gradual erosion of the Fourth Amendment.

United States v. Fields, 909 F.2d 470, 474 (11th Cir. 1990 (emphasis added)

This important distinction was noted by the United States Court of Appeals for the Fifth Circuit in *United States v. Ellis,* 330 F.3d 677 (5th 2003) where it reversed a denial of a suppression hearing following a bus search. In so doing it noted that, if the government agents delay the departure of the bus for purposes of drug interdiction, those agents must have reasonable suspicion that the passenger is committing a crime even if the departure of the bus is only subject to a trivial delay. *Id*. at 681.

United States v. Barrett, 976 F.Supp. 1105 (N.D. Ohio 1997) is also instructive. There a police officer briefly delayed a bus in order to engage in a consensual encounter with Barrett who was a passenger on the bus and who the officer believed might have been involved in drug trafficking. *Id*. at 1106-07. The Court found that, during the consensual encounter, Barrett consented to a search of his luggage where the officer located heroin. *Id*. at 1107-08. Even though the district judge found that Barrett consented to the search, he concluded that he must address the fact that the bus was delayed in order to conduct this consensual encounter.

> In this case, the bus driver was ordered to not depart until the officers had spoken with defendant. Even though the delay, according to Sgt. Ellenwood, only lasted two minutes (Tr. 14), it is enough to constitute a seizure for the purposes of the Fourth Amendment. Brevity of the stop is not determinative. The Supreme Court has held that a stop of an automobile by police officers, even if only for a brief period of time constitutes a seizure within the meaning of the Fourth Amendment. *Whren v. United States,* 517 U.S. 806, ????, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996); *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 1324 (1983) (an individual "may not be detained even momentarily without reasonable, objective grounds for doing so");

> *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979) ("stopping an automobile and detaining its occupants constitutes a 'seizure' ... even though the purpose of the stop is limited and the resulting detention quite brief"); *United States v. Torres*, 65 F.3d 1241, 1245 (4th Cir.1995). When Det. Greenwood told the driver that he could not yet depart, defendant was seized for the purposes of the Fourth Amendment.

Id. at 1109 (footnote omitted). Consequently, the Court granted Barrett's motion to exclude fruits of the illegal detention. *Id*. at 1110.

Mr. YYY submits that the following fact are not in dispute in this case:

- At the time he was "pulled off" the bus, the agents knew only that two women bound for Montgomery, Alabama were in possession of a substance that might have been methamphetamine and that Mr. YYY was the only other passenger on the bus allegedly bound for Montgomery.

- The bus had been detained past its leaving time at the time Mr. YYY was "pulled off" the bus.

- The bus departed at approximately 7:40 a.m.- immediately after Mr. YYY was placed under arrest- which was several minutes after Mr. YYY was removed from the bus.

In short, whether or not the interaction with Mr. YYY was consensual (to which there is a factual dispute), it is clear under the law that Mr. YYY was detained at the time he debussed. Moreover, there is no credible argument that the information that the agents possessed at the time Mr. YYY debussed rose to the level of "reasonable suspicion" that he had committed a crime. Consequently, the fruit of the illegal detention (*i.e.* all statements he made from the time he was approached on the bus and all evidence seized from Mr. YYY (e.g. his bus ticket and cell phone)) must be suppressed.

B. At the Time Mr. YYY Was Arrested, There Was Not Probable Cause to Arrest Him

At the time Mr. YYY was arrested, government agents allegedly knew that, in addition to traveling to the same location as the two women previously arrested, Mr. YYY had arrived in the same taxi as the women, he appeared to pay for the taxi, and he and the two women approached the

ticket counter at the same time. Nevertheless, the agents had also searched Mr. YYY and his bags prior to arresting him and no drugs nor other suspicious items were located. Mr. YYY submits that, on these facts, there was not probable cause sufficient to formally arrest him even if there had been reasonable suspicion to detain him in the first place. *But see* IV(A) *supra*.

It is first worth noting that, on these facts *plus* the statements that Mr. YYY allegedly made following his arrest, Magistrate Judge Castaneda previously determined that there was *not* probable cause for the government to have initiated criminal proceedings against Mr. YYY. Therefore it would appear that, at least in Magistrate Judge Castaneda's view, if there was no "probable cause" when the facts leading up to the Mr. YYY's arrest, as well as, Mr. YYY's alleged post-statements were examined, there could hardly be probable cause when the facts leading up to the arrest are simply considered on their own.

It is axiomatic, of course, that a person's "mere propinquity to others independently suspected of criminal activity" does not produce probable cause to search or arrest that person. *Ybarra v. Illinois*, 444 U.S. 85, 90 (1979). *See also*, *Sibron v. New York*, 392 U.S. 40, 62-63 (1968)*; United States v. Di Re*, 332 U.S. 581, 593-94 (1948).

On point is the Tenth Circuit case of *United States v. Hansen*, 652 F.2d 1374 (10th Cir, 1981). That court first noted that "association with known or suspected criminals is not enough in itself to establish probable cause." *Id*. at 1388. It then discussed the arrest of Defendant Bryant which took place under similar circumstances to the instant case.

> [W]e do not believe that the agents had probable cause to arrest Bryant at that time. We have determined that the information known to the agents at that time warranted a reasonable belief that Hansen and Means were involved in illicit drug activities, but none of this information directly implicated Bryant. In fact, the knowledge that nothing suspicious was observed in his room tended to negate probable cause as to Bryant. The only information tending to implicate Bryant was the fact that he was

> traveling with suspected cocaine dealers. *Such information may give rise to a suspicion that Bryant was also involved in the drug activity, but it does not amount to probable cause.*

Id. (emphasis added). Similarly, here, while it is true that it was established that Mr. YYY was traveling with the two women by the time he was arrested, searches of his bags and person produced nothing suspicious. So, while the agents might have had a "reasonable suspicion" that Mr. YYY was involved in the women's suspected drug activity once it was learned that they arrived at the Greyhound station together, they did not have "probable cause" to arrest Mr. YYY.

Also relevant is the Fifth Circuits holding and discussion in *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008). There, government agents suspected Rivera of being a drug trafficker. *Id*. at 570. They then witnessed what appeared to be a drug transaction between Rivera, Pompa, and Zavala. *Id*.[5] The agents stopped the car containing Pompa and Zavala but found no drugs in the car. *Id*. Still, Zavala and Pompa gave conflicting stories about the owner of the car and the purpose of their trip and both denied the existence of any cardboard box that the agents themselves saw them take from Rivera. *Id*. at 571. Moreover, after stopping the car, one of the agents realized that he recognized Pompa from an earlier undercover drug operation. *Id*. Based on these facts, the agents proceeded to search Zavala's cell phone. *Id*. at 570. The government argued that DEA agents had probable cause to arrest Zavala at the time they searched his cell phone so that such search was legal. *Id*. at 574. The Fifth Circuit rejected this argument: *Id*. at 575 ("At the time Moreman searched

[5]"Shortly after Rivera parked in the driveway of the Tall Timbers residence, Zavala and Pompa arrived in a Ford Taurus. At that time, the DEA agents did not recognize Pompa or Zavala from any previous investigation. The Taurus and the pickup parked next to each other and faced the same direction. Zavala was driving the Taurus, and Pompa was sitting in the passenger seat. The agents observed Pompa remove some unidentified items from the Taurus, place them into a cardboard box, and put the box into Rivera's pickup." *Zavala*, 541 F.3d at 570.

Zavala's cell phone, the agents had a reasonable suspicion of drug trafficking activity, but they did not have probable cause to arrest Zavala and charge him with a crime.").

> The district court correctly determined that the agents did not have probable cause to arrest Zavala at the time that Moreman searched Zavala's cell phone. The evidence obtained from Luna caused the DEA to put Rivera under surveillance; Zavala did not become a focus of the investigation until the agents fortuitously saw him participate in a suspicious transaction with Rivera and Pompa at the Tall Timbers residence.....After the stop, Moreman recognized Pompa from a previous DEA operation, but that operation had not resulted in a seizure of drugs or the arrest of Pompa. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."). Although Zavala and Pompa gave conflicting answers to several interview questions, this could not "serve as the catalyst to convert mere reasonable suspicion to probable cause." *Cf. Holloway*, 962 F.2d at 461.

Id. at 575.

United States v. Duckett, 550 F.2d 1027 (5th Cir 1977) is likewise relevant. There, Charles Gray, Barbara Gaston and Brad Colebrook entered Bahamas Airport with luggage that was ultimately determined to contain heroin. *Id*. at 1029. Duckett was at the front door of the Bahamas Airport with Colebrook and two other persons, and shortly thereafter was standing next to Colebrook when a porter was given $20 to take the red suitcase containing the cocaine. *Id*. Duckett then proceeded to a customs line different from the one to which Gray and Gaston had gone. *Id*. While waiting in line, he went over to Gray and Gaston and asked them for a key. *Id.* He then returned to his line to be inspected. *Id.* When asked to produce proof of American citizenship, Duckett presented a birth certificate in the name of Feton Sutton; however there was a passport in his luggage which was in Duckett's own name. *Id*. The authorities then examined the contents of the suitcase which Duckett was carrying and discovered marijuana traces. *Id*. Nevertheless, Duckett was permitted to depart. *Id*. at 1029-30. As he was leaving, he requested assurances that he would not

be searched again upon landing in Miami. *Id.* at 1030. Although the question presented to the Fifth Circuit involved the sufficiency of the evidence to convict Duckett rather than the question of probable cause, its discussion is instructive:

> The fact that Duckett was using an alias is suspicious, but it is, without more, equally consistent with a variety of explanations. The subsequent discovery of marijuana in his suitcase suggests one such alternative explanation. Of course the possession of marijuana traces does not inculpate Duckett in the heroin smuggling activities of Gray, Gaston and Colebrook. Similarly, Duckett's request that he be given assurances he would not be searched in Miami may have been due either to a concern that the authorities there would have found marijuana traces a sufficient basis for arrest, or to a desire on his part to avoid the undoubtedly unpleasant experience of a full customs strip search for the second time that day. The fact that he was not seen arriving in Miami is as consistent with the theory that Duckett wished to avoid another strip search as it is with any participation in the conspiracy. Finally, the testimony that he had been in Gray's home when heroin was present can only be considered as showing a longstanding acquaintanceship with Gray, since there was no testimony that Duckett had seen or been aware of the heroin at the time.

Id. at 1030.

Finally, there is Judge Royal Ferguson's decision in *United States v. Chacon*, 2003 WL 22231298 (W.D. Tex. Sept 19, 2003), *aff'd*, 88 Fed. Appx. 25 (5th Cir.2004) from when he sat in this district. That case also involved drugs located after agents boarded a bus. In that case, the defendant was traveling with a juvenile, drugs were found in the juvenile's luggage and the defendant gave "vague and suspicious answers" when questioned by an agent; however no drugs were found in the defendant's own luggage. *Id*. at *1-2. Relying upon the Supreme Court's decision in *Di Re*, Judge Ferguson held that there was no probable cause to arrest the defendant on these facts.

The facts of the instant case bear a close resemblance to the cases cited above. Indeed, like all of the above cases, Mr. YYY was traveling with or interacting with others who were justifiably suspected of drug activity. Like*, Zavala* and *Chacon*, the government alleges that Mr. YYY gave answers that agents either knew were false or were conflicting or "vague and suspicious." Like*,*

Duckett, Mr. YYY's ticket allegedly did not match his identification- identification which Mr. YYY apparently freely gave the agents. Nevertheless, also like the above cases, no drugs or evidence of criminal activity were found on Mr. YYY or in his luggage after he was detained and searched. In sum, as noted in these other cases with respect to the particular defendants involved in those cases, these facts may have constituted "reasonable suspicion" to detain Mr. YYY once agents reviewed the video showing his arrival with the two women, but they do *not* rise to the higher level of "probable cause" to arrest him. Consequently, even assuming that Mr. YYY was not illegally detained when he was "pulled off the bus" as discussed in the previous section, he was illegally arrested prior to being transported to the Central Regional Command Center to be interrogated. As such, any fruits following that illegal arrest (*i.e.* the statements he allegedly gave when he was interrogated) must be suppressed.

C Agents Questioned Mr. YYY at the Central Regional Command Center Despite His Request for a Lawyer

Agent Flockhart has alleged that Mr. YYY made voluntary statements to him while Mr. YYY was questioned at the Central Regional Command Center and after Mr. YYY was *mirandized*. It is not yet clear whether this questioning was audio recorded. Nevertheless, Mr. YYY submits that, in fact, he requested an attorney but the questioning continued. If that is the case, it is axiomatic that, even if Mr. YYY had been legally detained and legally arrested, all statements he made while at the Central Regional Command Center must be suppressed. *See, e.g.,. Escobedo v. Illinois*, 378 U.S. 478 (1964).

Respectfully submitted,

/s/ F. Clinton Broden

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on October 21, 2014, I caused a copy of the above document to be served via electronic filing on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden