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8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF ARIZONA

10 United States of America,  
11 Plaintiff,  
12 v.  
13 Daniel Thomas,  
14 Defendant.

CR-09-0658-TUC-DCB (CRP)

**GOVERNMENT'S RESPONSE  
TO DEFENDANT'S MOTION  
TO SUPPRESS STATEMENTS**

15 Plaintiff, United States of America, by its attorneys, Dennis K. Burke, United States  
16 Attorney, and Anca I. Pop, Assistant United States Attorney, respectfully submits this  
17 response to the defendant's Motion to Suppress Statements. As explained in the attached  
18 Memorandum of Points and Authorities, the defendant's statements were not obtained in  
19 violation of the Fifth Amendment or *Miranda*.<sup>1/</sup> Therefore, the statements should not be  
20 suppressed. The Motion to Suppress is currently scheduled for hearing before the  
21 Honorable Magistrate Judge Charles R. Pyle on Tuesday, November 3, 2009. The trial is  
22 currently scheduled to begin on January 12, 2010, before the Honorable District Judge  
23 David C. Bury.

24 DENNIS K. BURKE  
United States Attorney  
District of Arizona

25  
26 *s/Anca I. Pop*

27 Anca I. Pop  
Assistant U.S. Attorney  
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<sup>1/</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966)

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. ANTICIPATED FACTS:**

On March 27, 2009, at approximately 8:49 p.m., Tohono O’odham Nation K-9 Police Officer Leonard Henry was working traffic control on Highway 86, at milepost 120, in the Schuk Toak District on the Tohono O’odham Nation. Officer Henry stopped the vehicle driven by co-defendant Armando Padilla because he had reasonable suspicion that several traffic violations were committed. The defendant, Daniel Thomas, was a passenger in the front seat of the vehicle.

Subsequent to the stop, a total of 243 pounds of marijuana were discovered in the vehicle. For details with regard to the stop and the events that led to the discovery of the marijuana please refer to The Government’s Response to Motion to Suppress Evidence filed in this case.

Officer Henry handcuffed Padilla and Thomas. No questions were asked of Thomas throughout the encounter. At approximately 9:28 p.m., Officers Ray Elkdreamer and George Traviola III arrived to assist Officer Henry. Padilla was placed in Officer Traviola’s patrol car. Officer Henry’s K-9 partner, “Robbie,” alerted for illegal drugs on the large square object in the backseat and also near the trunk, in the area just above the license plate. Inside the trunk, the officers discovered nine other bales of marijuana packaged the same way as the bale found inside the vehicle. The total weight of the marijuana found in the vehicle was 243 lbs.

Padilla and Thomas were placed under arrest but they were not questioned by the TOPD officers and they did not make any statements. At approximately 9:30 p.m., Officer Elkdreamer drove the vehicle with the illegal drugs and with Thomas detained in the front passenger seat to the U.S. Customs Office in Sells, AZ. Officer Henry escorted them. Upon

1 arrival at the U.S. Customs Office, at approximately 9:41 p.m., the defendants and the illegal  
2 drugs were turned over to Immigration and Customs Enforcement (ICE) Special Agent  
3 Leander Mase who was the duty agent that day.

4 At approximately 12:49 a.m., on March 28, 2009, Agent Mase advised Padilla of his  
5 *Miranda* rights. He indicated that he understood his rights and signed a waiver. Padilla stated  
6 he met Thomas through his girlfriend who said Thomas lost some cars for doing something.  
7 Padilla stated that he had seen Thomas about one week before at the Bashas' store in Sells  
8 and gave Thomas a ride home. Since that time, Padilla stated that he has given Thomas a ride  
9 about three times around the Sells area. Padilla stated that on March 27, 2009, in the  
10 afternoon, he received a call from Thomas. Thomas asked him to come to Sells to move  
11 something for him. When he arrived in Sells, Padilla called Thomas from a Shell Service  
12 Station and Thomas instructed him to drive to his house. At Thomas's house, Thomas told  
13 Padilla that he had some stuff in his house that needed to be moved to San Pedro and left by  
14 the road. Padilla told Thomas that he was only going to take it to San Pedro and that was it.  
15 Thomas agreed; he then started bringing gunnysacks tied with rope from his house and  
16 loading them into the trunk of Padilla's car. Padilla did not help Thomas load the marijuana  
17 in the car but knew that it was marijuana because he could smell it. After Daniel finished  
18 loading the car, they left heading towards State Route 86. Padilla passed a police vehicle; he  
19 saw it turn around and catch up to them. Padilla told Thomas that the cops were behind and  
20 asked him what to do. Thomas told Padilla that he should pull over. After they pulled over  
21 they were arrested.

22 At approximately 2:26 a.m., on March 28, 2009, Agent Mase advised Thomas of his  
23 *Miranda* rights. He indicated that he understood his rights and signed a waiver. Thomas gave  
24 a statement. Officer Henry was also present. Thomas stated that he was a high school  
25 graduate and was about four or five credits short of a Bachelor's of Arts Degree. Thomas  
26 stated that the night before some Mexicans came to his house with stuff. Thomas stated that  
27 his companion, Lou, talked to them and they kept it on the hill. Thomas claimed that Lou  
28

1 called Padilla. Because Agent Mase believed that Thomas was not honest and was making  
2 untruthful statements, he terminated the interview at about 2:45 a.m.

3 At approximately 4:00 a.m., Padilla and Thomas were taken to the Tohono O’odham  
4 Police Department (TOPD). They were temporarily quartered there until they could be  
5 booked into the Federal Correctional Institution (FCI) in Tucson, AZ, which normally  
6 happens around 2:00 p.m. Thomas stated that at around 7:00 a.m., he was given some  
7 food—yogurt, milk and juice. At approximately 9:00 a.m., TOPD Sergeant David Cray  
8 transported Padilla and Thomas from the TOPD to the ASAC Sells Office where they were  
9 going to stay until they could be booked into the FCI in Tucson, AZ.

10 At approximately 11:00 a.m., at the duty Assistant United State Attorney’s  
11 recommendation, Agent Mase re-interviewed Thomas. Agent Mase asked Thomas if he still  
12 understood his rights and Thomas stated that he did. Agent Mase asked Thomas if he was  
13 still willing to answer questions and Thomas said that he was. Agent Mase asked Thomas if  
14 he was willing to provide a written statement, and Thomas agreed. Thomas wrote that on  
15 Thursday, March 26, 2009, he returned home just before sunset and was informed by Lou  
16 that five Mexicans had stopped by and told him that they needed a ride with five packs of  
17 marijuana. Lou then talked to Thomas about what he had to do. Later that evening, Padilla  
18 called and Lou talked to him on the phone. However, Thomas claimed that he did not know  
19 what the conversation was about. The next day, March 27, 2009, Thomas went home at 5:00  
20 p.m., and at around 6:00 p.m., Padilla called and told Thomas that he was coming over to  
21 the house. When Padilla got there, at around 8:00 p.m., both Thomas and Lou went outside  
22 to say “hello.” Thomas claimed that he then went inside the house and stayed there while the  
23 Mexicans loaded the marijuana in the vehicle. At around 9:00 p.m, Lou asked Thomas to go  
24 with Padilla in the car and take it to a dirt road by San Pedro. Thomas stated that he made a  
25 “dumb judgment” by getting into the car, and that 30 minutes after they started driving, they  
26 got stopped by Officer Henry.

27 Throughout his two interviews, Thomas did not ask for a lawyer at any time, and he  
28 never expressed an unwillingness to answer questions or a desire to terminate the interview.

1 The first interview was not terminated at Thomas's request; rather, Agent Mase terminated  
2 it because he believed that Thomas was dishonest. The agent was calm and cordial to  
3 Thomas during the interview. He was not threatening and did not make any promises or  
4 threats. They were simply run-of-the-mill interviews. Thomas did not display at any time any  
5 attention or concentration deficits. He was alert, clear, coherent and cooperative, and was  
6 conducting himself consistent with his age and education. Thomas never indicated that he  
7 suffered from headaches or nosebleeds during his interviews or detention, and did not show  
8 any signs of unusual stress. Moreover, Agent Mase will testify that Thomas did not show any  
9 signs of cognitive impairment. To the contrary, Thomas indicated that he understood his  
10 rights and ultimately gave a written, very well articulated, statement.

11 Moreover, none of the TOPD Correction Officers who came in contact with Thomas that  
12 night noticed any bleeding, excessive stress or any other physical or mental impairment, and  
13 Thomas did not make any complaints about headaches or nose bleeding. In fact, the Inmate  
14 Medical Report completed that night specifically states that Thomas was not disoriented,  
15 confused or unconscious, that he did not complain of pain, that he did not have visible trauma  
16 or bleeding, that there were no visible signs of alcohol or drug influence or withdrawal, and  
17 that when he was asked if he had a disease or needed medical care, Thomas answered, "No."

18 At approximately 11:55 p.m., Agent Mase interviewed Padilla again. Agent Mase asked  
19 Padilla if he still understood his rights and he stated that he did. Agent Mase asked him if he  
20 was willing to answer questions and Padilla stated that he was. The agent asked him whether  
21 it was he or Thomas who called first and Padilla stated that Thomas called him. When Agent  
22 Mase told him that Thomas claimed that Padilla initiated the call first, Padilla said that was  
23 incorrect. Padilla stated that he stood by the car at Thomas's house and saw Thomas bring  
24 out the burlap packs from the house. Padilla then told Agent Mase that while at the TOPD,  
25 he and Thomas were housed in the same cell. While there, Thomas asked Padilla if he  
26 thought that Lou would be able to cover for him, and Padilla responded that he did not know.  
27 At approximately 2:30 p.m., Sergeant Cray and TOPD Criminal Investigator Manny  
28 Gonzalez transported Padilla and Thomas to the FCI in Tucson, AZ.

1           On September 18, 2009 the defendant filed a Motion to Suppress Statements, arguing  
2 that Thomas did not knowingly and intelligently waive his rights and that his confession was  
3 involuntary. Therefore, the defendant argues that the statements he made subsequent to his  
4 arrest should be suppressed. The government disagrees and submits the following response.  
5

6           **II. LAW AND ARGUMENT:**

7           For a statement made during custodial interrogation to be admissible, the defendant's  
8 "waiver of *Miranda* rights must be voluntary, knowing, and intelligent." *United States v.*  
9 *Garibay*, 143 F.3d 534, 536 (9th Cir.1998). A waiver is valid if the "totality of the  
10 circumstances surrounding the interrogation" shows an uncoerced choice and the proper  
11 level of comprehension. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).  
12

13           **A. The defendant knowingly and intelligently waived his *Miranda* rights because**  
14 **the totality of the circumstances indicate that he had sufficient mental capacity,**  
15 **comprehension skills, and knowledge**

16           A waiver is made knowingly and intelligently if it is made with "a full awareness of  
17 both the nature of the right being abandoned and the consequences of the decision to  
18 abandon it." *Burbine*, 475 U.S. at 421. In determining whether a defendant knowingly  
19 and intelligently waived his *Miranda* rights, the courts consider (1) the defendant's  
20 mental capacity;(2) the defendant's verbal comprehension skills; (3) whether the  
21 defendant encountered any language difficulties during custodial interrogation; (4)  
22 whether the defendant signed a written waiver; (5) whether the defendant was advised of  
23 his rights in his native tongue; (6) whether the defendant appeared to understand his  
24 rights; (7) whether a defendant had the assistance of a translator; (8) whether the  
25 defendant's rights were individually and repeatedly explained to him; and (9) whether the  
26 defendant had prior experience with the criminal justice system. *Garibay*, 143 F. 3d at  
27 537- 538.

28           Thomas argues that because he has difficulty concentrating and remaining focused  
on the task at hand, he was unable to knowingly and intelligently waive his rights. He

1 claims that in 1995 he had a head injury, and after that he has had difficulties  
2 concentrating and remaining focused, paying attention during conversations,  
3 remembering times and places of meetings, and resisting what others want, he has had  
4 headaches, and he has made some poor decisions. In support of this claim, Thomas  
5 submitted a neuropsychological evaluation prepared by James Allender. The evaluation  
6 indicates that Thomas has some deficits in attention and concentration.

7  
8 However, nothing in Allender’s report supports Thomas’s claim that his mental  
9 capacity or comprehension skills caused him to sign a waiver that was not knowingly and  
10 intelligently made. The evaluation states that, while he demonstrated some mild word  
11 finding difficulty in conversation and lost his train of thought occasionally, Thomas “was  
12 found to be alert, cooperative, and oriented for person, place, and time. His fund of  
13 personal and general information was consistent with his age and education (some college  
14 course work). . . His speech was clear and coherent without evidence of loose  
15 associations or tangential thinking.” Allender determined that Thomas’ IQ of 101, which  
16 is a measure of intellectual abilities, was average, that his Verbal Comprehension Index  
17 of 94, which is a measure of verbal information and reasoning, was average, that his  
18 Perceptual Organization Index of 121, which is a measure of visuo-spatial problem  
19 solving, was in the superior range, that his Processing Speed Index of 122, which is a  
20 measure of psychomotor speed, was in the superior range, and that his Working Memory  
21 Index of 78, which is a measure of attention and concentration, was borderline. The  
22 report notes that Thomas scored average or above on tasks of conceptual reasoning, visual  
23 scanning, language generation, and response inhibition. The report concludes that  
24 Thomas’ abilities were “in the average range or above except on tasks of attention and  
25 concentration and mental arithmetic.” The report further concludes that while the “results  
26 of deficits in attention and concentration with relatively intact abilities in most areas  
27 evaluated *could be*<sup>2/</sup> consistent with a history of right frontal lobe injury,” they were not

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28 <sup>2/</sup> The government notes that Allender does not claim that the results *are* consistent with  
a head injury, but rather, that they *could be* a consistent with such injury.

1 independent diagnostic of such damage.

2 Nothing in this report indicates that Thomas' mental capacity or comprehension skills  
3 prevented him from knowingly and intelligently waive his *Miranda* rights. Allender does  
4 not claim that Thomas did not knowingly and intelligently waive his rights. To the  
5 contrary, he emphasizes that the defendant is an intelligent 36-years-old adult, who has  
6 average or above average memory, reasoning and communication abilities. This  
7 conclusion is further supported by the statements made by Thomas himself. Thomas  
8 admitted that while it is harder for him to concentrate, he can ignore distraction and focus  
9 on a task. He also admitted that he can divide his attention and multi-task adequately.  
10 Thomas further admitted that he can comprehend language adequately and can organize  
11 things properly. These statements indicate that he can concentrate and refocus whenever  
12 he wants to do so and that he has no problem understanding things. Moreover, he stated  
13 that he worked for the Nation and was moved up to a supervisory position. Being  
14 promoted to a supervisor position clearly indicates that Thomas has no problem paying  
15 attention, concentrating, and understanding at an average or above-average level.  
16 Although he mentioned to Allender that he has had headaches and nosebleeds after the  
17 head injury, and in order to avoid stress, he does not want to argue and gets easily  
18 persuaded to do things, the relevance of such statements is minimal. Just because he  
19 wants to avoid stress and headaches, Thomas cannot reasonably claim that he waived his  
20 rights unintelligently and unknowingly. Rather, Thomas' skills indicate that he had the  
21 mental capacity and comprehension to waive his rights knowingly and intelligently,  
22 which is exactly what he did in this case.

23 Approximately two months after the first evaluation, the defense attorney asked  
24 Allender to submit an addendum to his report addressing the impact of Thomas's 1995  
25 head injury on his ability to make decisions about his rights after his arrest. In order to do  
26 this evaluation, Allender met with Thomas for one hour and asked him to describe how he  
27 was feeling throughout the night of his arrest. Thomas told Allender that he had  
28 headaches, nosebleeds and wanted to avoid stress that night. Allender notes that Thomas's

1 cousin, Blaine Joaquin, told him that Thomas gets distracted more easily and  
2 demonstrates poor judgment. Based on this information, Allender concludes that getting  
3 distracted and wanting to avoid stress “could have played into [Thomas’s] writing a  
4 confession which he initially refused to do.” This conclusion is mere speculation and, as  
5 such, is irrelevant in this case. Allender does not state that these circumstances actually  
6 played any role in Thomas’s decision to write a confession or that they caused him to  
7 waive his rights unknowingly, unintelligently or involuntarily. Allender further concludes  
8 that

9 [i]f earlier in the evening he had focused on protecting his rights after he  
10 had heard his right [sic], but hours later at the second interrogation he  
11 had lost that focus and was at that time focused on his discomfort he  
12 might have given the officers what they wanted as a way to avoid further  
13 stress at the moment. If he had been read his rights at that time he might  
14 have been able to refocus on his need to protect his rights rather than  
15 avoid the stress related to his headache. Thus his ability to make an  
16 informed decision would have been compromised by his brain injury,  
17 headache and stress intolerance related to the assault in 1995.

18 This statement is nothing more than a hypothetical with multiple unknown variables. At  
19 no point does Allender state that this situation actually happened or that it more than  
20 likely happened. His conclusion is riddled with “ifs” and “mights” and represents nothing  
21 but mere guesswork. In essence, Allender concludes that (1) if Thomas had focused on  
22 his rights at the first interview, and if he had lost that focus at the second interview, and if  
23 he chose to focus on his discomfort instead, he might have given the statement to avoid  
24 stress, and (2) that if the agent would have read all his rights a second time he might have  
25 been able to refocus on his need to protect his rights rather than focusing on avoiding  
26 stress.<sup>3/</sup> This conclusion does not represent a scientific conclusion. It is pure speculation

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27 <sup>3/</sup> The government would note that before the first interview the defendant was read his  
28 *Miranda* rights, he indicated that he understood his rights and signed a waiver. Thomas does not  
seem to claim that at the first interview he was unable to focus on his need to protect his rights,  
and Allender presumes that Thomas actually focused on protecting his rights at that time. Having  
focused on his rights, Thomas chose to waive his rights knowingly, intelligently and voluntarily.  
Thus, Thomas’s first decision to protect his rights was reflected by his waiver of those rights;  
he did not invoke his rights. Later, before the second interview, he was reminded of his rights  
and he indicated that he still understood them and wished to proceed in the absence of an  
attorney. At that time, Thomas’s decision to proceed was consistent with his previous decision

(continued...)

1 with no factual or scientific basis. Therefore, it should not be given any weight by this  
2 court and Allender should not be allowed to testify at the suppression hearing.

3 Federal Rule of Evidence 702 states:

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5 If scientific, technical, or other specialized knowledge will assist  
6 the trier of fact to understand the evidence or to determine a fact  
7 in issue, a witness qualified as an expert by knowledge, skill,  
8 experience, training, or education, may testify thereto in the form  
9 of an opinion or otherwise, if (1) the testimony is based upon sufficient  
10 facts, (2) the testimony is the product of reliable principles and methods,  
11 and (3) the witness has applied the principles and methods reliably to  
12 the facts of the case.

13 In *Daubert*, the United States Supreme Court held that Rule 702 imposes a “gatekeeping”  
14 obligation on the trial judge to “ensure that any and all scientific testimony . . . is not  
15 only relevant, but reliable.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.  
16 579, 589 (1993). The Court in *Kumho* clarified that the gatekeeping function is not  
17 limited to only “scientific” expert testimony, but applies to all expert testimony. *Kumho*  
18 *Tire Co v. Carmichael*, 526 U.S. 137 (1999); *see also United States v. Hankey*, 203 F.3d  
19 1160, 1167 (9<sup>th</sup> Cir. 2000). Although Rule 702 generally is construed liberally, the 9<sup>th</sup>  
20 Circuit has enumerated six preliminary question of law determinations to be made by the  
21 trial judge before determining the admissibility of expert opinions: (1) whether the  
22 opinion is based on scientific, technical, or other specialized knowledge; (2) whether the  
23 expert’s opinion would assist the trier of fact in understanding the evidence or  
24 determining a fact in issue; (3) whether the expert has appropriate qualifications, i.e.,  
25 some special knowledge, skill, experience, training or education on that subject matter;  
26 (4) whether the testimony is relevant and reliable; (5) whether the methodology or  
27 technique the expert uses “fits” the conclusions; and (6) whether its probative value is

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27 <sup>3/</sup> (...continued)

28 to protect his rights by signing a waiver. Thus, there is no reason to believe that if Agent Mase  
would have actually re-read his rights instead of just reminding him of them, Thomas would  
have chosen not to waive his rights.

1 substantially outweighed by the risk of unfair prejudice, confusion of issues, or undue  
2 consumption of time. *Hankey*, 203 F.3d at 1168.

3 The government contends that, as it relates to his opinion in the addendum to his first  
4 evaluation, (1) Allender lacks the specialized knowledge or training, (2) does not have the  
5 appropriate qualifications and lacks the experience to support the proffered testimony  
6 with any reliability, (3) his opinion is not based on scientific, technical or specialized  
7 knowledge, (4) his testimony is irrelevant and unreliable, and, therefore, (5) it would not  
8 assist the court in its decision. There is nothing to indicate that Allender has any  
9 specialized knowledge, training or education to make the conclusions mentioned above.  
10 In fact, the defense counsel did not even submit a CV listing his education, training and  
11 experience. Moreover, Allender does not point to any scientific or specialized knowledge  
12 that he used to issue his opinion in the addendum. As noted above, his conclusions are  
13 purely hypothetical and have no basis in reality. Allender does not claim that the  
14 circumstances he listed in his conclusions actually existed or that they likely existed, and  
15 he does not point to any facts to support his conclusions. **His conclusions are not based**  
16 **on facts, but rather, on mere speculative premises.** Moreover, **there is no indication**  
17 **that his final conclusions are the product of reliable principles and methods.**  
18 Allender does not point to any principles or methods, let alone reliable principles or  
19 methods, that he applied to any facts in this case to arrive to these conclusions. Moreover,  
20 despite the fact that he states that the outcomes described in his conclusions **might** have  
21 occurred, he does not specify the probability of those outcomes. For the aforementioned  
22 reasons, his opinion is unreliable and irrelevant. Because an unreliable and irrelevant  
23 opinion cannot assist the court, Allender's opinion should be disregarded and his  
24 testimony should be precluded.

25 Moreover, the proposed testimony of Thomas's cousin, Blaine Joaquin, who claims  
26 that Thomas is often unable to pay attention during conversations and is more influenced  
27 by others as a result of the head injury, and has demonstrated poor judgement, is also  
28 unreliable and irrelevant and should be precluded. Joaquin does not have the training and

1 experience to state that the injury is the cause for Thomas paying less attention during  
2 conversations, being influenced by others, or making poor judgments. Moreover, he does  
3 not have the expertise necessary to claim that such conduct affected his ability to  
4 knowingly, intelligently and voluntarily waive his rights. What's more, while getting  
5 involved in drug smuggling is a clear example of poor judgment, waiving *Miranda* rights  
6 and confessing to marijuana smuggling is not. Poor judgment, getting more influenced by  
7 others, and failing to pay attention during conversations with his family and friends do  
8 not constitute defenses to criminal activity and or reasons for excluding subsequent  
9 confessions under the exclusionary rule.

10 In addition, there is nothing to indicate that Thomas himself communicated that he  
11 was incapacitated in any way or unable to make a waiver knowingly and intelligently. To  
12 the contrary, he represented to Agent Mase that he was an educated adult by claiming that  
13 he was a few credits short of graduating from college with a Bachelor's degree. He did not  
14 tell Agent Mase or Officer Henry that he suffered from headaches or that he had  
15 nosebleeds. In fact, he did not tell this to anyone that evening. None of the TOPD  
16 Correction Officers who came in contact with Thomas that night noticed any bleeding,  
17 excessive stress or any other physical or cognitive impairment, and Thomas did not make  
18 any complaints about headaches or nose bleeding. In fact, the Inmate Medical Report  
19 completed that night specifically states that Thomas was not disoriented, confused or  
20 unconscious, that he did not complain of pain, that he did not have visible trauma or  
21 bleeding, and that there were no visible signs of alcohol or drug influence or withdrawal. It  
22 also notes that when Thomas was asked if he had a disease or needed medical care,  
23 Thomas answered, "No." Notably, Thomas merely claims that he wanted to get attention  
24 through the door, but no one opened it or offered to help. He does not claim that he  
25 actually communicated his medical condition to anyone.

26  
27 Throughout his two interviews, Thomas did not ask for a lawyer at any time, and he  
28 never expressed an unwillingness to answer questions or a desire to terminate the

1 interview. Thomas did not display at any time any attention or concentration deficits. He  
2 was alert, clear, coherent and cooperative, and was conducting himself consistent with his  
3 age and education. Thomas did not show any signs of unusual stress. Moreover, Thomas  
4 did not show any signs of cognitive impairment. There were also no language difficulties  
5 and the rights were communicated to Thomas in his native tongue. Prior to his first  
6 interview, Thomas indicated that he understood his rights orally and by signing a written  
7 waiver. Prior to his second interview, when the agent asked him if he still understood his  
8 rights and if he was still willing to answer questions, Thomas reaffirmed that he knew his  
9 rights and that he wished to answer questions in the absence of a lawyer. He ultimately  
10 gave a written, very well articulated, statement. The fact that he was able to write such a  
11 coherent statement is sufficient proof that he was able to knowingly, intelligently and  
12 voluntarily waive his rights.

13 Moreover, Thomas has prior experience with the criminal justice system. On  
14 December 4, 2002, Customs Patrol Officers from Sells, assisted by the Tohono O’Odham  
15 Police Department, seized approximately 175.20 pounds of marijuana from Thomas’s  
16 vehicle, which was parked in front of his residence in Sells Arizona. Further, on June 28,  
17 2004, United States Immigration and Customs Enforcement Special Agents, along with  
18 United States Customs and Border Protection Patrol Officers, assisted by Tohono  
19 O’Odham Police Department, seized approximately 820.75 pounds of marijuana from  
20 Thomas’s residence. Therefore, Thomas’s personal life experience indicates that he was  
21 familiar with his *Miranda* rights, his option to waive those rights, and the consequences  
22 of such waiver.

23 The aforementioned facts show that Thomas had the proper level of comprehension  
24 to waive his rights. Therefore, this court should find that Thomas’s waiver was knowingly  
25 and intelligently made.

26  
27  
28 **B. The defendant voluntarily waived his *Miranda* rights and made a confession**

1 **because the totality of the circumstances indicate that his free will was not**  
2 **overborne**

3 “A waiver is voluntary if, under the totality of the circumstances, the confession was  
4 the product of a free and deliberate choice rather than coercion or improper inducement.”  
5 *Burbine*, 475 U.S. at 421; *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir.1998).  
6 Thus, “[t]he test is whether, considering the totality of the circumstances, the government  
7 obtained the statement by physical or psychological coercion or by improper inducement  
8 so that the suspect’s will was overborne.” *United States v. Leon Guerrero*, 847 F.2d  
9 1363, 1366 (9th Cir. 1988) (citing *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963);  
10 *United States v. Pinion*, 800 F.2d 976, 980 (9th Cir. 1986); *United States v. Tingle*, 658  
11 F.2d 1332, 1335 (9th Cir. 1981)). A confession extracted by any sort of threat or violence,  
12 or obtained by promises or improper influence, will be found to be involuntary. However,  
13 “coercive police activity is a necessary predicate to the finding that a confession is not  
14 ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth  
15 Amendment.” *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Derrick v. Peterson*, 924  
16 F.2d 813, 819-822 (9th Cir. 1991). Absent the use of coercive activity to undermine the  
17 suspect's ability to exercise his free will, there can be no finding of involuntariness.  
18 *Peterson*, 924 F.2d at 818. The conduct of the agents, be it promises, threats, or actions,  
19 “must be sufficiently compelling to overbear the suspect’s will in light of all attendant  
20 circumstances.” *Guerrero*, 847 F.2d at 1366.

21 In determining whether a defendant's will was over-borne in a particular case, the  
22 courts have assessed the totality of all the surrounding circumstances -- both the  
23 characteristics of the accused and the details of the interrogation. See *Schneckloth v.*  
24 *Bustamonte*, 412 U.S. 218, 226 (1973). Some of the factors taken into account have  
25 included lengthy questioning, deprivation of food or sleep, threats of physical harm,  
26 improper psychological persuasion, the age, intelligence and education of the accused, the  
27 repeated or prolonged nature of the questioning, and whether *Miranda* warnings were  
28 given. *Id.*; *Connelly*, 479 U.S. at 164, n. 1. No one factor is controlling and focus is on “a

1 careful scrutiny of all the surrounding circumstances.” *Bustamonte*, 412 U.S. at 226.

2 Applying the aforementioned test, it is clear that Thomas’s waiver and statements  
3 were voluntary. Thomas was aware of the nature of the offense for which he was arrested  
4 and he was not subject to coercion or pressure. The agent was calm and cordial to  
5 Thomas during the interview. He was not threatening and did not make any promises or  
6 threats. The encounters were simply run-of-the-mill interviews.

7 The interviews were short– the first one lasted approximately 20 minutes and the  
8 second one was under an hour long. Thomas was not badgered repeatedly, but rather, he  
9 was interviewed briefly and only twice; he was not subjected to hours of interrogation.  
10 The first interview occurred approximately six hours after he was arrested, which was a  
11 reasonable time given the circumstances of his arrest. Thomas was transported to Sells at  
12 around 9:30 p.m. After collecting all the evidence, Agent Mase was able to finish the  
13 interview with Officer Henry at approximately 12:45 a.m., only ten minutes before he  
14 started to interview Padilla. The interview with Padilla ended at approximately 2:00 a.m.,  
15 and only 26 minutes later, at 2:26 a.m., Agent Mase started Thomas’s interview. These  
16 circumstances indicate that Agent Mase did not unreasonably prolong the first interview,  
17 but rather, that he diligently performed his duties. Moreover, although the second  
18 interview was conducted 14 hours after Thomas was arrested, the timing of this second  
19 interview was not unreasonable and was not an instrument of coercion. Rather, Agent  
20 Mase re-interviewed Thomas at the duty Assistant U. S. Attorney’s recommendation,  
21 which was made in the morning.

22 Before the first interview, *Miranda* warnings were read to Thomas, and he indicated  
23 both verbally and in written form that he understood his rights and wished to waive them.  
24 Before the second interview, Agent Mase asked Thomas if he still understood his rights  
25 and if he was still willing to answer questions, and Thomas reaffirmed that he knew his  
26 rights and that he wished to answer questions in the absence of a lawyer. Throughout  
27 these two interviews, Thomas did not ask for a lawyer at any time, and he never  
28 expressed an unwillingness to answer questions or a desire to terminate the interview.

1 Thomas did not display at any time any attention or concentration deficits. Thomas is  
2 a 36-years-old adult of above-average intelligence and who has college education. At all  
3 times, he was alert, clear, coherent and cooperative, and was conducting himself  
4 consistent with his age and education. Thomas did not show any signs of unusual stress  
5 and did not communicate to Agent Mase or any of the officers that he suffered from  
6 headaches or nosebleeds or any cognitive impairments. Absent showing of coercive  
7 police activity, a defendant's mental condition alone does not justify a finding that the  
8 confession was involuntary under the Due Process Clause. *Connelly*, 479 U.S. at 164.  
9 Because Agent Mase was not even aware of any mental impairment, it cannot be claimed  
10 that he exploited Thomas's weaknesses.

11 Moreover, Thomas was not deprived of food or sleep. Thomas admits that he was  
12 given food in the morning and there is no evidence that he did not sleep at all throughout  
13 the night. Thomas claims that he did not "effectively" rest that night. However, that he  
14 might not have slept that night as much as he would have slept had he not been arrested,  
15 does not mean that he was physically coerced by sleep deprivation.

16 That Thomas voluntarily waived his rights and made a statement is further supported  
17 by the fact that he wrote a very articulated statement during his second interview. If he  
18 were so weak and fatigued by his headaches and the conditions of his detention and  
19 interview as to be incapable of making an unfettered decision to waive his rights and  
20 confess, he could not have written a statement like the one he provided.

21 Nothing indicates that Thomas did not waive his rights and make a confession  
22 voluntarily. There is no evidence that the agents created a coercive atmosphere during the  
23 defendant's interview or that the agents employed any improper influence, threats,  
24 violence, or promises to induce the defendant to make an inculpatory statement. There is  
25 no evidence of even subtle psychological coercion. There is no evidence that Thomas's  
26 cognitive functions were impaired by his alleged headaches, nosebleeds or fatigue so as to  
27 prevent him from making a free decision and voluntary confession. To the contrary, the  
28 evidence in this case shows that the defendant was alert and coherent and made his

1 statements voluntarily.

2 **III. CONCLUSION:**

3 The totality of the circumstances surrounding Thomas's interviews reveals both an  
4 uncoerced choice and the requisite level of comprehension. Therefore, the court may  
5 properly conclude that the *Miranda* rights have been properly waived and the confession  
6 was voluntary. Because there was no Fourth Amendment violation, Thomas's statements  
7 made following his arrest should not be suppressed under the exclusionary rule.  
8 Therefore, the United States respectfully requests that this honorable Court deny the  
9 defendant's motion to suppress statements.  
10

11 Respectfully submitted this 2<sup>nd</sup> day of October, 2009.

12  
13 DENNIS K. BURKE  
14 United States Attorney  
15 District of Arizona

16 *s/Anca I. Pop*

17 ANCA I. POP  
18 Assistant U.S. Attorney

19  
20 Copy of the foregoing served electronically  
21 or by other means this 2<sup>nd</sup> day of October, 2009, to:

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23 Jay Sagar, Esq.  
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