

CA NO. 91-50130

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	D.C. No. CR 84-0972-RMT
)	
Plaintiff-Appellee,)	
)	
v.)	Central District of
)	California
RICHARD W. MILLER,)	
)	
Defendant-Appellant,)	
_____)	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

The Honorable Robert M. Takasugi
United States District Court Judge

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING MILLER'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM ELECTRONIC SURVEILLANCE ON THE GROUND OF UNTIMELINESS, WHERE: THE MOTION WAS BEING MADE DURING THE THIRD TRIAL OF THIS ACTION; THE SAME MOTION HAD BEEN FILED PRIOR TO THE FIRST TRIAL, IN ACCORDANCE WITH FEDERAL RULE OF CRIMINAL PROCEDURE 12; NO NEW GROUNDS WERE BEING ASSERTED IN SUPPORT OF THE RENEWED MOTION; AND THE LITIGATION HAD UNDERGONE NO PROCEDURAL OR SUBSTANTIVE CHANGES, OTHER THAN THE DISMISSAL OF ONE COUNT IN THE INDICTMENT, SINCE THE FILING OF THE ORIGINAL MOTION.**

- 2. WHETHER, AS A MATTER OF LAW, MILLER'S STATEMENTS TO THE FBI DURING AND FOLLOWING HIS MEETING WITH SPECIAL AGENT-IN-CHARGE RICHARD BRETZING ON SEPTEMBER 29, 1984 UP TO THE TIME OF HIS ARREST ON OCTOBER 2, 1984 WERE THE PRODUCT OF COERCION AND THUS INVOLUNTARY UNDER THE FIFTH AMENDMENT, WHERE: AGENT BRETZING STRONGLY INFLUENCED MILLER'S DECISION TO SPEAK BY APPEALING TO MILLER'S RELIGIOUS VALUES; THE FBI DECEIVED MILLER AS TO THE TRUE NATURE AND SCOPE OF ITS INVESTIGATION INTO HIS ACTIVITIES; AND MILLER WAS SUBJECTED TO CONTINUOUS INTERROGATION OVER A FIVE-DAY PERIOD**

I.

STATEMENT OF JURISDICTION

The District Court had jurisdiction because the indictment charged appellant Richard W. Miller ["Miller"] with an offense under Title 18 of the United States Code. [CR 2]¹

The Court of Appeals has jurisdiction over this case pursuant to 28 U.S.C. 1291, permitting courts of appeal jurisdiction over appeals from final decisions of the United States District Courts. The District Court imposed a custodial sentence on Miller on February 4, 1991 [CR 1053]. Judgment was thereupon entered, commencing the 10-day period for filing a notice of appeal. [CR 1054] Berman v. United States, 302 U.S. 211, 212 (1937).

The notice of appeal was filed on February 13, 1991. [CR 1057] As such, this appeal is timely under Rule 4(b) of the Federal Rules of Appellate Procedure.

1

As used in this brief, the phrase, "CR", refers to the Clerk's Record, which is contained in the Excerpt of Record that has been filed together with the appellant's opening brief. The number immediately following the designation "CR" represents the numerical designation in the computer printout of the Clerk's Record where the reference can be found.

The phrase, "ECR", refers to the Excerpt of Record. The number immediately following represents the page number in the Excerpt of Record where the reference can be found.

The phrase, "RT", refers to the Reporter's Transcript, followed by the date of the proceeding and page reference.

II.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This criminal case involves the prosecution of an FBI agent on charges of espionage and the transmission of classified information. The history of this litigation encompasses seven years, including three trials. The first trial ended in a hung jury; the second in a conviction and reversal on appeal [U.S. vs. Miller, 874 F.2d 1255 (9th Cir. 1989), reh. denied 884 F.2d 1149 (9th Cir. 1989)]; and the third in convictions which are the subject of this appeal.

The third trial was conducted in 1990 before the district court without a jury. The court convicted Miller on October 9, 1990 [CR 1028], and this appeal follows.

B. COURSE OF PROCEEDINGS

1. Summary of Charges

The first superseding indictment on which Miller was tried in the third trial is in six counts:²

²

Originally, the superseding indictment was in seven counts. After Miller's second trial, which resulted in guilty verdicts on six of the seven counts, the government dismissed the seventh count. Following the Ninth Circuit's reversal of those convictions in 1989, the government retried Miller on the six counts on which he had been convicted in the second trial.

<u>Count</u>	<u>Offense</u>	<u>Statute</u>
1	Conspiracy to Transmit and Communicate Defense and Classified Information to a Foreign Government	18 U.S.C. 371, 794(c)
2	Copying and Obtaining Defense Information	18 U.S.C. 793(b)
3	Delivering Defense Information To a Foreign Government	18 U.S.C. 794(a)
4	Communication of Classified Information to a Foreign Government	50 U.S.C. 783(b)
5	Soliciting and Agreeing to Receive a Bribe by a Public Official	18 U.S.C. 201(c)
6	Agreeing to Receive a Bribe By a Public Official	18 U.S.C. 201(c)

2. Chronology of District Court Litigation

Briefly, the chronology of this litigation is summarized as follows:

<u>Event</u>	<u>Date</u>	<u>Clerk's Record</u>
Complaint filed	10/2/84	1
Indictment filed	10/12/84	2
Filed superseding indictment	11/7/84	22
First trial begins	8/1/85	444
First trial ends (hung jury)	11/6/85	533

Second trial begins	2/21/86	608
Verdict in second trial (convictions)	6/19/86	713
Mandate filed re: Ninth Circuit reversal of convictions from second trial	10/30/89	903
Case reassigned to district court Judge Takasugi	11/6/89	908
Third trial begins (bench trial)	8/22/90	922
Judgment in third trial (convictions)	10/9/90	1028
Sentencing of Miller	2/4/91	1053
Judgment/Commitment Order filed	2/4/91	1054
Notice of Appeal filed	2/13/91	1057

3. Chronology of Litigation As To Issues On Appeal

Two issues are before this Court by this appeal: 1) the District Court's denial of Miller's motion for suppression of wiretap³ evidence due to the government's failure to minimize the electronic eavesdropping of his residences; 2) the district court's denial of Miller's motion for suppression of his statements to the FBI during his interrogation

³

The wiretaps were applied for and authorized by the district court pursuant to the Foreign Intelligence Surveillance Act ("FISA"). The issue of whether the district court erred in authorizing the wiretaps is not before this Court on appeal. As discussed infra, the only issue before this Court concerning the wiretaps is whether the district court erred in denying Miller's motion to suppress wiretap evidence as untimely.

which commenced on September 28, 1984.

Due to the lengthy and involved history of this case, a chronology of the specific motions which are the subject of this appeal is set forth below, with references to the Clerk's Record ("CR"):

Issue #1: Motion To Suppress Electronic Eavesdropping Due To Failure To Minimize

<u>Filing</u>	<u>Date</u>	<u>Clerk's Record</u>
Motion to suppress electronic surveillance filed by Miller	12/7/84	64
Court issued order granting government's application for extension of time to oppose motion	12/10/84	75
Government filed its opposition papers	12/21/84	121
Miller filed reply to opposition	1/2/85	137
Status hearing on motion held: motion denied	1/9/85	170
Court declared mistrial re: trial #1, excused jury	11/06/85	533
(No motions on wiretap issue filed connection with trial #2)		
Trial #3: Miller attempted to renew motion to suppress for failure to minimize during trial	8/30/90	(pp.72 --)⁴ (transcript)
Government filed opposition to renewal of motion	9/06/90	996, 1001

⁴

There is no entry of this in the Clerk's Record. Thus, the only reference here is to the Reporter's Transcript.

Miller filed memo of points and authorities in support of renewal of motion	9/11/90	1006
Gov filed reply to memo	9/12/90	1007
Court issued order denying renewal as untimely	9/25/90	1019

Issue #2: Motion To Suppress Miller's Statements

<u>Filing</u>	<u>Date</u>	<u>Clerk's Record</u>
Motion to suppress statements of Miller filed	12/7/84	87
Government opposition filed	12/21/84	125
Reply filed by Miller	1/2/85	146
Gov filed declarations of Paul Minor and James Murphy in opposition to motion	1/9/85	800⁵
Status hearing on motion	1/10/85	171
Status hearing on motion	1/11/85	172
Status hearing on motion	1/12/85	173
Status hearing on motion; testimony of witnesses	1/15/85	174

⁵

The number 800 is not a typographical error. While it is clearly out of numerical sequence, this is the actual number as it appears in the Clerk's Record.

Status hearing on motion; testimony of witnesses	1/16/85	175
Status hearing on motion; testimony of witnesses	1/18/85	177
Status hearing: court denied motion	1/22/85	178
[trial #1 ends in mistrial] [after mistrial and before trial #2]:		
Motion to suppress statements filed	12/9/85	555
gov filed consolidated opposition several motions	12/20/85	554, 561
Status hearing: court denied motion	1/15/86	563
Miller filed supplemental points and authorities re: motion	1/23/86	565
[after 9th Cir. reverses conviction following trial #2, and before trial #3]:		
Motion to suppress statements filed	1/16/90	932
Evidentiary hearing on motion	8/21/90	991
Court ruling: motion denied	8/21/90	991

C. Bail Status of Mr. Miller

Mr. Miller is presently in custody. He was remanded to the custody of the U.S. Marshalls Service at the time of his sentencing on February 4, 1991. [CR 1053]

III.

STATEMENT OF FACTS

In 1984, Richard W. Miller was a 20-year veteran of the Federal Bureau of Investigation ["FBI"] and the brunt of much criticism and scorn within his agency. (RT 8/23/90 at 20, 100) His annual performance reviews for several years preceding 1984, and for the entire 1984 year up to his arrest on October 2, carried the markings of someone who would be targeted for dismissal and ultimately, prosecution. As early as 1976, Miller's weight problems violated FBI regulations, and between 1976 and 1984 the FBI censured Miller and placed him on probation three times. (RT 8/23/90 at 52-55, 89-91; 147)

During the preceding year, 1983, the FBI had rated Miller's attitude unsatisfactory, suspended him, and took away all of his case assignments outside the office. (RT 8/23/90 at 56, 89-91; 8/24/90 at 97) The principal figures who imposed these sanctions on Miller were Richard Bretzing, the Chief Agent in charge of the FBI's Los Angeles office ["Bretzing"] and P. Bryce Christensen ["Christensen"], the chief assistant directly under Bretzing. (RT 8/21/90 at 15-19; 23-26)

Moreover, for the 1984 year, Miller's performance review classified him as "minimally acceptable", and his immediate supervisor, Gary Auer, had warned him about complaints against him from other FBI agents in the office. (RT 8/23/90 at 71-

81; 8/24/90 at 115) Moreover, only a few months prior to his arrest, Bretzing and Christensen again placed Miller on departmental probation and suspended him, this time without pay. (RT 8/23/90 at 96-97) He was still on probation at the time of his arrest. (RT 8/23/90 at 100)

Miller's shortcomings and misguided approaches to his work were documented and well known within the FBI and were clearly known to his superiors at the FBI's Los Angeles office, where Miller had been based since 1964. (RT 8/23/90 at 20) They included disregard of instructions, failure to comply with FBI rules, regulations and reporting requirements. (RT 8/23/90 at 52, 54, 55, 89-91) During his career, Miller had been transferred frequently from one squad to another.

Despite such deficient conduct, the FBI in 1983 undertook a curious action in regard to Miller's employment, the significance of which would become apparent only after his arrest and interrogation. The agency assigned Miller to the Foreign Counter-Intelligence Squad ["FCI-1 Squad"], a highly prestigious section within the Los Angeles Office which dealt directly with matters of national security. (RT 8/28/90 at 96-97) This unusual move, given Miller's embarrassing employment record, placed Miller within a working environment where he would be exposed on a regular basis to classified information and to the people and documents that were

central to the FBI's investigation of Soviet⁶ espionage activities. (RT 8/30/90 at 47) The predictable soon occurred.

In late May 1984, Miller reported to Gary Auer that he had been telephoned at his desk in the FCI-1 Squad by an unidentified woman who spoke with an Eastern European accent and who claimed to have information for the FBI. (RT 8/28/90 at 125) Despite the fact that Miller was on probation at the time and had recently been suspended without pay, Auer - who himself had rated Miller as "minimally acceptable" for the 1984 year -- nonetheless gave Miller permission and an FBI car to meet with the unidentified woman. Not only, but Auer gave Miller permission to meet with her alone.⁷ (RT 8/22/90 at 128; 8/23/90 at 71) Upon meeting the woman on May 24, 1984, Miller learned that she was none other than Svetlana Ogorodnikova ["Svetlana"], a name well known to him and to others within the FCI-1 Squad as a Soviet contact. (RT 8/28/90 at 130)

6

The term "Soviet" is used in the historical context of the 1984 year, when the events at issue occurred.

7

Auer himself had been contacted by Svetlana in March 1984 -- only two months before she contacted Miller. (RT 8/30/90 at 64) At trial, Auer said that he did not actually meet with Svetlana but sent two FBI agents instead to meet with her. (RT 8/30/90 at 69-70) Auer further admitted that if he had met with Svetlana, he would not have met with her alone (as he had given Miller permission to do), but rather would have done so in the company of at least one other FBI agent. (RT 8/29/90 at 69; 8/30/90, 107-110)

During their meeting, Svetlana told Miller about her prior relationship with another FBI Special Agent in the Los Angeles Office named John Hunt, who had attempted to solicit her, unsuccessfully, as an informant. (RT 9/6/90 at 55) Indeed, the Svetlana - Hunt escapade had been an intriguing chapter in the recent history of the FCI-1 Squad. Only two years previously, in May 1982, Hunt had opened an FBI file on Svetlana for the purpose of evaluating her as a potential asset/informant. (RT 9/6/90 at 55) Over the next six to eight months, he met with Svetlana approximately 55 times and, inevitably, they became romantically involved. As emotional dependencies evolved on both sides, Hunt -- by his own account -- sought to cultivate a double-agent role for Svetlana that would make her a useful resource for the FBI's monitoring of Soviet intelligence activities. The endeavor ultimately failed, and in January 1983 the FBI closed its file on her after determining that she was too unreliable, and her political loyalties too unclear, to be an asset. (RT 9/6/90 at 118-119).

Hunt was never sanctioned by the FBI, let alone prosecuted by the Department of Justice, for his involvement with Svetlana. As the history of the instant litigation clearly demonstrates, however, the FBI's posture towards Miller in regard to his soon-to-occur interactions with Svetlana were strikingly more punitive than the benign, hands-off position displayed by the agency towards Hunt. What the trial record establishes is that Svetlana unwittingly gave the FBI a golden opportunity to finish off Miller's failing career by enticing Miller into committing acts that culminated in his prosecution and conviction for espionage. However, as discussed below, the FBI

would need Miller's confession in order to accomplish its goal.

Miller's relationship with Svetlana began to evolve in late July 1984. (Gov. exhibit 126, in evidence, at page 2)⁸ On September 1, it became the subject of a formal FBI investigation which culminated in Miller's arrest on October 2. (RT 8/30/90 at 54) The investigation was premised on the notion that Miller might have become an agent for the Soviet government (RT 1/15/85⁹ at 106), and it included: 24-hour surveillance of Miller, Svetlana and her husband, Nickolas Ogorodnikova ["Nickolas"]; wiretaps on their respective telephones; listening devices planted inside their automobiles; and closed circuit cameras throughout the FBI office to monitor Miller's movements and activities. (RT 8/30/90 at 57-58)

The FBI wiretaps were installed on Miller's telephone at his two residences, one located in Lynwood, Ca. (where he stayed during the week) and the other in Bonsall, Ca. (RT 8/30/90 at 55, 61)¹⁰ They became effective on September 4 and 5, respectively. (RT 8/30/90 at 56) Once in place, the wiretaps were operated 24

8

Exhibit 126 is included in Appellant's Excerpt of Record.

9

The references to the Reporters Transcript for dates in January 1985 pertain to the hearing held before District Court Judge David V. Kenyon prior to the first trial, in connection with Miller's pretrial motion to suppress his statements to the FBI.

10

Trial testimony of FBI agent John S. Bradford.

hours per day, seven days per week and continued to the date of his arrest. (RT 8/30/90 at 62) All calls were listened to and recorded, regardless whether the call had any bearing on the purpose behind the surveillance. (RT 8/30/90 at 62-64, 67) Thus, calls were recorded even if the subject was as innocuous as Miller's wife, Paula, speaking to a friend about going to the grocery store. (RT 8/30/90 at 64)

Throughout this investigative period, the FBI allowed Miller to continue working in the FCI-1 Squad, where he had ongoing access to classified information. (RT 8/30/90 at 54; 9/20/90 at 101-102) Miller's employment was already in probationary status when he first met with Svetlana in May 1984. (RT 8/23/90 at 96-97) Nonetheless, rather than terminate Miller's employment due to suspected unauthorized or illegal conduct, or at least re-assign him to another squad which did not expose him to sensitive national security information, the FBI kept Miller on in his present position where would have continued access to classified materials, and where Svetlana would have a continued desire to seek him out -- all the while quietly conducting surveillance in the hope of building a criminal case.

At best, the FBI's investigation produced only a sketchy profile of what appeared to be espionage activity between Miller and Svetlana. Incidents such as their meetings in a park near the FBI office; Miller's calls to Svetlana to confirm their meeting plans; long evening walks taken by Svetlana and Nicholas following her meetings with Miller; and the surveillance of a woman matching Svetlana's description

entering and exiting the Soviet Consulate in San Francisco, all invited suspicions of espionage. (RT 8/29/90 at 121-131, 135, 136, 145-152; 8/30/90 at 132; 9/12/90 at 16-27) Other aspects of the FBI's investigation that did not focus directly on Miller, such as the interception of conversations between Svetlana and Soviet Consulate official Alexander Grishin, served to enhance this suspicion by bringing to light certain travel plans by which Svetlana would bring a "friend", presumably Miller, to Europe for KGB training. (RT 8/30/90 at 94-102)

Suspicious aside, by the end of September 1984, the FBI's investigation was far too inconclusive to constitute a prosecutable case against Miller. Indeed, at trial the parties stipulated that the FBI's surveillance had shown that Svetlana had spent weekends at roadside motels en route to San Francisco with an unknown person who clearly was not Miller. (RT 8/29/90 at 153-156) Moreover, surveillance of Svetlana outside her residence and at public places, such as Orbach's Department Store, failed to yield any concrete evidence of any illegal behavior, let alone espionage activity connected to Miller. (RT 8/30/90 at 8-22; 29-35)

Thus, to build its criminal case against Miller, the FBI turned to none other than Miller himself. (RT 9/12/90 at 159-160) The FBI's quest to pin criminal charges on Miller, who was perceived as a potential traitor to the agency, was no more evident than in the name designated for the investigation: "Whipworm". (RT 8/30/90 at 24)

On September 27, Miller reported his relationship with Svetlana to supervisor Christensen who, like Miller, was a Mormon. (RT 9/12/90 at 80, 110-111) Aware of the ongoing investigation, Christensen invited Miller to relate everything he could recall, seeing that Miller was reporting without any notes. (RT 9/12/90 at 80-81) Unlike Christensen, Miller was unaware of the ongoing FBI investigation. He complied with Christensen's request. As he spoke, Christensen typed his statement. (Exhibit 126)

Principally, Miller stated the following: he had met Svetlana in the spring of 1984; that he realized her potential as an informant over the course of his meetings with her, and that he continued meeting with her after their initial meeting on May 24, 1984. Svetlana expressed interest in having him work for the Soviet intelligence community. Miller portrayed himself as a likely recruitment target, suggesting that he might be interested if certain payment conditions were met. On one occasion, they travelled together to San Francisco. (RT 9/12/90 at 84-88, 91)

Miller explained that he knew he had not been given permission by the FBI to continue seeing Svetlana after the initial meeting; that he did not tell his superiors what he was doing out of fear that if they knew, they would tell him to stop due to their lack of confidence in him; and that his motivation for undertaking these unauthorized actions was to resuscitate his failed career at the FBI. Miller also

emphasized that he was reporting these events at this time because he felt he could not continue to carry the operation any further on his own. (RT 9/12/90 at 125-128; 152-154; 166)

The following morning, September 28, Miller himself typed a one-page "addendum", adding facts he later recalled. (Exhibit 127) Christensen's recordation of Miller's statements (Exhibit 126) and the addendum would be the only verbatim recordation of any statement given by Miller. (RT 8/22/90 at 69)

While Miller clearly acknowledged that his actions with Svetlana clearly had transgressed FBI rules and regulations, his statements to Christensen hardly amounted to an admission of espionage. Nonetheless, Christensen now had the open door the FBI had been waiting for to build their criminal case against Miller.

Without delay, the FBI seized upon this opportunity by placing Miller under intensive interrogation and polygraph testing that commenced on September 28 and extended for five consecutive days, culminating with his arrest near midnight on October 2. (RT 9/13/90 at 12; 9/14/90 at 151) This interrogation period was a critical part of the case. While in the early stages he steadfastly denied having done so, Miller did admit in the final two days of interrogation that he gave Svetlana at least one classified document. His admission was and is the only evidence of that fact; and it remains uncorroborated by any independent evidence.

In light of its materiality to the government's case against Miller, and because of its relevance to the suppression issue on appeal to this Court, the interrogation period is summarized below:

The first interrogation session began midday on September 28, and lasted until about 9:00 p.m. In charge of the questioning were two agents, Larry Torrence and Graham Van Note, who had flown to Los Angeles from headquarters specifically for the Miller investigation. (RT 1/15/85 at 103-104) The session was punctuated by multiple polygraph examinations administered by another FBI agent, James Murphy. (RT 9/18/90 at 20) Between polygraph tests, agents Torrence and Van Note repeatedly drilled Miller about his relationship with Svetlana. (RT 9/13/90 at 25-99) Each time, Miller emphasized that while his actions were unorthodox, they were for the benefit of the FBI, with the aim of accomplishing the goals conveyed to Christensen during their meeting on September 27. (RT 9/13/90 at 86) Miller openly admitted having had unauthorized contacts, as well as sexual relations, with Svetlana; but he steadfastly denied passing any classified information to her. (RT 9/13/90 at 139) Every two hours, agents Torrence and Van Note debriefed Christensen on the progress of their interrogation. (RT 1/12/85 at 281)

In all, the first day of interrogation lasted nine hours. Miller showed obvious signs of fatigue when the session adjourned. (RT 1/15/85 at 126-127)

The next day, September 29, brought an even longer version of the same ordeal, commencing at 9:00 a.m. and ending at approximately 7:00 p.m. Like the previous day, in the course of the questioning, Miller executed several written waivers of his constitutional rights. (RT 9/12/90 at 116) On this day, the interrogation sessions were divided among FBI agents working in teams, including the team of agents Torrance and Van Note from the day before. (RT 9/13/90 at 139) Again, Miller maintained that the facts were as he had stated them previously. However, he was told by agent Murphy that he was failing the polygraph tests. (RT 9/18/90 at 99; 9/13/90 at 115) Distrustful of Murphy, Miller requested to be tested by another polygraph examiner. (RT 9/14/90 at 96)

By 7:00 p.m. on the second day of interrogation, Miller had not made any statements that could be regarded as admissions or statements against interest. He had not admitted to any of the elements of the crimes for which he would later be indicted. (RT 1/12/85 at 283; 9/18/90 at 192-193) Thus, in the eyes of the FBI, the interrogation was at a stand off. The agency had not extracted the self-incriminating statements it wanted in order to build its case.

At this juncture, Bretzing, the Chief Agent in charge of the FBI's Los Angeles office, entered the scene. (RT 9/20/90 at 83) A bishop in the Mormon Church, Bretzing occupied a principal position of authority not only within the FBI, but within the hierarchy of the Mormon community as well. (RT 1/15/85 at 30; 8/21/90 at 17)

That community had an established constituency at the FBI's Los Angeles office that included agents Christensen and Miller, and Bretzing's status as bishop was well-known within the FBI office.¹¹ (RT 1/12/85 at 285-286; 8/21/90 at 17)

Because the interrogations had reached a stand off, Bretzing instructed Christensen to have Miller brought to his office later in the day after agents Torrence and Van Note had concluded their interrogation. Bretzing's goal was simple and direct: to make Miller confess to something. (RT 8/21/90 at 25-26¹²; 9/20/90 at 116) Accomplishing this objective was critical. The investigation of Miller was being engineered out of the FBI's central headquarters in Washington, D.C. This meant that headquarters was closely observing Bretzing's handling of the internal investigation. There was talk that Bretzing himself was under investigation as a result of the Miller affair; and this was hardly what Bretzing needed, particularly in light of earlier, unrelated allegations against Bretzing that he had been promoting favoritism towards the Mormon FBI agents in the Los Angeles office. (RT 8/21/90 at 24-25)

To accomplish his goal, Bretzing took an approach that he was uniquely positioned to apply: an appeal to Miller's religious values as a fellow Mormon. (RT 1/12/85 at 282-283) This strategy, which reflected the collective thinking of Bretzing,

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By this point in time, Miller had been excommunicated from the Mormon church.

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See specifically, page 26 at lines 5-8.

Christensen and agents Torrence and Van Note (RT 1/15/85 at 139-140), focused on a key fact known to these agents: that Miller was presently an excommunicated Mormon who hoped to redeem himself in the eyes of his church and reenter it in good standing.¹³ (RT 1/12/85 at 118) Bretzing had discussed the fact of Miller's excommunication with Christensen prior to meeting with Miller. (RT 1/12/85 at 286) The objective would be to exploit this vulnerability and thereby elicit the confession the FBI was unable to get through the interrogations conducted by the other agents.

At approximately 7:00 p.m. on September 29, in the presence of Christensen, Bretzing first sat down with Miller. (RT 1/15/85 at 9; 8/21/90 at 15-16) By this point in time, Miller had been subjected to nearly two full days of interrogation; already he had endured ten hours of interrogation on the 29th before his meeting with Bretzing. (RT 1/12/85 at 285) The meeting lasted 15-20 minutes, during which Bretzing did not ask Miller any questions; rather, as he had planned to do, he gave Miller a speech, the gist of which was a clear appeal to Miller's religious beliefs and values. (RT 8/21/90 at 25) He expressed his concern over the situation and asked Miller if he had recognized its "spiritual ramifications", using the word "recognized" with specific reference to the first step in the five-step process of repentance in the Mormon faith. (RT 1/12/85 at 289; 1/15/85 at 10; 9/20/90 at 83)

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Excommunication in the Mormon religion does not carry the same sense of finality as in the more commonly known Catholic religion. An excommunicated Mormon may still engage in certain activities and work his way back into the graces of the church. (RT 1/18/85 at 149-181, testimony of Armand Mauss)

Miller's relationship with God was a significant component of Bretzing's appeal, as Bretzing sought to reconnect Miller to key religious values that were central to the Mormon faith, which Bretzing feared Miller might have abandoned due to his excommunication from the church. (RT 1/15/85 at 56, 66) Speaking in a language that Mormons would understand, Bretzing reminded Miller that if he had any hope of redeeming himself and getting back into the Church, he would have to fulfill basic Mormon commands. These included the duty to repent when one had transgressed the law or "offended someone," to make a full "confession" to the offended parties, and to make "restitution".¹⁴ (RT 1/12/85 at 290, 297; 1/15/85 at 57; 9/20/90 at 116, 124) Bretzing explained that restitution under Mormon law included letting the government know how much damage he had caused, and how much he had compromised national security through his actions with Svetlana. (RT 1/15/85 at 11)

Emphatically, Bretzing urged Miller to account candidly for his actions and to "unburden" himself. (RT 1/15/85 at 64) Turning to the subject of family, Bretzing reminded Miller that his wife and children needed someone in his position to respect. (RT 9/20/90 at 124) When Miller reiterated his innocence, Bretzing instructed him to be quiet, stating that he preferred silence to denials. (RT 1/15/85 at 9; 9/20/90

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Bretzing's appeal for Miller to get back into good standing in the Church was a critical part of the speech because Miller had previously been excommunicated. Expert testimony at Miller's suppression hearing established that under Mormon law, if a Mormon dies while in an excommunicated status, he cannot enter the celestial kingdom (the Mormon version of Heaven). (RT 1/18/85 at 154-157, testimony of Armand Mauss)

at 117) Bretzing then brought the meeting to a close by advising Miller to reflect upon these thoughts overnight and to return the next morning. At the conclusion of the session, Miller broke down and cried. (RT 1/12/85 at 298-299; 9/20/90 at 124)

Bretzing's appeal to Miller's religious values had a great impact upon Miller's moral and religious psyche and would prove pivotal to the direction of the five-day interrogation process. Shortly after this initial meeting with Bretzing, Miller's statements to his interrogators began to vary; at first slightly, and later more significantly. He felt moved to discuss with the interrogators not only his activities with Svetlana, but also other acts of misconduct which he had committed in the past, in order to cleanse his soul of the sins which he had committed. (RT 1/17/85 at 40-41, 44, 103-104; 9/14/90 at 59-61, 92, 115, 124-130, 148-152; 9/18/90 at 7-11, 17, 179-180, 185-187, 192-193; 9/19/90 at 59, 69-70, 76-81, 87-93).

The interrogation on September 29 did not end with the Bretzing meeting. Immediately thereafter, Miller travelled alone with Christensen for a three-hour drive to Miller's residence on Bonsall, where the FBI was to conduct a search. (RT 1/12/85 at 300) As Christensen drove, he pressed the issue of Miller having failed the polygraph tests. (RT 1/12/85 at 300-301, 306) Miller then stated that two years earlier, he had provided an FBI informant with information from the Department of

Motor Vehicles in exchange for money.¹⁵ (RT 1/12/85 at 302)

By the time Miller returned to his Lynwood residence after the search in Bonsall, it was 3:30 a.m. In all, the second day of interrogation had spanned 19.5 hours. (RT 8/21/90 at 59)

Throughout these first two days of interrogation (September 28 and 29), the FBI deceived Miller as to the true nature of its investigation into his activities with Svetlana. While the goal was clearly to develop a criminal prosecution, Miller was led to believe that his questioning by the agents were merely for the purpose of clearing up the potential breach of security arising out of his dealings with Svetlana. He was constantly reassured that he was still part of the "team". (RT 1/12/85 at 71-72) Moreover, Bretzing's religious appeal did not convey any suggestion of possible criminal prosecution. Reflecting Miller's trust in these assurances, the search of his residence on September 29 was done with his consent.

Moreover, while the search of the Bonsall residence was being conducted, Miller's wife, Paula, was informed by Christensen that the purpose of the search was to investigate her husband's failure to report certain conversations he had had with

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In its opinion reversing the conviction of the second trial, the Ninth Circuit ruled that evidence of bribery in connection with informant Grayson was not admissible under Federal Rule of Evidence 404(b) to establish Miller's intent under the statutes charged in the superseding indictment. 874 F.2d at 1268-1269.

certain people, that these activities did not constitute a prosecutable offense, and that her husband would not lose his job as a result thereof. Paula later conveyed the result of this conversation to Miller. (RT 1/11/85 at 158)

The third day of interrogation, September 30, 1984, began at 12:15 p.m. Bretzing again summoned Miller to his office, and when he arrived, Miller saw that Christensen was once again present. (RT 1/15/85 at 12-13) Before their session began, Bretzing picked up where he left off the evening before by once again appealing to Miller's religious values in hopes of eliciting a confession. (RT 1/15/85 at 12-13) Bretzing wanted to know if Miller had reflected on their talk of the prior evening. Miller said he had. Bretzing then pressed Miller to "own up to it", to confess to all improper activities, claiming that Miller would undoubtedly earn back the respect and self-esteem he had lost. The religious appeal had a strong impact. Like the day before, Miller broke down and cried.

That same day, believing that his request for another polygraph examination would be granted, Miller undertook a "pre-polygraph" interview with Paul K. Minor, the Chief Polygrapher of the FBI. (RT 9/19/90 at 7) Rather than administer an exam, however, Minor extended the interview process into a series of lengthy discussions that lasted through the morning of October 2, 1984. No polygraph exam was ever given. (RT 8/21/90 at 45; 9/19/90 at 66)

Minor had been debriefed by Bretzing and Christensen and thus knew what issues to focus on in his sessions with Miller. (RT 8/21/90 at 34-35) During his questioning by Minor, Miller began to manifest the effects of lengthy interrogation, which had included accusations of lying due to failed polygraphs, and strong religious appeals by the Special Agent in Charge / Mormon Bishop, Bretzing. Accordingly, as he commenced his pre-polygraph interviews with Minor in the afternoon of September 30, Miller began to express uncertainty as to his actions with Svetlana. He wasn't sure whether or not Svetlana may have had access to and/or taken his credentials into the Soviet Consulate during her visit there on August 23, 1984. (RT 8/21/90 at 59)

As the interrogation wore on, Miller eventually stated that he believed that she might have done so and probably had. (RT 8/21/90 at 59) That ended Miller's interrogation for the day, Minor having obtained a statement that was beginning to build a criminal case. (RT 9/19/90 at 21-22) Curiously, Minor, who had flown out to Los Angeles for the specific purpose of giving Miller a polygraph exam (RT 8/21/90 at 32), did not test Miller on this statement to determine if it was truthful. It clearly appeared that the FBI was interested only in obtaining statements, not in ascertaining their veracity.

The sessions with Minor continued into the fourth day of interrogation, October 1. Minor responded to Miller's continual apprehensions by urging him to take a definitive position on his actions with Svetlana. Under this pressure, Miller said he

had given Svetlana a classified document. (RT 9/19/90 at 99) Again, Minor failed to administer a polygraph exam.

At about this time, Miller told Minor he was exhausted and willing to sign anything just to get the interrogation process over with. He offered to sign a confession if Minor would write it for him. (RT 9/19/90 at 90)

Despite Miller's fatigue, Christensen confronted Miller and pressed him about his statement to Minor that he had given Svetlana a classified document. Miller responded by telling Christensen that his interrogators had told him so often that he had done something he did not recall doing, that he could not be certain that he was saying what actually happened or what they had told him had happened. (RT 1/12/85 at 312, 345; 8/21/90 at 76) Miller stated, "I feel that I'm being told something so often that I'm starting to believe it." (RT 1/12/85 at 321) Towards the end of the interrogation on October 1, Miller reiterated to Christensen what he had told Minor earlier, that he was so tired and exhausted that he was ready to sign anything, just to end the interrogation process. (RT 1/12/85 at 312)

The interrogation session with Christensen was followed up with continued questioning by agents Torrence and Van Note, who since the interrogation began on September 28 had kept in constant contact with surveillance agents monitoring the 24-hour electronic eavesdropping on Miller's residential telephones. In

so doing, Torrence and Van Note were able to stay abreast of telephone conversations between Miller and his wife concerning the status of the interrogation process. (RT 1/15/85 at 121)

As the October 2 session with Torrence and Van Note got under way, Miller expressed his concern that he should be speaking with an attorney before continuing with the interrogation. (RT 1/12/85 at 318) Nonetheless, the agents continued with their questions, pressing Miller on the issue of whether he passed classified information to Svetlana. Contrary to the statement to Minor that he had given Svetlana a document in San Francisco, Miller explained that he did not hand anything over to her; rather, he had shown her a copy of a document at his residence during her visit in August 1984, but that she seemed unimpressed and disinterested. (RT 9/19/90 at 41).

The agents persisted in their probe. They conveyed to Miller that the FBI had in its possession taped evidence showing Miller passing classified information; in fact, no such evidence existed. (RT 1/12/85 at 345) But the ploy left its mark. By the end of the fourth day of interrogation, Miller had become convinced that he gave Svetlana classified information.

On October 2, 1984, the fifth and final day of interrogation, Miller was once again questioned by Minor. (RT 9/19/90 at 50) During the session, Miller

requested that the interrogation terminate so that he could go home, rest, and talk things over with his wife. (RT 9/19/90 at 53) His request was honored, and he was told to return later to conclude the interrogation. (RT 9/19/90 at 56) However, Miller first thanked Minor for "helping" him to remember the events described by Minor on October 1. (RT 8/21/90 at 79)

Before leaving the FBI office, Miller approached Christensen, an active Mormon, and asked for a blessing from both him and Bretzing. (RT 1/12/85 at 307; 8/21/90 at 17, 66, 71) In making this request, Miller was still feeling the strong impact from Bretzing's religious entreaties from September 29 and 30. (RT 8/21/90 at 71-72)

Miller was unable to return for further interrogation because FBI agents came to his home around midnight on October 2, 1984, and arrested him while he was dressed in a bathrobe and pajamas. He was transported immediately to a duty magistrate in San Diego. (RT 9/20/90 at 88) During the ride to San Diego, he was accompanied by Bretzing and two other agents and interrogated. The agents testified that Miller again admitted to passing classified information to Svetlana. (RT 9/20/90 at 90) A criminal complaint was filed later that day, and the initial indictment followed on October 12, 1984.

IV.

STANDARD OF REVIEW

1. This Court reviews the district court's denial of Miller's wiretap suppression motion for abuse of discretion. United States vs. Gonzales, 749 F.2d 1329 (9th Cir. 1984).

2. This Court reviews the district court's denial of Miller's motion to suppress his statements de novo. The voluntariness of a statement under the Fifth Amendment is a legal, not factual question. Miller vs. Fenton, 474 U.S. 104 (1985).¹⁶

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The Court is respectfully referred to its 1986 ruling in United States vs. Pinion, 800 F.2d 976 (9th Cir. 1986), where it held that the review of a district court determination of the voluntariness of a confession is reviewed for clear error. In so holding, the Ninth Circuit panel, per Weigel, D.J., stated that it is not clear whether Fenton, supra, will have an effect on this standard of review.

V.

ARGUMENT

A. THE COURT COMMITTED REVERSIBLE ERROR BY RULING THAT MILLER'S RENEWAL OF HIS MOTION TO SUPPRESS ELECTRONIC SURVEILLANCE EVIDENCE WAS UNTIMELY

1. Introduction

At the conclusion of the trial testimony of FBI agent Bradford regarding the installation of FISA wiretaps on Miller's telephones and the 24-hour monitoring thereon, defense counsel orally renewed Miller's written motion from a prior trial seeking suppression of all electronic eavesdropping evidence due to the government's failure to minimize. Counsel advised the Court that objections to such evidence had been raised by the defense in the prior two trials, and that a written motion on the minimization issue had been filed prior to the first trial. (RT 8/30/90 at 72) The government objected to the renewal on grounds of untimeliness. (RT 8/30/90 at 75). Written memoranda were submitted to the Court (CR 996, 1001, 1006, 1007), and the Court subsequently issued an order denying the renewed motion due to untimeliness. (CR 1019) The order does not contain any findings of fact in support thereof.

2. Applicable Legal Standards

The issue before this Court is a narrow one: whether the district court abused its discretion in holding that Miller had waived his right to object to the claim that the government improperly failed to minimize the wiretap implemented under FISA by raising his objection in an untimely fashion.

Rule 12(b)(3) of the Federal Rules of Criminal Procedure provides that motions to suppress are required to be made in advance of trial. While this rule appears to be absolute, the district court does have discretion to permit the issues relating to such a motion to be litigated after the trial has begun. See, generally, United States vs. Gonzales, 749 F.2d 1329 (9th Cir. 1984). While a motion to suppress must be made prior to trial, in exercising its discretion, a court may permit it if it is made within a reasonable time thereafter. United States vs. Hicks, 524 F.2d 1001 (5th Cir. 1975), cert. denied, 424 U.S. 946. The court's discretion should be exercised in favor of permitting a motion to be raised during trial if it amounts to the renewal of a prior and does not constitute a new motion. United States vs. Worthington, 698 F.2d 820 (6th Cir. 1983)(motion raised during trial deemed untimely as new motion, not renewal of prior motion).

3. Application Of The Facts To The Law

In the case at bar, Miller's objections to the wiretap evidence at trial amounted to the renewal of a previously filed motion. The same issues had been properly pleaded in a motion to suppress in the same litigation (District Court Case No.

CR 84-972) which was filed on December 7, 1984 and denied by the district court on January 9, 1985. (CR 64, 75, 121, 137, 170).¹⁷ No new grounds were raised by Miller when he renewed the motion during the third trial. The objection raised by Miller to the wiretap evidence merely sought to relitigate a previously raised issue under the circumstances adduced at trial that 100% of the telephone calls being monitored by the FBI were listened to, recorded and preserved.¹⁸

Accordingly, the district court clearly had the discretion to entertain the motion and should have done so. Well before the third trial began -- in fact, long before the case was assigned to District Court Judge Takasugi -- all of the arguments in support of Miller's motion were already part of the district court file in the subject litigation. In terms of reviewing a written motion on the merits of the wiretap issue, all the district court needed to do was go back into the court file and review Miller's motion filed in December 1984, as well as the government's written opposition thereto. Requiring Miller to refile the same motion again prior to the third trial invites unnecessary duplication. The law should be construed with an eye towards efficiency and the avoidance of duplication.

It should also be noted that there were no procedural modifications in the

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The chronology of litigation of the wiretap suppression issue is outlined for the Court's convenience on pages 4-5 of this brief.

¹⁸ **See pages 11-12 of this brief.**

litigation prior to the third trial. The indictment on which Miller was prosecuted in the third trial was the same as that in the first and second trials, with the exception that count seven had been dismissed voluntarily by the government. Miller was not re-arraigned on the indictment prior to the third trial, nor was he required to enter a new not guilty plea. Thus, from a procedural perspective, the litigation had not changed between December 1984, when the written suppression motion on the minimization was filed, and the third trial. It follows that Miller's objections to the wiretap evidence at the third trial merely served to renew the previously filed motion and should therefore have been allowed.

B. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DENYING MILLER'S MOTION TO SUPPRESS HIS STATEMENTS TO THE FBI

1. Introduction

Miller has extensively litigated the issue of suppression of his statements to the FBI before the district court. A chronology of the litigation on this issue is provided on pages 5-6 of this brief. Most recently, Miller's motion to suppress his statements was denied by the district court on August 21, 1990, at a hearing held directly before the commencement of the third trial.

2. All Statements Made By Miller After The Religious Appeals By Agent Bretzing on September 29, 1984, And All Fruits Thereof, Were The Result of Coercion And Thus Involuntary And Should Therefore Have Been Suppressed By The District

Court

a. Applicable Legal Standards

It has long been established that a confession by a defendant in a criminal action is admissible in evidence only if it was freely and voluntarily given. See Blackburn vs. State of Alabama, 361 U.S. 199, 205 (1960). Any confession obtained by means of coercion, whether physical or mental, violates the due process clause of the Fourteenth Amendment and renders a conviction based on such confession invalid. Id.; see also, Rogers vs. Richmond, 365 U.S. 534 (1961).

Whether a confession or oral admission is voluntary or involuntary is determined by whether the conduct of the governmental official to whom the admission was made, was such as to overbear the defendant's will to resist and bring about an admission that is not of his own free will. Fernandez-Delgado vs. United States, 368 F.2d 34 (9th Cir. 1966).

To determine the voluntariness of a confession, the court must consider the effect that the totality of the circumstances had upon the will of the defendant. Schneckloth vs. Bustamonte, 412 U.S. 218, 226-27 (1973); Procunier vs. Atley, 400 U.S. 446, 453 (1971); Miller vs. Fenton, 796 F.2d 598, 604 (3d Cir. 1986). The ultimate issue is whether the

. . . pressure, in whatever form, was sufficient to cause the petitioner's will to be overborne and his capacity for self-

determination to be critically impaired. Culombe vs. Connecticut, 367 U.S. 568 (1961).

Ferguson vs. Boyd, 566 F.2d 873, 877 (4th Cir. 1977).

In applying the totality of the circumstances test, a court is required to:

. . . consider the specific tactics utilized by the police in eliciting the admissions, the details of the interrogation, see, e.g., Haynes vs. Washington, 373 U.S. 503, 508-510, 83 S.Ct 1336, 1340-41, 10 L.Ed. 2d 513 (1963); Spano vs. New York, 360 U.S. 315, 321, 79 S.Ct. 1202, 1206, 3 L.Ed. 2d 1265 (1959); Ashcraft vs. Tennessee, 322 U.S. 143, 152-54, 64 S.Ct. 921, 925-26, 88 L.Ed. 1192 (1944), and the circumstances of the accused, (citations omitted), in order to determine if there has been a violation of due process.

Rachlin vs. United States, 723 F.2d 1373, 1377 (8th Cir. 1983).¹⁹

It is well established that an involuntary confession may result from

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The interrogation of Miller occurred in 1984, two years prior to the Supreme Court's ruling in Colorado vs. Connelly, 479 U.S. 157 (1986), which held that "coercive police activity is a necessary predicate to finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment." Id. at 164. Moreover, the opinion in Connelly does not contain any language which would indicate that the ruling should be applied retroactively. Accordingly, Miller respectfully contends that Connelly does not apply to the facts of this case.

psychological, as well as physical, coercion:

A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion".

Blackburn vs. State of Alabama, *supra*, 361 U.S. at 206. Indeed, coercive pressures can exist independently from threats of use of force. United States vs. Hernandez, 574 F.2d 1362 (5th Cir. 1978) (five hours in police wagon said to be a coercive pressure).

The Ninth Circuit has adopted these criteria:

Before a criminal defendant's statement can be used against him, the government must prove its voluntariness by a preponderance of the evidence . . . The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne. United States vs. Guerrero, 847 F.2d 1363, 1365-66 (9th Cir. 1988).

Accord: United States vs. Crespo de Llano, 830 F.2d 1532 (9th Cir. 1987) (inculpatory statement must be product of a rational intellect and free will).

Within this due process framework, an appeal to a suspect's religious values may render a subsequent confession involuntary. In Davis vs. State of North Carolina, 339 F.2d 770 (4th Cir. 1964), reversed on other grounds, 384 U.S. 737 (1966), the Court articulated the standards as follows:

If prayer or other religious influences are to be held coercive so as to require the exclusion of a subsequent confession, the religious references, themselves, ought to be designed or calculated to so arouse the prisoner's fears of a divine judgment as to overcome his resistance to present confession. 339 F.2d at 776.

The Court went on to note the following:

When there has been a prior relationship between the clergyman and the prisoner, justifying the conclusion that the prisoner looks upon the clergyman as his spiritual advisor, such religious exhortation may be all the more coercive. Id. at 776 n.11.

In reversing the appellate court, the Supreme Court in Davis held the confession at issue to be the product of coercion. 384 U.S. 737. In so doing, the religious factor was addressed by the Court in such a way as to indicate that it was a

significant factor in the ruling. See also, Brewer vs. Williams, 430 U.S. 387 (1977) (coercion existed where the defendant who was known to officers to have deep religious convictions was persuaded to lead officers to location of victim's body).

b. Application Of The Facts To The Law

When the totality of the circumstances test is applied to the facts here, there can be no doubt that the admissions made by Miller were the product of a will overborne.

First, the interrogations covered five days, during which the pace was continual and unrelenting. On September 29 alone, the combination of interrogation sessions, driving to and from Miller's Bonsall residence (during which the questioning continued), and the search of the residence, totalled 19.5 hours. Miller returned home at 3:30 a.m. on September 30, and he returned for additional questioning later that morning. By the time he began to make statements of a potentially incriminating nature, Miller was showing clear signs of exhaustion.

Second, in order to fulfill their goal of building a prosecutable case, the FBI officials who questioned Miller set out to purposefully mislead him as to the true nature and scope of the investigation into his activities with Svetlana. By continually reassuring him that he was still part of the "team", and that the investigation was merely to clear up a potential breach of security, they lulled Miller into a false sense of security. The effect was to critically impair Miller's capacity for self-determination in

the course of the interrogation process. Ferguson, supra, 566 F.2d at 877.

By deceiving Miller in this fashion, the FBI was able to continue questioning him hour after hour, without arousing his suspicions that he might end up in jail as a direct result of these conversations. Likewise, these tactics enabled the FBI to succeed in obtaining Miller's consent to search his residence on September 29, thus bypassing the burdensome and time-consuming procedures for obtaining a warrant.

Indeed, these deceptive practices were brazenly applied while the search itself was being conducted. Knowing fully well that the FBI had been actively investigating Miller for possible prosecution for a month, and that the agency had invested extensive man-hour resources in this effort, as evidenced by the 24-hour electronic eavesdropping, Christensen nonetheless advised Paula Miller that her husband's activities did not constitute a prosecutable offense and that he would not lose his job. Obviously, Christensen intended that Paula would advise her husband of this statement, which she did, in order to maintain Miller's misconception as to the FBI's true motives.

Perhaps the most pernicious application of deceit in an effort to elicit a confession was manifested by Bretzing's appeal to Miller's religious values on September 29 and 30. Oblivious to the FBI's true intentions, Miller met with the chief of his office, Bretzing, on September 29 and 30. Bretzing, aiming to get a confession out

of Miller, exploited his status as a Mormon Bishop to play upon Miller's religious vulnerability by preaching to him about the five steps of repentance that Miller would have to comply with in order to fulfill his desired wish of being readmitted into the Mormon Church. Of course, the principal theme behind Bretzing's strategic ploy was to have Miller confess to a criminal act in regard to his activities with Svetlana, thus enabling the FBI to prosecute him -- all in the name of repentance.

Bretzing's religious appeal was clearly "designed or calculated to so arouse (Miller's) fears of a divine judgment as to overcome his resistance to present confession" and thereby induce a statement from Miller. Davis vs. North Carolina, supra, 339 F.2d at 776. Cf. Yates vs Breazeale, 402 F.2d 113, 114 (5th Cir. 1968) (confession not invalid where defendant requested minister of his own selection). Had it not been for Bretzing's appeal, Miller would not have made the statements that he gave during the interrogation sessions following the two meetings with Bretzing, i.e., that he believed Svetlana may have taken his credentials into the Soviet Consulate in San Francisco, and that he believed he gave Svetlana classified information. This is evident from the profound shift in Miller's conduct during the subsequent interrogation sessions, as compared to the sessions that preceded the meetings with Bretzing. Prior to the first meeting with Bretzing on September 29, Miller had made no statements of any kind that would constitute an admission to criminal wrongdoing; he had not admitted to any elements of the statutes under which he would later be prosecuted.

However, this all changed after the Bretzing meetings. The evidence amply shows that Bretzing was able to exert such powerful influence upon Miller's psyche because, as a Mormon Bishop, Bretzing occupied a position of clear authority. A Mormon himself, Miller respected Bishop Bretzing's religious advice. As an excommunicated Mormon, Miller saw himself in need of redemption, and thus revered Bretzing's guidance, albeit without realizing Bretzing's manipulative designs. Thus, Miller felt compelled to follow Bretzing's dictates and cleanse his soul through confession. Cf. Davis vs. North Carolina, supra, 339 F.2d at 776 (police officer was not the prisoner's religious advisor). By exploiting Miller's religious vulnerability, Bretzing augmented the illusion already instilled in Miller that his discussions with the FBI were non-adversarial in character. Fenton, supra, 796 F.2d at 607.

The powerful impact of Bretzing's appeal to Miller's religious values cannot be overstated. As recognized by the Fifth Circuit in Yates, supra, 402 F.2d at 120:

Strongly religious people generally, in order to relieve themselves of a sense of guilt, believe in the cleansing power of confession and the forgiveness which results. This record reflects that Yates was highly emotional and when urged by his religious advisor, a Pentacostal minister, to confess and be forgiven, the effect would be catastrophic in compelling a confession.

Moreover, he had been assured that he would receive no more than life if he confessed.

Like Yates, Miller demonstrated a highly emotional state as he broke down and cried during each of his meetings with Bretzing. While he was not assured of more lenient treatment in a criminal prosecution if he confessed, as Yates was, Miller nonetheless had been deceived by the FBI throughout the five days of interrogation as to the true nature and scope of the investigation, thus inducing in Miller the same perception as with Yates, to wit, that he had nothing to fear and something to gain by confessing.

This focus on Miller's personality traits is an appropriate and necessary component of the voluntariness analysis. In determining whether the circumstances at hand indicate that Miller's statements were involuntary, the Court must consider whether the FBI's tactics were sufficiently manipulative to overbear the will of a person with Miller's characteristics. Fenton, supra, 796 F.2d at 611. The Supreme Court has recognized that

[t]he limits [of permissible questioning tactics] in any case depend upon a weighing of the circumstance of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced

criminal. Stein vs. New York, 346 U.S. 156, 185 (1953),
cited in Fenton, supra, 796 F.2d at 611.

On these facts, such an overwhelming appeal to Miller's religious beliefs made by a Bishop in the Mormon Church who clearly sought to elicit a confession, coupled with the statements by the FBI agents which were designed to mislead Miller as to the true nature and scope of the investigation, were so manipulative and coercive that they deprived Miller of his ability to make an unconstrained, autonomous decision to confess. Fenton, supra, 796 F.2d at 605. As such, the FBI violated the Fifth Amendment due process clause and privilege against self-incrimination. Brown vs. Mississippi, 297 U.S. 278, 286 (1936) (due process); Bram vs. United States, 168 U.S. 532, 542 (1897) (self-incrimination). Accordingly, the district court committed reversible error in denying Miller's motion to suppress his statements.

c. Miranda Waivers Immaterial

The fact that Miller signed several waivers of his constitutional rights prior to the interviews which culminated in his admissions, are of no legal effect. It has been held that even in a case where Miranda warnings are properly given and a waiver thereof properly taken, the ultimate test of admissibility of a confession still remains whether it was voluntarily and freely made. A coerced confession is still inadmissible, regardless of compliance with Miranda. See Coyote vs United States, 380 F.2d 305 (10th Cir.), cert. denied, 389 U.S. 992 (1968).

d. "Fruits" of Miller's Statements Should Also Have Been Suppressed

Additionally, the district court erred in not suppressing all "fruits" of the coerced statements. It is well established that the government may not use the information it has improperly extracted as a means of finding proper evidence. Silverthorne Lumber Co., Inc. vs. United States, 251 U.S. 385 (1920). In what has been called a "time-worn metaphor", [Harrison vs. United States, 392 U.S. 219, 222 (1968)], the government is said to be barred from the use of "a fruit of the poisonous tree". If there is a direct relationship between illegally obtained evidence and the acquisition of subsequent evidence, then the subsequent evidence must also be suppressed. See Brown vs. Illinois, 422 U.S. 590 (1975).

VI.

CONCLUSION

Miller respectfully contends that the district court erred in denying his motion to suppress wiretap evidence on the ground of untimeliness. Therefore, this Court should reverse his convictions on all counts and remand for a new trial with the following directive:

1) that the district court rule on Miller's wiretap suppression motion on the merits prior to the new trial.

Furthermore, Miller respectfully contends that the district court erred in denying his motion to suppress his statements. This error also requires reversal of Miller's convictions on all counts and a new trial. This Court should issue such an order, together with the following directives:

1) that all statements made by Miller during and subsequent to the first meeting with Bretzing on September 29, 1984 be suppressed and thus inadmissible at the new trial;

2) that the district court hold an evidentiary hearing and issue findings of fact as to all evidence obtained by the government which would constitute "fruits" of the inadmissible statements; and that the district court suppress all such "fruits".

STATEMENT OF RELATED CASES

There are no related cases. The prosecution of Miller's co-defendants in the indictment are not the subject of any pending appeals at this time.

DATED: January 14, 1992

Respectfully Submitted,

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(by CJA appointment)