"THE FEDERAL CORNER"

Beware of the Federal Hordes

F. R. (Buck) Files, Jr.

Waldo Snerd's lawyer, Herman Glertz, was plagued by nightmares. There was a common theme: A horde of federal agents in possession of a search warrant for Waldo's home or business descended upon his residence. While there or at his place of business, they interrogated Waldo and obtained an inculpatory statement from him. After Waldo was indicted, Herman filed a motion to suppress the statement in each case, alleging that Waldo was in custody and that no *Miranda* warning was given to him. In each nightmare, the Government blithely assured the judge that Waldo was not in custody and that no *Miranda* warning was necessary. Before the judge ruled, Herman awakened -- stressed that he didn't know the outcome of Waldo's case.

What was a nightmare for Herman has become a reality for defense lawyers across the country. In a trilogy of cases from the federal courts in Illinois, Louisiana and Virginia, defendant's lawyers were confronted with the same nightmare that Herman dreamed about. If you have such an issue, you should be familiar with *United States v. Borostowski*, ___ F.3d ___, 2014 WL 7399074 (7th Cir., IL 2014); *United States v. Wittich*, ___ F.Supp.3d ___, 2014 WL 5430997 (E.D. LA, 2014); and, *United States v. Freeman* ___ F.Supp.3d ___, 2014 WL 6473691 (E.D. VA, 2014).

In *Borostowski*, a panel of the Seventh Circuit [Circuit Judges Flaum, Kanne and Rover; opinion by Rovner] held that the defendant was in custody and remanded the case to the district court to consider whether Borostowski unequivocally invoked his right to counsel. In *Wittich* and *Freeman*, each district judge held that the defendant was in custody and granted his motion to suppress the statement given by him. I have set out more of the opinion in *Borostowski*, but only short excerpts from the opinions in *Wittich* and *Freeman* that show the unusual physical or mental state of each defendant prior to the time he made his inculpatory statement.

United States v. Borostowski, ___ F.3d ___, 2014 WL 7399074 (7th Cir., IL 2014).

[From the Opinion]

> Michael J. Borostowski pled guilty to an indictment charging him with one count of receiving child pornography in violation of 18 U.S .C. §§ 2252A(a)(2)(A) and 2252A(b)(1); five counts of distributing child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2252A(b)(1); and three counts of possessing child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). Borostowski reserved his right to appeal the district court's denial of his motions to suppress. The district court sentenced him to 293 months of imprisonment, followed by a lifetime of supervised release. On appeal, Borostowski challenges the district court's conclusion that he was not in custody when officers questioned him on the day a search warrant was executed at his home.

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Michael Borostowski, the defendant here, had a prior conviction related to child pornography. Using information gleaned from that investigation, an agent applied for a warrant to search Borostowski's person, his 1993 red Chevrolet truck and the premises where he lived…

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At approximately 6:05 a.m. on November 15, 2012, thirteen law enforcement agents executed the search warrant at the home where Borostowski lived with his parents and sister. Additional officers from local law enforcement assisted in traffic and perimeter security but did not enter the house. The initial "entry team" was comprised of seven agents. One agent carried a ballistic shield and all seven agents were armed with handguns.

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Agent Spencer told Borostowski that they were searching for electronic media, that he was not under arrest, and that they wished to ask him questions about his activities and items from the house. Using a standard form, Agent Spencer then read Borostowski his Miranda rights and asked if he understood them. Borostowski indicated that he did understand. *Agent Spencer then read the consent portion of the form to Borostowski and asked if he was willing to answer questions. Borostowski replied that he wanted to cooperate and added, "But I think I should have an attorney present."* Agent Spencer told Borostowski that he was "a bit unclear of exactly what you mean and what you want," and suggested that they discuss this further. *Borostowski then told the agent that he was "torn and conflicted," that he wanted to cooperate but that he was also concerned that what he said would be used against him. Agent Spencer asked if Borostowski had an attorney in mind and he replied that he did not. Agent Spencer asked who had represented Borostowski when he was previously prosecuted for child pornography offenses. Borostowski then named Assistant Federal Public Defender Robert Alvarado, and explained that he had pled guilty in that case and had served time in prison. The agents did not stop the questioning at that time and did not contact Attorney Alvarado because, as Agent Nixon candidly acknowledged, they wanted to continue the interview without a lawyer present.* Instead, Agent Spencer told Borostowski:

> One of the things you can do, I said, is you can start answering questions now. If you choose not to answer a certain question, you can say I don't want to answer that question. You can stop answering questions at any time during the interview, and, you know, if you choose during the interview to have an attorney, you can do that also.

Agent Spencer also told Borostowski that he understood his concerns, that he had "some things [he] had to show him to clear up," and that he would like Borostowski's cooperation. At that, Borostowski agreed to be interviewed and signed the consent portion of the Miranda form. *From the introductions to the*

> *signing of the consent form, approximately fourteen minutes had elapsed.* (Emphasis added)
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> We review the district court's findings of historical fact for clear error, but the ultimate "in custody" determination for *Miranda* purposes is a mixed question of law and fact qualifying for independent review.
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> In determining whether a person is in custody, our first step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.
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> Relevant factors include the location of the questioning, its duration, statements made during the interrogation, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of questioning. *Howes*, 132 S.Ct. at 1189. *See also Ambrose*, 668 F.3d at 956 (in determining whether a person is in custody, a court should consider, among other things, whether the encounter occurred in a public place, whether the suspect consented to speak with officers, whether the officers informed the suspect that he was not under arrest, whether the interviewee was moved to another area, whether there was a threatening presence of several officers and a display of weapons or physical force, whether the officers deprived the suspect of documents needed to depart and whether the officers' tone was such that their requests were likely to be obeyed).
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> *On balance, we cannot agree with the district court that a reasonable person in these circumstances would have felt free to end the encounter and leave at any point throughout the day*. We vacate the court's finding and remand so that the court may consider in the first instance whether and when Borostowski unequivocally invoked his right to counsel. If the court concludes that Borostowski did invoke his right to counsel, then any statements that Borostowski made from that point forward would be excluded from trial. (Emphasis added).

United States v. Wittich, ___ F.Supp.3d ___, 2014 WL 5430997 (E.D. LA, 2014)

Judge Nanette Jolivette Brown granted the motion to suppress the statements made by Wittich, concluding that he was in custody and that no *Miranda* warning was given. What makes *Wittich's* case unusual is found in the following experts from the opinion:

> On the morning of July 13, 2012, FBI agents conducted a search of TBC's facility pursuant to a search warrant. Parsons, the case agent, and 10 to 15 other agents executed the search. The agents wore bullet-proof vests, and carried weapons. Local law enforcement was also at the scene.9 Parsons testified that he had conducted surveillance of TBC and Wittich's home on approximately five occasions before execution of the warrant.

> *Wittich was not present at TBC on the morning of the search because he had undergone surgery on July 3, 2012, to remove his prostate due to prostate cancer.* Parsons testified that he asked FBI Agents Wood and Soyez to go to Wittich's home to notify him of the search and ask if he wanted to go to TBC to speak to Parsons. Parsons stated that Wood and Soyez would not have been able to interview Wittich at his home because they did not know the facts of the case. Parsons testified that his expectation was that Wittich would want to come to TBC to speak to him. (Emphasis added)
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> *Mrs. Wittich testified that two FBI agents came to her home on the morning of July 13, 2012, asking to speak to her husband. She informed the agents that Wittich had major surgery on July 3, 2012. Wittich was taking Percocet following the surgery, which Mrs. Wittich testified made him drowsy and caused him to lose any concept of time. Wittich was using a catheter and drainage bag. She also testified that Wittich asked the agents if she could drive him to TBC, but the agents stated that they were required to take him. Mrs. Wittich testified that she had to help Wittich get dressed so that he could leave with the agents.* (Emphasis added)

United States v. Freeman ___ F.Supp.3d ___, 2014 WL 6473691 (E.D. VA, 2014)

Judge James C. Cacheris granted the motion to suppress the statements made by Freeman, concluding that he was in custody and that no *Miranda* warning was given. What makes *Freeman's* case unusual is found in the following experts from the opinion:

> *As an initial matter, the Court gives greater weight to the testimony and credibility of Freeman and his family members, which was consistent and corroborated. The Court gives less weight, and in some instances, no weight at all, to the testimony of the four federal law enforcement officers, which was generally inconsistent, uncorroborated, and less credible.* (Emphasis added)
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> Around 6:00 a.m. on Tuesday July 30, 2013, twenty-one state and federal law enforcement officials executed a federal search warrant on Freeman's home.
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> *Freeman, who wears a breathing mask for sleep apnea, was delayed in exiting the bedroom because he had to take off the mask, which takes between thirty seconds and one minute.* (Emphasis added)
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> *Freeman held a tissue in one hand, which he had used to wipe excess moisture from the sleep apnea mask. An unidentified officer knocked the tissue out of Freeman's hand with his handgun. ("[H]e went, gestured like that (indicating), and knocked out of my hand the thing that I had, and I thought he was shooting me. I really thought I was going to be shot (crying).").) Freeman responded by yelling, "Please, don't shoot."*

At some point between getting out of bed and meeting the officers outside his bedroom, Freeman defecated in his shorts. Realizing this, but now standing in the hallway with his hands in the air next to an armed officer, Freeman asked to use the bathroom. With some reluctance, the officer allowed Freeman to go into the bathroom, but kept watch from the open doorway. Freeman attempted to inconspicuously clean himself using a towel and water, but needed to change into different clothes. The officer, still with his handgun drawn, escorted Freeman from the bathroom to his bedroom to change. Freeman slowly and deliberately changed his clothes in full view of the officer, who ordered Freeman to keep his hands visible at all times. (Emphasis added)

My Thoughts

- I am old enough to remember when we didn't have enough federal officers in Tyler to constitute a horde. That has now changed, and I have had clients descended upon by such an armed horde in two recent cases. Fortunately, neither made an inculpatory statement.
- I am convinced that the *horde theory* is a civilian equivalent of General Schwarzkopf's *shock and awe theory* from his invasion of Iraq. It worked for Schwarzkopf and it works for the hordes of federal officers.
- Our only protection lies with the judges who hear our motions to suppress our clients' statements.