

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Crim. No. DKC-99-0452
)	
FRANCISCO SANTINI, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
_____)	

**DEFENDANT FRANCISCO SANTINI'S
MOTION (1) TO SUPPRESS ANY TESTIMONY CONCERNING
HIS STATEMENTS TO FBI AGENTS ON MARCH 4, 1999;
(2) TO HOLD A HEARING ON THE RELIABILITY
OF AGENT RODEN'S VERSION OF HIS STATEMENTS; AND
(3) TO REQUIRE THE GOVERNMENT TO PRODUCE
ANY ROUGH NOTES BY THE AGENTS OF HIS STATEMENTS**

Defendant Francisco Santini, by his undersigned counsel, hereby moves to suppress any testimony by FBI agents concerning his statements to them at an interview on March 4, 1999. Defendant Santini asserts that his statements were not voluntary because they were induced by assurances that he was not a target of the investigation, which he interpreted to mean that he would not be prosecuted and that his statements would not be used in any criminal prosecution against him. Defendant further moves that this Court hold a hearing to determine the reliability of Agent Roden's version of his statements, since the interview in question was conducted partly in Spanish, a language Agent Roden does not understand. Finally, defendant moves that the Government be required to produce any notes taken by the Agents relating to his statement on March 4, 1999. The particulars supporting this motion are stated in the accompanying memorandum of points and authorities.

Respectfully submitted,

By:

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(Appointed by this Court)*

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**DEFENDANT FRANCISCO SANTINI'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF HIS MOTION (1) TO SUPPRESS ANY TESTIMONY CONCERNING
HIS STATEMENTS TO FBI AGENTS ON MARCH 4, 1999;
(2) TO HOLD A HEARING ON THE RELIABILITY
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ANY ROUGH NOTES BY THE AGENTS OF HIS STATEMENTS**

Defendant Francisco Santini, by his undersigned counsel, states the following in support of his motion to suppress any testimony concerning his statements to FBI agents on March 4, 1999, and seeking other relief relating to his statements.

FACTUAL BACKGROUND

The present case arises out of a Government investigation of Cardio-Tel's business operations in Puerto Rico during the years 1992-96. This investigation was initiated at least as early as October 1997, when representatives of Xact, the Medicare carrier to which Cardio-Tel submitted its claims for reimbursement, ran a report (which was subsequently delivered to the Government) listing the Unique Provider Identifier Numbers (UPINs) for all physicians who had prescribed electro-cardiographic (ECG) monitoring services for which bills were submitted by Cardio-Tel. This report also listed the total amount that Cardio-Tel billed, and that Xact paid, for

claims associated with each physician. The Xact Report indicated that an unusually large volume of the claims for reimbursement submitted by Cardio-Tel related to patients of Dr. Francisco Santini. There appears to be a check mark or other marginal notation next to the line relating to Dr. Santini's UPIN number in the Xact report. *See Exhibit 1 (excerpts from Xact Report).* Although defense counsel has received little concrete information from the Government concerning the course of its investigation, it seems likely that the preparation of the massive Xact report on Cardio-Tel's billings was one of the initial steps in the Government's inquiry.

Ten months later, in early August 1998, two agents of the Department of Health and Human Services-Office of the Inspector General (HHS-OIG) paid a call upon former Cardio-Tel President Daniel Gershoni at his residence in Potomac, Maryland. The agents questioned Mr. Gershoni about Cardio-Tel's operations and quizzed him about the location of the company's business records, which Gershoni indicated were still in his possession. A subpoena was subsequently issued to Gershoni for the company's records. The HHS-OIG agent's report of this interview with Gershoni (attached as Exhibit 2) carries the Office of Investigations File Number 3-97-00392-9, which again indicates that this investigation was originally opened in 1997.

In November 1998, a local FBI agent in Puerto Rico, Victor Diaz, contacted Dr. Santini and conducted an initial interview with him about his relationship with Cardio-Tel. Significantly, the interview report (FBI-302) prepared afterwards by Agent Diaz indicates that he questioned Dr. Santini about whether he had been offered or paid kickbacks by Cardio-Tel representatives, suggesting that the Government may already have received information to this effect from Ramon Zayas or Manuel Soldevila, who appear to be its principal co-operating witnesses. *See Exhibit 3 (FBI-302 relating to Diaz Interview of Dr. Santini on 11/20/98).*

Less than two weeks later, Agent Diaz again called upon Dr. Santini with a Grand Jury subpoena requesting a preliminary group of patient records. *See* Exhibit 4 (FBI-302 relating to service of subpoena by Agent Diaz on 12/2/98).

Then, on January 29, 1999, the Government issued a subpoena to Dr. Santini for records relating to approximately 380 of his patients, all of whom had apparently been the subjects of ECG-related reimbursement claims submitted by Cardio-Tel. *See* Exhibit 5 (Excerpts from second Grand Jury subpoena issued to Dr. Santini). Dr. Santini subsequently produced four full boxes of patient records in response to this subpoena on or before February 22, 1999.

In February 1999, the Government requested Dr. Santini's carrier, Seguros de Servicio de Salud de Puerto Rico, Inc. (commonly known as Triple-S), to run a full report on all of Dr. Santini's billings in 1994-95. *See* Exhibit 6 (Excerpts from Triple-S Billing Report on Dr. Santini dated 2/12/99).

On March 4, 1999, shortly after Dr. Santini produced the hundreds of records required by the Government's second Grand Jury subpoena, Dr. Santini was visited by three FBI agents: Victor Diaz, Mark Batts, and David Roden, the case agent in this matter. Given that he had recently received two grand jury subpoenas, the second of which demanded production of hundreds of his records; that he had previously been interviewed by FBI Agent Diaz about his utilization of Cardio-Tel's monitors; and that the presence of three agents certainly suggested a significant level of Government interest in the matter, Dr. Santini now reasonably sought assurances about his status before agreeing to respond further to the agents' questions. Dr. Santini had been told by Jose Gonzalez Nego, one of the Cardio-Tel independent contractors he had dealt with, that before he agreed to be questioned by FBI agents in connection with an investigation relating to his sales of lymphadema pumps, his attorney had asked the FBI agents

whether Nego was a target of their investigation. Dr. Santini therefore similarly asked the FBI agents whether he was a target of their investigation relating to Cardio-Tel, and indicated that he was unsure whether it was prudent for him to speak with them without having an attorney present. Dr. Santini recalls that one of the agents – he believes it was either David Roden or Victor Diaz – responded “No,” that he was not a target of the investigation, but that information was being sought from him only as a witness in connection with an investigation of Cardio-Tel. The agents did not advise Dr. Santini that his status was subject to change, nor that any statements he made to them that day could be used against him in a federal criminal proceeding. Dr. Santini thereupon agreed to respond to the agents’ questions. Agent Roden’s report indicates that because of Dr. Santini’s limited ability to speak English, the bulk of the interview was conducted in Spanish and translated into English by Agent Diaz. (Agent Roden does not speak Spanish.) It is unclear whether any of the agents took notes during the interview.

Six days later, Agent Roden prepared a report summarizing his recollections of that interview, *see* Exhibit 7 (FBI-302 report dated 3/10/99 Relating to 3/4/99 Interview of Dr. Santini), and we expect he will be asked to testify concerning the statements supposedly made on this occasion at trial. Seven months after that interview, in early October 1999, Dr. Santini and Mr. Gershoni were indicted by a Federal Grand Jury in this District on charges of conspiracy, mail fraud, and wire fraud. The Indictment was sealed until early December.¹

¹ A curious incident occurred after the sealing of the Indictment that may be relevant with regard to Agent Diaz’s understanding of the focus of the investigation, or possibly to his appreciation of the importance of appropriately advising an individual about his status as a target of an investigation. On November 24, Assistant U.S. Attorney Sandra Wilkinson mistakenly issued a trial subpoena calling for Dr. Santini to appear and testify on December 17, 1999. *See* Exhibit 8 (Trial Subpoena Dated 11/24/99). (AUSA Wilkinson has advised us that she actually meant to issue a Notice of Appearance for Dr. Santini’s arraignment, and we accept that explanation.) When Agent Diaz subsequently served the subpoena on Dr. Santini, however, he advised him that his appearance was being sought before the Grand Jury for purposes of

ARGUMENT

I. THIS COURT SHOULD SUPPRESS ANY TESTIMONY RELATING TO DR. SANTINI'S STATEMENTS TO THE FBI AGENTS ON MARCH 4, 1999 BECAUSE THEY WERE OBTAINED BASED UPON WHAT HE UNDERSTOOD TO BE ASSURANCES THAT HE WAS NOT AT RISK OF PROSECUTION, AND HIS STATEMENTS THEREFORE WERE NOT VOLUNTARILY MADE

_____ Whenever a defendant makes statements that the Government subsequently seeks to use against him or her at trial, the Government has the burden of proving, by a preponderance of the evidence, that the defendant's statements were voluntary. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v. Garcia*, 780 F. Supp. 166, 171 (S.D.N.Y. 1991). When determining the voluntariness of a particular statement, the test is whether the statement was freely given under the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also Malloy v. Hogan*, 378 U.S. 1, 6-7 (1964) (the constitutional inquiry is not whether the conduct of the law enforcement officers in obtaining the confession was shocking, but whether the confession was free and voluntary); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).²

Under the Supreme Court's and the Fourth Circuit's voluntariness jurisprudence, a statement is involuntary if it was "extracted by any sort of threats or violence, [or] obtained by

questioning, and that, as a witness, his expenses for traveling to Maryland to testify would be paid for by the U.S. Marshals' Service. At no time did Agent Diaz advise Dr. Santini that he had already been indicted by the Grand Jury, and he does not seem to have found it strange or otherwise inquired of AUSA Wilkinson about his understanding that a Grand Jury subpoena had been issued to an indicted defendant. Shortly thereafter, AUSA Wilkinson caught the mistake, and a Notice of Arraignment was issued.

² Because Dr. Santini was not "in custody" when he was interviewed by the agents on March 4, the agents were not required to give him *Miranda* warnings. *See Minnesota v. Murphy*, 465 U.S. 420, 430-31 (1984) (*Miranda* warnings are not constitutionally required when the government questions a suspect on whom its investigation has already focused in a non-custodial setting). Of course, whether some form of advice of rights was given may still be significant in assessing the defendant's understanding of his circumstances and state of mind under the non-custodial "voluntariness" analysis.

any direct or indirect promise, however slight, [or] by the exertion of any improper influence.” *Hutto v. Ross*, 429 U.S. 28, 30 (1976), *quoting Bram v. United States*, 168 U.S. 532, 542-43 (1897) (emphasis added); *see also United States v. Shears*, 762 F.2d 397, 401-02 (4th Cir. 1985); *Grades v. Boles*, 398 F.2d 409, 412 (4th Cir. 1968). Thus, promises designed to lull a defendant into a false sense of security, as well as threats and coercive conduct, can render a statement involuntary.

And that is precisely what occurred here. Before Dr. Santini agreed to respond to the agents’ questions on March 4, he expressly indicated that he was uncertain whether he should meet with them without obtaining an attorney. He was assured by one of the agents that they were only investigating Cardio-Tel and that he was not a target of the investigation. At no time did the agents advise him that any statements he made could be used against him, or otherwise suggest that he need have any concerns about speaking freely to them. Having received what he understood to be assurances that he would not be prosecuted in connection with this matter, Dr. Santini did not seek the assistance of counsel and agreed to speak freely. As the authorities set forth below demonstrate, his statements on March 4 were therefore involuntary and must be suppressed.

A. At the Time of His Interview by the FBI Agents on March 4, 1999, Dr. Santini Clearly Appears to Have Been Either a Target or Subject of the Government’s Investigation.

The *United States Attorney’s Manual* defines a “target” as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” A “subject” of an investigation is defined as a person whose conduct is within the scope of the grand jury’s investigation.” Section 9-11.151. The Third Circuit has stressed that “the test as to whether a

witness is the target of a grand jury investigation cannot be whether he ‘necessarily’ *will* be indicted, but whether according to an objective standard he *could* be indicted.” *Crocker v. United States*, 568 F.2d 1049, 1054 (3d Cir. 1977) (emphasis added).

By March 1999, the Government’s investigation of Cardio-Tel was already well over a year old, and in the previous several months the investigation had focused on Dr. Santini to such a degree as to indicate that the Government was actively considering him as a possible target of the investigation. In the initial interview by Agent Diaz three-and-a-half months earlier, the Government had already questioned Dr. Santini about whether he had received kickbacks from Cardio-Tel – an allegation that would subsequently appear in both the original and superseding Indictments against him. The Government had issued two separate Grand Jury subpoenas to Dr. Santini in the previous three months – the first seeking a limited number of records, while the second was sweeping, seeking production of files relating to nearly 400 patients. Yet the FBI agents’ assurances to Dr. Santini at the beginning of their meeting on March 4 were not hedged or equivocal: he was told that he was not a subject of their investigation, and it was therefore suggested that he did not need to consult with counsel before speaking to them.

In the analogous context of questioning targets before the Grand Jury, the courts, the American Bar Association, and even the Department of Justice itself have all recognized that fundamental fairness demands that a witness who is a target should be accurately apprised of their status and of the fact that anything he or she says can be used against him or her in a future criminal prosecution. Thus, the *ABA Standards Relating to the Prosecution Function* (1971) provide that: “If the prosecutor believes that a witness is a *potential* defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.” Section 3.6(d) (emphasis

added). Many of the Federal Circuit Courts of Appeal have likewise taken strong positions that witnesses called to testify before grand juries should be accurately advised of whether they are targets or subjects of the grand jury's investigation. See *United States v. Pacheco-Ortiz*, 889 F.2d 301, 302 (1st Cir. 1989) (expressing Court of Appeals' "profound dissatisfaction with the failure of a United States Attorney's Office in this Circuit to abide by Department of Justice policies and procedures prescribing the giving of certain warnings prior to obtaining grand jury testimony from targets of an investigation," and indicating that in the future, such failures would likely result in a judicial referral to the Department's Office of Professional Responsibility); *United States v. Babb*, 807 F.2d 272, 279 (1st Cir. 1986) (describing prosecutor's failure to give subject or target warnings to any witness called before the grand jury during the course of the investigation "to be more than 'quite troublesome'; we find it to be unprofessional and worthy of severe condemnation"); *United States v. Crocker*, 568 F.2d 1049, 1056 (3d Cir. 1977) (warning U.S. Attorneys that in the future the Court might exercise its supervisory powers to suppress statements made by Grand Jury witnesses who were not warned of their status as targets or subjects, particularly where specific inquiry was made by the defendant's counsel); *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976) (exercising supervisory authority to suppress grand jury testimony of witness who was not advised that he were a target).

The *U.S. Attorney's Manual* provides that "It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a 'target' or 'subject' of a grand jury investigation." Section 9-11.151. Prosecutors are instructed that an "Advice of Rights" form should be appended to all grand jury subpoenas served on a subject or target of the investigation. The *U.S. Attorney's Manual* also provides that, notwithstanding the Supreme Court's unwillingness to find that warnings of target status to Grand Jury witnesses are

constitutionally mandated, “the Department of Justice continues its longstanding policy to advise witnesses who are known ‘targets’ of the investigation that their conduct is being investigated for possible violation of federal criminal law.” *Id.*

United States v. Costello, 750 F.2d 553, 554-555 (7th Cir. 1984) provides a good illustration of how FBI agents should properly proceed in conducting an interrogation where they suspect the interviewee of having been involved in criminal activity. During a non-custodial interview with an employee whom they strongly suspected of involvement in an arson at a car dealership, the agents advised the employee that he was under no obligation to speak to them; that he was a potential defendant in a later criminal action; that he could terminate the interview at any time; that they would inform the U.S. Attorney of his co-operation, but that they could not grant him immunity because “immunity . . . is not under the FBI’s jurisdiction.”

In this case, the least that can be said of the agents’ conduct is that they failed to exercise the care and scrupulousness shown by those in *Costello*, thereby creating a serious risk that Dr. Santini would be misled into thinking that he had received assurances of non-prosecution. At worst, the agents’ actions raise the possibility that their representations to Dr. Santini may have been actively dishonest.³ In either case, suppression of Dr. Santini’s statements is mandated under Supreme Court and Fourth Circuit precedent.

B. Defendant’s Statements Are Not Voluntary and Must be Suppressed When They Are Based Even in Part on his Understanding that He Has Been

³ If the agents’ assurances to Dr. Santini prove to have been dishonest, this Court should exercise its general supervisory role with regard to the fair administration of justice, *see United States v. Dionisio*, 410 U.S. 1, 9 (1973); *McNabb v. United States*, 318 U.S. 332, 340 (1943); *United States v. Jacobs*, 547 F.2d 772, 776-77 (2d Cir. 1976); *In the Matter of John Doe*, 410 F. Supp. 1163, 1165 (E.D. Mich. 1976), and find that fundamental fairness requires that his statements be suppressed, and the Indictment against him dismissed.

Assured by Government Agents That He is Not at Risk of Prosecution.

In assessing whether a defendant's statement to law enforcement officials was voluntarily made, the courts have long recognized that defendants are particularly vulnerable to assurances or suggestions by law enforcement officials that they are not in legal jeopardy and that their statements will not be used in any criminal prosecution against them. *See, e.g., United States v. Shears*, 762 F.2d 397, 401-02 (4th Cir. 1985); *United States v. Gonzalez*, 736 F.2d 981 (4th Cir. 1984); *Grades v. Boles*, 398 F.2d 409, 412 (4th Cir. 1968); *United States v. Goldstein*, 611 F. Supp. 626, 631 (N.D. Ill. 1985). Thus, the threshold question here is whether such statements were made to Dr. Santini. Once it is established that they were, the only further showing that must be made to support suppression is that the statements by law enforcement officials to Dr. Santini were "an important consideration" in inducing him to make his statement. *Grades v. Boles*, 398 F.2d 409, 412 (4th Cir. 1968). Because it is the defendant's state of mind that is the focus of the "voluntariness" analysis, *see Culombe v. Connecticut*, 367 U.S. 568, 603-04 (1961), the standard the court must apply is a subjective one: What did Dr. Santini understand the agents to mean? If he subjectively understood that he had been promised that his responses would not be used against him and that he therefore had no need to consult an attorney, then his statements were involuntary and must be suppressed.

When the facts relating to this matter are fully developed at the suppression hearing, we believe the record will clearly establish both that (1) Dr. Santini's willingness to talk to the agents on March 4 was critically affected by their statements to him about his legal status and (2) that he understood the agents' statements to mean that he faced no danger of prosecution, and thus that nothing he said would be used in any criminal proceeding against him. Dr. Santini was not unnaturally concerned by the mounting evidence between November 1998 and late February

1999 that he was himself under investigation in connection with his use of Cardio-Tel's services. Dr. Santini therefore reasonably questioned the agents about his status at the start of the March 4 meeting, specifically indicating that he was concerned that he should consult an attorney before agreeing to respond to their questions. The agents then made representations to Dr. Santini that he understood to signify that his statements would not be used against him. Having established to his satisfaction that the agents were not seeking to prosecute him, he then responded to the agents' questions.

The Fourth Circuit has repeatedly recognized that a defendant's will can easily be overborne for purposes of the "voluntariness" analysis if he believes he has received assurances that his statements will not be used against him. The leading case is *Grades v. Boles*, 398 F.2d 409 (4th Cir. 1968). In *Grades*, the petitioner in a *habeas* case testified that he had made his confession only after he received what he understood to be assurances from a state prosecutor that if he confessed, he would be charged only with a single attempted robbery; would not be prosecuted for several other offenses; and would not face prosecution under a recidivist statute. The prosecutor maintained that he had merely advised the defendant that "as the matter stood at that time, he would be tried only on that one case." *Id.* at 411.

The Fourth Circuit held that the petitioner's statement was involuntary and should have been excluded at his trial. In reaching this conclusion, the Court of Appeals stressed that it was the defendant's understanding, not the prosecutor's intent, that was controlling. The Fourth Circuit also affirmed that, because of the impact that such assurances are likely to have, a defendant's statement must be excluded if it was made even "in part" based on the defendant's understanding that he had been promised he would not be prosecuted:

In the instant case, no matter how much the legally-trained prosecutor may have hedged his responses with words like 'policy' or 'in all probability,' there is

no gainsaying the fact that petitioner believed, as he testified at his trial and again at his habeas corpus hearing, ‘I was assured by the Prosecutor that all other charges would be dropped.’ Petitioner did not seek out the prosecutor for an abstract discussion on criminal procedures in Cabbell County. He wanted to know how *he* would be affected by ‘co-operating’ with the police or by failing to do so. Grades asked whether he would be tried as a recidivist if he were convicted on the attempted robbery charge, not whether it was the prosecutor’s general policy to press for the mandatory life sentence against persons who are convicted repeatedly of felonies. *To the petitioner’s ears*, the prosecutor’s words could have meant only one thing: If he signed the statement, he would be punished for attempted robbery and nothing else.

Nor is there room for doubt that it was *this understanding of immunity from prosecution for several other offenses*, including the dreaded recidivist charge, that *at least in part* prompted Grades to sign the confession. Seventy years ago, the Supreme Court recognized the inherent difficulty of calibrating the effect of an unconstitutional inducement, when it observed “* * * *the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.*”

Grades, 398 F.2d at 412, quoting *Bram v. United States*, 168 U.S. 532, 543 (1897) (emphasis added).

More recently, in *United States v. Gonzalez*, 736 F.2d 981 (4th Cir. 1984), a defendant claimed that he made a statement to DEA agents based on the representation of a co-operating co-conspirator (Carranza) that he would “walk out without any blame” on himself if he assisted the agents. The Fourth Circuit held that “If Carranza induced the admission by Gonzalez by a promise of immunity, and if Carranza was acting at the behest of the DEA agents and as their authorized agent, the subsequent admission by Gonzalez to the DEA agents was involuntary and inadmissible.” *Id.* at 982 (again citing *Bram*).

As *Grades* indicates, a statement made in reliance on *perceived* or *understood* promises of non-prosecution is involuntary, even if the agents merely implied that the defendant would not be prosecuted, or if they otherwise qualified or hedged statements that were made with the intention of luring the defendant into a false sense of security. Thus, in *United States v.*

Goldstein, 611 F. Supp. 626 (N.D. Ill. 1985), the district court suppressed a defendant's non-custodial statements to two FBI agents where the agents falsely led him to understand that the only purpose of their questioning was to make restitution to the victims whose stolen goods he had purchased. Judge Shadur stressed in *Goldstein* that "when the government misleads a suspect concerning the consequences of a confession, his statements are regarded as having been unconstitutionally induced by a prohibited direct or implied promise." *United States v. Goldstein*, 611 F. Supp. 626, 631 (N.D. Ill. 1985), citing *Grades*, 398 F.2d at 411-14; see also *United States v. Shears*, 762 F.2d 397, 401-02 (4th Cir. 1985) ("There are certain promises whose attraction renders a resulting confession involuntary if the promises are not kept, and the defendant's perception of what government agents have promised is an important factor in determining voluntariness.") (emphasis added).

Because of the enormous impact that a perceived promise of non-prosecution, or a suggestion that a defendant's statements will not be used against him, necessarily has on the mind of an individual subject to questioning, the Fourth Circuit in *Grades* reaffirmed the continuing validity of the Supreme Court's statement in *Bram* that "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if *any* degree of influence has been exerted." 398 F.2d at 412 (emphasis added); see also *Goldstein*, 611 F. Supp. at 632 (under the principle established in *Bram*, once it is determined that a statement was made in response to perceived assurances of non-prosecution, "it is unnecessary to probe [the defendant's] mind in any detail").

Although the agents' apparent commitment to Dr. Santini that they had no interest in prosecuting him and would not use his statements against him is alone a sufficient basis upon which to find his statements involuntary, there are other circumstances present here that likewise

support a finding of involuntariness. Dr. Santini has never previously been charged with a crime, and thus had no significant experience with the criminal justice system. While the agents may have understood that an individual's status as a subject or witness rather than a target is subject to re-interpretation, that subtlety would have been lost on Dr. Santini absent an explicit explanation of it by one of the agents. Nor did Dr. Santini have counsel present to alert him to any possible ambiguities or reservations contained in the assurances he received from the agents. *See Grades*, 398 F.2d at 413 (finding it "crucial" that Grades was not represented by counsel during his discussion with the prosecutor). Finally, while *Miranda* warnings were not constitutionally required here, *see* page 5 n.1 *supra*, the agents' failure to give Dr. Santini any explanation of his legal rights can obviously be considered in assessing his subjective understanding of his situation for purposes of the voluntariness analysis.

C. In Order to Assess Whether the Agents May Have Deliberately Misled Dr. Santini About his Status on March 4, 1999, the Government Should Be required to Produce Certain Materials from its Investigative File for the Court's Review.

One of the key issues raised by this motion is the possibility that one or more of the FBI agents may have knowingly or unknowingly misled Dr. Santini concerning his status with regard to the investigation at the time of their meeting on March 4. In order to afford the Court a fair opportunity of determining what Dr. Santini's status was with regard to this investigation at that time, we request that the Government be directed to produce the following materials for the Court's review:

- (1) the original U.S. Attorney's Office authorization sheet for this matter, which will indicate the date the investigation was opened, and the identities of any individuals who were considered possible targets of the investigation at that time, as well as any subsequent amendments to this authorization;

- (2) any FBI-302 reports or HHS-OIG reports relating to interviews with Manuel Soldevila, Ramon Zayas, or other individuals that the Government considers to be co-conspirators of the defendants in this case; and
- (3) any Grand Jury testimony given by Manuel Soldevila, Ramon Zayas, or other individuals that the Government considers to be co-conspirators of the defendants in this case, or any testimony given by an FBI agent or other investigative agent summarizing information provided by such alleged co-conspirators; and
- (4) any summary testimony given by one of the Government's investigating agents recounting the course and history of the Government's investigation in this matter.

II. IF THE COURT DETERMINES NOT TO SUPPRESS DR. SANTINI'S STATEMENT, THIS COURT SHOULD HOLD A HEARING TO DETERMINE THE RELIABILITY OF AGENT RODEN'S VERSION OF HIS STATEMENT BEFORE IT IS CONSIDERED BY THE JURY AT TRIAL

Dr. Santini originally made many, if not most, of the statements at issue on March 4 in Spanish, which was then translated into English by Agent Diaz, whose overall level of familiarity with this investigation is uncertain. Agent Roden, who subsequently wrote up the report detailing Dr. Santini's supposed statements, does not speak Spanish.

The courts have recognized that under circumstances like these, where the likely testifying agent could not initially understand the bulk of the defendant's statements, it is appropriate to hold a pre-trial hearing on the reliability of the defendant's alleged statements at which the translator is made available for cross-examination. *See United States v. Martinez-Gaytan*, 213 F.3d 890 (5th Cir. 2000); *see also United States v. Nazemian*, 948 F.2d 522, 525-27 (9th Cir. 1991) (discussing circumstances under which translator's performance may raise questions about the reliability of the defendant's statement). In another case, the Sixth Circuit has suggested that where an FBI agent did not prepare his report of an interview until six days after the meeting in question, there were sufficient questions about the report's reliability to

require a hearing – as well as production of the agent’s notes – before the report could be used in cross-examining the defendant. *United States v. Shoupe*, 548 F.2d 636, 641-42 (6th Cir. 1977).

Under the particular circumstances of this case, we further move that the Government should therefore be required to produce any rough notes taken by any of the agents at the meeting with Dr. Santini on March 4 so that they can be used in assessing the reliability of Agent Diaz’s translation and Agent Roden’s subsequent report. We also submit that these notes likely include material that falls within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and therefore should be produced for that reason. *See United States v. Pelullo*, 105 F.3d 117, 120-23 (3d Cir. 1997); *United States v. Alvarez*, 86 F.3d 901, 903-05 (9th Cir. 1996) (rough notes can be *Brady* material when there are discrepancies or differences between the notes and the agent’s written report). Finally, we note that Judge Frederick Smalkin of this Court has held that “handwritten, fairly contemporaneous notes” by an agent of a defendant’s statements are discoverable under Fed. R. Crim. P. 16(a)(1)(A), since they constitute a “written record” containing the substance of a relevant oral statement by the defendant. *United States v. Maricus Love*, Crim. No. S-98-0383 (D. Md. March 10, 1999) (copy attached as Exhibit 8). We therefore seek production of any rough notes that may exist relating to this session on this ground as well.

CONCLUSION

For the reasons stated, this Court should suppress any testimony relating to Dr. Santini’s statements to the FBI agents on March 4, 1999; in the alternative, the Court should hold a pre-trial hearing on the reliability of Agent Roden’s version of Dr. Santini’s statements, and should require the Government to produce any rough notes taken by any of the agents in connection with this hearing.

Respectfully submitted,

By: _____
Jefferson M. Gray

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*Counsel for Dr. Francisco Santini
(Appointed by this Court)*

CERTIFICATE OF SERVICE

I hereby certify that I have, this ____ day of July, 2000, caused a copy of the foregoing Defendant Francisco Santini's Motion to Suppress Any Testimony Concerning His Statements to FBI Agents on March 4, 1999 and Seeking Other Relief to be delivered by first-class mail, postage prepaid, to

Sandra Wilkinson
Ronald J. Tenpas
Assistant U.S. Attorneys
U.S. Attorney's Office
6500 Cherrywood Lane
Greenbelt, Maryland 20770.

Counsel for the United States of America, and to

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Counsel for Daniel Gershoni.

Jefferson M. Gray, Esq.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Crim. No. DKC-99-0452
)	
FRANCISCO SANTINI, <i>et al.</i> ,)	
)	
<i>Defendant.</i>)	
_____)	

ORDER

Upon consideration of Defendant Francisco Santini's Motion to Suppress Any Testimony Concerning His Statements to FBI Agents on March 4, 1999, the Government's Opposition thereto, and the record herein, it is this ____ day of _____, 2000, hereby

ORDERED that defendant Santini's Motion is GRANTED; and it is further

ORDERED that any testimony relating to Dr. Santini's statements to the FBI agents on March 4, 1999 is hereby suppressed.

The Hon. Deborah K. Chasanow
U.S. District Court Judge

Copies to:

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