IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

HAI VAN TRAN,

Defendant.

REPORT AND RECOMMENDATION

06-CR-39-C

REPORT

The grand jury has charged defendant Hai Van Tran with being a felon in possession of a firearm. The evidence against Tran arose during execution of this court's search warrant on February 10, 2006 at Tran's residence in Cottage Grove. Tran has moved to suppress this evidence on two grounds. First, Tran challenges the probable cause determination supporting the warrant. Second, Tran claims that the FBI obtained his statements in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). As a collateral matter, Tran also has moved to dismiss the indictment, challenging the constitutionality of 18 U.S.C. § 922(g).

For the reasons stated below, I am recommending that the court deny Tran's challenge to the charging statute and to the search warrant, but that it grant his motion to suppress his statements.

I. Constitutionality of § 922(g)

Starting with the pro forma place-holder, Tran acknowledges that courts consistently have found 18 U.S.C. § 922(g)(1) constitutional, *see, e.g., United States v. Williams*, 410 F.3d 397 (7th Cir. 2005), but he wishes to challenge the statute for the record. Duly noted. Consistent with circuit law, this court should deny Tran's motion to dismiss.

II. Probable Cause for the Search Warrant

Tran challenges whether the information in the agent's affidavit provided probable cause to support the search warrant issued by this court.

A. The Warrant Affidavit

The affidavit speaks for itself and may be found loose in the case file as Defendant's Exhibit No. 1.

By way of synopsis, on February 7, 2006, FBI Special Agent Josh Mayers presented a 14 page, 24 paragraph affidavit to this court in support of his request to search the residence located at 311 Southing Grange Street in Cottage Grove ("311 Southing"), a property owned by Cheng Muy Ly, and to which address automobiles were registered by Khanh Van Nguyen, Andrew Nam Peterson and Hai Van Tran. The FBI believed that this home was connected to a suspected multistate MDMA (ecstacy) trafficking ring in which Nguyen, Peterson, Ly and Tran were believed to be involved.

According to Agent Mayers, an informant (CW-1) met Nguyen in Atlantic City (NJ) in November 2005 through an introduction by a David Nguyen ("David"), a man targeted by the FBI for alleged involvement in a Vietnamese criminal organization that involved drugs, prostitution, credit card schemes and loan sharking. CW-1 saw Nguyen retrieve bags of money from his automobile (registered to Nguyen at 311 Southing) and negotiate the purchase of 50 pounds of hydroponic marijuana for $2,750 per pound. FBI Agent Tia Breen advised Agent Mayers that CW-1 had provided dozens of different pieces of information that had been independently corroborated. On November 10, 2005, agents surveilled David upon his arrival in Madison, Wisconsin where he was driven to 311 Southing by a man believed to be Nguyen.

On November 28, 2005, a second informant of unknown reliability (CW-2) told an Everest Metro Police Detective that Andrew Nam Peterson was a drug dealer with no legitimate employment. CW-2 provided Peterson's bank statements showing $20,000 in cash deposits by Peterson over the past 18 months; Agent Mayers opined that these deposits could be the proceeds of illegal drug trafficking.

On January 9, 2006, agents conducted a trash pick at 311 Southing, from which they recovered handwritten notes that the agents opined were "pay and owe" sheets related to drug trafficking, plus receipts for four $1000 money orders purchased on the same day.

On January 16, 2006, CW-1 reported Nguyen, Peterson, David and two others were together at a specified hotel room in Baton Rouge, and that one of the men ("Nhu LNU")

was seen loading $300,000 into a truck. On January 17, 2006, agents saw Peterson's Honda, registered to 311 Southing, drive to, then from the specified hotel. CW-1 further reported that he and Peterson unloaded from a truck into Peterson's car three boxes containing 50,000 to 100,000 ecstacy tablets.

On January 17, 2006, CW-1 reported that David, Nhu, "Bang LNU" and CW-1 had driven from New Orleans to Merrillville, Indiana overnight, using Nguyen's car registered to 311 Southing. Agents surveilled the car in Merrillville.

On January 19, 2006, CW-2 meet with Agent Mayers and others to report that Peterson had left a sock containing 51 pills; CW-2 showed the sock and pills to the agents, who believed they were MDMA. CW-2 also provided some notes in Peterson's handwriting that the agents recognized as ""pay and owe" sheets for drug transactions.

On January 20, 2006, CW-1 reported that David was meeting with two Asian men at a specified apartment in Merrillville. They arrived in the GMC Yukon registered to Tran at 311 Southing.

On January 22, CW-1 reported that the day before, he was present when Nguyen and David took two suitcases full of ecstacy from the address of a suspected drug trafficker in New Orleans and place them in a rental car.

On January 23, 2006, agents conducted another trash pick at 311 Southing, from which they recovered more suspected "pay and owe" sheets and a receipt for a $1000 money order.

On February 3, 2006, FBI agents arrested David and some other people in New Orleans, seizing the two suitcases of MDMA described by CW-1, about 160,000 more MDMA pills, 400 pounds of marijuana, and $250,000 in U.S. currency.

B. Probable Cause

Tran's challenge to the warrant for his house focuses on the credibility of the informants, the unsupported surmises of the agents regarding "pay and owe" sheets, and the weakness of the connection of the most inculpatory evidence to his home.

Probable cause exists when the circumstances, considered in their totality, induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005). When the police use informants to establish probable cause, the credibility assessment should consider whether the informants personally observed the events reported, the degree of detail they provide, whether the agents have independently corroborated the information, and the age of the information. *Id.*[1] *See also United States v. Olson*, 408 F.3d 366, 370 (7th Cir. 2005). Put another way, probable cause exists when, given all the circumstances known to the agents, including the veracity and basis of knowledge of informants providing hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United*

[1] A fourth factor in *Mykitiuk*, a search warrant case, is whether the informant personally appeared before the issuing judge so that the judge could make his/her own credibility determination. *See id.*

States v. Newsome, 402 F.3d 780, 782 (7th Cir. 2005). Even unproven informants can provide useful information; sometimes their tips are sufficient, without more, to establish probable cause. *United States v. Koerth*, 312 F.3d 862, 867-68 (7th Cir. 2002).

Probable cause is a fluid concept that relies on the common-sense judgment of the officers based on the totality of circumstances known to them. In determining whether suspicious circumstances rise to the level of probable cause, officers are entitled to draw reasonable inferences based on their training and experience. *United States v. Reed*, *supra,* 443 F.3d 600, 603 (7th Cir. 2006). "So long as the totality of the circumstances, viewed in a common sense manner, reveals a probability or substantial chance of criminal activity on the suspect's part, probable cause exists." *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir. 2005). It is not appropriate to consider each piece of evidence individually in a "divide and conquer" approach; rather the focus must be on what the evidence shows as a whole. *United States v. Caldwell*, 423 F.3d 754, 760 (7th Cir. 2005).

Tran makes some individually valid points about the informants, the agents' surmises, and the degree of separation between his house and the main action in this case. But the affidavit as a whole provides a tapestry of interwoven facts detailing two informants' richly detailed observations of and participation in actual drug trafficking and support activities, many of which were directly corroborated by agents, including the ultimate seizure of large amounts of drugs and cash by alleged members of this far-flung and peripatetic crew. The several direct uses of cars registered to 311 Southing provide enough of a nexus to Tran's

house to support its search; additionally, however, agents recovered on more than one occasion what they believed to be drug records. Tran challenges this characterization, but to no avail: the agents had training and experience to offer these opinions, and in the context of all the other information at their disposal, their conclusions were sufficiently supported for the court to deem them credible. Frankly, this one is not a close call: there was more than enough evidence in the affidavit to support this search warrant.

C. The Good Faith Doctrine

Even if probable cause did not support this warrant, suppression would be inappropriate unless the police lacked good faith in relying on the warrant. *United States v. Sidwell*, 440 F.3d 865, 869 (7th Cir. 2006), citing *United States v. Leon*, 468 U.S. 897, 920-22 (1984). An officer's decision to seek a warrant is prima facie evidence that she was acting in good faith; a defendant may rebut this prima facie evidence only by establishing that the issuing judge wholly abandoned her judicial role, or that the warrant affidavit was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable. *Id.*

Tran argues the last point: in his view, because the affidavit was so woefully inadequate, the agents must have known this and cannot have their warrant rescued by *Leon*. As just indicated, upon further review the court still thinks the probable cause presentation is fine; even if this conclusion is incorrect, there is more than enough information in Agent Mayer's affidavit to fall under the aegis of the good faith doctrine.

III. Tran's Statements to the FBI

On February 10, 2006, the FBI questioned Tran for an hour and a half at the Cottage Grove Police Department without first providing *Miranda* warnings. Tran contends that he was in custody during this questioning, and that the lack of *Miranda* warnings entitles him to suppression of his statements. The government disagrees. On June 20, 2006, this court held an evidentiary hearing to develop what turned out to be essentially undisputed facts:

FACTS

On February 10, 2006, FBI agents and other law enforcement officers executed this court's search warrant for 311 Southing Grange Street in Cottage Grove, the residence in which defendant Hai Van Tran lived with his wife and young children. The FBI waited until one child had left for school, then knocked, announced, and entered between 8:00-9:00 a.m. The entry team secured the house and found Tran asleep in a back bedroom with a child. At least four or five agents wearing body armor entered the room, pointed their firearms at Tran, roused him, demanded to see his hands, laid him on the floor and handcuffed his hands behind his back.

FBI Agent Steven Marshall escorted Tran in his sleeping clothes out to the kitchen and allowed him to sit in a chair. Tran was not free to leave and agents would have stopped him if he tried. Agent Marshall identified himself, explained that the agents were in Tran's house to execute a search warrant and that Agent Marshall had questions he wished to ask

Tran about a multi-state drug conspiracy that the FBI was investigating. Agent Marshall asked Tran if he was willing to come with the agents to another location away from his family to answer their questions. Tran responded affirmatively.

Agents brought Tran's clothing to him, temporarily uncuffed him, allowed him to dress in the kitchen then re-cuffed Tran's hands in front. Three agents escorted Tran to a marked squad car belonging to the Cottage Grove Police Department.[2]

It is not clear whether any agent actually laid hands on Tran while he walked to the squad car. Agents placed Tran in the back seat of the squad car still wearing handcuffs. As with most squad cars, there were no door handles allowing Tran to exit on his own. A police officer drove Tran about a mile to the Cottage Grove Police Department.

There, Agent Marshall and Agent Jennifer Price of Wisconsin's DOJ escorted Tran, still in cuffs, to an interview room inside. The room was approximately 10' x 15' with a window to the exterior and a narrow window in the door, furnished with a desk and three chairs. The desk was against the outside wall. Tran sat beside the desk, Agent Price sat at the other side, and Agent Marshall sat facing them both with his back to the door. The interview room was large enough for Tran to have walked around Marshall to the door. This door was locked from the outside by the Cottage Grove police, forcing the agents to knock

[2] Although the agents' subjective intent is not relevant to the analysis, if Tran had tried to walk away from the agents between his doorway and the squad car, the agents would have interceded to offer their opinion that "we probably need to talk." But Tran never attempted to pull away from his cocoon of escorting officers.

to be let out. At the agents' request, the police unlocked the door, although it remained closed during the interview.

The agents removed Tran's handcuffs and got him a cup of coffee. At one point, they allowed Tran to use the restroom, although apparently they escorted him. Agent Marshall told Tran that he was not under arrest. He did not tell Tran that he was free to leave.[3] Agent Marshall asked Tran if he would answer their questions and told Tran that he did not have to. Agent Marshall, however, did not provide full *Miranda* warnings to Tran.

Both agents questioned Tran in conversation tones. Meantime, their colleagues were searching Tran's house and telephoning updates to Marshall and Price. About 90 minutes into the interview, searching agents telephoned to report that they had found a firearm in the house. Agent Marshall asked Tran if the firearm was his; Tran responded that it was. Agent Marshall asked Tran if he had any prior felony convictions; Tran responded that he did. Agent Marshall told Tran that they were going to take a short break. Agent Marshall and Agent Price stepped into the hallway, closed the door behind them and discussed what to do. They decided they would arrest Tran as a felon in possession of a firearm. The agents re-entered the interview room and Agent Marshall read Tran his *Miranda* rights off of a pre-printed card. Tran asked what was going on and stated that he needed to talk to a lawyer. The agents immediately terminated the interview.

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[3] Although the agents' subjective intent is not relevant to the analysis, they did not plan to arrest Tran at that time. If Tran had *asked* to leave, Agent Marshall would have allowed this and would have offered him a ride to some location other than his home (which was temporarily off limits because agents still were searching it).

ANALYSIS

A person is "in custody" for *Miranda* purposes not only when the police formally "arrest" him, but also when the police subject him to conditions equivalent to formal arrest by restraining his freedom of action in any significant way. *United States v. James*, 113 F.3d 721, 727 (7th Cir. 1997). *See also United States v. Cranley*, 350 F.3d 617, 620 (7th Cir. 2003)(suspect in custody for *Miranda* purposes when reasonable person in same circumstances would believe himself unable to leave without police permission). As the court explained in *United States v. James*,

> [C]ustody implies a situation in which the suspect knows he is speaking with a government agent and does not feel free to end the conversation; the essential element of a custodial interrogation is coercion. Furthermore, the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. In other words, the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.
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> In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

113 F.3d at 727.

The inquiry into the circumstances of temporary detention for a *Miranda* analysis requires a different focus than that for a Fourth amendment custody analysis. *United States*

v. Smith, 3 F.3d 1088, 1096-97 (7th Cir. 1993). "A completely different analysis of the circumstances is required. The inquiry is much narrower. The number of relevant factors is severely limited. Police officers have much less discretion [in Fifth Amendment cases] than in Fourth Amendment cases." *Id.* at 1097.

A brief review of similar cases helps frame the analysis. In *Sprosty v. Buchler*, 79 F.3d 635 (7th Cir. 1996), the court reviewed a habeas petition filed by a state prisoner who had been questioned in his own home while agents executed a search warrant. Although the petitioner ultimately lost on the merits of his *Edwards* claim, the court concluded that the police had subjected him to custodial interrogation in his home.

The court's examination of the totality of circumstances was informed by the purpose of the *Miranda* rule, namely "to protect individuals from compelled self-incrimination." The court therefore considered whether the petitioner had been "subjected to pressures that sufficiently impaired his free exercise of his privilege against self-incrimination." 79 at F.3d at 640-41. Some of the factors a court is to consider are the length of the detention; whether it takes place in public as opposed to a police-dominated atmosphere; the number of officers present; the extent to which a person has been made aware that he is free not to answer questions; whether there has been prolonged, coercive and accusatory questioning; whether the police have employed subterfuge to induce self incrimination; the degree of police control over the environment in which the interrogation takes place, particularly whether the suspect's freedom of movement is physically restrained or otherwise significantly curtailed;

and whether the suspect could reasonably believe that he has the right to interrupt prolonged questioning by leaving the scene. 79 F.3d at 641. The court noted that "where police are in full control of the questioning environment, custody is more easily found." *Id.*, *quoting United States v. Griffin*, 7 F.3d 1512, 1518-19 (10th Cir. 1993).[4] The court weighed the factors on both side of the equation, declared it a close question, then determined that the petitioner had been in custody.

In *Sprosty*, five law enforcement agents converged on petitioner's mobile home in order to execute a search warrant to look for pornographic photographs petitioner had taken of adolescent boys. When they arrived, petitioner was sitting in a car in his driveway. The officers blocked petitioner's car with theirs, read petitioner the warrant, then accompanied him into the kitchen of his home. 79 F.3d at 638. Inside, agents re-read the warrant and read petitioner his *Miranda* rights. Petitioner's mother, sister, and a third friend were present in the mobile home. One uniformed officer was assigned to watch petitioner during the three hour search. Different agents repeatedly asked petitioner where the pictures were located. One of the agents advised the petitioner that if he told them where the pictures

[4] When considering a Fifth Amendment custody issue in *United States v. Wyatt*, 179 F.3d 532 (7th Cir. 1999), in which police asked their suspect to step outside a public tavern to speak with them, the court deemed helpful to its analysis the seven part test used to determine the voluntariness of a consent to search: (1) whether the encounter occurred in a public place; (2) whether the suspect consented to speak with the officers; (3) whether the officers informed the suspect that he was not under arrest and was free to leave; (4) whether the police moved the suspect to another area; (5) whether there was a threatening presence of several officers and a display of weapons or physical force; (6) whether the officers deprived the suspect of documents needed to continue on his way; and (7) whether the officers' tone of voice was such that their requests likely would be obeyed. *Id*. at 535.

were, they would see to it that pending burglary charges would be dropped. Petitioner agreed, handed over the photographs, and confessed. 79 F.3d at 639.

Noting that the factors pointed in both directions, the court of appeals concluded that petitioner had been in custody. 79 F.3d at 641. Weighing against detention, petitioner was in the familiar surrounding of his own home, in the presence of his mother and a family friend. He was never handcuffed or otherwise physically restrained to his chair. The court found that although the police curtailed petitioner's ability to communicate with the outside world, they did not prevent him from speaking with others in the mobile home. *Id.*

On the other hand, the police found that the familiarity of being at home was outweighed by the degree to which the police dominated the scene. 79 F.3d at 641-42. The police had blocked egress with their cars and escorted petitioner into his home. Four officers searched while one kept guard over petitioner for three hours while all concerned repeatedly asked petitioner to lead them to the photographs. *Id.* Treading cautiously, the court also found that in this case, where the police had not advised petitioner he was not under arrest, the reading of *Miranda* rights provided some support for an inference that petitioner was in custody for purposes of *Miranda*. The court found that these facts, viewed in their totality, demonstrated that petitioner's freedom of action had been significantly restrained in a way that increased the likelihood that petitioner would succumb to police pressure to incriminate himself. *Id.*

In *United States v. Smith*, 3 F.3d 1088 (7th Cir. 1993) the court found that, although the defendant was not under formal arrest during a hot-pursuit investigative detention, he was in custody for *Miranda* purposes because he and his four friends had been frisked, placed in handcuffs, and told to sit in a specific place near the road; the five suspects were outnumbered on the street by seven or more police; and "[the defendant] was not free to go anywhere. His movement was curtailed as if he were handcuffed to a chair in a detective's office or placed in a holding pen in a station house or put behind bars." 3 F.3d at 1097. The court continued:

> Although [defendant] had not been told whether he was under arrest, he was removed from the taxicab in which he was riding, separated from his property and his associates and handcuffed. By the time of his arrest, there were . . . at least seven officers . . . were present. Under these circumstances, there was sufficient curtailment of [defendant's] freedom of action to establish custody for *Miranda* purposes."

Id. at 1098.

In *United States v. Wyatt*, 179 F.3d 532, the court determined that the defendant was not in custody for *Miranda* purposes when he voluntarily accompanied two La Crosse police officers out of a bar and talked to them on a public street after they frisked him for weapons. Among the factors deemed relevant by the court were that the police asked the defendant to step outside rather than demanding; they questioned the defendant in a public place (*i.e.*, they did not take him to an interrogation room or otherwise remove him from a public place); they did not ever say that he was under arrest; no guns were drawn; there was no

other evidence of a show of force or authority; they did not take any of his documents; they did not handcuff him; and when he agreed to be driven to the police station for further questioning, they did not handcuff him during his ride in the squad car. *Id.* at 536-37.

In *United States v. Jones*, 21 F.3d 165 (7th Cir. 1994), defendant, his employee, and a CI met an undercover officer in a motel room for the purpose of buying two kilos of cocaine from the officer. After the money changed hands, at least six law enforcement agents, some with guns drawn, converged on the room. One agent confronted defendant as he walked out of the room and told him "in a friendly tone of voice" that he wanted to speak with him at police headquarters. The defendant said "all right" and agreed to come. Two officers escorted the defendant to their squad car, and drove him to the station. They did not handcuff him at any time. They told him that he was not under arrest. Two or three agents questioned the defendant in a large room containing three or four desks. The door was closed but not locked. The agents repeated to the defendant that he was not under arrest and not in custody; at some point one of the agents told him that he was free to leave. The length of the interview is not of record. *Id.* at 167. No one ever provided *Miranda* warnings to defendant, who later tried to suppress his statements on this basis.

The court determined that he had not been in custody. First, at the motel room, although the defendant had seen a gun displayed, he had not been handcuffed or otherwise physically restrained and was told he was not under arrest. He agreed to accompany the police to their headquarters, where again he was told that he was not under arrest and that

he was free to leave. There was no evidence that the officers ever made any threatening gestures or statements or otherwise engaged in "strong arm tactics" that would justify a belief by the defendant that he was in custody. *Id.* at 170.

In *United States v. Fazio*, 914 F.2d 950 (7th Cir. 1990), the court found that the defendant was not in custody for *Miranda* purposes where officers with a search warrant met defendant at the door when he arrived at his restaurant, escorted defendant into the restaurant, opened an office safe at the officers' direction, then was ensconced briefly in a small room next to the office while the search continued. 914 F.2d at 952 and 955. The officers never drew their firearms and never handcuffed the defendant, and there was no evidence that he was locked in the room or physically restrained in any way. *Id.* at 955.

Tran's situation, like those outlined above, presents a mix of circumstances. Perhaps if a reviewer were to parse them one at a time and sort them into two columns, this would seem like a close case. But here, the total is greater than the sum of its parts: the *gestalt* of this situation screams custody. The cases cited above share a pivotal brace of interrelated concerns: the degree to which the police dominated the scene, and whether the defendant was subjected to actual physical restraint. In Tran's case, the agents chose to dominate the scene with overwhelming force followed by the immediate and virtually continuous physical restraint of Tran.

The scene was set by the forceful entry of five armed and armored agents into the sleeping Tran's bedroom. Tran was roused from slumber by shouts of "show me your

hands!" He awoke to find himself confronted by a daunting display of tactical force. His second experience with this squad was to be dropped to the floor and handcuffed with his hands behind his back, then led into his kitchen while still in his sleepwear. This characterization is not meant to imply that the agents acted unreasonably; they are professionals trained to secure safely a potentially volatile scene, and they did so here. But the issue is not Fourth Amendment reasonableness, it is whether an objective person confronted and treated in this manner reasonably would deem his freedom of action restrained in significant ways.

The government correctly points out that it is not improper temporarily to detain a person while executing a search warrant, but that is beside the point. The point is that by detaining Tran in this fashion, the agents efficiently and unequivocally established to Tran that they were in charge and he was not. Their dominance led to his submission. Even if one were to accept the dubious premise that the agents never "arrested" Tran until the conclusion of his interview at the police station, from the moment he awoke with five gun barrels aimed at him, Tran's freedom ever after was significantly restrained. The only time he was uncuffed prior to his interview at the police station was for the brief period he was allowed to put on his clothes in the kitchen under the supervision of the agents. He was never not within arms reach of at least one watchful agent; usually he was outnumbered.

True, Agent Marshall told Tran that he was not "under arrest" but even if this were an accurate characterization of Tran's situation,[5] it is irrelevant: as noted above, the key to a *Miranda* challenge is "custody," not "arrest." Although the agents' subjective intent is irrelevant, Tran was not free to go. More importantly, any reasonable person in Tran's shoes would have deduced that he was not free to go. So, when Agent Marshall asked the handcuffed, unclothed Tran if he would agree to be transported to the police station to be questioned, Tran's affirmative response does not demonstrate that Tran was not in custody. It simply shows that the agents were moving their restrained suspect from one location (his home, temporarily controlled by a squad of agents) to another (a police station, permanently controlled by the local constabulary).

Once ensconced by agents in the mid-sized interview room, Tran finally was freed from handcuffs, but no reasonable person in his situation would have felt himself free to go. True, Tran never *asked* if he could go, but from his perspective, what was the point? All he knew was that his cuffs had come off because he was in a room in a police station that was locked from the outside so that even the two agents with him could not leave without being let out. The agents treated him courteously by providing coffee and a restroom break, but these are voluntariness factors, not custody factors: after all, arrestees get to drink coffee and use the bathroom, just like other people.

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[5] As the court noted in *United States v. Garcia*, 376 F.3d 648, 651 (7th Cir. 2004), sometimes the term "arrest" is used too narrowly to mean full custodial arrest and booking, when in fact any seizure that exceeds the bounds of an allowable investigative detention is an "arrest."

The upshot of all this is that, regardless of Tran's Fourth Amendment status, for Fifth Amendment purposes, Tran constantly was in the agents' custody from the moment they entered his bedroom to the conclusion of his interview at the police station. Therefore, pursuant to *Miranda*, Tran was entitled to be advised of his rights before being questioned. Because the agents did not provide an advisal, Tran's statements are inadmissible at trial.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend this court deny defendant Hai Van Tran's motions to dismiss the charge and to quash the search warrant, and that the court grant defendant Tran's motion to suppress his statements.

Entered this 26th day of July, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

July 26, 2006

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Re: United States v. Hai Van Tran
Case No. 06-CR-039-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before August 7, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 7, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge