FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **JOSEPH LG. VILLAGOMEZ** **Defendant.**	**CRIMINAL CASE NO. 11-0094A** **DPS CASE NO. 11-002738** **ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION IN LIMINE**

I. INTRODUCTION

THIS MATTER came before the Court on May 31, 2012 at 9:00 a.m. in Courtroom 202A on Defendant's Motion in Limine ("Defendant's Motion"). Joseph LG. Villagomez ("Defendant") was represented by Joaquin DLG. Torres, Esq. The Commonwealth of the Northern Mariana Islands ("the Government") was represented by Margo A. Brown, Esq., and James McCallister, Esq.

Based on the pleadings, the papers on file and arguments of counsel, the Court DENIES in part and GRANTS in part Defendant's Motion.

II. BACKGROUND[1]

On March 29, 2011, Defendant was arrested and his residence was searched pursuant to arrest and search warrants acquired based on an investigation conducted by the Department of Public Safety Drug Enforcement Task Force and Criminal Investigation Division ("the Task Force").[2] On the previous day, the Task Force received information from an informant that

[1] The following facts are derived from the investigative reports and affidavits signed by the investigating detectives, and from the testimonies of Defendant and Detective Sean White at the May 31, 2012 hearing.

[2] The detectives in the Task Force involved in the investigation of Defendant included: Sean White, Buddy Igitol, Dennis Reyes, and Roque Camacho.

Defendant was growing marijuana plants behind his unpainted, tin house located behind the ACE II Poker Room in Dan Dan, Saipan. This information prompted an investigation of Defendant's house on March 29, 2011 at approximately 3:00 p.m. Upon arrival at Defendant's house, Detectives Reyes and Camacho smelled marijuana and discovered what appeared to be twenty marijuana plants growing in plain view in a fenced-in area on Defendant's property. Defendant was at work during this time.

While conducting surveillance on the property, one of Defendant's family members, Patrick Manglona, drove by Defendant's residence and began harassing the detectives. The detectives arrested Manglona for obstructing justice. In order to secure the evidence, the detectives remained at Defendant's residence as they called Detective Sean White to obtain search and arrest warrants based on the Task Force's findings. Detective White prepared an Affidavit of Probable Cause in Support of the Issuance of an Arrest and Search Warrant ("the Affidavit") and had it signed by an Assistant Attorney General. The Affidavit accurately described the property as a tin, unpainted house in Dan Dan, Saipan; however, Detective White marked the incorrect residence on a map that he sketched.

The Honorable Kenneth L. Govendo received the Affidavit and issued an arrest and search warrant on the same day at 3:22 p.m. The search warrant permitted the detectives to search for "any drugs, ammunition, drug paraphernalia, drug legers, contrabands and any instrument of the crime." (Search Warrant, p.1.) Then, at 3.30 p.m., Detectives White and Igitol went to Defendant's place of employment. The detectives showed Defendant the arrest and search warrants and told him he was under arrest for Illegal Possession of a Controlled Substance and Cultivation of Marijuana. The detectives did not inform Defendant of his *Miranda* Rights until 6:54 p.m. During this time period of approximately three and half hours during which Defendant was under arrest and not *Mirandized*, Defendant produced multiple incriminating statements.

After arresting Defendant, Detectives White and Igitol transported Defendant to his house in order to unlock his front door for the detectives to execute the search warrant without needing to break down Defendant's door. On route, the detectives stopped at Defendant's parents' residence, which was the residence incorrectly marked on the map in the Affidavit. Detective White immediately realized the house they stopped at was not Defendant's residence, and they continued driving to Defendant's house without ever exiting the vehicle. At approximately 4:10 p.m., the two detectives and Defendant arrived at Defendant's house, where Detectives Reyes and Camacho were waiting.

Defendant unlocked his house door and walked inside with the detectives. Once inside the residence, Detective White, following standard search safety procedure, asked Defendant if there were any children, dogs, or weapons in the house. Defendant responded affirmatively and pointed out a plastic container with his father's old .22 caliber ammunition, which the detectives seized. The detectives also found and seized marijuana, "ice," and drug paraphernalia from Defendant's residence.

The matter before the Court is a motion to suppress all evidence obtained pursuant to the Task Force's search of Defendant's residence and to suppress all pre-*Miranda* statements given by Defendant while in custody. Defendant contends the search warrant was invalid and Defendant was subject to custodial interrogation without being given his *Miranda* rights.

III. DISCUSSION

A. TIMELINESS

The Government objects to Defendant's Motion on the grounds of timeliness for being in violation of the Court's First Amended Pretrial Order ("the Pretrial Order"). The Pretrial Order set the deadline for filing dispositive motions on April 5, 2012, at 9:00 a.m., and motions in limine were ordered to be filed in a timely fashion such that a hearing may be held on May 31, 2012. Defendant's Motion was filed on May 14, 2012. The determination of whether Defendant's Motion is untimely depends on whether it is a dispositive motion or a motion in limine.

A dispositive motion includes a "motion to suppress." *See United States v. Raddatz*, 447 U.S. 667, 673 (1980); *United States v. Jaramillo*, 891 F.2d 620, 628 (7th Cir. 1989); *United States v. Salahuddin*, 607 F. Supp. 2d 930, 933 (E.D. Wis. 2009).[3] A motion to suppress is defined as a device "used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation" of one's constitutional rights. Black's Law Dictionary 1014 (6th ed. 1990). Clearly, Defendant's Motion that seeks to eliminate from trial the use of evidence obtained in violation of Defendant's Fourth and Fifth Amendment rights is a motion to suppress and, thus, constitutes a dispositive motion.

Notwithstanding the fact that a motion to suppress is a dispositive motion, Defendant contends that a motion to suppress *also* constitutes a "motion in limine." However, a motion in limine is defined as a "pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent predispositional effect on [the] jury." Black's Law Dictionary 1013 (6th ed. 1990). In other words, a motion in limine is used to exclude evidence that is inadmissible pursuant to Commonwealth Rule of Evidence 403,[4] which is not at issue in this matter. Therefore, Defendant's Motion is *only* a dispositive motion to suppress, which was filed well past the filing deadline.

Motions to suppress evidence must be filed by the date set by the court before trial. NMI R. Crim. P. 12(b)(3) and (c). Failure to timely file a motion to suppress constitutes a waiver, but the court for good cause may grant relief from the waiver. NMI R. Crim. P. 12(f). "The decision whether to grant relief from waiver under Rule 12(f) lies in the discretion of the trial court, once good cause for such relief is shown." *Commonwealth v. Yoo*, 2004 MP 5 ¶ 11 (citing *United States v. Tekle*, F.3d 1108, 1113 (9th Cir. 2003)). For example, in *United States*

[3] Where CNMI statutes or case law has not addressed an issue of law, the Court applies "the rules of common law, as expressed in the restatements of law . . . [and] as generally understood and applied in the United States . . . ." 7 CMC 3401; *Ito v. Macro Energy, Inc*., 4 NMI 46, 55 (1993).

[4] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." NMI R. Evid. 403.

v. Hall, 565 F.2d 917, 919-20 (5th Cir. 1978),[5] the court found "good cause" under Rule 12(f) to consider an untimely motion to suppress based on the court's desire to avoid penalizing the criminal defendant for the inadvertence of his attorney.

Here, Defendant's counsel inadvertently filed the instant motion as a "motion in limine" rather than as a "motion to suppress"; if Defendant's Motion truly was a motion in limine, it would have been filed in a timely manner. In any case, the Government is not prejudiced by the untimely filing of Defendant's Motion since the Government had sufficient time to oppose the motion prior to the May 31, 2012 hearing. In order to avoid penalizing Defendant for his counsel's honest mistake as to what constitutes a dispositive motion and a motion in limine, the Court finds good cause under Rule 12(f) to hear Defendant's Motion on its merits.

In a similar vein, Defendant moves to strike the Government's opposition as untimely since it was filed only two days prior to the hearing. "A party opposing a motion may file and serve any opposition to the motion not later than five (5) days preceding the noticed date of hearing, unless another period is fixed by order of the court." NMI R. Prac. 8(a)(2). Therefore, the latest time at which the Government could have filed its opposition for it to be timely was May 26, 2012.[6] Since the Government filed its opposition on May 29, 2012, it is untimely. However, the Court finds good cause under Rule 12(f) to consider the Government's opposition in light of the untimely filing of Defendant's Motion.[7]

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[5] "Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, this Court has long held that it is appropriate to consult . . . the federal rules when interpreting the Commonwealth Rules of Criminal Procedure." *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7 (citing *Commonwealth v. Jai Hoon Yoo*, 2004 MP 5 ¶ 8 n.1).

[6] Five days before the May 31, 2012 hearing landed on Saturday, May 26, 2012. If the Government was unable to file its opposition on that day being a weekend day, it should have filed its opposition on the previous week day of Friday, May 25, 2012.

[7] The Court recognizes that the Commonwealth Rules of Practice regarding the scheduling of motions is slightly confusing; therefore, the Court will hereafter set its own filing schedule that will read:

> All motions shall be filed no later than sixteen (16) days from the hearing date; oppositions shall be filed no later than seven (7) days from the hearing date; replies shall be filed no later than three (3) days from the hearing date; weekends and holidays are included in computing these time requirements; any late filing shall be stricken from the record, unless good cause is shown; good cause applications shall be pled in writing, and shall be heard immediately prior to the motion argument.

B. VALIDITY OF THE SEARCH WARRANT

The United States Constitution and Commonwealth Constitution guarantee the "right of the people to be secure in their persons, houses, papers and belongings against unreasonable searches and seizure." U.S. Const. amend. IV, § 3; NMI Const. art. I § 3. To minimize the risks of unreasonable searches and seizures, the Constitution requires law enforcement officials to obtain a search warrant supported by probable cause that "particularly" describes "the place to be searched," and "the persons or things to be seized." NMI Const. art. I, § 3(a).

Defendant argues that the search warrant at issue is invalid because it (1) failed to particularly describe the place to be searched, (2) is overbroad, and (3) lacked probable cause.

1. Particularity of the Place to be Searched

The Commonwealth Superior Court adopted the two-prong test in *Turner*, which states that the place to be searched is described with sufficient particularity if the search warrant "enable[s] the executing officer to locate and identify the premises with reasonable effort" and "there is [no] reasonable probability that another premise might be mistakenly searched." *United States v. Turner*, 770 F.2d 1508, 1510 (9th Cir. 1985); *accord Commonwealth v. Wang*, Crim. No. 97-0187 (Super. Ct. Jan. 29, 1998) (Order Denying Defendant's Motion to Suppress at 9) (citation omitted). In applying the two-pronged "particularity" test of *Turner*, the court should consider: whether the description was reasonable for the location intended, whether the agents executing the warrant personally knew which premises were intended to be searched, whether the premises had been under surveillance before the warrant was sought, and whether the premises that were intended to be searched were actually searched. *Id*.

All four *Turner* factors weigh in favor of finding the search warrant in compliance with the Constitutional particularity requirement as to the description of the place to be searched. The search warrant contained an accurate, physical description of Defendant's residence, which was intended to be searched. Detective White had personal knowledge of Defendant's residence and its location, and the residence was under ongoing surveillance by two other detectives. Lastly, Defendant's residence was in fact the only residence searched. The only

error in the Affidavit was the attached map that incorrectly labeled Defendant's residence; however, the erroneous map was not relied upon in the execution of the search warrant.

The *Turner* case similarly involved a search warrant containing a correct description of the suspect house but an incorrect street number. *Turner*, 770 F.2d at 1510. The Court held that the warrant description was nevertheless sufficiently particular because agents had the suspect's house under surveillance, the executing officer had personal knowledge of its location, and the intended house was in fact searched. *Id.* at 1511. Other cases have also upheld the validity of search warrants despite defects such as an incorrect street address so long as the circumstances made it highly unlikely that different premises would be mistakenly searched. *See, e.g., U.S. v. McCain*, 677 F.2d 657, 661 (1982) ("Where one part of the warrant description is imprecise but the description has other parts which identify the place to be searched with particularity, searches have been routinely upheld.") (citing cases).

Detective White was able to locate the premises with reasonable effort and there was no reasonable probability that another premise might be mistakenly searched. The single defect of the home's incorrectly marked location had no impact on the execution of the search warrant and does not invalidate the warrant. *See Turner*, 770 F.2d at 1510 ("[S]earch warrants must be tested and interpreted in a common sense and realistic, rather than a hypertechnical, manner."). The search warrant is sufficiently particular as to the place to be searched.

2. Overbreadth

The Fourth Amendment's "particularity" requirement forbids "general searches." *Commonwealth v. Pua*, 2009 MP 21 ¶ 20 (quotations omitted). "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (citations and quotations omitted). "The particularity requirement [also] ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985). However, search warrants need not contain "elaborate specificity" of the items to be seized, and item descriptions may be "broad or generic" when the

"circumstances and the nature of the activity under investigation permit." *United States v. Peterson*, 103 F. Supp. 2d 1259, 1266 (D. Colo. 2000) (quotations omitted).

Here, the search warrant authorized the executing officers to search for "drugs, ammunition, drug paraphernalia, drug ledgers, contraband, and *any instrument of crime*." (Search Warrant, p.1) (emphasis added). Defendant contends that the catchall provision, "any instrument of crime," transforms the search warrant into an unconstitutional general search. However, the challenged phrase was added at the end of a list of specific items. When read in context, the discretion of the detectives is sufficiently limited to search for illegal items relating only to the specified crimes of drug trafficking and possession. *See United States v. Greene*, 250 F.3d 471, 477-78 (6th Cir. 2001) ("[T]he language of a warrant is to be construed in light of an illustrative list of seizable items.") (quotations and citations omitted).

The United States Supreme Court analyzed a search warrant containing a similar catchall provision and held it was valid. *Andersen v. Maryland*, 427 U.S. 463, 481 (1976). In *Andersen*, the search warrant authorized a search for evidence in connection with the fraudulent sale of real estate, "together with other fruits, instrumentalities and evidence of crime at this [time] known." *Id*. at 479. The Court noted that general warrants are prohibited by the Fourth Amendment in order to prevent "general, exploratory rummaging in a person's belongings." *Id*. at 480 (*quoting Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). However, the catchall phrase, when read in context, was limited to evidence related to fraud involving the specific piece of real estate, and was therefore not overbroad. *Id*. at 481. Similarly, in the instant case, the specific description of drugs and related instrumentalities sufficiently limited the discretion of the detectives in their search.

The search warrant description was sufficiently particular such that the detectives did not have carte blanche to seize anything and everything. *Contra Voss*, 774 F.2d at 404-05 (holding a search warrant was unconstitutionally overbroad because it allowed the government to rummage through all files that could be evidence of "any federal crime"). The search warrant gave the detectives permission to search only for drugs and any fruits or instrumentalities thereof. Furthermore, "search warrants [may be] cast in comparably broad

terms [] where the subject of the search was a drug trafficking or drug dealing business." *See United States v. Wicks*, 995 F.2d 964, 973 (10th Cir. 1993) (citing cases). The detectives did not exceed the scope of the search warrant by seizing unrelated items, which may have transformed the valid warrant into an impermissible general warrant. *See United States v. Medin*, 842 F.2d 1194, 1199 (10th Cir. 1988). The search warrant comports with the constitutional particularity requirement when viewed in its entirety.

3. Probable Cause

There must be probable cause that all items listed in a search warrant will be found at the searched premises. *See* NMI Const. art. I § 3; *United States v. Whitney*, 633 F.2d 902, 907 (9th Cir. 1980) ("The command to search can never include more than is covered by the showing of probable cause to search."). The determination of whether there was probable cause sufficient to support the breadth of the warrant is based on a totality-of-the-circumstances analysis. *United States v. Dupree*, 781 F. Supp. 2d 115, 154 (E.D. N.Y. 2011) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). A finding of probable cause requires a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. "Great deference" shall be given to the magistrate's finding of probable cause. *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (citing *Jones v. United States*, 362 U.S. 257, 270-71 (1960)).

Defendant contends the search warrant is invalid because there was no probable cause that "ammunition" would be found in Defendant's house. The Affidavit discussed the discovery of approximately twenty marijuana plants growing on Defendant's premises, but there was no mention of ammunition or related items such as guns, weapons, or firearms.

Even though there was no direct evidence that Defendant possessed illegal ammunition, it is common that drug traffickers carry firearms and ammunition to protect their drugs. *United States v. Alvarez*, 860 F.2d 801, 829-30 (7th Cir. 1988) (recognizing firearms as common tools of drug trade). Therefore, probable cause for ammunition could be inferred from the allegation that Defendant was cultivating marijuana. *See United States v. Jones*, 994 F.2d 1051, 1056 (3d

Cir. 1993) ("[P]robable cause can be, and often is, inferred by considering the type of crime.") (quotations and citations omitted). Many courts have noted it is reasonable to infer that suspected drug dealers may have illegal ammunition or weapons at their homes. *See, e.g.*, *United States v. Whitner*, 219 F.3d 289, 298 (3d Cir. 2000); *United States v. Johnson*, 26 F.3d 669, 690-91 (7th Cir. 1994); *United States v. Taylor*, 931 F. Supp. 1447, 1461 (N.D. Ind. 1996).

The Court recognizes there was no direct or clear evidence that Defendant had illegal ammunition at his home; however, all that is needed to establish probable cause is a "fair probability" that the items will be found at the searched premises. *Gates*, 462 U.S. at 238; *cf. United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988) ("[E]ven though the affidavit contained no facts that the weapons were located in defendant's trailer, we reject his argument that the warrant was defective.") In light of the evidence that Defendant was cultivating multiple marijuana plants at his house, the frequency of drug dealers who possess illegal ammunition or weapons, and the great deference owed to the issuing magistrate's finding of probable cause, the Court finds that probable cause existed for the ammunition. *See United States v. Ventresca*, 380 U.S. 102, 109 (1965) ("[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."); *United States v. Martinez*, 588 F.2d 1227, 1234 (9th Cir. 1978).

Even assuming the warrant was invalid, the evidence obtained pursuant to it would not be suppressed based on the "good faith" exception to the exclusionary rule as announced in *United States v. Leon*, 468 U.S. 897 (1984). The good faith exception is applicable when the executing officer's reliance on the legitimacy of the search warrant was objectively reasonable. *Id*. at 908. "A certain deference should be given searches where the law enforcement officers have sought and obtained judicial approval of their actions." *In re Grand Jury Subpoenas*, 926 F.2d 847, 855 (9th Cir. 1991). Here, Detective White obtained approval from a neutral magistrate judge for a search warrant after including ample evidence of Defendant's drug possession in the Affidavit. The search warrant authorized a search for drugs and related items, including ammunition. The warrant was not so totally defective upon its face that a

reasonable police officer would not have relied on it. Therefore, even if the warrant was invalid, Defendant's request to suppress the evidence obtained in the Task Force's search would still be denied.

The Court concludes that the search warrant is valid in its entirety.[8]

C. MIRANDA RIGHTS

The Fifth Amendment to the United States Constitution protects criminal defendants from being compelled to testify against themselves. To protect the Fifth Amendment right against compelled self-incrimination, suspects placed in custody must be informed of their *Miranda* rights prior to any interrogation by law enforcement officers. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "Miranda warnings are required when a suspect is both in custody and subject to interrogation." *Commonwealth v. Wang Hong Yan*, 4 NMI 334, 337 (1996) (citation omitted).

There is no dispute that Defendant was in custody and made incriminating statements before he was *Mirandized*. The issue is purely whether Defendant was subject to interrogation. The standard for determining whether a statement is the product of interrogation is outlined in *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). "'Interrogation' . . . refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id*. at 301. The court shall consider the totality of the circumstances, including the knowledge of the police officers to determine whether they should have known that their words or conduct were likely to elicit an incriminating response from the defendant. *Id*. at 302.

After arresting Defendant, Detectives White and Igitol merely requested Defendant to accompany them to his residence so they could execute the search warrant without breaking down the door. This basic request was not likely to elicit incriminating statements.

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[8] Even if the Court agreed with Defendant that the warrant was overbroad as to the challenged phrase, "any instrument of crime," and the warrant lacked probable cause for ammunition, the remedy would be to simply sever that invalid portion(s) rather than to invalidate the entire warrant. *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001) (citing *United States v. Brown*, 984 F.2d 1074, 1077 (6th Cir. 1993)); *People v. Couser*, 303 A.D.2d 981, 982 (N.Y. App. Div. 2003); *People v. Joubert*, 140 Cal. App. 3d 946, 953 (Cal. Ct. App. 1983).

Furthermore, Detective White had been in law enforcement training with Defendant just two months prior to Defendant's arrest, making it particularly unlikely for Detective White to believe *Miranda* warnings were necessary to protect Defendant's right against compelled self-incrimination. When Defendant began offering incriminating remarks, Detective White repeatedly told Defendant to be quiet. Defendant was not subject to interrogation while being transported to his residence and, thus, he was not entitled to *Miranda* warnings at that time.

After entering Defendant's residence, Detective White asked Defendant, as part of a standard safety procedure, whether there were any weapons, dogs, or children in the house. By asking Defendant if he had any weapons in his house, Detective White invited an incriminating response. *See United States v. Brady*, 819 F.2d 884, 887 (9th Cir. 1987) (noting that a response to a question regarding the possession of a weapon could be incriminating in several ways); *see also United States v. Barthwaite*, 458 F.3d 376, 382 (5th Cir. 2006). Therefore, Detective White's question posed to Defendant whether he had any weapons in his house constituted custodial interrogation based on the *Innis* standard.

1. *Public Safety Exception*

Despite the aforementioned *Miranda* violation, testimonial statements may still be admissible under the narrow "public safety" exception articulated in *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). In *Quarles*, police chased a man suspected of rape into a supermarket where police lost sight of him. *Id*. at 652. Eventually, the police apprehended the suspect inside the supermarket and discovered he was wearing an empty shoulder holster. *Id*. The police immediately handcuffed him and, without administering *Miranda* warnings, asked where the gun was. *Id*. The defendant then pointed out the location of the gun. *Id*. The Court held the defendant's statement admissible, "concluding that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id*. at 657. The public safety exception to the *Miranda* rule arises when there is an "objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon." *Id*. at 659.

In the instant case, there was no objective, immediate danger to the detectives or the public by the potential presence of a weapon in Defendant's house. Detective White asked Defendant about a weapon while already inside Defendant's private residence with Defendant in handcuffs and three other detectives nearby. Any possible weapon inside the private residence presented no danger to the public, and the detectives did not have an objective basis to feel threatened by Defendant. Furthermore, Defendant's residence is very small and it had been under surveillance for nearly two hours immediately prior to the search, minimizing the possibility that any accomplices may have been inside.

The Government contends that it is common for weapons to be involved in drug operations; therefore, it was prudent for Detective White to ask Defendant if he had weapons in his home. However, "[t]o sanction unwarned questioning about the presence or whereabouts of a gun in every case were a gun is suspected would result in the [public safety] exception swallowing the [*Miranda*] rule." *State v. Stephenson*, 796 A.2d 274, 279-80 (N.J. Super. Ct. 2002) (citing cases). Where a defendant is handcuffed and surrounded by police officers inside a private dwelling, there is generally no exigency to permit the officers to inquire into the whereabouts of a weapon without first complying with *Miranda*. *See id*. (holding there was a *Miranda* violation when defendant was asked about a weapon while he was handcuffed and surrounded by three police officers in his motel room); *see also Brathwaite*, 458 F.3d at 382 n.8.; *United States v. Salahuddin*, 668 F. Supp. 2d 1136, 1142-43 (E.D. Wis. 2009).

Unlike in *Quarles* and other cases that have applied the public safety exception, Detective White inquired into the whereabouts of a weapon inside a *private* residence while Defendant and the surrounding premises were under the full control of law enforcement officers. Detective White's subjective purpose in asking about any potential weapons for the detectives' safety is immaterial. *Id*. at 656 ("[The] exception does not depend upon the motivation of the individual officers involved."). There was no objective basis to believe that the possible presence of a weapon in Defendant's house posed a threat to the detectives or the public, making the public safety exception inapplicable. Defendant's response to Detective

White's question about any weapons being in the house shall be suppressed. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

2. *Physical Evidence*

The *Miranda* rule protects against violations of the Self-Incrimination Clause of the Fifth Amendment; however, the Self-Incrimination Clause is not implicated by the admission into evidence of the physical fruit of a voluntary statement.[9] *See United States v. Patane*, 542 U.S. 630, 636 (2004); accord *Commonwealth v. Cabrera*, Crim. No. 09-0037B (NMI Super. Ct. Aug. 19, 2009) (Order Granting in Part and Denying in Part Defendants' Motion to Suppress at 6). In *Patane*, the defendant was arrested for violating a temporary restraining order by contacting his ex-girlfriend. *Id*. at 635. Without administering the full *Miranda* warnings, the arresting officer questioned the defendant about the whereabouts of a pistol and the defendant responded that he had a pistol in his bedroom. *Id*. The Court affirmed the suppression of the statements the defendant made regarding the pistol, but held that the pistol itself was admissible because the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations. *Id*. at 642.

Miranda is a prophylactic rule[10] to the Self-Incrimination Clause, which is limited by the Constitution to excluding only coerced *testimonial* statements. *Id*. at 638 ("[W]e have held that the word 'witness' in the constitutional text limits the scope of the Self-Incrimination Clause to testimonial evidence.") (quotations and citations omitted). *Miranda*, as a prophylactic rule, "necessarily sweep[s] beyond the actual protections of the Self-Incrimination Clause," which negates the need to extend the rule any further. *Id*. In conclusion, Defendant's

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[9] A "voluntary statement" in this context does not mean a statement made without any prompting or questioning from a third party. Rather, a "voluntary statement" means a statement that is not procured by duress, intimidation, threats, or other means of actual coercion inflicted by a third party. The Supreme Court explains:

> And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination.

Patane, 542 U.S. at 644.

[10] Because *Miranda* is only a prophylactic rule, "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights." *Id*. at 641.

voluntary statements regarding his possession of .22 ammunition shall be suppressed due to the *Miranda* violation, but the physical, nontestimonial evidence of the .22 ammunition is admissible evidence. *See id.* at 641-42 ("The exclusion of unwarned statements . . . is a complete and sufficient remedy for any perceived *Miranda* violation.") (quotations and citations omitted).

IV. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** Defendant's Motion to suppress evidence obtained from the search and seizure. The Court hereby **DENIES** Defendant's Motion to suppress all statements made by Defendant while being transported from work to his house while in custody. The Court hereby **GRANTS** Defendant's Motion to suppress Defendant's response to Detective White's inquiry into the presence of any weapons inside Defendant's house.

IT IS SO ORDERED this 13th day of June, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge