UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL, Defendants.	CR08-50079-02 **UNITED STATES' RESPONSE OPPOSING DEFENDANT MARSHALL'S MOTION TO SUPPRESS STATEMENTS**

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response opposing Defendant Marshall's Motion to Suppress Statements.

Defendant Marshall is seeking to suppress statements made to BIA Director Robert Ecoffey on December 26, 2003, "on the grounds that said statements were elicited in violation of Richard Marshall's Sixth Amendment right to counsel." See Exhibit A (statement of December 26, 2003, (Graham04408-04409)). As demonstrated herein, Defendant's Sixth Amendment right to counsel was not violated, and the same holds true with respect to his Fifth Amendment rights.

It is a fundamental and well-established principal of law that the Sixth Amendment right to counsel does not attach until adversarial judicial proceedings have been initiated. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). "It is the commencement of a formal prosecution, indicated by the initiation of adversarial judicial proceedings, that marks the beginning of the Sixth Amendment right to counsel." Texas v. Cobb, 532 U.S. 162, 176 (2001) (quoting McNeil v. Wisconsin, 501 U.S. 171 (1991); Austin v. United States, 509 U.S. 609, 608 (1993) ("the protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.'"). The Sixth Amendment right comes into play when the suspect has been formally charged (the right has "attached"), and the prosecution is at a "critical stage." See generally United States v. Gouveia, 467 U.S. 180, 190 (1980) (holding the Sixth Amendment right to counsel does not apply to pre-charge questioning, even if the suspect has been arrested); Hoffa v. United States, 385 U.S. 299, 307-08 (1966) (holding the Sixth Amendment right to counsel does not apply if the suspect has an attorney on other charges and is the focus of a government investigation); United States v. Moore, 122 F.3d 1154, 1156 (8th Cir. 1997) (holding the right to counsel does not attach with the filing of a complaint under Fed. R. Crim. P. 3); United States v. Manvujano, 425 U.S. 564, 581 (1975) (holding that Sixth Amendment right to counsel does not apply to a grand jury target); United States v. Hayes, 231 F.3d 663, 674 (9th Cir. 2000)

(Sixth Amendment right to counsel had not attached, even though the defendant had received a "target letter," counsel had been appointed, and a court order to depose witnesses had been obtained).

When Defendant Marshall provided his statement on December 26, 2003, there was no initiation of adversarial proceedings or formal charges. A federal grand jury did not indict Marshall until August 20, 2008 [DE1], with the Superseding Indictment filed on October 7, 2008 [DE28]. Accordingly, Defendant Marshall's Motion to Suppress his statement of December 26, 2003, on Sixth Amendment grounds should be denied.

Although Defendant's Motion to Suppress is premised only upon the Sixth Amendment, well-settled principles of law further demonstrate there was no Fifth Amendment violation. Defendant Marshall's meeting of December 26, 2003, did not violate his Fifth Amendment right to counsel in that it clearly was not a custodial interrogation. See Miranda v. Arizona, 384 U.S. 436, 467-70 (1966); Edwards v. Arizona, 451 U.S. 477, 481-82 (1981). Whether an encounter is a custodial interrogation is determined by balancing the following six Griffin factors: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with

authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning. United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990). A suspect is considered to be "in custody" either upon his/her formal arrest or "under any other circumstances where the suspect is deprived of his [or her] freedom of action in any significant way." Id. at 1347 (citing Berkemer v. McCarty, 468 U.S. 420, 429 (1984)).

On December 26, 2003, Director Ecoffey observed Marshall coming out of the Oglala Sioux Tribal Housing Office in Pine Ridge, South Dakota. See Exh. A. Director Ecoffey pulled up in front of the office, at which time Marshall approached the vehicle and got into the passenger side saying "hello." Id. Director Ecoffey told Marshall that he was still investigating the murder of Annie Mae Aquash, and advised Marshall of information he had received concerning what had occurred at Marshall's residence. Id. At the end of the interview, Marshall indicated that he would think about the things that were discussed and if he remembered any additional details, he would call Director Ecoffey. Id.

Examination of the totality of the circumstances and the Griffin factors clearly demonstrates that the December 26, 2003, meeting between Ecoffey

and Marshall was not a custodial interrogation triggering Fifth Amendment right to counsel. See generally United States v. Baswell, 792 F.2d 755, 759 (8th Cir. 1986) (statement made in agent's car where defendant voluntarily entered the car did not constitute a custodial interrogation). Indeed, on December 26, 2003, Director Ecoffey was not aware of the full extent of Defendant Marshall's conduct and involvement in the murder of Aquash, including Marshall's counseling the criminal venture to commit the murder, the exchange of the "baggage" note with Theda Clarke, and the specific details surrounding his providing the murder weapon and shells. During the December 26, 2003, meeting, Defendant Marshall voluntarily entered Director Ecoffey's vehicle, was never handcuffed or restrained, and was not arrested until approximately five years after his statement.

Furthermore, Defendant Marshall has failed to demonstrate a legally cognizable invocation of any Miranda rights. As recently reiterated by the United States Supreme Court "we have in fact never held that a person can invoke his *Miranda* rights anticipatorally, in a context other than 'custodial interrogation'. . . . " See Montejo v. Louisiana, 2009 WL 1443049 *12 (May 26, 2009) (quoting McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991)). In his Motion to Suppress Statement, Defendant Marshall's only claim to the invocation of any right to counsel stems from an anticipatory representation by an attorney associated with Marshall being a witness at grand jury proceedings

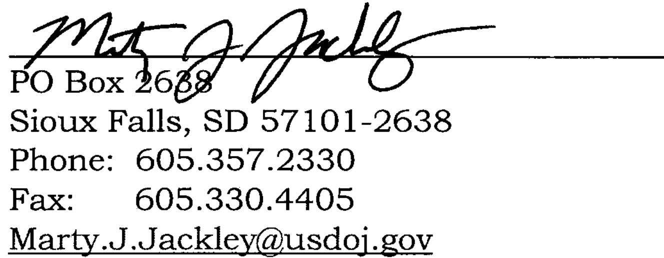
on or about January 3, 2003. This is more than eleven months prior to the date of his statement to Ecoffey. Based upon the fundamental principal that an individual cannot anticipatorally invoke Miranda rights, it is not necessary to address the scope of the attorney's representation nor concerns relating to an attorney's attempted global representation of various and numerous parties giving rise to potential inappropriate witness control and inherent conflicts of interest. *See S.D.C.L. app. 16-18* (2003) (SD Rules of Professional Conduct 1.7 Conflict of Interest); *see also S.D.C.L. app. 16-18* (2003) (SD Rules of Professional Conduct 1.8(b) Conflict of Interest).

CONCLUSION

Defendant Marshall's Motion to Suppress his statement of December 26, 2003, to Director Ecoffey should be denied because there clearly was no commencement of a formal prosecution. The statement date of December 26, 2003, combined with the August 8, 2008, issuance date of the Indictment obviates the need for any evidentiary hearing. Furthermore, there exists no claim, nor substantive evidence, that Marshall was subject to a custodial interrogation triggering any Fifth Amendment right to counsel nor does there exist any evidence of a proper invocation of the right to counsel. Accordingly, Defendant Marshall's statement is properly admissible under Fed. R. Evid. 801(d)(2).

Dated and electronically filed this 29th day of June 2009.

MARTY J. JACKLEY
United States Attorney



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CERTIFICATE OF SERVICE

The undersigned hereby certifies on June 29, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☒ Electronic Case Filing

Marty J. Jackley