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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID LEE FRY,

Defendant.

Case No. 3:16-CR-00051-13-BR

DEFENDANT DAVID FRY'S MOTION
TO COMPEL DISCOVERY

Certification of Conferral: The defendant, through counsel, has conferred with the government regarding this motion. The government opposes the motion. This motion pertains only to defendant David Fry. Defendant requests that the Court consider this motion at the next monthly status conference scheduled for **May 4, 2016**.

Defendant David Lee Fry, through his attorney, Per C. Olson, hereby moves the court for an order compelling the government to produce records of communications that are relevant to a motion defendant will file to suppress statements obtained in violation of his Fifth and Sixth Amendment rights. Defendant seeks the following documents:

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All records of communications of the Assistant US Attorneys involved in this case and any law enforcement agents involved in the arrest, detention, and interrogation of Mr. Fry on February 11, 2016, pertaining to his attorney's invocation of his Fifth and Sixth Amendment rights and any decision to interrogate Mr. Fry. This request includes, but is not limited to, text messages, emails, and notes or memoranda of phone conversations occurring between AUSA Ethan Knight, Special Agent Sean Hamblet, Special Agent Eric Thompson, and Special Agent Audrey (Last Name Unknown).

Background

On February 3, 2016, the grand jury returned an indictment naming David Fry as a defendant in this matter. At that point in time, defendant's Sixth Amendment right to counsel fully attached. On February 11, 2016, at approximately 11:00 a.m., defendant was taken into custody by FBI agents at the Malheur National Wildlife Refuge. At or near the time of his arrest, Mr. Fry's attorney invoked Mr. Fry's Fifth and Sixth Amendment rights through two separate channels of communication.

One channel was through Federal Public Defender Lisa Hay who, in the day leading up to the arrest of the last four remaining persons at the refuge, was leading an effort to have counsel available to speak with the individuals upon their arrest. In this regard, Ms. Hay was in contact with an FBI Agent named Audrey (last name unknown). At 10:47 a.m. and 11:15 a.m., on February 11, Ms. Hay sent Audrey text messages saying, in substance, that attorney Per Olson was available and waiting to speak with Mr. Fry; that Mr. Olson invoked Mr. Fry's Fifth and Sixth Amendment rights; and that Mr.

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Olson asked that the agents not question Mr. Fry. At 11:38 a.m., Audrey acknowledged receipt of the invocations by texting, "I just passed the message on."

The other channel was from attorney Olson through AUSA Ethan Knight. At 11:07 a.m. on February 11, Mr. Olson sent an e-mail to Mr. Knight and to AUSA Geoffrey Barrow stating that Mr. Olson represented Mr. Fry. The e-mail read: "Please pass on to the agents that I'm invoking on his behalf his right of counsel and his right against self-incrimination." Mr. Knight communicated that invocation of rights to the FBI; but it is not known *when* that communication was made or whether it was received by the agents who took custody of defendant and interrogated him, as described below.

Following his arrest, Mr. Fry was transported from Burns to Bend in an FBI vehicle accompanied by FBI Special Agents Sean Hamblet and Eric Thompson. The agents interrogated Mr. Fry during the entire transport, starting at 12:18 p.m. when Agent Hamblet advised Mr. Fry of his rights under Miranda. This was almost an hour after Audrey stated that she would convey to the arresting agents counsel's invocation of rights; and it was more than an hour after counsel invoked defendant's rights with Mr. Knight.

The audio recording of the interrogation reveals that defendant was not advised of any of the following critical pieces of information that bear on whether his waiver was knowing and voluntary: (1) that he had an attorney; (2) that the attorney was available to speak with Mr. Fry; (3) that the attorney had invoked defendant's right against self-incrimination and right of counsel; and (4) that the attorney specifically had asked that Mr. Fry not be questioned.

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It is a matter of public record that, at the time of his arrest, Mr. Fry was in a particularly vulnerable state of mind. He thought about taking his own life out of a fear that he would be sexually assaulted in custody. The agents assured him that he would be safe, and ultimately, Mr. Fry relied on that assurance when he acquiesced to an arrest. It will be defendant's contention that the government should not have taken unfair advantage of the trust defendant had placed in the agents in his vulnerable state of mind by interrogating him in disregard of his counsel's invocations.

Discussion

Defendant intends to file a motion to suppress the statements he made to Agents Hamblet and Thompson in response to their post-invocation interrogation. He seeks an order compelling the government to produce all communications to and from law enforcement regarding counsel's invocation of rights and his request that Mr. Fry not be questioned. The materials are relevant and pertinent to defendant's motion to suppress because the communications would show whether and when the invocation was communicated to Agents Hamblet and Thompson, whether the agents acknowledged receipt of the invocations, and whether the agents purposefully concealed from Mr. Fry any fact relating to the appointment of an attorney or the attorney's invocation of rights in order to improperly induce Mr. Fry into waiving those rights.

Mr. Fry's Sixth Amendment right to counsel had already attached well before his arrest and interrogation when he was indicted by a grand jury in this matter on February 3, 2016. See *United States v. Gouveia*, 467 US 180, 188 (1984) (Sixth Amendment right attaches "at or after the initiation of adversary criminal proceedings – whether by way of formal charge, preliminary hearing, *indictment*, information, or arraignment."

(Citation omitted; emphasis added)). Once that right attaches and the adversary judicial process has been initiated, the defendant has the right to have counsel present at all “critical” stages of the criminal proceedings. *United States v. Wade*, 388 US 218, 227-28 (1967). Interrogation by an FBI agent unquestionably is a critical stage. *Massiah v. United States*, 377 US 201, 204-05 (1964); *Montejo v. Louisiana*, 556 US 778, 786 (2009).

A person in custody may waive his Sixth Amendment right to counsel after it has attached and submit to a custodial interrogation. *Montejo*. In *Montejo*, the Court held that neither the defendant’s request for counsel at arraignment nor the appointment of counsel gave rise to any “presumption” that any subsequent waiver by defendant to police-initiated interrogation is invalid. However, the Court’s decision does not render the type of discovery at issue here irrelevant, because defendant may still challenge the validity of his waiver even if it’s not “presumptively” invalid by virtue of an appointment of counsel. In fact, the Court in *Montejo* ordered a remand for a hearing to allow *Montejo* to press a claim that his Sixth Amendment waiver was not knowing and voluntary because “it was based on misrepresentations by police as to whether he had been appointed a lawyer.” *Id.* at 798. Likewise, communications to, from, and among the agents involved in defendant’s arrest is pertinent to the question whether Mr. Fry’s purported waiver was knowing and voluntary.

Also, *Montejo* involved a very different type of invocation than the one at issue here, and therefore, the decision should have no bearing on the question of production before the court. In *Montejo*, the “invocation” was not act or statement made by either the defendant or his lawyer. Rather, it consisted of the court ordering the appointment

of a public defender at the first appearance. The defendant subsequently was interrogated after waiving his *Miranda* rights, and the court held that the appointment of counsel did not override the waiver. In contrast, the invocation here was explicit in asserting both defendant's Sixth Amendment right of counsel *and* his Fifth Amendment right against self-incrimination. Counsel's invocation specifically directed law enforcement not to question Mr. Fry. Defendant will contend in his suppression motion that law enforcement may not ignore such an explicit invocation and directive, and that the agents' disregard of the invocation rendered Mr. Fry's purported waiver invalid. See *Edwards v. Arizona*, 451 US 477 (1981) (holding that once a defendant has invoked his Fifth Amendment right to counsel, authorities may not interrogate the defendant and seek a waiver until counsel is made available).

Information in the custody of the government that is relevant and helpful to a defendant in the context of a suppression motion must be provided in discovery. See *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (government's *Brady* obligation extends to materials that would be helpful to the accused "at trial *or on a motion to suppress* * * *." (Emphasis added)); *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) (same); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) (same), *vacated on other grounds*, 503 US 930 (1992). See also Fed.R.Cr.P. 16(a)(1)(E)(i) (government must provide documents that are "material to preparing the defense.")

The government's refusal to disclose internal law enforcement communications likely is rooted in a claim of privilege. However, the "law enforcement" privilege is not absolute. The privilege must "give way" when the communication "is relevant and
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helpful to the defense of an accused, or is essential to a fair determination of a cause.”
Roviaro v. United States, 353 US 53, 60-61 (1957).

Furthermore, the nature of the communications sought here does not put them in the same category as internal law enforcement communications typically not disclosed in discovery. Defendant seeks discovery of his own lawyer’s communication to law enforcement invoking his rights. Ideally, the messages from one law enforcement official to another would contain only that invocation of rights intended for the agents responsible for defendant’s arrest and transport. Ideally, the messages should not contain any other type of internal communication between law enforcement officials that would normally fall within the privilege. As such, disclosing the communications to the defense would not negatively impact any interest that the privilege is designed to protect.

That said, if the communications do more than just convey counsel’s invocation of rights to the arresting agents – that is, if they include communications about whether the invocation should be ignored, whether Mr. Fry should be advised of his attorney’s invocations, whether Mr. Fry should be given an opportunity to talk with his attorney, etc. – then defendant is entitled to receive those as well, because they would be helpful and material to his suppression motion. The government’s interest in hiding evidence of a purposeful interference of the attorney-client relationship is non-existent. *See United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980) (intentional government intrusion into the attorney-client relationship violates the Sixth Amendment when the intrusion substantially prejudices the defendant by giving the prosecution an unfair advantage at trial).

To conclude, defendant moves the court for an order compelling the government to produce the law enforcement communications described herein.

DATED this 29th day of April, 2016.

s/ Per C. Olson
Per C. Olson, OSB 933863
Attorney for Defendant David Fry