

JUN 04 2009


CLERKUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISIONUNITED STATES OF AMERICA,
Plaintiff,

Case No. 08-50079

vs.

MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO SUPPRESS
STATEMENTSJOHN GRAHAM, a.k.a.
JOHN BOY PATTON, and
VINE RICHARD MARSHALL, a.k.a.
RICHARD VINE MARSHALL, a.k.a.
DICK MARSHALL,
Defendants.FACTS

In December 2002, Richard Marshall was subpoenaed to testify as a witness before the Grand Jury in the matter of the investigation into the murder of Anna Mae Aquash. Richard Marshall retained attorney Charles Abourezk to represent him as his legal counsel in the matter.

On January 3, 2003, attorney Abourezk sent a letter to Assistant United States Attorney (AUSA) Robert Mandel informing Mr. Mandel that Mr. Abourezk was acting as attorney for Richard Marshall in the matter of the investigation into the death of Anna Mae Aquash. See: Affidavit of Charles Abourezk, Exhibit "A".

On that same day, January 3, 2003, Mr. Abourezk had a personal conversation with Robert Ecoffey, who was working as investigator for the government in its investigation concerning the death of Anna Mae Aquash. At the time, Ecoffey was employed by the Law

Enforcement Services of the Bureau of Indian Affairs (BIA). In their conversation, Abourezk informed Ecoffey that he was acting as attorney and legal counsel for Richard Marshall in the matter of the investigation into the death of Anna Mae Aquash.

With attorney Abourezk accompanying him and acting as his legal counsel in the matter, Richard Marshall testified before the Grand Jury on January 15th, 2003. That Grand Jury returned an indictment that charged Arlo Looking Cloud and John Graham with the first degree murder of Anna Mae Aquash.

Eleven months later, on December 26th, 2003, when the government was preparing for the trial of Looking Cloud, Robert Ecoffey approached Richard Marshall at Marshall's place of work, and without the presence or knowledge of his attorney and without any valid waiver of his right to counsel, Ecoffey questioned Marshall about facts involved in the investigation in the death of Anna Mae Aquash. Marshall made statements in answer to Ecoffey's questions that the government now seeks to offer as evidence in Marshall's trial.

The Defendant Richard Marshall moves for an order from the Court suppressing these statements on the grounds that on December 26th, 2003, the government and Robert Ecoffey had notice and actual knowledge that Marshall had invoked his right to counsel on all matters involving the government's investigation concerning the death of Aquash and that Charles Abourezk was his attorney in that matter, and that therefore all statements elicited from the defendant by Ecoffey were obtained by violating the defendant's Sixth Amendment right to counsel.

ARGUMENT

I.

THE GOVERNMENT'S AGENT VIOLATED MARSHALL'S SIXTH AMENDMENT RIGHT TO COUNSEL BY QUESTIONING HIM AFTER MARSHALL HAD INVOKED THAT RIGHT BY RETAINING COUNSEL IN THE MATTER.

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” Interrogation is a critical stage of a criminal proceeding and a person has a right to invoke his Sixth Amendment right to counsel at that stage. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964).

Merely by requesting counsel, a person invokes his Sixth Amendment right to counsel, and all interrogation must then cease, unless the suspect himself initiates further conversation and waives his right to counsel. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981). Here, Richard Marshall had not merely requested counsel: he had actually retained counsel in the very matter that Ecoffey sought to question him about, thereby unequivocally invoking his right to have an attorney between him and the government in all matters related to the investigation of this particular case.

Here, the defendant had retained legal counsel to represent him in the matter under investigation and the government had notice of that fact. The federal investigator, Bob Ecoffey, had actual personal knowledge of the fact Mr. Abourezk was Richard Marshall's attorney in all matters relating to the investigation into the death of Aquash.

Under Massiah and Edwards, once Marshall retained legal counsel in the matter under investigation, a government agent may not deliberately question and elicit statements from him outside of the presence of counsel, without violating his Fifth and Sixth Amendment rights.

The Sixth Amendment imposes on the government an affirmative obligation to respect and preserve the citizen's choice to seek the assistance of legal counsel. Under the Sixth Amendment, the prosecutor and police have an affirmative obligation not to act in a matter that circumvents and thereby dilutes the protection afforded by the right to counsel. Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985). The Sixth Amendment is violated when the government obtains statements by knowingly circumventing the citizen's right to have counsel present in a confrontation between the accused and the government agent. Maine v. Moulton above. The proof that the government must have known that its agent was likely to obtain statements from the accused in the absence of counsel suffices to establish the Sixth Amendment violation, Maine v. Moulton.

Once a citizen has requested or actually retained counsel, the police cannot question that citizen unless he voluntarily waives the previously invoked right to counsel. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977). Here there is absolutely no evidence that Richard Marshall waived his right to previously invoked right to counsel.

Once the Sixth Amendment right to counsel has been invoked, the police may not interfere with efforts of the defendant's attorney to act as medium between his client and the police during interrogation. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135 (1986). Here, the government investigator interfered with the attorney's efforts to act as medium between his client and the investigators by simply ignoring the fact, which he knew, that Marshall had legal counsel in the matter.

By questioning the defendant outside the presence of counsel, when he had actual knowledge that the defendant was represented by an attorney in the matter, Ecoffey ignored and

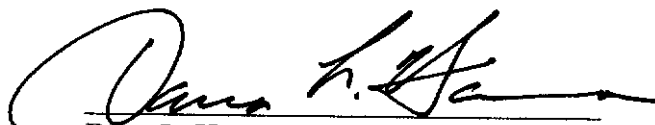
willfully violated the defendant's Sixth Amendment right to counsel.

Therefore, the government should be prohibited from offering any statements made by the defendant to Ecoffey in its case in chief.

Dated this 4th day of June, 2009.

RICHARD MARSHALL, Defendant

By



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PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby confirm that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Suppress Statements on the other parties in this case by hand delivering to the attorneys of record at the addresses listed below:

Marty J. Jackley, United States Attorney and
Robert Mandel, Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

Dated this 4th day of June, 2009.



Dana L. Hanna