UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLEY DEAN HILL, Defendant.	08:17-CR-1187-HMH-1 **GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**

INTRODUCTION

The United States of America ("Government"), by and through its undersigned attorneys, hereby opposes Defendant Charley Hill's Motion to Suppress Statements ("Motion") filed April 5, 2018. *See* ECF No. 64. Defendant contends that his February 11, 2010 statement should be suppressed "because it was involuntarily made in violation of his rights under the Fifth Amendment." Mot. at 1. The Government respectfully requests that the Court find that (1) the Fifth Amendment does not protect against use of a statement that is itself a crime, and in any event (2) the statement at issue was voluntarily made in a non-custodial setting, and accordingly deny the Motion.

BACKGROUND

On January 23, 2010, SOC LLC ("SOC") Iraq in-country manager William Van Ritch ("Ritch") and SOC business development manager David Johnston contacted the International Contract Corruption Task Force ("ICCTF"), an interagency law enforcement task force, to report that Defendant and SOC local counsel Zuhair Al-Maliki ("Al-Maliki") "devised a scheme to commit fraud by inflating the cost of registering SOC's vehicles in Iraq, and then submitting false claims to the U.S. Government for reimbursement." Mot. Ex. A at 3. The ICCTF, with the Federal Bureau of Investigation ("FBI") taking the lead, opened an official investigation into possible violations of federal criminal law by Defendant, as well as Defendant's then-employer SOC and

SOC's employees and agents. *See* Indictment ¶ 3. Because of the allegations against Defendant, SOC intended to terminate Defendant's employment, and Ritch agreed to wear a recording device to conduct a consensual monitor of the meeting with Defendant. Mot. Ex. A at 3. On February 11, 2010, the day of that meeting, Army Criminal Investigative Division Special Agent ("SA") Charles Hunt IV obtained authorization from a military magistrate to search Defendant's person and seize certain items. *See generally id.*

Unbeknownst at the time to Ritch or the ICCTF, Defendant covertly recorded an approximately four hour, twenty-six minute audio file on February 11, 2010, which included his conversations with both Ritch and the FBI ("February 11th recording").[1]

On that day, Defendant met with Ritch in Ritch's office "for what [he] believed to be a typical work meeting." Mot. at 2. (The office was an interior room within a type of freestanding trailer that is commonly used on non-permanent military bases.) During that meeting, Ritch asked Defendant about SOC's high vehicle registration costs, and Defendant responded that according Al-Maliki, "he had to pay bribes to get everything." 2/11/10 Audio at 01:03:35.[2] Shortly thereafter, Ritch confronted Defendant:

> [Corporate management in] Philadelphia and SOC believe that you've been involved in that. Now listen careful to what I'm going to say because you got to make a decision here. . . . My instructions are as follows, okay: you're going to be terminated, effective today. . . . Now, what the company wants to know is your involvement in any extra money that you might have taken for yourself or for anybody else over here."

Id. at 01:05:09–01:05:44. Ritch further informed Defendant that his "instructions are that if [Defendant didn't] tell [Ritch] everything, [Ritch is] to call in federal fraud investigators. . . . That's

---

[1] During the execution of the search warrant later that evening, members of the ICCTF recovered a digital voice recorder and dozens of audio recordings made by Defendant, including the February 11th recording. As noted in Defendant's Motion, Mot. at 3 n.1, this recording was included in the discovery provided to Defendant and can be provided to the Court upon request. Quotations herein from conversations on February 11, 2010 are transcribed from this recording.

[2] Defendant's conversation with Ritch begins approximately fifty-one minutes into the February 11th recording.

coming from the top. That's coming from the CEO." *Id.* at 01:06:57–01:07:07. In response to Ritch's questions, Defendant denied that he had taken any money and maintained that it was Al-Maliki who handled the vehicle registration costs. Near the end of the conversation, Ritch reiterated that Defendant was terminated and informed him:

> Here's what's going to happen. I'm going to call these investigators. They're going to come talk to you, either right now or some time. We're going to take you back to the villa. We're going to get all your personal gear. We're going to give you a place to stay tonight. And we're going to fly you home.

Id. at 01:11:26–01:11:42. Defendant responded "okay. Okay." *Id.* at 01:11:43. Ritch subsequently left the office, and another individual entered to retrieve Defendant's Common Access Card ("CAC").[3] When Defendant protested, he was informed: "Charley, the rules have changed. When you've been terminated, you have to give up the CAC card." *Id.* at 01:15:04–01:15:08. Defendant's passport was not taken from him. SOC made the decision to terminate Defendant and consequently retrieved his CAC; the ICCTF did not direct either SOC action.

Following the meeting with Ritch, Defendant was interviewed by two members of the ICCTF, FBI SAs Phillip Bond, Jr. ("Bond") and August Bauer ("Bauer"), in Ritch's office. Defendant was already within the office when the agents entered, and subsequently all three individuals were seated in a natural positioning in the room. Defendant was not physically restrained. Following introductions but before Defendant made any substantive statements, Bond informed Defendant:

> Before you say anything, let me say a couple of words. First of all, we're not here — You're not arrested. You're free to end this conversation at any time. But I'd like you to consider a couple things first. Number one, this is going to be your only chance before you actually speak to an attorney to take advantage of what I'm about to tell you. August and I are in a position to be able to basically make a deal with you, in the hopes to try to mitigate or minimize what's going on here. And, from

[3] The CAC is a standard identification card issued to Department of Defense military personnel, civilian employees, and contractors.

> what I understand, a lot of this — it's been going on for a while and there are actually some family members involved. I think Jennifer, your daughter, as well is one of them. So, before you answer any of my questions, or before you say anything, first let me tell you that I'm going to ask you some questions and if you decide to answer me, if any of those answers are untrue, I can charge you for providing a false statement to a federal officer. Okay, a federal officer. It's 1001. And that'll just be added on to whatever it is else that we're looking at here. So, what I would like to do is try to work something out with you where you're able to get me some information on what's going on and in return what I would do is ensure, to the best of my ability, that any other persons that are involved in this particular matter are not — not end up spending any time, for instance, in jail or the media gets ahold of it, et cetera, et cetera. So, I can help with those things. But the only way I can do that right now is if you talk to me. If you decide not to talk to me and you ask me to leave, or you say never mind, I want a lawyer, I will be glad to leave. But I will tell you that, you know, if you do that, there's no deal, and that the gloves will come off and we'll go after everybody. Okay? Everyone. So, it's up to you. You know, this is your best bet right now. Would you like to talk to us?

Id. at 01:19:16–01:22:07. Defendant responded: "Well, yeah, I'm not an attorney." *Id.* at 01:22:08–01:22:12. (The Government believes that Defendant's transcription of "No, I'm not an attorney," Mot. at 3, is incorrect.) Bond and Defendant had the following exchange:

> PB: Well, why is it you don't want to talk to us?
>
> CH: I think I have, under the rights I have, if I'm not mistaken, I have a right to speak to an attorney. I would rather talk to somebody.
>
> PB: Mm-hmm.
>
> CH: Yeah, am I being arrested? Am I — I've already lost my —
>
> PH: You're not being arrested.[4]

[4] Bond subsequently informed Defendant a third time that he was not being arrested. *Id.* at 01:24:50.

CH: Yeah. I've already been told I've lost my job. So, you know, my concern is my employment. And, you know, if I'm on —

PB: Well, your employment — I believe you were terminated, right?

CH: Yeah.

PB: So, it's not a concern anymore. It's done.

CH: It's a concern, yeah. It's a concern about getting my job back.

PB: They just fired you. So, I'm assuming they don't plan on re-hiring you.

CH: Okay.

PB: Is that correct?

CH: Yeah. I mean, unless there's proof that I've not done anything wrong.

PB: Mm-hmm. I'm still giving you the offer to talk to me. If you don't want to talk to me, I mean, I will leave. But I'm telling you — this is your best bet. I've been doing this a long time. Alright?

CH: So, there's no guarantee that you can get my job back?

PB: Get your job back?

CH: Yes.

PB: No, I'm not looking to get your job back at all.

Id. at 01:22:20–01:23:41. Following this dialogue, which included a second offer by Bond that the FBI would leave if Defendant did not want to talk to them, Defendant continued to speak with the SAs and to answer their questions.[5] At no point did Defendant ask the agents to end the interview or to leave. Because the interview was non-custodial, Defendant was not provided with *Miranda* warnings. It was during this interview that Defendant made statements giving rise to the instant case. *See* Indictment ¶¶ 4–6.

[5] In fact, Bond suggested that Defendant "take a minute and think about what it is that we're talking about here," and he and Bauer were "going to step out of the room" *Id.* at 01:25:05–01:25:12. However, the SAs did not end up leaving the office because Defendant continued the conversation.

On February 14, 2018, a grand jury returned an indictment against Defendant, charging him with one count of making materially false statements to the FBI on February 11, 2010, in violation of 18 U.S.C. § 1001 and § 2. ECF No. 28.

LEGAL STANDARDS

I. The Fifth Amendment and False Statements

It is well established that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." *Brogan v. United States*, 522 U.S. 398, 404 (1998). Moreover, "[t]he Fifth Amendment's prohibition against self-incrimination relates to crimes alleged to have been committed prior to the time when the testimony is sought. A person, uninformed of his rights, who testifies and thereby incriminates himself of a crime that has been committed, may assert a fifth amendment privilege if prosecuted for that crime, but it has been held that he is not free to falsely testify and commit perjury." *United States v. Kirk*, 528 F.2d 1057, 1061–62 (5th Cir. 1976) (citing *Glickstein v. United States*, 222 U.S. 139, 142, (1911)) (internal citations omitted). Accordingly, a defendant is "not free to lie to the questioners and be absolved from the consequences of those lies because of the absence of warnings. The exclusionary rule does not act as a bar to the prosecution of a crime where the statements themselves are the crime." *United States v. Melancon*, 662 F.3d 708, 712 (5th Cir. 2011); *accord United States v. Vreeland*, 684 F.3d 653, 661 (6th Cir. 2012); *United States v. Mitchell*, 812 F.2d 1250, 1253 (9th Cir. 1987), *overruled on other grounds by Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) ("A person who is detained illegally is not immunized from prosecution for crimes committed during his detention.").

II. *Miranda* Requirements

Miranda v. Arizona, 384 U.S. 436 (1966), mandates that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. Under *Miranda*, the requisite warnings and waiver thereof are "prerequisites to the admissibility of any statement made by a defendant." *Id.* at 476. However, "[t]he procedural safeguards prescribed by *Miranda* only apply 'where there has been such a

restriction on a person's freedom as to render him "in custody."'" *Burket v. Angelone*, 208 F.3d 172, 196 (4th Cir. 2000) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)). "A person is 'in custody' for purposes of *Miranda* if the person has been arrested or if his freedom of action has been curtailed to a degree associated with arrest." *Id.* at 196–97 (citing *Stansbury v. California*, 511 U.S. 318, 322 (1994)). "The issue does not turn on the subjective evaluation of the situation by the defendant or the police officers; instead, the test is an objective one. '[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'" *Davis v. Allsbrooks*, 778 F.2d 168, 171 (4th Cir. 1985) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 421–22 (1984)). "Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Howes v. Fields*, 565 U.S. 499, 509 (2012) (internal citations omitted).

The custody at issue for *Miranda* purposes is law enforcement custody.[6] In determining how a "reasonable person" would have viewed the restrictions on his freedom of action, the court "must be careful to separate the restrictions on his freedom arising from police interrogation and those incident to his background circumstances," and to "differentiat[e] between police-imposed restraint and circumstantial restraint." *United States v. Jamison*, 509 F.3d 623, 629 (4th Cir. 2007). For example, courts have concluded that a defendant was not "in custody" within *Miranda* notwithstanding restrictions on the defendant's ability to leave the encounter with law enforcement due to being hospitalized, *id.*, or being in prison, *Howes*, 565 U.S. at 517. *Cf. Florida v. Bostick*, 501 U.S. 429, 436 (1991) (rejecting *per se* seizure where defendant's "freedom of movement was restricted by a factor independent of police conduct — i.e., by his being a passenger on a bus"). "In such circumstances, 'the appropriate inquiry is whether a reasonable person would feel free to decline officers' requests or otherwise terminate the encounter.'" *Jamison*, 509 F.3d at 628

---

[6] Conversely, "*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement." *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (concluding that an undercover officer posing as a fellow inmate was not required to Mirandize incarcerated suspect).

(quoting *Bostick*, 501 U.S. at 436).

If a defendant was not "in custody" at the time of his interrogation, he "could not invoke the protections provided by *Miranda*." *Burket*, 208 F.3d at 197. As a result, in a non-custodial interview, a defendant is not entitled to *Miranda* warnings or the related protections even assuming a request for an attorney.[7] *Id.* ("And after Burket said, 'I'm gonna need a lawyer,' Detective Hoffman again informed Burket that he was not under arrest and free to leave. In light of these facts, Burket was not entitled to *Miranda* warnings after he stated 'I'm gonna need a lawyer.'")

III. Private Actor as an Agent of the Government

Defendant has correctly identified that, to determine whether a private individual acted as a government agent for the purposes of the Fifth Amendment, there are "'two primary factors' to be considered: (1) 'whether the Government knew of and acquiesced in the private' individual's challenged conduct; and (2) 'whether the private individual intended to assist law enforcement or had some other independent motivation.'" *United States v. Day*, 591 F.3d 679, 683 (4th Cir. 2010) (quoting *United States v. Jarrett*, 338 F.3d 339, 344) (4th Cir. 2003)) (reversing suppression of statements obtained by private security guards during an un-Mirandized interrogation). This determination must be "resolved in light of all the circumstances." *Jarrett*, 338 F.3d at 344. However, Defendant fails to acknowledge that he bears the burden of proving the agency relationship. *Id.*

IV. Voluntariness

Independent of whether *Miranda* applies to questioning, the Fifth Amendment requires that any statement to law enforcement be voluntarily made. "A statement is involuntary under the Fifth Amendment only if it is "involuntary" within the meaning of the Due Process Clause." *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (en banc) (citing *Oregon v. Elstad*, 470 U.S. 298, 304 (1985)). "The test is whether the confession was 'extracted by any sort of

---

[7] Even assuming that an interview is custodial, "to invoke the right to counsel and prevent further interrogation, a suspect must unambiguously request the assistance of counsel." *Burket*, 208 F.3d at 198 (citing *Davis v. United States*, 512 U.S. 452, 458–60 (1994)). Statements such as "I think I need a lawyer" or "Maybe I should talk to a lawyer" have been held to be insufficiently unambiguous to constitute "an unequivocal request for counsel." *Id.*

threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" *Hutto v. Ross*, 429 U.S. 23, 30 (1976) (internal quotation marks omitted) (alterations in original) (quoting *Bram v. United States*, 168 U.S. 532, 542-543 (1897)). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."[8] *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a confession involuntary." *Braxton*, 112 F.3d at 780. Rather, the "proper inquiry 'is whether the defendant's will has been "overborne" or his "capacity for self-determination critically impaired,"'" based on the totality of the circumstances. *Id.* at 780–81 (quoting *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987)). The Government must show voluntariness by a preponderance of the evidence. *Id.* at 781.

However, "'a law enforcement officer may properly tell the truth to the accused.' Indeed, '[t]ruthful statements about [the defendant's] predicament are not the type of 'coercion' that threatens to render a statement involuntary.'" *Braxton*, 112 F.3d at 782 (quoting *Pelton*, 835 F.2d at 1072–73) (internal citations omitted). Where law enforcement officers have probable cause to arrest a third party, they are "not coercive in threatening to do so." *United States v. Johnson*, 351 F.3d 254, 263 (6th Cir. 2003); *accord Newland v. Hall*, 527 F.3d 1162, 1189 (11th Cir. 2008) (rejecting ineffective assistance claim following guilty plea for failure to raise coercion based on threat to charge a third party); *Allen v. McCotter*, 804 F.2d 1362, 1364 (5th Cir. 1986).

LEGAL ARGUMENT

Defendant contends that various purported violations of his Fifth Amendment rights require suppression of his statements to FBI agents on February 11, 2010. However, the Fifth Amendment does not protect against use of false statements that are the basis for a charge under 18 U.S.C. § 1001. In any event, there was no Fifth Amendment violation to remedy.

---

[8] The Supreme Court has "recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). Although *Connolly* addressed due process under the Fourteenth Amendment, the voluntariness analysis is the same under either amendment. *See Connolly*, 479 U.S. at 169–70; *see also United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002).

I. The Fifth Amendment Is Not Relevant to Use of Defendant's Statement.

The Fifth Amendment's prohibition against self-incrimination protects against use of a defendant's statements about a prior criminal act. *See Kirk*, 528 F.2d at 1061. However, assuming *arguendo* that Defendant's constitutional rights were somehow violated when he was interviewed on February 11, 2010 — which they were not — "[b]ecause the statements he made were themselves charged as criminal conduct, they [would] properly [be] admitted as the key evidence on the counts of making false statements." *Melancon*, 662 F.3d at 712. Other Courts of Appeals to have considered this issue have agreed. *See Vreeland*, 684 F.3d at 661; *Mitchell*, 812 F.2d at 1253.

This situation is closely analogous to that in *United States v. Mitchell*: Mitchell was charged under 18 U.S.C. § 871 with threatening to kill the President during a seizure at the Honolulu airport that he contended ripened into a *de facto* arrest without probable cause, and he argued that his threatening statements "thus should be excluded as tainted evidence." 812 F.2d at 1253. In rejecting his argument, the Ninth Circuit noted that "[c]ommitting a crime is far different from making an inculpatory statement, and the treatment we afford the two events differs accordingly." *Id.* In this instance, as in *Mitchell*, "the evidence that [Defendant] seeks to bar and the crime itself are one and the same." *Id.* No purported Fifth Amendment violation in the circumstances of the FBI interview can preclude prosecution for the crime that Defendant committed during that interview.

II. Defendant Was Not in Custody, and Therefore *Miranda* Warnings Were Not Required.

It is undisputed that Defendant was not under arrest at the time of his interview on February 11, 2010, so the question under *Miranda* is whether "his freedom of action ha[d] been curtailed to a degree associated with arrest." *Burket*, 208 F.3d at 197. In considering all the circumstances, it is clear that Defendant was not "in custody" at the time. The interview did not take place in a law enforcement setting, but rather in Ritch's SOC office, with only two agents present and all three individuals seated in a natural positioning in the room. Defendant was not isolated or physically restrained; the office was in a trailer, as is common on military bases, and there was an outer room through which other SOC employees routinely moved in and out. Defendant was informed

repeatedly that he was not under arrest, and that the FBI would leave if he did not want to talk to them. Had Defendant asked the agents to leave, they would have done so,[9] and Bond and Bauer did, in fact, depart at the end without arresting Defendant. The tone of the interview remained conversational throughout, as can be heard on the audio recording. A reasonable person in Defendant's situation would have understood that he could have ended the interview if he so chose. *See Davis*, 778 F.2d at 171.

Defendant contends that he "and any other reasonable person would not have believed that they were free to leave at the time," Mot. at 4, noting that "if he had attempted to leave, [his] credentials had been confiscated by SOC prior to the interview," rendering him "unable to leave the building or move around freely at the Victory Compound" and leaving him "incredibly isolated at this time, with his activities for the next 24 hours being dictated by SOC," *id.* at 5. It was SOC's decision to terminate Defendant's employment, and the consequential removal of his employment credentials and any associated restrictions on his freedom of movement due to his being on a military base were incidental to that decision. These are exactly the sort of "background circumstances" that may cause "circumstantial restraint" that is independent of — and therefore irrelevant to — the sort of "police-imposed restraint" with which *Miranda* is concerned. *Jamison*, 509 F.3d at 629. Just as the *Jamison* court concluded "*Miranda* warnings were not required" because "Jamison's freedom to terminate the interview was curtailed primarily by circumstances resulting from his injury and hospital admittance rather than by police restraint," *id.* at 625, Defendant was not entitled to *Miranda* protections due to any restraints created by his employment situation.

Perhaps implicitly acknowledging that Defendant was not in law enforcement custody on February 11, 2010, Defendant contends that SOC "was acting as a government agent when they

---

[9] Defendant does not contend that he asked the agents to leave. However, he claims that he invoked his right to remain silent by responding to Bond's question of "Would you like to talk to us?" by stating "No, I'm not an attorney." *See* Mot. at 7. Contrary to Defendant's claim that he "clearly expressed that he did not want to speak to the FBI agents," *id.*, the Government views this as an incorrect transcription of Defendant's much more equivocal response of "Well, yeah, I'm not an attorney." As discussed in this section, Defendant was not entitled to *Miranda* protections in a non-custodial interview, and the agents' failure to terminate the interview following Defendant's ambiguous statement does not transform the situation into a custodial one.

questioned [him]," entitling him to Fifth Amendment protections in his interactions with SOC employees. Mot. at 3. (Although Defendant does not explicitly argue the point, he appears to be suggesting that he was "in custody" during the FBI interview as a result of this purported agency relationship.) Defendant's Motion points out that Ritch had notified the ICCTF of the fraud allegations with Defendant, and that the search warrant affidavit "clearly demonstrates both factors [articulated in *Day*], that the government was not only aware that Mr. Hill would be questioned by Mr. Ritch but that government agents were actively involved in monitoring this conversation," which "was for the purpose of assisting law enforcement." Mot. at 4. This argument is unavailing.

First, the ICCTF's relationship with SOC is irrelevant to *Miranda* insofar as Defendant was unaware of it or any potential coercion — *e.g.*, when he arrived at Ritch's office "for what [he] believed to be a typical work meeting," Mot. at 2 — because "[t]here is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess," *Perkins*, 496 U.S. at 296–97. Although Defendant presumably became aware of potential law enforcement consequences once "[h]e was specifically questioned about fraudulent activities," Mot. at 4, this does not transform the interaction into a law enforcement custodial one. *See Davis*, 778 F.2d at 171 ("Custody does not result merely because an individual is questioned in a 'coercive environment,' or is the 'focus' of a criminal investigation." (internal citations omitted)).

Second, turning to the two factors, Defendant fails to carry his burden, *Jarrett*, 338 F.3d at 344, to establish an agency relationship such that SOC's actions could give rise to *Miranda* protections. The first factor — "'whether the Government knew of and acquiesced in the private' individual's challenged conduct," *Day*, 591 F.3d at 683 — "require[s] evidence of more than mere knowledge and passive acquiescence by the Government before finding an agency relationship," *id.* at 685 (quoting Jarrett, 338 F.3d at 345) (internal quotation mark omitted). It is true that the ICCTF arranged the consensual monitoring with Ritch, but Defendant — who himself covertly recorded the conversations — is not challenging that conduct. Rather, the "private individual's challenged conduct" in this situation appears to be the conversation with Ritch that included

Defendant's termination, the consequential removal of Defendant's employment-related credentials, and any incidental restrictions on his freedom of movement while on the base. As discussed above, *see supra* pp. 2–3, these were SOC's decisions. Defendant has shown no "evidence of more than mere knowledge and passive acquiescence" by the ICCTF in SOC's decisions. With respect to the second factor — "whether the private individual intended to assist law enforcement or had some other independent motivation," 591 F.3d at 683 (internal quotation marks omitted) — Defendant does no more than make a conclusory assertion that SOC's action "was for the purpose of assisting law enforcement," Mot. at 4. The specific facts at issue in *Day* are useful in rejecting this contention: the *Day* court noted that the private security guards' "responsibility [was] to protect the tenants and property" of the complex that they guarded, "irrespective of any simultaneous goal of assisting law enforcement." 591 F.3d at 686; *see also United States v. McGill*, 718 F. Supp. 2d 1240, 1250 (S.D. Cal. 2010) (analyzing *Day* in denying defendant's motion to suppress statements made while in the custody of cruise ship employee on board the ship). Similarly, while SOC may have had a simultaneous goal of assisting law enforcement, SOC's primary, independent motivation (and therefore Ritch's instruction) was to terminate an employee suspected of fraud and "to know [Defendant's] involvement in any extra money that [he] might have taken for [him]self or for anybody else over here." 2/10/11 Audio at 01:05:21–01:05:44. Accordingly, Defendant has failed to carry his burden to establish an agency relationship to SOC that would trigger Fifth Amendment protections in connection with SOC's decisions.

Because Defendant was not in law enforcement custody — either directly or by proxy due to an agency relationship — on February 11, 2010, he was not entitled to *Miranda* protections. *See Burket*, 208 F.3d at 197. Accordingly, Defendant's contentions pertaining to the failure to Mirandize him, *see* Mot. at 6–10, are irrelevant. Like in *Burket*, after Defendant said "I would rather talk to somebody," [10] Bond reiterated that Defendant was not under arrest and that the agents

[10] Moreover, such a statement is in line with the equivocal statements like "I think I need a lawyer" or "Maybe I should talk to a lawyer" that have, in any event, been held to be insufficiently unambiguous. *See Burket*, 208 F.3d at 198 (citing *Davis v. United States*, 512 U.S. 452, 458–60 (1994)).

would leave if he did not want to speak to them, *see supra* pp. 4–5. *See Burket*, 208 F.3d at 197 ("And after Burket said, 'I'm gonna need a lawyer,' Detective Hoffman again informed Burket that he was not under arrest and free to leave. In light of these facts, Burket was not entitled to *Miranda* warnings after he stated 'I'm gonna need a lawyer.'"). Accordingly, there was no Fifth Amendment violation committed in the FBI agents' non-custodial interview of Defendant.

III. Defendant's Statements Were Voluntary.

Defendant contends that "[o]n more than one occasion, the agents induced [him] to make a statement by making threats and/or giving [him] the hope of benefit." Mot. at 7. Specifically, "[b]y using threats against [his] children as a bargaining chip, the FBI agents' coercive tactics forced [Defendant] into a situation where his statement could no longer be considered voluntary. He was forced to choose between surrendering his Fifth Amendment rights or placing his children at risk of prosecution." *Id.* at 8.

Defendant is correct that Bond noted that family members, including Defendant's daughter, were involved in the criminal activity under investigation, and that he informed Defendant that if Defendant "decide[d] not to talk to [the agents,] . . . there's no deal, and . . . the gloves will come off and [law enforcement will] go after everybody." There was nothing impermissible in this. At the time that Bond made these statements to Defendant, the ICCTF investigation had collected evidence indicating, *inter alia*, that Defendant had mailed cash proceeds of his alleged fraud to individuals in the United States, including his daughter. Therefore, Bond had a good faith basis to suggest that law enforcement could investigate other individuals involved in the criminal allegations. The fact that Defendant may have felt pressured to speak to the agents when presented with this reality did not render the agents' tactics in this regard coercive. *See Allen*, 804 F.2d at 1364 ("The petitioner's confession was therefore not involuntary by reason of his desire to extricate his wife from a possible good faith arrest."). "Voluntariness is not . . . 'to be equated with the absolute absence of intimidation,' for under this test virtually no statement would be voluntary." *Pelton*, 835 F.2d at 1072 (quoting *United States v. Wertz*, 625 F.2d 1128, 1134 (4th Cir. 1980)).

In fact, Bond's statements to Defendant were much less coercive than statements involving third parties that have been found non-coercive in other cases. Bond offered to "ensure, to the best of [his] ability, that any other persons that are involved in this particular matter are not — not end up spending any time, for instance, in jail," but did not promise that other individuals would be kept entirely out of the investigation. Conversely, no imminent arrest of any individual was suggested if Defendant did not cooperate. In contrast, in *Johnson*, the defendant's half-sister was faced with immediate arrest when a search of her residence turned up drugs belonging to the defendant, and police promised not to charge her if the defendant returned to the residence and confessed. 351 F.3d at 257. Despite rejecting the "suggestion that it was anything other than this threat that caused Johnson to confess his guilt as soon as he entered the premises," *id.* at 260–61, the Sixth Circuit concluded that "the police would not have acted wrongfully had they arrested [the half-sister] and were not coercive in threatening to do so," *id.* at 263. Defendant's sole reliance on the finding of (economic) coercion in *United States v. Giddins*, 858 F.3d 870 (4th Cir. 2017), ignores the on-point case law pertaining to threats to third parties.

The false statement charge for which Defendant has been indicted underscores the lack of coercion in this case. This is not a situation in which Defendant confessed to a crime in the course of law enforcement interrogation. In seeking to have his false statement suppressed on Fifth Amendment grounds, Defendant's argument boils down to, in essence, the contention that he was coerced into *lying* to law enforcement about whether he mailed cash back to the United States. Based on the totality of the circumstances — in which Defendant engaged in a civil conversation in a workplace office with FBI agents who had made clear from the outset that they would leave if Defendant chose not to talk to them — it is incoherent to conclude that Defendant's will was "overborne" or his "capacity for self-determination critically impaired" when he made the calculated decision to affirmatively answer falsely, instead of telling the truth or refusing to answer. *See Braxton*, 112 F.3d at 780–81 (quoting *Pelton*, 835 F.2d at 1071) (internal quotation marks omitted). This is especially true given that Defendant had been explicitly warned by Bond that lying to the FBI could result in the very charge on which Defendant has now been indicted.

The FBI's permissible reference to possible repercussions to involved family members did not coerce Defendant into ignoring Bond's § 1001 warning and deciding to make a false statement.

CONCLUSION

The Government respectfully requests that the Court deny the Defendant's Motion, because the Fifth Amendment does not protect against use of Defendant's statement made to the FBI on February 11, 2010 in a false statement prosecution, and in any event the statement at issue was voluntarily made in a non-custodial setting.

Respectfully submitted,

BETH DRAKE
UNITED STATES ATTORNEY
District of South Carolina

By: s/ *Jessee C. Alexander-Hoeppner*
JESSEE C. ALEXANDER-HOEPPNER
DAVID FUHR
Trial Attorneys
Criminal Division, Fraud Section
DAVID STEPHENS
Assistant U.S. Attorney
District of South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to counsel for the Defendant.

s/ *Jessee C. Alexander-Hoeppner*
JESSEE C. ALEXANDER-HOEPPNER
Trial Attorney
Criminal Division, Fraud Section