

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT PADUCAH**

**CRIMINAL ACTION NO. 5:06 CR-19-R**

**UNITED STATES OF AMERICA**

**PLAINTIFF**

**v.**

**STEVEN D. GREEN**

**DEFENDANT**

**UNITED STATES' RESPONSE TO  
DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**

Comes the United States, by counsel, and responds to defendant Steven Green's Motion to Suppress Statements. The Motion concerns statements that the defendant made during his arrest in Nebo, NC, on June 30, 2006. It also concerns post-arrest statements Green made while agents were driving him to the Buncombe County Detention Center in Asheville, NC, on June 30, 2006, and statements made while he was being driven to the federal courthouse in Charlotte, NC, on July 3, 2006. The Motion should be denied because Green's statements were made voluntarily and not in response to interrogation.

**I. Facts**

On June 30, 2006, law enforcement agents from the Federal Bureau of Investigation ("FBI") arrived at a house in Nebo, NC, to arrest the defendant based on a Warrant for Arrest issued in the Western District of Kentucky. An undercover officer encountered Green in the backyard of the house. Once Green was identified, a team of agents approached him and he was immediately restrained. While the defendant was

being handcuffed, Green said he wished the agents had called him because he would have turned himself in to the authorities.

As the arresting agents walked Green from the backyard of the house toward the officers' cars parked toward front of the house, agents noticed that the defendant's grandmother – who had just witnessed Green's arrest – was visibly upset. Agents asked the defendant if they could explain to his grandmother why he was being arrested. Green initially said yes, but then changed his mind and said no because he did not want to upset her.

Before transporting Green to the Buncombe County Detention Center in Asheville, NC, the agents let Green smoke a few cigarettes. Although the agents did not attempt to question Green, the defendant told the officers that he did not want to answer questions without an attorney present. When Green was done smoking, agents placed him in the backseat of their car and began driving to Asheville.

During the defendant's transport to the detention center, agents did not ask Green any questions. However, without prompting, the defendant stated the following over the course of the approximately 45-minute drive:

*"You probably think I'm a monster."*

*"I'm not a criminal in the United States – except for getting arrested for marijuana when I was sixteen."*

*"Knew you guys were coming."*

*"All of my buddies were getting killed over there – my Lieutenant got his face blown off."*

*"George Bush and Dick Cheney ought to be the ones that are arrested."*

*“Joining the Army was the worst decision I ever made.”*

In addition to these statements, Green engaged the agents in small talk regarding the amount of time that he spent in Iraq and said he would have turned himself in prior to arrest. The agents, however, did not ask him any questions.

Three days later, on July 3, 2006, FBI agents transported Green from the Buncombe County Detention Center to the Federal Courthouse in Charlotte, NC. During the approximately 2-hour drive to Charlotte, agents did not ask Green any questions. Again, however, without prompting, the defendant made the following statements:

*“Will I be tried federally or by the military?”*

*“Will the federal system take into account what goes on over there in Iraq?”*

*“I guess I will get called as a witness or have to testify at the other guys’ trials.”*

*“How long will judicial process take?”*

*“Guess I’m looking at spending the rest of my life in jail.”*

*“I heard that some of the Vietnam era guys had gotten out of prison after getting 20-30 year sentences for the same things.”*

*“Joining the Army was the worst decision I ever made.”*

*“Thought I was passed this, being discharged out of the military.”*

*“At least I got to enjoy being home for a while.”*

In addition to making these statements, the defendant again engaged the agents in conversation. The agents did not ask Green any questions. Green, however, volunteered information related to at least a dozen topics - most related to his tour of duty in Iraq. Finally, Green asked the agents about the status of the others involved, and stated that he knew authorities were coming to arrest him. Green stated that he and his grandmother

had gone to dinner and planned to go to a movie. Instead, he came home because he was thinking about turning himself in. However, he thought he would “enjoy the last half-hour of freedom.”

Upon reaching the Federal Courthouse in Charlotte, Green received his initial appearance and was turned over to the U.S. Marshals for booking.

## **II. Argument**

Green claims the statements he made to federal agents after an invocation of rights were obtained in violation of *Miranda* and the Fifth and Sixth Amendments. However, Green’s statements should not be suppressed because they were not made in response to interrogation and the statements were voluntary. Furthermore, the Constitution does not require suppression because at the time Green made the statements to law enforcement, Green’s Sixth Amendment right to counsel had not yet attached.

### **A. The Fifth Amendment Does Not Warrant Suppression of Green’s Statements Because the Defendant Was Not Subject to Interrogation.**

In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Supreme Court stated that “the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” Thus, *Miranda* protection extends only to those who, while in custody, are interrogated by persons they know are acting on behalf of the government. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). “[W]here a defendant makes a voluntary statement without being questioned or pressured by an interrogator, the statements are admissible . . .” *United States v. Murphy*, 107 F.3d 1199, 1204 (6th Cir. 1997).

In a motion to suppress, the United States bears the burden of proving by a preponderance of the evidence that the statements were not the product of custodial interrogation. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986). In this case, there is no dispute that Green was in custody when he made the statements. However, even after Green invoked the right to counsel, he continued to volunteer statements to the agents - these statements were not the product of an “interrogation” and therefore no Fifth Amendment right was implicated. *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981).

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Supreme Court defined “interrogation” for purposes of *Miranda* as “express questioning or its functional equivalent.” *Id.* at 300-01 (1980). The functional equivalent of express questioning consists of “words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 301.

In *Innis*, the defendant was arrested on suspicion of robbing a taxi driver with a sawed-off shotgun. *Id.* at 294. The defendant was advised of his *Miranda* rights, and he stated that he wanted to speak with a lawyer. *Id.* En route to the police station, two of the officers in the car engaged in a conversation between themselves concerning the missing shotgun. *Id.* One of the officers stated that there were a lot of handicapped children running around in this area” and “God forbid one of them might find a weapon with shells and they might hurt themselves.” *Id.* The defendant interrupted the conversation and stated that he “wanted to get the gun out of the way because of the kids in the area of the school.” *Id.* The defendant then led the police to the gun. *Id.*

The Court held that the defendant was not “interrogated” for purposes of *Miranda*. *Id.* at 302. Although the Court noted that the officers’ dialogue might have subjected the defendant to “subtle compulsion,” the Court required a showing that the “suspect’s incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.” *Id.* at 303.

If the officers’ “subtle compulsion” in *Innis* did not constitute the functional equivalent of interrogation, the functional equivalent of interrogation clearly is not present in this case. Immediately following the defendant’s arrest, law enforcement agents asked Green one question – could they explain to his grandmother why he was being arrested. This was not a question designed to elicit an incriminating response and was asked before the defendant said that he did not want to answer questions without his lawyer present. *See United States v. Ronayne*, 1995 WL 258137, \*7 (6th Cir. 1995) (unpublished) (agent’s explanation to defendant’s mother as to why they were arresting her son did not amount to even “subtle compulsion” under *Innis*). Moreover, once the defendant invoked his right to counsel and was driven to the Buncombe County Detention Center in Asheville, and later the Federal Courthouse in Charlotte, federal agents did not initiate conversation with Green; they did not ask him a single question; and they did not engage in conversation among themselves that was reasonably likely to elicit an incriminating response from the defendant.

The fact of the matter is that Steven Green was a chatterbox during his transportation to Asheville and Charlotte. None of his statements or topics of discussion were police-initiated. Without encouragement from the agents in the car, Green volunteered statement after statement and sought to engage the agents in conversation. The fact that agents may have responded to Green's questions does not create the functional equivalent of interrogation. Rather, the nature of Green's statements and his eagerness to talk about the topics he raised more likely suggested a waiver of rights and a willingness to subject himself to actual interrogation. *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that an accused who expressed desire to deal with police through counsel "is not subject to further interrogation unless the accused himself initiates further communication, exchanges, or conversations with the police").

After Green told the officers he did not want to answer their questions without a lawyer present, the agents did not ask any questions or say anything to the defendant or among themselves that was reasonably likely to elicit an incriminating response. Rather, Green engaged the agents in conversation and made statements on his own accord. For purposes of *Miranda*, he was not interrogated and his statements should not be suppressed.

**B. The Defendant's Statements Were Voluntary and Not the Result of Coercive Police Activity That Caused Green's Will to Be Overborne.**

A defendant's statement must be suppressed if it is involuntary within the meaning of the Fifth Amendment, which guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . without due process of law." U.S. Const. Amend. V. The government bears the burden of proving by a

preponderance of the evidence that a defendant's statements were not made involuntarily. *United States v. Wrice*, 954 F.2d 406, 410 (6th Cir. 1992).

“[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 of the [Fifth] and Fourteenth Amendment.” *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). In addition, any “evidence that a defendant suffered, at the relevant time, from a condition or deficiency that impaired his cognitive or volitional capacity is never, by itself, sufficient to warrant the conclusion that his confession was involuntary for purposes of due process; some element of police coercion is always necessary.” *United States v. Newman*, 889 F.2d 88, 94 (6th Cir. 1989).

In the Sixth Circuit, the test for voluntariness of statements involves three factors: (i) whether the police activity was objectively coercive; (ii) whether the coercion in question was sufficient to overbear the defendant's will; and (iii) whether the alleged police misconduct was the crucial motivating factor in the defendant's decision to make the statements. *United States v. Ostrander*, 411 F.3d 684, 696 (6th Cir. 2005); *United States v. Johnson*, 351 F.3d 254, 260 (6th Cir. 2003); *United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999); *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir. 1988).

First, Green does not allege any coercive activity on the part of FBI agents nor is there evidence of such conduct. To the contrary, the facts suggest that the agents involved in the arrest acted reasonably and graciously. When the arresting agents saw how upset Green's grandmother was at his arrest, the officers asked if Green would like them to explain to her what why he was being arrested. When Green declined their offer,

the agents respected Green's privacy and did not tell his grandmother why they were arresting him. In addition, before transporting Green from the place of arrest to the detention facility in Asheville, the agents allowed Green to compose himself and smoke a few cigarettes. Finally, when Green invoked his right to counsel, agents did not ask him any questions and only answered inquiries that he initiated. Accordingly, there is no evidence of coercion by the arresting or transporting officers.

Second, the police conduct was insufficient to overbear the defendant's will. Factors relevant to determining whether defendant's will was overborne include age, education, intelligence, awareness of rights, length of questioning, and use of physical punishments. *Mahan*, 190 F.3d at 423; *see also United States v. Doe*, 236 F.3d 672, 680 (6<sup>th</sup> Cir. 2000); *United States v. Weekly*, 130 F.3d 747, 751 (6<sup>th</sup> Cir. 1997). At the time of Green's arrest, the defendant was a 21-year-old male who had received his GED and volunteered to the agents that he had received training in the Army to operate a rocket launcher. Furthermore, he understood his rights – in fact, he did not even need the agents to read him his *Miranda* rights before he invoked his right to counsel. Green admitted having prior experience with the criminal justice system. And there is no evidence to suggest that the defendant was under the influence of alcohol or drugs when he provided the statements. He was not subject to any questioning and his time in custody with the agents was limited to two car rides from Nebo to Asheville and from Asheville to Charlotte. Based on these factors, there is no reason to believe that Green's will was overborne by police conduct or that he was coerced into making involuntary statements.

Finally, the type of coercive conduct that has rendered confessions involuntary in other cases is so far removed from the facts of this case that it simply cannot be said that Green was induced to make involuntary statements because of the actions of the police. *See, e.g., Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (statement obtained after police held a gun to suspect's head); *Payne v. Arkansas*, 356 U.S. 560, 564-65 (1958) (statement obtained after police threatened to turn suspect over to an angry mob); *Brown v. Mississippi*, 297 U.S. 278, 281-82 (1936) (statement obtained after police whipped suspect); *Malinski v. New York*, 324 U.S. 401, 403, 406-07 (1945) (statement obtained after forcing suspect to remain naked); *Reck v. Pate*, 367 U.S. 433, 441 (1961) (statement obtained after depriving suspect of adequate food, sleep, and contact with family); *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (statement obtained after depriving suspect of food and keeping suspect naked in a small cell); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (statement obtained after interrogating suspect virtually nonstop for 36 hours); *Davis v. North Carolina*, 384 U.S. 737, 752 (1966) (statement obtained after isolating suspect for several weeks); *Spano v. New York*, 360 U.S. 315, 323 (1959) (statement obtained after suspect erroneously told that a friend, who had three children and a pregnant wife, would lose his job); *Leyra v. Denno*, 347 U.S. 556, 559-61 (1954) (statement obtained after hours with psychiatrist trained in hypnosis, although suspect erroneously told that doctor was a general practitioner).

The three factors identified in *Ostrander* and other Sixth Circuit cases make it clear that Green's post-arrest statements were voluntary within the meaning of the Due Process Clause. There is no evidence that FBI agents created a coercive environment

that caused the defendant's will to be overborne. Therefore, for purposes of the Fifth Amendment, defendant's Motion should be denied.

**C. The Sixth Amendment Does Not Warrant Suppression Because Green's Right to Counsel Had Not Attached When Green Made the Statements.**

The defendant's Motion also seeks to suppress Green's statements based on the Sixth Amendment. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend VI. Statements obtained in violation of a defendant's right to counsel are inadmissible as evidence in the prosecution's case-in-chief. *Michigan v. Harvey*, 494 U.S. 344, 348-49 (1990). However, the Sixth Amendment right to counsel only attaches at critical stages of a criminal prosecution after the initiation of adversarial judicial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

In this case, all the statements that the defendant now seeks to suppress were made prior to the initiation of adversarial judicial proceedings. Although a criminal complaint had been filed and the defendant had been arrested, Green had not yet appeared before a judicial officer nor was he formally accused. Therefore, Green's Sixth Amendment right to counsel had not attached. *See Rothgery v. Gillespie County*, 128 U.S. 2578 (2008) (reaffirming that the Sixth Amendment right to counsel attaches at the defendant's initial appearance, which is when the he "learns the charge against him and his liberty is subject to restriction..." (*id.* at 2592)); *Brewer v. Williams*, 430 U.S. 387 (1977) (holding the right to counsel attaches when the defendant first appears before a judicial officer and is formally accused); *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding the defendant's constitutional right to counsel did not attach during a police station show up before his arraignment); *Powell v. Alabama*, 287 U.S. 45 (1937) (holding that the right

to counsel only attaches at the time adversary judicial proceedings have been initiated); *Hastings v. Cardwell*, 480 F.2d 1202 (6th Cir. 1973) (finding defendant's Sixth Amendment right to counsel was not violated when he was denied counsel at show-up, affirming the holding in *Kirby* that the right "attaches only at or after the time that adversary judicial proceedings have been initiated against him." (*Kirby*, 406 U.S. 682 at 688)). Here, the Sixth Amendment could not have been violated because the Right to Counsel had not attached at the time of Green's post-arrest statements.

### **III. Conclusion**

Although Green was in custody when he made his statements and he had invoked his right to counsel, Green did not make his statements in response to interrogation or the functional equivalent of express questioning. Furthermore, Green's statements were voluntary and not the product of coercive police conduct sufficient to overbear his will. In this case, the Fifth Amendment does not require suppression.

The defendant's motion should also be denied because Green's statements were not made in violation of the Sixth Amendment. At the time Green made the statements, adversarial judicial proceedings had not been initiated and the Sixth Amendment right to counsel had not yet attached. Where the Sixth Amendment has not attached, there can be no violation.

For the above reasons, and others which may be adduced at a hearing on this matter, the United States requests that the Court deny the defendant's Motion to Suppress Statements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 21, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, and Patrick J. Bouldin, Assistant Federal Defender, counsel for defendant, Steven D. Green.

/s/ Marisa J. Ford  
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