IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. 11-CR-57-A

BERGAL MITCHELL, III,

Defendant.

GOVERNMENT'S CONSOLIDATED RESPONSE TO THE DEFENDANT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S TWO DECEMBER 28, 2012 REPORTS, RECOMMENDATIONS AND ORDERS (#119 AND #120)

THE UNITED STATES OF AMERICA, by and through its attorneys, James P. Kennedy, Jr.[1] and Anthony M. Bruce, Assistant United States Attorneys, hereby files its Response to the defendant's Objections to Judge's two December 28, 2012 Reports and Recommendations (#119 and # 120) setting forth the points and authorities upon which the government relies in urging the Court to adopt both Reports and Recommendations (#119 and # 120) setting forth the points and authorities in their entirety.

IN OPPOSITION TO THE DEFENDANT'S OBJECTIONS, it is respectfully shown unto the Court as follows:

[1]The United States Attorney, William J. Hochul, Jr., has been recused from this case.

The Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C), both Reports and Recommendations must be reviewed by this Court *de novo*. However, where, as is the case with most of the defendant's objections, a defendant simply reiterates his original arguments, the clearly-erroneous standard applies to this Court's review. *United States v. Preston*, 635 F.Supp.2d 267 (W.D.N.Y. 2009), relying on *Barratt v. Joie*, 2002 WL 335014, at *1 (S.D.N.Y.).

Background and Incorporation by Reference

I. Report and Recommendation #119

In a motion filed on November 27, 2012, the defendant moved to dismiss the indictment, claiming "that the government is barred from prosecuting defendant under the doctrine of sovereign immunity." (#114) The government responded to that motion on November 29, 2012 (#116) and on December 28, 2012, the Magistrate Judge filed # 119 recommending to this Court that the defendant's motion be denied. The government's response is incorporated into this memorandum by reference.

In his original motion (#114), the defendant, relying on *Sue/Perior Concrete and Paving, Inc. v. Seneca Gaming Corp.*, 952 N.Y.S.2d 353 (4th Dept. 2012), argued that the indictment should be dismissed on sovereign immunity grounds because it "it alleges 'he was acting as an agent of the [Seneca Nation of Indians, the Seneca Gaming Corporation and the Seneca Niagara Falls Gaming Corporation] and fail[s] to sufficiently allege . . . specific conduct that was *ultra vires* to his official capacity or his chartered authority." In response, we pointed out that the *Sue/Perior Concrete* case was a civil case and that the defendant was trying to stretch the civil doctrine of sovereign immunity into the context of a criminal case. In the R&R, the magistrate Judge, citing *United States v. Williams,* 2011 WL 4093884 (W.D.Okla) and *United States v. Markiewicz*, 1989 WL 139221 (N.D.N.Y.), rejected the defendant's argument, saying, that the doctrine of sovereign immunity had "nothing to do with the reach of federal criminal laws of general applicability." The Magistrate Judge went on to say that the indictment's allegation that "[a]t no time prior to receiving and spending the $338,000 that he and his wife had obtained from the monies expended by the [Seneca Nation of Indians] . . . to acquire the property, did defendant . . . ever disclose his financial interest in such transaction to the [Seneca Nation of Indians, the Seneca Gaming Corporation and the Seneca Niagara Falls Gaming Corporation] was

sufficient to overcome the defendant's claim that the indictment did not allege that he acted *ultra vires."*

Then, at page 4 of his objections, the defendant asserts the "scheming to steal allegations" should not be deemed to exist outside the defendant's "official *capacity*" (emphasis in defendant's objections). This claim, made without citation to any authority, seems to be a blanket claim that if the defendant committed the fraud with which he is accused while at his job (for lack of a better term), the fraud would have been committed by the defendant "in his official capacity" thus putting him under the doctrine of sovereign immunity and out of the reach of federal criminal laws of general applicability. In the first instance, this makes no sense, legally, and in the second, simply does nothing to demonstrate how the Magistrate Judge's R&R was incorrect.

Although he nibbles at the edges, the defendant's Objections are, in the end, a reiteration of the arguments he made to the Magistrate Judge and thus should be reviewed under the clearly erroneous standard rather than under the more liberal *de novo* standard, but, for the reasons stated under either standard, they must be rejected.

II. Report and Recommendation #120

a. The defendant's Statements

The defendant's motion, the corresponding R&R (#120) and the objections now before the Court (#124) relate to statements the defendant made to three FBI agents at the Jamestown resident office of the FBI on August 10, 1988.[2] During that interview, Mitchell made a few minor incriminating statements and additionally lied on three different subjects: (a) that he was not aware of the $248,000 being wire-transferred from Michael Dowd to Barry Halftown; (b) that he was not aware that $125,000 had been paid out of the SmokeSpirits.com account to buy his parents' house; and (c) that he had asked Barry Halftown to loan $23,000 to one Jon Phillips. Indeed, Count 13 of the indictment charges the defendant with a violation of 18 U.S.C. § 1001(a)(2) based on the false statements he made to the agents during the course of that interview.

b. The Magistrate Judge's Report and Recommendation

In his Report and Recommendation (#120 at 11), the Magistrate Judge found that the defendant was not in custody at the time of

[2]The government filed two memoranda, #69 and #106, in opposition to the defendant's motion. They are incorporated into this response by reference.

the August 10, 2008 interrogation, and for that reason no so-called *Miranda*[3] warnings were required. Then, the in the R&R at 18, the Magistrate Judge further found that the government had demonstrated, by a preponderance of the evidence, "that the [August 10, 2008] interrogation was not so coercive that the defendant's free will was overborne," *i.e.* that the statement was voluntary (#120 at 18). We submit that the Magistrate Judge's R&R was correct, and, as we shall point out, the defendant's objections are mostly a reiteration of the arguments he made to the Magistrate Judge which subjects them to a clearly erroneous analysis by this Court.

c. Was the Defendant in Custody for *Miranda* Purposes?

In the section of the R&R devoted to the question of whether or not the defendant was in custody on August 10, 2008 (#120 at 12 – 18), the Magistrate Judge first addressed each of the arguments the defendant made: that he was tricked into entering the interrogation room, that he was interrogated at a law enforcement facility, that three armed law enforcement officers sat between the defendant and the exit and yelled at the defendant, that the agents took the defendant's cell phone, that the interrogation lasted for three hours and that he was not told whether or not he was under

[3]*See Miranda v. Arizona* 384 U.S. 436 (1966).

arrest. The Magistrate Judge then went on to say that while some of these factors might suggest the defendant was in custody, *the totality of the circumstances* [*led him*] *to conclude that* [*the defendant*] *was not in custody.* (#120 at 9; *see generally* # 120 at 9 – 12). The defendant's objections are essentially reiteration of the arguments he made to the Magistrate Judge in his Post-Hearing Memorandum, # 68, and on this score, we invite the Court to compare pages 4 through 8 of the defendant's Post Hearing Memorandum (#68) with his Objections at 6-12. In essentially repeating his prior argument, the defendant has reiterated those arguments he made to the Magistrate Judge thus subjecting them to the clearly erroneous standard of review by this Court.

d. Was the Defendant's Statement "Voluntary?"

In his Post-Hearing Memorandum (#68 at 14 – 16), the defendant asserted 13 factors[4] (which he called a "non-exhaustive summary") that demonstrated that his statement was involuntary. At 13 – 17 of his R&R (#120) the Magistrate Judge addressed each of the factors posited by the defendant and, as noted, found the defendant's statement to have been voluntary (#120 at 17). A reading of the defendant's Objections on this score will

[4]The defendant also filed an untitled document (#92) prior to the issuance of the R&R in which he reiterated these arguments.

demonstrate that the defendant has again essentially repeated the arguments he made to the Magistrate Judge in his Post-Hearing Memorandum (#68) and his second, untitled memorandum (#92) at 7–11) # 68 (compare cited pages of #68 and # 92 with the defendant's Objections pages 12 – 16 of #68 and his argument at pages 12 – 19 of #124.

Notwithstanding the foregoing, we shall briefly respond to the six argument that appear in #124 at pages 13 – 17:

The Defendant's Previous Experience with Law Enforcement

Here, the Magistrate Judge examined the defendant's background in business and his intelligence in conjunction with the defendant's lack of experience with law enforcement and determined the factor (the lack of experience with the legal system, did "not weigh in favor of concluding that his statements where involuntary.") (#124 at 13). However, the Magistrate Judge, citing *United States v. LeBrun*, 363 F.3d 715, 726 (8th Cir 2004) for the proposition that where a defendant, as the defendant here, possessed at least average intelligence, his statements were not compelled. The defendant has not cited *LeBrun*, much less distinguished it.

The Agents Were Visibly Armed

The defendant argues that the fact that the agents were "visibly" armed was a factor, among others that had to be considered in determining if the defendant's statement was voluntary. However, the Magistrate Judge considered this factor and found that the agents did not draw their weapons or "otherwise use them to compel the defendant's statements," and, citing *United States v. Drayton*, 536 U.S. 194, 205 (2002) (Holding that the presence of a holstered firearm, by itself, is unlikely to contribute to the coerciveness of the encounter.) (#120 at 14) *Drayton*, unless distinguishable, controls the consideration of this issue by the Court, and the defendant has not distinguished it.

The Defendant's Cell Phone, His Seat at the Table, and the Agents Raising their Voices

The undisputed proof here is two-fold. The defendant was not permitted to take his cell phone into the interview room, but just as surely he never asked for it (and, by extension, was never denied access to it). Similarly, the seating arrangement placed the defendant farthest from the door and the agents closer to it and thus between the defendant an the door, but the Magistrate Judge pointed to the fact that "there was no evidence that the . . . seating arrangement acted to preclude the defendant from exiting

the interrogation," and that he was escorted to both the lavatory and the lobby during the interrogation "where he was unattended." The defendant has not pointed to any evidence that refutes this and there is no evidence that would refute it. The agents did, in fact, raise their voices, but so, too, did the defendant, and, as the Magistrate Judge pointed out, the agents raising their voices "will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne, citing *Jenner v. Smith*, 982 F.3d 329, 334 (8th Cir. 1993). The defendant has not pointed the Court either to to any evidence that contradicts the Magistrate Judge's reading of the record or any authority contrary to that cited by the Magistrate Judge.

The Use of a Ruse to get the Defendant to Come to the FBI's Jamestown Office

Again, there appears to be no dispute about the facts. Special Agent Brent Isaacson used a ruse to get the defendant to come to the Jamestown FBI office. The defendant first argues not that use of the ruse somehow makes any statements made after the defendant arrived at the FBI's Jamestown Office involuntary, but rather that the ruse was, in essence, a "lie" of the type that can be used to impeach and that Special Agent Isaacson's use of the ruse, or, put another way, that Isaacson's resort to this "lie," is enough to call Isaacson's credibility into question. (*See* #124 at

14). However, while he does not come out and say it, the Magistrate Judge obviously credited Isaacson's testimony,[5] and absent a hearing before this Court, this Court must accept that finding. *See United States v. Widner*, 2010 WL 4861508 (W.D.N.Y.).

Then, the Magistrate Judge, citing *Frazier v. Cupp*, 394 U.S. 731, 739 - 40 (1969), noted that while a misrepresentation might be relevant to a determination of voluntariness, it was not determinative. The defendant points out this same language in *Cupp* (*see* #124 at 15), but since *Cupp* was considered by the Magistrate Judge for the same proposition posited by the defendant, the defendant's argument misses the mark in trying to point out how the R&R on this point was wrong.

[5] "[This] court may not reject the magistrate judge's credibility findings without conducting an evidentiary hearing at which the district judge has the opportunity to observe the witnesses and evaluate their credibility firsthand. *See In re Karten*, 293 Fed.Appx. 734, 736 (11th Cir.2008) ("The Supreme Court has held that a district judge has broad discretion to accept a magistrate's credibility findings without hearing witness testimony, in the criminal suppression hearing context, consistent with due process") (*citing United States v. Raddatz*, 447 U.S. 667, 680–81 (1980)); *Cullen v. United States*, 194 F.3d 401 (2d Cir.1999) ("without an evidentiary hearing, the District Court could not reject the Magistrate Judge's proposed credibility finding. *See United States v. Widner*, 2010 WL 4861508 (W.D.N.Y.) (Report and recommendation of Payson, M.J., adopted by Larimer, D.J.)

The Threat to Prosecute the Defendant's Wife

The defendant asserts that the Magistrate Judge erred in "dismiss[ing] the idea that defendant was placed in the coercive position of deciding whether to save himself or his wife" was at least partially indicative of the fact that his statement was involuntarily given. The Magistrate Judge determined that the defendant was told his wife was under investigation and that she was a target (citing the hearing transcript at 33 and 32) and noted that there was "nothing in the record to establish this was inaccurate." (#120 at 16). Although the defendant appears to equate it to making an "objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause" that the Seventh Circuit called "overbearing conduct" in *United States v. Miller,* 450 F.3d 270, 272 (7th Cir. 2006), no such treat, objectively reasonable or not, was made in this case. Thus, the defendant's argument appears to be based on an inaccurate premise and must be rejected.

The Significance of the Fact that the Defendant did not "Confess" to Anything

Most, if not all, of what the defendant said to the agents on September 10, 2008 that the government intends to use at trial are, were, as pointed out above, false (exculpatory) statements. The

defendant did not "confess" to Special Agent Isaacson or to either of the other two agents present on September 10. Magistrate Judge McCarthy found it significant that the agent's conduct did not result in a "confession." (#120 at 17). In *United States v. Willis,* 2006 WL 2239738 (W.D.N.Y.), Judge Larimer, after considering several of the same arguments advanced here,[6] found the fact that Willis refused to sign the Miranda waiver form when requested by Officer Post to be persuasive evidence that the interrogation was "not so psychologically coercive that Willis' free will." *Id*. This case is not significantly different. Lies are volitional. They are the product of one's free will and they demonstrate, perhaps better than any other evidence in the case, that the defendant's statements were voluntary.

[6] *Willis* sets a fairly high bar for a lack of voluntariness. In the case, the defendant was questioned by a Rochester Police Officer who was wearing a mask (which Judge Larimer found was "intimidating") and was questioned while handcuffed to a chair. Despite these factors, the Court there found his statement to have been voluntary. *United States v. Willis,* 2006 WL 2239738 (W.D.N.Y) at *6

WHEREFORE, it is prayed that the Court adopt both of the Magistrate Judge's December 28, 2012 Reports and Recommendations (#119 and #120) in all respects.

DATED: Buffalo, New York, February 15, 2013.

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Acting Under Authority Conferred
by 28 U.S.C. § 515

s/Anthony M. Bruce

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, I electronically filed the **GOVERNMENT'S CONSOLIDATED RESPONSE TO THE DEFENDANTS'S OBJECTIONS TO THE MAGISTRATE JUDGES TWO DECEMBER 28, 2012 REPORTS, RECOMMENDATIONS AND ORDERS (#119 AND #120)** with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant on this case:

Paul J. Cambria, Jr., Esq.

s/Laura Rogers
LAURA ROGERS
Legal Assistant