04-0750

To be Argued By:
JEFFREY A. MEYER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0750

UNITED STATES OF AMERICA,
Appellant,

-vs-

GARY MILLS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Dominic J. Squatrito, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B), and this Court has appellate jurisdiction over the government's appeal from the district court's order suppressing evidence under 18 U.S.C. § 3731.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court err when it ordered suppression of a criminal defendant's uncounseled statements to the police that were made prior to the filing of any federal charge and therefore prior to attachment of the defendant's Sixth Amendment right to counsel with respect to the charged federal offense?

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BRIEF FOR THE UNITED STATES OF AMERICA

This interlocutory appeal calls upon the Court to address the scope of a criminal defendant's right to counsel under the Sixth Amendment. The question posed is whether the Sixth Amendment bars evidence in a federal criminal trial of a defendant's uncounseled statements to police officers that were made *after* the filing of local state charges concerning the conduct about which he made statements but *before* the filing of a separate federal charge concerning the same conduct.

The defendant is a convicted felon who is alleged to have possessed a gun. Such conduct is a violation of both

state and federal law. Prior to his arrest on state weapons charges, the defendant agreed to be interviewed by the police. The district court found that, on the day before the interview, the defendant had been charged in Connecticut Superior Court with illegally possessing the gun at issue. The defendant was not federally charged with unlawful gun possession until eight months after the interview and at the conclusion of a federal grand jury investigation. Despite the absence of a pending federal charge when the defendant spoke to the police, the district court ordered suppression of the defendant's uncounseled statements. It reasoned that the statements were elicited after the defendant's right to counsel had attached as a result of the filing of state charges and that this warranted exclusion of the statements in the federal criminal proceeding.

The district court misapprehended the degree to which the Sixth Amendment right to counsel is offense specific. For purposes of Sixth Amendment analysis, a federal offense is not the same as a state offense, even assuming common or identical factual elements. The salient fact is that the defendant was not federally charged when he spoke to the police. Accordingly, regardless when or whether state charges were filed, the defendant's right to counsel as to the federal gun charge had not attached at the time that he spoke to the police. The district court erred in ruling to the contrary, and this Court should reverse.

STATEMENT OF THE CASE

On February 18, 2003, a federal grand jury in Connecticut returned an indictment charging the defendant with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). See Joint Appendix ("JA") at 10-11.

By motion filed on April 15, 2003, the defendant moved to suppress statements he made to local police officers during the course of an interview on June 18, 2002. JA 4.

On July 29, 2003, the district court conducted an evidentiary hearing. JA 22-121.

On September 30, 2003, the district court entered an order and ruling concluding that the defendant's interview statements to the local police officers should be suppressed on the ground that they were obtained in violation of his Sixth Amendment right to counsel. JA 122-37 (unpublished).

On January 9, 2004, the district court denied the government's motion for reconsideration, and it re-affirmed its ruling suppressing the defendant's statements. JA 148-52 (United States v. Mills, 2004 WL 57282 (Jan. 8, 2004)).

On January 29, 2004, the government filed a timely notice of appeal and certification under 18 U.S.C. § 3731. JA 153-55. The defendant is detained pending trial in this matter. JA 9.

STATEMENT OF FACTS

A. Background

On June 13, 2002, a New Haven police officer, Michael Fumiatti, was shot in the face by an assailant who fled on foot and threw away the gun he used. The police later found the gun and learned from an ownership trace that it was once owned by someone named Michael Rice. JA 16, 34-35.

On June 15, 2002, the police arrested Rice and interviewed him. Rice said that in December 2001 he gave three loaded guns (including the one later found in connection with the police shooting and another one found in possession of a 15-year old boy) to someone he knew as "G Knocker" in return for five bags of crack cocaine. Rice was shown a photo board and picked out the defendant-appellee, Gary Mills, as "G Knocker." JA 17.

On June 17, 2002, Detective Francis Murphy of the New Haven Department of Police Services applied to a Connecticut Superior Court judge for a warrant to arrest the defendant. The arrest warrant affidavit described the information provided by Rice and alleged that the defendant "is in fact a CONVICTED FELON with multiple arrests & convictions dating back thru 1983 for crimes including both Illegal Narcotics Violations and Violence." JA 16-18.

On that same day, a state prosecutor also completed and signed an information charging the defendant with three counts of Criminal Possession of a Firearm by a

convicted felon, in violation of Conn. Gen. Stat. § 53a-217, three counts of Carrying a Pistol without a Permit, in violation of Conn. Gen. Stat. § 29-35, and two counts of Illegal Transfer of a Firearm, in violation of Conn. Gen. Stat. § 29-37j. JA 12-14.[1] At that time, the defendant was already detained on unrelated state charges at a local jail – the New Haven Correctional Center in New Haven, Connecticut. JA 37.

On June 18, 2002, Detectives Murphy and Steven Coppola went to the jail for the purpose of interviewing the defendant about the guns he allegedly received from Rice. Prior to going to see the defendant, one of the detectives ascertained from a correctional staff member that the defendant would be willing to speak with them. JA 38-40.

When the detectives met with the defendant, they did not fully advise the defendant of his Miranda rights; they gave him an "Advice of Rights" form and waiver which the defendant refused to sign. JA 44, 71, 77-78. However, the defendant signed a "Voluntary Interview" statement before the interview began that read as follows:

> This is to indicate my willingness and desire to be interviewed by Det. Coppola of New Haven PD. I understand that I may refuse to be interviewed and/or photographed by the above party/ies, but choose of my own will to be interviewed and/or photographed.

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[1] The district court's opinion omits mention of the three counts of Criminal Possession of a Firearm. JA 125.

JA 41, 123. The defendant agreed to the interview because he was "curious" why the detectives wanted to speak with him; he knew that he could refuse to speak with the detectives. JA 87-88, 123.

The interview took place in an office room at the jail. There were no bars on the doors or windows of the room. The defendant was not handcuffed or shackled during the interview. The detectives did not bring their guns or handcuffs to the interview. JA 42, 97, 123. The defendant described the detectives as "very professional," and the tone of the interview as "very, very relaxed." JA 89-90, 123. The district court concluded that "[t]he detectives were not threatening or intimidating" and that "[t]he defendant knew that he could stop the interview at any time if he no longer wished to speak with the detectives." JA 123; 97-98. The district court further found that "[t]he defendant never asked the detectives if he could speak to an attorney." JA 123; 56, 98.[2]

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[2] As the district court noted, there were some discrepancies between the testimony of the detectives and the defendant concerning what was said during the interview. Detective Coppola testified that he and Detective Murphy told the defendant at the outset that they were investigating a police shooting and had reason to believe that the gun involved had passed through the defendant's hands. Detective Coppola further testified that he gave the defendant a standard Miranda warning and waiver form, but that the defendant refused to sign it and that the defendant refused a request to have the interview tape-recorded. The defendant testified that the detectives told him that "there was no problem" with him and that they told him about the nature of their investigation only at the end of the

The detectives asked the defendant several questions about Rice. He identified Rice on a photo board, acknowledged that he knew Rice from his neighborhood, and discussed some of his past interactions with Rice. Although he denied taking any guns from Rice, he told how Rice was from the suburbs and would come to the defendant's inner city New Haven neighborhood to buy drugs (but not from the defendant), how he had lent money on many occasions to Rice before, and how Rice would in turn give him items as collateral in return for the cash loaned by the defendant. JA 21, 24-25, 46-47, 103-09, 124.[3]

Although Detective Murphy had obtained an arrest warrant for the defendant on the previous day, the detectives did not execute the warrant or tell the defendant of the warrant or signing of a charging information concerning the subject matter about which they questioned him. The defendant learned of the charges the next day when he was brought from the jail to the court to be

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interview. JA 123.

[3] Consistent with the certification of the United States Attorney under 18 U.S.C. § 3731, the government believes that the defendant's admissions of these prior dealings with Rice will significantly corroborate the testimony of Rice and other cooperating witnesses at trial. Although the defendant denied receiving guns from Rice, his admission to associations and murky dealings involving unspecified "items" received from Rice will significantly curtail his defense options at trial by eliminating his ability to claim that he did not know or engage in any transactions with Rice.

arraigned on the charges, and counsel was appointed by the state court to represent him. JA 51, 93-95, 125.

The shooting of Officer Fumiatti on June 13, 2002, eventually resulted in a federal grand jury investigation in light of the fact that the man who was identified as the shooter, Arnold Bell, was at that time on federal supervised release. When the defendant was questioned by the New Haven police detectives on June 18, 2002, there were no federal charges pending against the defendant. After several more months of investigation, a federal grand jury returned an indictment on February 18, 2003, charging the defendant with unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), on the basis of his possession as a convicted felon of the firearm that was eventually used by Arnold Bell to shoot Officer Fumiatti.[4]

Following the filing of the federal indictment, the defendant was appointed a federal criminal defense attorney under the Criminal Justice Act. On June 2, 2003, his federal counsel filed a motion to suppress the statements made by the defendant on June 18, 2002, to the New Haven police detectives on the following grounds: (1) that the statements were obtained while he was in custody and in violation of his Miranda rights; (2) that his statements were involuntary because he was "tricked" by

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[4] Except for the requirement that the gun have previously traveled in interstate commerce, a federal charge under 18 U.S.C. § 922(g)(1) has the same factual elements as a state charge under Conn. Gen. Stat. § 53a-217(a)(1) for criminal possession of a firearm by a convicted felon.

the detectives; and (3) that his statements were obtained in violation of his Sixth Amendment right to counsel.

B. The District Court's Rulings

Following an evidentiary hearing on July 29, 2003, the district court issued a ruling granting the defendant's motion to suppress on September 30, 2003. As an initial matter, the district court concluded that there was no Miranda violation, because the defendant – although incarcerated on other charges – was not subject to custodial interrogation "'above and beyond that inherent in custody itself.'" JA 128 (quoting United States v. Morales, 834 F.2d 35, 38 (2d Cir. 1987)); see also United States v. Rodriguez, 356 F.3d 254, 258-59 (2d Cir. 2003) (describing "in custody" requirement as applied to person subject to questioning while already incarcerated on unrelated charges). The district court further rejected the defendant's claim that his statements were involuntary, noting the non-coercive atmosphere of the interview, the defendant's signing of a "Voluntary Interview" statement, and that "the defendant was well experienced in the ways of the criminal justice system." JA 129-31.

Despite rejecting the defendant's Miranda and voluntariness claims, the district court concluded that his statements were obtained in violation of his right to counsel because they were elicited after issuance of the state charging information. The court rejected the government's argument that the defendant's Sixth Amendment right to counsel did not attach until the defendant's arraignment on June 19, 2002. It concluded instead that the right to counsel attached upon the state's

issuance and filing of a charging information on June 17, 2002, one day before the detectives interviewed the defendant. JA 131-36.

On October 27, 2003, the government moved for reconsideration of the district court's suppression ruling. The government's reconsideration motion argued in pertinent part that the Sixth Amendment is "offense-specific" and that, under "dual sovereignty" principles, two state and federal offenses cannot be considered to be the same offense. Accordingly, the government argued that, even assuming attachment of the defendant's right to counsel for purposes of the state court gun charges at the time that he was interviewed by local police, there were no federal charges pending at that time, and therefore the defendant's right to counsel had not yet attached as to the later-charged federal gun charge. JA 143-44.

The government also noted that the facts of this case did not involve any attempt to use the filing of federal charges in order to circumvent the defendant's Sixth Amendment rights. It noted that the defendant "was not indicted and arraigned [in federal court] until several months after his interview with detectives and his arrest in state court," and that "federal investigators were not involved in interviewing the defendant." JA 144-45. It further noted that "[t]he federal investigation that led to the defendant's indictment was initiated independent of the state prosecution and after the defendant had been arrested by the State." JA 145.

The government stressed the independent federal interest in investigating the activities of Arnold Bell (who

shot the policeman while on federal supervised release), and its hope (unrealized) that the defendant would cooperate against Bell. Id.[5] It noted that the federal charge against the defendant "was not brought because of any perceived problem with the state case against defendant Mills, particularly no problem with state prosecutors using the defendant's statements as evidence." Id. The defendant had not even moved to suppress his statements in the state case. Id.

On January 9, 2004, the district court entered a memorandum of decision denying the government's motion for reconsideration. The district court conceded that "it may be that the Sixth Amendment right to counsel had not attached in this federal case at the time Mills spoke to local police," but added that "[t]his, however, is not a relevant question." JA 151. It framed the inquiry instead as "whether the statements made to local police officers during the course of questioning that violated the Sixth Amendment rights of the defendant in a state case may be used by the federal government to prove other crimes arising out of the same transaction." Id.

On January 29, 2004, the government filed a timely notice of appeal and certification under 18 U.S.C. § 3731.

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[5] On February 26, 2004, Arnold Bell was convicted after a federal jury trial for possession of the firearm that he used to shoot the police officer. On April 6, 2004, Bell was convicted after a state jury trial on charges related to his shooting of the police officer.

JA 153-55. The defendant has been ordered detained pending trial. JA 3, 9.[6]

For purposes of this appeal only, the government does not challenge the district court's determination that the police elicited statements in violation of the defendant's right to counsel as to the state charges.[7] The government challenges only the district court's further determination that the defendant's statements were elicited in violation

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[6] The government has been advised that the state charges against the defendant were dismissed on April 4, 2003 (several weeks after the filing of the federal indictment in this case).

[7] Although the record indicates that a state court prosecutor *signed* a charging information on June 17, 2002, in conjunction with preparation of the arrest warrant and affidavit, it does not reflect whether a charging information was actually *filed* in court that day or any time before the defendant was interviewed on June 18 or brought to court and arraigned on the charges on June 19, 2002. Cf. State v. Lewis, 600 A.2d 1330, 1336 n.6 (Conn. 1991) (noting "there is no provision in [Connecticut] law providing for the filing of an information prior to the arrest of an accused, [and] it is difficult to understand why the information would have been filed at that time"). The district court's opinion assumed without objection from the government that the charging information was filed on the same day that it was signed. For purposes of this appeal only, the government accepts the district court's conclusion that the charging information was filed prior to the time that the defendant spoke to the police. If the government does not prevail in this appeal, it anticipates that it will seek leave of the district court on remand to re-open the evidence to seek to show that no charges were filed at the time that the defendant was interviewed.

of his right to counsel with respect to a federal charge that was not yet filed when the defendant was interviewed.

SUMMARY OF ARGUMENT

The district court erred when it ordered suppression of the defendant's uncounseled statements to the police. Even if the statements were made after the filing of state charges, they were made many months before the filing of a federal charge. His right to counsel as to the federal gun charge had not attached. In concluding that a violation of the right to counsel as to the state charges could justify suppression of the statements in the federal case, the district court failed to understand the degree to which the defendant's Sixth Amendment right to counsel is both offense and prosecution specific. Despite the common factual elements of the state and federal gun charges, they are not the same offense for purposes of the Sixth Amendment and well-established principles of dual sovereignty. Accordingly, the defendant's statements were not elicited in violation of the defendant's right to counsel as to the then-uncharged federal offense. The Court should reverse.

ARGUMENT

I. THE DEFENDANT'S STATEMENTS WERE NOT OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL AS TO THE FEDERAL GUN OFFENSE

A. GOVERNING LAW AND STANDARD OF REVIEW

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Fellers v. United States, 124 S. Ct. 1019, 1022 (2004) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)); see also Kirby v. Illinois, 406 U.S. 682, 689 (1972) (same).

Because the Sixth Amendment right to counsel arises only upon the initiation of adversary judicial proceedings, the Supreme Court has recognized that the right is "offense specific." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The right "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." Id.

In reviewing a district court's ruling on a motion to suppress evidence, this Court reviews findings of fact for clear error and rulings of law *de novo*. See United States v. Gaskin, 364 F.3d 438, 456 (2d Cir. 2004); Rodriguez, 356 F.3d at 257. Although a district court's denial of a

motion for reconsideration of a suppression order is ordinarily reviewed for abuse of discretion, see United States v. Bayless, 201 F.3d 116, 131 (2d Cir. 2000), "[a] district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996).

B. DISCUSSION

The district court erred in concluding that the police interview of the defendant violated his right to counsel as to a federal charge that was not yet filed at the time that the defendant was interviewed. The defendant was interviewed by local police on June 18, 2002. No federal charges were pending. The federal indictment was not filed until eight months later on February 18, 2003, at the conclusion of a federal grand jury investigation. The defendant's Sixth Amendment right to counsel as to an unfiled federal charge had not attached at the time that he was interviewed by local police. Compare Fellers, 124 S. Ct. at 1023 (defendant's right to counsel in federal case violated by agents' deliberately eliciting uncounseled statements from the defendant after the filing of a federal indictment and in absence of waiver of counsel).

It is of no consequence that state charges were pending concerning the same factual subject matter at the time that the defendant was interviewed by the police. That is because, as detailed below, the Sixth Amendment right to counsel is offense specific and because – notwithstanding any overlap of facts or elements – a federal offense is not the same as a state offense for purposes of the Sixth Amendment.

In McNeil v. Wisconsin, *supra*, the Supreme Court ruled that the Sixth Amendment is "offense specific." 501 U.S. at 175. On this basis, it concluded that the police did not violate the Sixth Amendment right to counsel of a defendant McNeil who was already charged, incarcerated, and represented by counsel for an armed robbery in one town in Wisconsin, when it questioned McNeil about factually unrelated offenses involving a murder, attempted murder, and burglary in another town in Wisconsin. Id. at 176.[8]

More recently, in Texas v. Cobb, 532 U.S. 162 (2001), the Supreme Court re-affirmed that the Sixth Amendment

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[8] In McNeil, the Court also discussed what it characterized as a "different 'right to counsel'" that stems – not from the Sixth Amendment – but from the Fifth Amendment and the Court's decisions in Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, 451 U.S. 477 (1981). See 501 U.S. at 176. The Court in McNeil concluded that the Fifth Amendment right to counsel was not violated by the custodial interrogation of a criminal defendant who validly waived his Miranda rights and did not at any time invoke his right to counsel during the course of interrogation; it concluded that the prior appointment of counsel for Sixth Amendment purposes in connection with the robbery offense did not constitute a valid invocation of the Fifth Amendment right to counsel for purposes of custodial interrogation concerning the other, uncharged offenses. Id. at 177-82.

Here, the police interview of the defendant in this case did not violate his Fifth Amendment right to counsel because he was neither subject to custodial interrogation nor requested the assistance of counsel. JA 123, 126-29. Accordingly, the Fifth Amendment right to counsel is not at issue in this case.

right to counsel is offense specific. The defendant in Cobb burglarized his neighbor's home, murdered two of the occupants after he was discovered, and then buried their bodies in the woods. He was charged and initially confessed to the burglary but denied knowledge about the missing people. When the police later acquired additional evidence linking Cobb to the murders, the police conducted non-custodial questioning of Cobb again, and this time he confessed to the murders. Cobb was convicted for capital murder, and he challenged on appeal the admissibility of his murder confession, claiming that the confession was obtained in violation of his Sixth Amendment right to counsel because he was represented by counsel for the burglary charge, and the murders were factually related to the burglary. Id. at 164-66.

The Supreme Court rejected this argument. The Court concluded that the right to counsel is "offense specific," and there is no "exception for crimes that are 'factually related' to a charged offense." Id. at 168. "[I]t is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses." Id. at 171-72.

Most significant for purposes of the instant appeal, the Court in Cobb further explained the meaning of an "offense" for Sixth Amendment purposes, equating it with the meaning of the term as used for purposes of the Double Jeopardy Clause of the Fifth Amendment. "We see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." Id. at 173.

Drawing a further parallel between the Sixth Amendment and Double Jeopardy analysis, the Court noted that "we could just as easily describe the Sixth Amendment as 'prosecution specific,' insofar as it prevents discussion [between the police and a defendant] of charged offenses as well as offenses that, under Blockburger [v. United States, 284 U.S. 299 (1932)], could not be the subject of a later prosecution." Id. at 173 & n.2. "And, indeed, the text of the Sixth Amendment confines its scope to 'all criminal *prosecutions*.'" Id. (emphasis in original).

In view that the Sixth Amendment is offense specific and that the meaning of the term "offense" in the Sixth Amendment context is the same as in the Double Jeopardy Clause context, it is readily apparent that the filing of state charges does not trigger a defendant's right to counsel for purposes of any later-filed federal charge. That is because of the Double Jeopardy Clause's dual sovereignty doctrine – that a federal and state offense are not the same "offense" even if they are premised on identical factual conduct and elements that would otherwise qualify them as the same offense if prosecuted by a single sovereign. "[T]he States are separate sovereigns with respect to the Federal Government," and "two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." Heath v. Alabama, 474 U.S. 82, 89, 92 (1985) (successive murder prosecutions by different states arising from same murder did not violate Double Jeopardy Clause); United States v. Lanza, 260 U.S. 377, 382 (1922) (successive prosecutions by federal and state government arising from the same illegally produced liquor did not

violate Double Jeopardy Clause; "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each"); see also United States v. Williams, 104 F.3d 213, 216 (8th Cir. 1997) (federal prosecution of defendant for unlawful possession of firearm not barred under Double Jeopardy Clause by prior state weapons prosecution arising from same incident); United States v. All Assets of G.P.S. Auto. Corp., 66 F.3d 483, 493-96 (2d Cir. 1995) (general discussion of dual sovereignty doctrine).

Based on the foregoing analysis and precedents, the Fifth Circuit has correctly concluded that statements elicited from a defendant in violation of his right to counsel as to a state-charged offense are nonetheless admissible in the trial of a later-charged federal offense, and that this is so despite the fact that the offenses arise from identical conduct. See United States v. Avants, 278 F.3d 510 (5th Cir.), cert. denied, 536 U.S. 968 (2002). The defendant in Avants was charged in Mississippi state court with the murder of an elderly African American sharecropper in 1966. After Avants was charged and he obtained counsel, two agents of the Federal Bureau of Investigation interviewed Avants and elicited statements from him concerning the sharecropper murder. Avants told the agents that he "blew [the sharecropper's] head off with a shotgun." But after the interview, he was eventually acquitted in state court. More than 30 years later, and in light of the fact that the murder took place on federal park land, the federal government indicted the defendant for the same murder. The federal trial court suppressed Avants's statements to the FBI agents,

reasoning that the statements had been obtained in violation of Avants's right to counsel as it had attached as a result of the state murder charge. Id. at 513-14.

The government appealed, and the Fifth Circuit reversed. After reviewing the Supreme Court authority discussed above, id. at 515-18, the Fifth Circuit noted that under the dual sovereignty doctrine the federal and state offenses were not the same offense for Sixth Amendment purposes, despite the fact that their elements "are virtually identical." Id. at 518. The court concluded that "because the federal charge is a separate offense for purposes of the Sixth Amendment and because the federal murder charge was not pending until the year 2000, no Sixth Amendment right to counsel had attached as to the federal murder charge" when the statements were elicited from the defendant. Id. "[T]he federal agents could not have violated Avants's right to counsel as to this federal murder charged during the 1967 interview because his right to counsel had not yet attached with respect to the federal charge." Id. at 522.

In Avants, the government did not raise its "dual sovereignty" argument until appeal. Applying plain error review in light of this procedural forfeiture, the Fifth Circuit nonetheless concluded that "the district court's error is 'clear and obvious' under the law as it exists today." Id. at 521.

Here, unlike Avants, the government preserved its "dual sovereignty" argument by raising it in a motion for

reconsideration before the district court.[9] Indeed, the government's memorandum in support of reconsideration specifically cited and discussed Cobb, Heath and Avants. JA 143-44. But the district court's ruling on reconsideration did not cite or discuss any of these precedents.

Rather than evaluating these precedents, the district court dismissed as "not a relevant question" whether "it may be that the Sixth Amendment right to counsel had not yet attached in this federal case at the time Mills spoke to local police." JA 151. Instead, it framed "[t]he issue in this case [a]s whether the statements made to local police officers during the course of questioning that violated the

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[9] See United States v. Hassan, 83 F.3d 693, 696-97 (5th Cir. 1996) ("the Government did not waive its argument on appeal by waiting until the motion for reconsideration to advance it"; applying *de novo* review to government's legal claim raised for first time in motion for reconsideration that suppression of evidence was not warranted under the independent-source doctrine); United States v. Herrold, 962 F.2d 1131 (3d Cir. 1992) (applying *de novo* review to pure legal claim raised by government for first time in motion for reconsideration and reversing suppression order); see also Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 332 F.3d 147, 158 (2d Cir. 2003) (noting in context of civil appeal that this Court has discretion to decline to consider argument raised for first time in motion for reconsideration but that "we are more likely to exercise our discretion when either (1) consideration of the issue is necessary to avoid manifest injustice or (2) the issue is purely legal and there is no need for additional factfinding") (internal quotations omitted).

Sixth Amendment rights of the defendant in a state case may be used by the federal government to prove other crimes arising out of the same transaction." Id.

This approach was incorrect. By focusing on whether the conduct involved the "same transaction," rather than the "same offense" under dual sovereignty principles, the district court failed to understand that the "same conduct" test has been rejected for purposes of Double Jeopardy analysis. See United States v. Dixon, 509 U.S. 688, 704 (1993); United States v. Chacko, 169 F.3d 140, 147 (2d Cir. 1999). And Cobb instructs that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." 532 U.S. at 173.

Two federal district courts have agreed with the Fifth Circuit's decision in Avants. See United States v. Coker, 298 F. Supp.2d 184, 191 (D. Mass. 2003) (declining in federal attempted arson case to suppress statements that were made by defendant to federal law enforcement agents prior to federal indictment but after arrest and appointment of counsel on state arson charges arising from same incident); United States v. Gidden, 2003 WL 22992074 at *3 (E.D.N.Y. Dec. 16, 2003) (Weinstein, J.) (declining to suppress post-state-charge statements made to federal and state investigators concerning firearms offense).

Nor does this case qualify for the recognized exception – known as the "Bartkus exception" – to the dual sovereignty doctrine – where it can be shown that one prosecuting authority has simply served as a "tool" or "cover" for another in order to circumvent a criminal

defendant's constitutional rights. See Bartkus v. Illinois, 359 U.S. 121, 131-34 (1959). The Bartkus exception "is not triggered simply by cooperation between the two authorities ... the [first] government must have effectively manipulated the actions of the [second] government so that ... officials [of the second] retained little or no independent volition." United States v. Whalers Cove Drive, 954 F.2d 29, 38 (2d Cir. 1992); see also United States v. Arena, 180 F.3d 380, 399 (2d Cir. 1999) (noting that dual sovereignty "principle is inapplicable if one of the sovereigns effectively controlled the other, and the subsequent prosecution was merely a sham, masking a second prosecution by the sovereign that pursued the first prosecution," but that "the fact that the two sovereigns cooperated in an investigation does not warrant departure from the general principle" of dual sovereignty); Coker, 298 F. Supp.2d at 192 (in absence of evidence that "the federal authorities dominated or manipulated the state prosecution," evidence of routine coordination between federal and state authorities was not sufficient to trigger Bartkus exception and to warrant federal suppression of defendant's statements obtained in violation of right to counsel stemming from state court charges).[10]

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[10] In light of the narrow scope of the Bartkus exception, the Court should decline to follow United States v. Red Bird, 287 F.3d 709 (8th Cir. 2002), in which the Eighth Circuit upheld an order suppressing on Sixth Amendment right-to-counsel grounds a defendant's statements obtained prior to the filing of federal charges but after the filing of tribal charges and the appointment of tribal counsel. Failing to cite Bartkus, the Eighth Circuit relied largely on evidence of cooperation between federal and tribal authorities. See id. at 715 ("the

Here, the federal government has a compelling interest in presenting evidence of the defendant's voluntary admissions against him at trial. This interest is not defeated simply by the fortuitous timing of state court charges. To the extent that a right to counsel may be triggered by initiation of a state court prosecution, the right rises no higher than its source – to protect the defendant from the use of subsequent, uncounseled statements in such state-initiated proceedings.

The Sixth Amendment does not otherwise preclude the use of uncounseled statements with respect to federal charges that have not been filed at the time that the statements are made. The right is both "offense specific" and "prosecution specific." Cobb, 532 U.S. at 173 n.2. It "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." McNeil, 501 U.S. at 175.

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tribal charge in this case initiated the federal investigation and proceedings, and the tribe and the U.S. worked in tandem to investigate the rape"). As noted above, such cooperation alone does not suffice to trigger the Bartkus exception. Moreover, the Eighth Circuit decision failed to discuss or acknowledge Avants, and it involved "tribal sovereignty [which] is 'unique and limited' in character." Id. at 715 (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

CONCLUSION

For the foregoing reasons, the order of the district court suppressing the defendant's statements to local police officers should be reversed.

Dated: May 24, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that ten copies of the foregoing Brief for the United States of America were sent by United States mail to the Clerk of Court and two copies of the foregoing brief were sent by United States mail to the following persons or counsel of record on this day of May 24, 2004, to:

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