UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 3:10CR093(AWT)**
	:	
v.	:	December 21, 2010
	:	
MORRIS OLMER,	:	
	:	
Defendant.	:	

UNITED STATES' OPPOSITION TO DEFENDANT OLMER'S
MOTION TO SUPPRESS STATEMENTS

Defendant Morris Olmer has moved to suppress statements he made to law enforcement officers on May 13, 2010 during the execution of a search warrant at offices he shared with co-defendant David Avigdor. Without filing a supporting affidavit, the defendant claims that law enforcement agents engaged in a custodial interrogation of him and failed to advise him of his *Miranda* rights before questioning him. Defendant's motion should be denied without a hearing. The defendant, a former attorney, was specifically advised that he was not in custody and was free to leave before he was interviewed–a fact that, as defendant's attorney concedes, is plainly stated in the summary of his interview. [Doc. # 148-1, Morris Olmer, 11/18/10 at 2]. Defendant was at his own law office building when he was interviewed, he was not handcuffed or restrained in any manner before or during the interview, and was not subject to any frisk or pat-down. He was simply never in custody and therefore his motion should be summarily denied.

II. BACKGROUND

A. The Indictment

On July 29, 2010, a grand jury sitting in New Haven returned a fifteen count Second Superseding Indictment (the "Indictment") charging defendant Morris Olmer with conspiracy to commit mortgage fraud (Count 1), wire fraud (Counts 2-9), and false statements (Counts 11-14). The 18-page Indictment describes in detail the scheme defendant Olmer and others engaged in to obtain millions of dollars in residential real estate loans, including loans insured by the FHA, through the use of sham sales contracts, false loan applications and fraudulent property appraisals, and to conceal the conspiracy from others. Defendant conducted many of the closings on the fraudulent transactions and was also involved in creating false HUD-1 settlement statements.

B. Search of Olmer's Office

On May 13, 2010, law enforcement agents executed a search warrant at the law offices of David Avigdor located at 419 Whalley Avenue, Suite 200, New Haven.[1] Defendant Olmer, a disbarred attorney, worked in the same office providing assistance to Avigdor's law practice. As Olmer entered the building that morning, case agent Special Agent John Keaney of the Department of Housing and Urban Development, Criminal Investigation Division advised him that the office was being searched. Agent Keaney asked to talk to the defendant and told him that a vacant office on the third floor of the same building was available to use for an interview. Defendant agreed to follow Agent Keaney and another agent from HUD-OIG to the third floor

[1]Facts regarding the search and interview are taken from the Memorandum of Interview of Morris Olmer on May 13, 2010, a copy of which is filed concurrently under seal for the reasons set forth in the Motion to Seal and by agreement of the parties.

for an interview. Once they arrived at the third floor office, Agent Keaney specifically informed defendant that he was not in custody and was free to leave at any time. Defendant said that he understood he was free to leave, but wanted to talk. At that time, the other case agent, FBI Agent David Connell, arrived at the third floor office and took the place of the HUD-OIG agent who had been accompanying Agent Keaney.

The defendant admitted during the interview that:

- He shared office space with co-defendant David Avigdor and had done so since approximately February 2007.
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III. DISCUSSION

A. Applicable Law

A suspect is entitled to *Miranda* warnings only if he or she is interrogated while in custody. *Illinois v. Perkins,* 496 U.S. 292, 296 (1990). In determining whether a defendant is in custody for *Miranda* purposes, the test is an objective one, namely "whether a reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest." *United States v. Mussaleen,* 35 F.3d 692, 697 (2d Cir.1994). As this Circuit has explained:

> [I]t makes sense for a court to begin any custody analysis by asking whether a reasonable person would have thought he was free to leave the police encounter at issue. If the answer is yes, the *Miranda* inquiry is at an end; the challenged interrogation did not require advice of rights.

United States v. Newton, 369 F.3d 659, 672 (2d Cir. 2004).

On the other hand, if a reasonable person would not have thought himself free to leave, additional analysis is required because, as *Berkemer* instructs, not every seizure constitutes custody for purposes of *Miranda. Id.* In such cases, a court must ask whether, in addition to not feeling free to leave, a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest. *Id. See also California v. Beheler,* 463 U.S. 1121, 1125 (1983). It is only if the answer to this second question is yes that the person is determined to be "in custody" and "entitled to the full panoply of protections prescribed by *Miranda."* *Berkemer v. McCarty,* 468 U.S. at 440.

The in-custody analysis focuses upon the presence or absence of affirmative indications that the defendant was not free to leave. *United States v. Mitchell,* 966 F.2d 92, 98 (2d Cir. 1992) (interview at defendant's home not custodial). Factors to be considered include (1) whether a suspect is told that he is free to leave; (2) the location and atmosphere of the

interrogation; (3) the language and tone used by police; (4) whether the subject is searched, frisked, or patted down; and (5) the length of the interrogation. *United States v. Bridges*, 2000 WL 1170137 at *8 (S.D.N.Y. 2000) (citations omitted).

Decisions in this circuit have emphasized that in the absence of actual arrest, an interrogation is not "custodial" unless the authorities affirmatively convey the message that the defendant is not free to leave. *See Campaneria v. Reid*, 891 F.2d 1014, 1020 n. 1 (2d Cir.1989) (law enforcement officials must "act or speak in a manner that conveys the message that they would not permit the accused to leave"); *United States v. Guarno*, 819 F.2d 28, 31-32 (2d Cir. 1987) (same). We have also stated that a custodial setting is one providing "inherently coercive pressures that tend to undermine the individual's will to resist and to compel him to speak." *United States v. Morales*, 834 F.2d 35, 33 (2d Cir. 1987).

Further, absent an arrest, interrogation in familiar surroundings such as one's own home is generally not deemed custodial. *Newton*, 369 F.3d at 672. Similarly,a defendant who voluntarily comes to a police station for questioning is not, without more, in custody. *See Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Mussaleen*, 35 F.3d at 697. *See also United States v. Kirsteins*, 906 F.2d 919, 924 (2d Cir. 1990) (suspect who appeared voluntarily at U.S. Attorney's Office in response to a "request" for an interview was not in custody). Nor does the fact that an investigation has focused on a particular suspect require *Miranda* warnings if the suspect is not in custody. *See Beckwith v. United States*, 425 U.S. 341, 347 (1976).

The use of handcuffs, weapons, or the presence of multiple officers may create circumstances that rise to the level of a formal arrest. *See, e.g.*, *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995), *on reh'g*, 86 F.3d 275 (2d Cir. 1996) (airline passenger in custody

where he was asked to step away from boarding area, travel documents were removed, and he was surrounded by seven officers with visible handguns); *United States v. Uribe-Velasco*, 930 F.2d 1029, 1033 (2d Cir. 1991) (defendant in custody when officer approached from behind, told defendant not to move, kept his hand on defendant's back during questioning, and eight other officers surrounded him with guns drawn).

B. The Court Should Deny the Defendant's Motion Without a Hearing Because It Is Not Supported by an Affidavit Creating any Contested Issue of Fact.

At the outset, the Court should deny defendant's request for an evidentiary hearing on the motion because he has not submitted any affidavit that in any way challenges any factual statements in the interview reports. Indeed, the defendant's motion concedes that the only available information concerning the interview, Agent Keaney's written report, plainly states that the defendant was told that he was not in custody and was free to leave at any time. [Doc. # 148-1, Morris Olmer, 11/18/10 at 2]. To the extent the defendant claims that his interview did not occur in the manner reflected in the interview report, then his motion is deficient because it lacks any affidavit from a person with knowledge of the facts to contest them. To the extent he agrees with the report, then no hearing would be permissible, as it would simply be an effort to cross-examine the government's trial witnesses in advance of trial.

It is well-settled in the Second Circuit that a defendant seeking to suppress evidence bears the burden of demonstrating disputed issues of fact that would justify an evidentiary hearing. *See United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969). The defendant's burden is not satisfied by "conclusory, non-particularized allegations of unlawful official behavior." *United States v. Tracy*, 758 F. Supp. 816, 820 (D. Conn. 1991). Rather, the showing

required to justify a hearing must be made by an affidavit of someone with personal knowledge of the underlying facts – an attorney's declarations are insufficient. *United States v. Gillette*, 383 F.2d 843, 848-49 (2d Cir. 1967) (affidavit by defense attorney in support of motion not based on attorney's personal knowledge insufficient to create factual issues to be resolved at evidentiary hearing); *United States v. Caruso*, 684 F. Supp. 84, 87 (S.D.N.Y. 1988) (same).

A motion to suppress suggesting that the factual circumstances are different from those set forth in the reports and related evidence, but is not supported by an affidavit of someone with personal knowledge of those facts, is properly decided without an evidentiary hearing. *See, e.g., United States v. Sierra-Garcia*, 760 F. Supp. 252, 264-65 (E.D.N.Y 1991); *United States v. Viscioso*, 711 F. Supp. 740, 745 (S.D.N.Y. 1989); *Caruso*, 684 F. Supp. at 87; *United States v. Vasta*, 649 F. Supp. 974, 986 (S.D.N.Y. 1986).

Indeed, courts in this district have repeatedly recognized that a motion to suppress based upon purportedly contested factual issues, but not supported by an affidavit by someone with personal knowledge of those facts, should be considered without a hearing. In *United States v. Diaz*, 303 F. Supp. 2d 84 (D. Conn. 2004), the Court held:

> [D]efendant filed no affidavit reciting any supporting facts to his assertion that the events in question occurred differently than attested to in the Police Report. The Second Circuit has made very clear that a defendant seeking to suppress evidence bears the burden of demonstrating disputed issues of fact that would justify an evidentiary hearing. *See United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969). The required showing must be made by an affidavit from an individual with personal knowledge of the underlying facts. *See United States v. Ruggiero*, 824 F. Supp. 379, 393-94 (S.D.N.Y. 1993) (finding a motion to suppress not supported by the proper affidavit may be denied without a hearing). Because defendant has provided no such affidavit and there is no basis for suppressing such evidence on the existing record, defendant's request for oral argument is denied.

Id. at 93-94 (emphasis added); *see United States v. Renaldo Rose*, 3:03-CR-33 (EBB), 2004 WL 78060 at *5 (D. Conn. Jan. 9, 2004).

Here, there is no basis for holding an evidentiary hearing, as the defendant has not met his burden of putting in issue any facts attested to in the report of his interview. Indeed, his motion at most is simply an incomplete recitation of that report and his counsel's unsworn argument is insufficient to raise disputes of fact. Accordingly, the Court should deny the motion without a hearing.

B. No *Miranda* Warnings Were Required as Defendant Was Never in Custody

In any event, defendant's statements did not require *Miranda* warnings as he was not in custody at any time before or during his interview. When Agent Keaney asked for an interview, defendant was in surroundings entirely familiar to him--his own law office. The search was executed during normal business hours. Defendant was never handcuffed or restrained in any manner and was not subject to a frisk or pat-down of any kind. There is no evidence that the interviewing agents here officers used anything but a polite, non-threatening, conversational tone in speaking with the defendant. *See also United States v. Bridges*, 2000 WL 1170137 at *8 (S.D.N.Y. 2000) (unreported decision) (fact that suspect questioned for limited time by only one or two agents who employed a normal, conversational tone of voice, no handcuffs or restraints were used, officers did not draw weapons "weigh heavily in favor of finding defendant was not 'in custody"). No more than two agents were present at any time except during a brief period when one agent took the place of another. Defendant makes no complaint at all that his interview took too long.

The only thing defendant's counsel even mentions are that defendant was "led to a vacant third-floor room by two law enforcement agents" and that he was told "he was the subject of a federal investigation." The fact that defendant was told he was a "subject" of a federal investigation is a non-issue**,** as the Supreme Court has expressly found that even where an investigation has focused on a particular suspect, no *Miranda* warnings are required if the suspect is not in custody. *Beckwith*, 425 U.S. at 347. Further, although defendant now complains about it, he voluntarily followed agents from the entrance to his law office to the third floor office after having been informed of the purpose of the interview and specifically where the interview would take place. Once there, he was specifically told he was free to leave at any time. This was not custodial interrogation, it was a voluntary interview, plain and simple.

Defendant relies heavily on the fact that two agents conducted his interview as if that alone would render him "in custody" for *Miranda* purposes. But defendant offers no facts to indicate that those agents said or did anything that would have made a reasonable person believe he was not free to leave. It is well established that the presence of two (or more) law enforcement officers, without more, simply does not rise to the level of a custodial interrogation. *See, e.g.*, *United States v. Newton*, 39 F.3d 659, 675 (presence of six officers would not by itself, have led a reasonable person to conclude that he was in custody); *United States v. Alcantara*, 2009 WL 4756491 at *9 (S.D.N.Y. 2009) (presence of four officers at a traffic stop did not render defendant in custody); *United States v. Bridges*, 2000 WL 1170137 at *8 (S.D.N.Y. 2000) (defendant questioned by two officers at twilight at the side of a somewhat desolate highway and not told he had the right to leave was nonetheless not in custody).

Defendant may now regret his decision to speak with law enforcement agents, but based on the surrounding circumstances, no reasonable person would conclude anything but that they were free to leave at any time. Thus, defendant was never in custody and no *Miranda* warnings were required. His motion should be denied without an evidentiary hearing.

Conclusion

For these reasons, the United States respectfully requests that the Court deny the defendant's motion to suppress without a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2010, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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MEMORANDUM OF INTERVIEW
FILED UNDER SEAL