IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DIOGENES A. DIONISIO,

Defendant.

REPORT AND RECOMMENDATION

04-cr-30-bbc

REPORT

Defendant Dionisio A. Diogenes is citizen of the Republic of the Philippines and a practicing physician. In 2004, a grand jury sitting in this district indicted Dr. Dionisio, charging him with fraud against the government's TRICARE medical insurance program for overseas veterans. Dr. Dionisio has moved to dismiss the indictment and to suppress his statements to investigators. This report and recommendation addresses the timely-filed motion to suppress (dkt. 23) and the untimely motion to dismiss and to suppress filed by a Philippine attorney appearing on Dr. Dionisio's behalf. (Dkt. 39).[1] For the reasons stated below, I am recommending that this court deny both motions.

On July 10, 2008, this court held an evidentiary hearing. Having heard and seen the witness testify and having considered the affidavits, exhibits, and other evidence submitted by the parties, I find the following facts:

FACTS

Diogenes A. Dionisio was born in the Manila, Philippines in 1950 and has been a resident of the Republic of the Philippines his entire life. Dr. Dionisio graduated from medical

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[1] On October 6, 2008, I recommended that this court grant Dr. Dionisio's motion to dismiss the indictment based on pretrial delay. *See* dkt.58.

school in 1975 and completed his residency in internal medicine in 1983. In 1988, Dr. Dionisio founded the CDMF Medical Clinic in Mandaluyong City, Philippines. Dr. Dionisio has practiced medicine at this clinic ever since.

In 1998, the U.S. Department of Defense Criminal Investigative Service, with assistance from U.S. postal inspectors and other agents, began investigating possible health care fraud emanating from overseas providers of health care services to retired military personnel and their dependents under the TRICARE program (known at the time as CHAMPUS). Because TRICARE's overseas claims were processed by WPS insurance company in Madison, the United States Attorney's Office for the Western District of Wisconsin (the USAO) assumed responsibility for overseeing the investigation. DCIS targeted the Philippines as a hot zone due to the number and dollar amount of claims generated there.

In 2000, federal investigators made two trips to the Philippines to interview participants in the suspicious TRICARE claims. Philippine agents accompanied and assisted the American agents. Evidence developed during and after these trips suggested that Dr. Dionisio had submitted fraudulent TRICARE claims to WPS. In August 2001, investigators made a third trip to the Philippines. On August 21, 2001, American and Philippine investigators met with Dr. Dionisio at his medical clinic. According to Dr. Dionisio, the agents did not advise him that they were conducting a criminal investigation or that he was a target. No one advised Dr. Dionisio of his *Miranda* rights, or other wise indicated that he had the right to remain silent or to have counsel present.

Dr. Dionisio inferred that the agents were conducting a routine insurance review. He answered their questions and reviewed their spreadsheet of over 600 patients of his for whom

he had submitted CHAMPUS claims. Dr. Dionisio marked which patients had received 80% of the CHAMPUS insurance check for personal use; which patients had received treatment but for whom he never received payment; and which patients he was not sure he ever treated. According to Dr. Dionisio, any name that he did not mark meant that he had treated the patient and the patient had received 40-60% of the CHAMPUS payment for personal use. Dr. Dionisio also explained that he intentionally overstated to CHAMPUS the length of his patients' hospital stays to see how much money he could obtain for the patients. When asked to provide a sworn statement of his CHAMPUS activities, Dr. Dionisio stated he wanted to consult with an attorney first. Dr. Dionisio was willing to sign and date the spread sheet that he had marked. The agents left; Dr. Dionisio remained at his clinic.

ANALYSIS

Dkt. 23: The Timely Motion to Suppress

Dr. Dionisio contends that his statement to American investigators must be suppressed because the agents obtained it in violation of the Bill of Rights of the 1987 Constitution of the Republic of the Philippines, which provides at Article III, Section 12 that:

> (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. . . .
>
> * * *
>
> (3) Any confession or admission obtained in violation of this . . .shall be inadmissible in evidence against him.

According to Dr. Dionisio, Section 12(1) must be read literally: the right attaches to every person "under investigation" whether he is in custody or not.

Dr. Dionisio suggests that the American investigators were bound by the Philippine Constitution while questioning him in the Philippines, but he doesn't explain why Philippine law is relevant to his motion to suppress evidence in a United States district court. The government seems willing to concede the point, referring in passing to *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976). *Marzano* suggests the opposite: the exclusionary rule is a court-created prophylaxis designed to deter United States agents from violating the United States Constitution; if foreign agents, acting on their own, violate the Fourth (or Fifth) Amendment, no purpose would be served by excluding the evidence. *Id.* at 271.[2] Perforce, when United States agents comply with the Fifth Amendment when interviewing a Filipino in the Philippines, no purpose would be served by excluding the resulting statement if it nonetheless were to have been obtained in violation of stricter local laws. From the perspective of a United States court, no illegal or unconstitutional conduct occurred, so there is nothing to deter.[3] *Cf. United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir. 2000)(Application of the exclusionary rule is only appropriate when the Constitution or a statute requires it; there is no exclusionary rule generally applicable to international law violations); *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985)(The exclusionary rule doe not apply if a defendant's statements are obtained by foreign officers in a foreign country even if the officers violate the foreign law. If, however, American agents are involved, then the requirements of *Miranda* and *Edwards* apply).

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[2] *See also United States v. Marzook*, 435 F.Supp.2d 708, 743 (N.D. Ill. 2006), applying the *Marzano* analysis to confessions obtained in violation of *Miranda* by foreign agents on foreign soil.

[3] If American agents act jointly with foreign agents to obtain a confession in violation of *Miranda*, then the exclusionary rule applies in U.S. courts. *See United States v. Yousef*, 327 F.3d 56, 144-45 (2nd Cir. 2003). The agents in this case did not violate *Miranda*. Dr. Dionisio was never in custody, so he was not entitled to *Miranda* warnings.

In the instant case, the American agents did not violate *Miranda* when they interviewed Dr. Dionisio in a noncustodial setting at his clinic. Therefore, suppression of his statement is not an available remedy in this court even if the agents were to have violated of the Philippine Bill of Rights.

But they did not. Contrary to Dr. Dionisio's argument, Section (12) only applies to suspects in custody. Dr. Dionisio's support for his position is limited to a block quote from a Philippine case, *People v. Lopez*, Philippines S.Ct. LEXIS 5145 (1994), quoted in *United States v. Kole*, 164 F.3d 164, 173-74 (3rd Cir. 1998). Review of *Kole* and *Lopez* reveals that they do not establish the proposition for which Dr. Dionisio is citing them. The issue in *Kole* was whether to count the defendant's conviction in the Philippines when computing his sentencing following a conviction in federal court in the United States. To support its conclusion that Philippine convictions were worthy of credence in the American system, the court in *Kole* quoted *Lopez*'s summary of the rights of an accused in the Philippine legal system. Contrary to the implication of Dr. Dionisio's argument, the defendant in *Lopez* was in custody at the time he was questioned, and the court was addressing his rights as an arrestee:

> At the time a person is arrested, it shall be the duty of the arresting officer to inform him of the reasons for the arrest and he must be shown the warrant of arrest, if any. He shall be informed of his constitutional right to remain silent and to counsel. . . It shall be the responsibility of the arresting officer to see to it that this is accomplished. No custodial investigation shall be conducted unless it be in the presence of counsel . . . Hence if there is no counsel at the start of the custodial investigation . . .any statement elicited from the accused is inadmissible in evidence against him.

Kole, 164 F.3d at 173, *quoting Lopez* at **21-22.

This is the only case cited by Dr. Dionisio, and seems to prove the *government's* point: the agents' noncustodial interview of Dr. Dionisio did not violate the Constitution or laws of the Philippines. Lest there by any lingering doubt, the government cites other cases holding that Section 12 applies only to custodial interrogation. *See, e.g., People v. Dela Cruz,* G.R. Nos. 118866-68 (2nd Div. 1997) (""An accused person must be informed of the rights set out in [Paragraph 1] of Section 12 upon being held as a suspect and made to undergo custodial investigation by police authorities"); *People v. Loveria*, G.R. No. 79128 (Supreme Court, Manila, Third Div. 1990) ("The court must emphasize that the so-called Miranda rights contained in [Section 12(1)] may be invoked by a person only while he is under custodial investigation"); *Gamboa v. Hon. Alfredo Cruz*, F.R. No. L-56291 at 3 (Supreme Court, Manila, en banc, 1988)(Section 12 rights attach upon being subjected to custodial inquest or being held to answer for a crime).

In sum, there is no support on any level for Dr. Dionisio's motion to suppress his August 21, 2001 statement to federal agents.

Docket 39: The Untimely Motion To Dismiss and To Suppress

In the April 7, 2008 scheduling order, this court set July 3, 2008 as the deadline for filing pretrial motions and set July 10, 2008 as the date for the motion hearing and any evidentiary hearing. *See* dkt. 5. Dr. Dionisio timely filed a series of motions for discovery and to dismiss the indictment. *See* dkts. 13-16. On the morning of the motion hearing, Dr. Dionisio filed a late motion to suppress evidence. *See* dkt. 23. At the hearing, the government did not object to this motion because it did not require the government to call additional witnesses and there

was plenty of time to brief the motion in conjunction with the other motions. The court then took evidence and set a briefing calendar that required post-hearing briefs from Dr. Dionisio by July 31, 2008, a government response by August 19, 2008 and any reply by August 29, 2008.

On July 30, Dr. Dionisio filed a motion for leave to file additional motions and a motion to admit pro hac vice his personal attorney from the Philippines, Renecio Espiritu. The court did not act on this motion immediately. Apparently, Attorney Espiritu presented a copy of his anticipated motion to the government, *see* dkt. 39, because on the same day Dr. Dionisio filed this erstwhile motion with the court (August 19, 2008), the government filed its opposition, claiming that it was too late and that there was no showing of good cause for this neglect. *See* dkt. 45.

The government is correct. Last April this court set long motion deadlines pursuant to F.R. Crim. Pro. 12(c). Thereafter, Dr. Dionisio and Attorney Giesen never suggested that they needed more time, that an attorney–from the Philippines, no less–would be joining the team, or that additional substantive motions were under consideration. Although Attorney Giesen claims not to be well-versed in Philippine law, he never explained why Dr. Dionisio waited for four months to bring Attorney Espiritu onto the team, or why the issues raised in his late motion could not have been raised earlier. After all, Attorney Giesen timely filed his suppression motion and brief in reliance on Philippine law.[4]

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[4] The fact that I have found that Attorney Giesen did not accurately gloss Philippine law might be seen as evidence of his claim that he needed outside assistance from someone like Attorney Espiritu. But this doesn't wash for two reasons: (1) if this were true, then Attorney Giesen should have obtained assistance months ago; and, (2) Attorney Espiritu's motion and brief to the court are less accurate and less helpful than Attorney Giesen's brief on suppression.

I admitted Attorney Espiritu pro hac vice so that he could comfort his friend and back up Attorney Giesen, not so that he could file late, unsupported motions that caught the government off guard. Pursuant to Rule 12(e), all new issues raised in Attorney Espiritu's late motion are waived. *See United States v. Garcia*, 485 F.3d 481, 484 (7th Cir. 2008). Any supplemental arguments he offers in support of points already made in Dr. Dionisio's timely-filed motions add nothing to the analyses and do not change the outcome. It is regrettable that the government was forced to respond substantively to this motion, but for what it's worth, the government's point-by-point refutation of Attorney Espiritu's arguments is correct. This motion should be denied as procedurally waived and substantively meritless.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant's motion to suppress evidence (dkt. 23)and his late motion to dismiss and to suppress (dkt. 39).

Entered this 9th day of October, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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October 9, 2008

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Re: United States v. Diogenes A. Dionisio
Case No. 04-cr-030-bbc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before October 20, 2008, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 20, 2008, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;
(2) judgment on the pleadings;
(3) summary judgment;
(4) to dismiss or quash an indictment or information;
(5) to suppress evidence in a criminal case;
(6) to dismiss or to permit maintenance of a class action;
(7) to dismiss for failure to state a claim upon which relief can be granted;
(8) to dismiss actions involuntarily; and
(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. *See United States v. Hall,* 462 F.3d 684, 688 (7th Cir. 2006).