UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Case No. 21-cr-187 (ECT/LIB)

Plaintiff, ORDER AND v. REPORT AND RECOMMENDATION John Jerrod Jones,

Defendant.

This matter comes before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636 and Local Rule 72.1, and upon the parties' various Motions for the discovery and production of evidence, [Docket Nos. 17, 25, 26, 27, 28, 29, 30, 31], as well as, Defendant John Jerrod Jones' ("Defendant") Motion to Suppress Statements, Admissions, and Answers. [Docket No. 32] . The Court held a Motions hearing on April 13, 2022, regarding the parties' pretrial motions.

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1 At the April 13, 2022, Motions hearing regarding Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 32], the parties requested, and were granted, the opportunity to submit supplemental briefing. (Amended Minutes, [Docket No. 48]). Defendant subsequently sought twice to extend the deadline for his post-hearing briefing, which the Court granted ultimately setting Defendant' s time to file his post-hearing briefing by May 20, 2022, with the Government' s post-hearing briefing due by June 3, 2022. [Docket Nos. 51-54]. Defendant filed his post-hearing briefing on May 23, 2022. [Docket No. 55]. The Court subsequently granted the Government' s request for an additional week to submit its post-hearing briefing setting its time to file by June 13, 2022. [Docket Nos. 60, 61, 62]. Upon the completion of the briefing, Defendants' Motions to Suppress Statements, Admissions, and Answers, [Docket No. 32], was taken under advisement. Thereafter, Defendant, through counsel, sought on July 1, 2022, leave to reopen the evidentiary hearing on his Motion to Suppress Statements, Admissions, and Answers, [Docket No. 32], so that he could now testify in support of his motion. (See Motion to Re-Open Motions Hearing, [Docket No. 63]). It is important to note that at the April 13, 2022, Motions hearing, Defendant had and did exercise his right of confrontation as to the Government's witness es; exhibits were offered and admitted without objection; Defendant had the right to testify but rested his case without choosing then to exercise

that right; and Defendant completed his briefing on his Motion to Suppress Statements, Admissions, and Answers, [Docket No. 32], without any contemporaneous effort to seek to reopen the evidentiary hearing. There has been no material change of circumstance nor any previously unknown evidence identified by Defendant to have materialized while the Court had Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 32], under advisement. Accordingly, Defendant's Motion to Re - Open Motions Hearing, [Docket No. 63], on his motion to suppress is DENIED. See e.g., United States v. Andrews, No. 18-CR-149 (SRN/DTS), 2019 WL 669808, at *3 (D. Minn. Feb. 19, 2019), report and recommendation adopted, 381 F. Supp. 3d 1044 (D. Minn. 2019) (denying motion to reopen evidentiary hearing where the defendant had presented testimony and arguments at the evidentiary hearing and had completed supplemental briefing on the issues).

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For the reasons discussed herein, the Government's Motion for Discovery, [Docket No. 17]; Defendant's Motion for Disclosure of 404(b) Evidence, [Docket No. 25]; Defendant's Motion to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant, [Docket No. 26]; Defendant's Motion for Discovery and Inspection, [Docket No. 27]; Defendant's Motion for Discovery of Expert Under Rule 16, [Docket No. 28]; Defendant's Motion for Discovery Regarding Forensic Testing and Experts, [Docket No. 29]; and Defendant's Motion to Retain Rough Notes, [Docket No. 31], are GRANTED. Defendant's Motion for Early Jencks Act Material, [Docket No. 30], is DENIED. Further, it is recommended that Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 32], be DENIED. I. Background

Defendant is charged with one (1) count of felon in possession of a firearm – armed career criminal in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1), as well as, one (1) count of possession of an unregistered firearm in violation of 18 U.S.C. §§ 5861(d) and 5871. (Indictment, [Docket No. 11]). II. Government's Motion for Discovery. [Docket No. 17].

The Government seeks discovery pursuant to Rules 16(b), 12.1, 12.2, 12.3, and 26.2 of the Federal Rules of Criminal Procedure, as well as, Rules 702, 703, and 705 of the Federal Rules of Evidence. (See Gov't's Mot. for Discovery, [Docket No. 17]).

A. Inspection and Copying Pursuant to Rule 16(b)

1. Documents and Tangible Objects The Government requests that the Court order Defendant to permit inspection and copying of all books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of Defendant and which Defendant intends to introduce as evidence in his case-in-chief at trial.

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Defendant did not object to the request. The motion is granted, and Defendant shall disclose any such responsive materials no later than fourteen (14) days before trial.

2. Reports of Examinations and Tests The Government further requests all results and reports of physical or mental examinations and of scientific tests or experiments made in connection with the above captioned matter, or copies thereof, within the possession or control of Defendant, which Defendant intends to introduce as evidence in his case-in-chief at trial or which were prepared by a witness whom Defendant intends to call at trial. Defendant did not object to the request. The motion is granted, and Defendant shall disclose any such responsive materials no later than fourteen (14) days before trial.

3. Expert Testimony The Government also seeks a written summary of expert testimony Defendant intends to use under Rule 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial. The Government asserts that the summary must describe the opinions of the expert witnesses, the basis and reasons therefore, and the witnesses' qualifications. Defendant did not object to the request. The motion is granted, and Defendant shall disclose any such responsive materials for experts he intends to call in his case-in-chief at trial no later than thirty (30) days before trial. 2

B. Notice of Alibi Defense Pursuant to Federal Rule of Criminal Procedure 12.1, the Government seeks an Order from the Court requiring Defendant, if he intends to claim alibi as a defense, to state the specific place or places at which Defendant claims to have been at the time of the alleged offenses in the above

2 If Defendant intends to use experts only as rebuttal to the Government's experts, if any, offered in the Government's case-in-chief, then the Defendant should make such disclosures ten (10) days before trial.

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captioned matter and the names and addresses of the witnesses upon whom Defendant intends to rely to establish such alibi. Defendant did not object to this request. The motion is granted, and Defendant shall give notice of same pursuant to Rule 12.1 as soon as practicable and in no event later than twenty-one (21) days before trial.

C. Notice of Insanity/Mental Illness Defense In addition, pursuant to Federal Rule of Criminal Procedure 12.2, the Government requests the Court to order Defendant, if he intends to rely upon the defense of insanity or introduce expert testimony relating to a mental disease or defect or any other mental condition of Defendant relevant to the issue of guilt, to provide the Government notice of such defense. Defendant did not object to this request. The motion is granted, and Defendant shall give notice of same pursuant to Rule 12.2 as soon as practicable and in no event later than twenty-one (21) days before trial.

D. Notice of Public Authority Defense Furthermore, pursuant Federal Rule of Criminal Procedure 12.3, the Government seeks an Order from the Court requiring Defendant, if he intends to rely upon the defense of actual or believed exercise of public authority, to notify the Government of the agency involved and the time during which Defendant claims to have acted with public authority. Defendant did not object to this request. The motion is granted, and Defendant shall give notice of same pursuant to Federal Rule of Criminal Procedure 12.3 as soon as practicable and in no event later than twenty-one (21) days before trial.

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G. Witness Statements The Government seeks all statements within Defendant's possession or control of any witness that Defendant intends to call in connection with a suppression hearing, detention hearing, trial, or sentencing.

Defendant did not object to this request. The motion is granted. To the extent Defendant has statements in his possession or control of any witness that he intends to call to testify in connection with a suppression hearing, detention hearing, trial, or sentencing, Defendant shall disclose such statements to the Government no later than three (3) days before such witness is called to testify. III. Defendant's Motion for Disclosure of 404(b) Evidence. [Dock et No. 25]. Defendant seeks immediate disclosure of any "bad act" or "similar course of conduct" evidence that the Government intends to offer at trial pursuant to Federal Rule of Evidence 404(b). (See Def.'s Mot. for Disclosure of 404(b) Evidence, [Docket No. 25]). Defendant further seeks the purpose for which the Government will offer said evidence. (Id.). Defendant seeks such disclosures at least two (2) weeks before trial. (Id.).

In its written response, the Government suggested that disclosures regarding Rule 404(b) evidence be made no later than two (2) weeks before trial, as proposed by Defendant. (See Gov't's Omnibus Response, [Docket No. 35], at pp. 1-2).

In relevant part, Rule 404(b)(3) provides that the Government must "provide reasonable notice of any" Rule 404(b) "evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it." Fed. R. Evid. 404(b)(3)(A). In that notice, the Government must also "articulate . . . the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Fed. R. Evid. 404(b)(3)(B).

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Defendant's Motion for Disclosure of Rule 404(b) Evidence, [Docket No. 25], is granted, as set forth herein. The Court orders the Government to disclose to the Defense as soon as practicable, and in no event later than fourteen (14) days before trial, formal notice of any specific 404(b) evidence it intends to offer, as well as, the purpose for which it intends to offer it into evidence at trial. 3 IV. Defendant's Motion to Compel Attorney for the Government to Disclose Evidence

Favorable to the Defendant. [Docket No. 26]. Defendant seeks immediate and ongoing disclosure of evidence favorable to him which would fall within the authority of Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and their progeny. (Def.'s Mot. to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant, [Docket No. 26]).

The Government, acknowledging its duty to disclose responsive materials and information, represented that it has previously disclosed evidence favorable to the Defendant within its possession and will continue to comply with its obligations under Brady, and its progeny. (Gov't's Omnibus Response, [Docket No. 35], at p. 2).

Defendant's motion seeking disclosure of evidence favorable to him which would fall within the authority of Brady, Giglio, and their progeny is granted. The Government will disclose any and all remaining and/or subsequently discovered, obtained, or obtainable material responsive to Brady to the Defense as soon as said responsive materials are discovered by the Government. 4

3 Federal Rule of Evidence 404(b) does not extend to evidence of acts which are "intrinsic" to the charged offense. United States v. Adediran, 26 F.3d 61, 63 (8th Cir. 1994) (standards applicable to evidence considered under Rule 404(b) do not apply to such "inextricably intertwined" evidence); see United States v. Williams, 900 F.2d 823 (5th Cir. 1990). 4 The Court notes that in Kyles v. Whitley, 514 U.S. 419 (1995), the United States Supreme Court "emphasized the discretion of the prosecutor, not the trial judge, in deciding what evidence is producible under Brady." United States v. Garrett, 238 F.3d 293, 304 n.4 (5th Cir. 2000) (emphasis added). The Sixth Circuit has also explained that "while the Brady rule imposes a general obligation upon the government to disclose evidence that is favorable to the accused and material to guilt or punishment, the government typically is the sole judge of what evidence in its possession is subject to disclosure." United States v. Clark , 957 F.2d 248, 251 (6th Cir. 1992). That being said, "[i]f [the Government] fails to comply adequately with a discovery order requiring it to disclose Brady material, it acts at its

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The Government will disclose materials which are responsive to Giglio and related to the impeachment of the Government's witnesses to be called at trial no later than seven (7) days before trial, or when ordered by the trial judge to disclose trial witnesses, whichever is earlier. V. Defendant's Motion for Discovery and Inspection, [Docket No. 27], Motion for

Discovery of Expert under Rule 16, [Docket No. 28], and Motion for Discovery Regarding Forensic Testing and Experts, [Docket No. 29]. Defendant seeks disclosure of any written, recorded, or oral statements made by Defendant or copies thereof in the possession, custody, or control of the Government; the substance of any oral statements made by Defendant, whether before or after arrest, which the Government intends to offer in evidence at the trial; as well as, a copy of his criminal history. (See Def.'s Mot. for Discovery and Inspection, [Docket No. 27]). Defendant requests

permission to inspect and/or copy books, papers, documents, photographs, and tangible objects in the possession, custody, or control of the Government and which are material to the preparation of the defense or are intended for use by the Government as evidence in chief at the trial or were obtained from or belonged to the Defendant. (Id.). Defendant also requests permission to inspect and copy the results of any physical or mental examinations or scientific tests or experiments. (See Def.'s Mot. for Discovery, [Docket No. 27]; Def.'s Mot. for Discovery Regarding Forensic Testing and Experts, [Docket No. 29]). Further, Defendant seeks immediate production of "[t]he results of any forensic testing done in this case," and in particular , "more detailed discovery related to DNA testing," including:

1. All DNA laboratory report(s), 2. Any hospital or medical reports relevant to the DNA in this case, 3. Chain-of-custody documentation for all forensic samples, 4. The disk containing the raw data, 5. The case notes, 6. Copies of the genescan and genotype printouts, 7. Correspondence between BCA agents and any law enforcement, prosecutorial

or other state, tribal or county officials,

own peril." Id. Accordingly, the Court encourages the Government to carefully evaluate the materials in its possession in light of a liberal understanding of its Brady obligations.

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8. All documents regularly kept within the specific BCA case file referenced, 9. Documents relating to the case referenced regularly kept in a place other than

the BCA case file, 10. A copy of the "unexpected results" file, kept pursuant to DAB Guidelines for

the 6 months preceding and the 6 months following the testing in the above referenced case, any other information in the form of documentation or encompassed in some other manner that the BCA has in their possession and/or control, or knows of and can access, regarding this case, including but not limited to any QAR which contains any reference to this case whatsoever, 11. All data from the original case relied upon in this "convicted offender match." (Id.).

Lastly, pursuant to Rule 16(a)(1)(G), Defendant requests written summaries of any expert opinion the Government intends to use in its case-in-chief, including expert witnesses' qualifications and opinions, as well as, the basis for those opinions. (Def.'s Mot. for Discovery of Expert under Rule 16, [Docket No. 28]). Defendant suggests that said expert disclosures be made by no later than two (2) weeks before trial. (Id.).

In its written response to Defendant's Motion for Discovery and Inspection, the Government asserted that it had already disclosed substantial materials pursuant to Rule 16, and it would continue

to comply with its obligations under Rule 16. (See Gov't's Omnibus Response, [Docket No. 35], at p. 4). Regarding forensic testing, the Government asserted that it had submitted the "short-barreled shotgun at issue in this case to the Minnesota BCA for fingerprint"; however, as of November 30, 2021, the BCA had not yet assigned a technician to perform the testing. (Id.). The Government further asserted that it would "continue to press the BCA to complete the forensic testing posthaste," and would "acquire and produce the underlying documentation and data . . . [w]hen the results of the forensic testing are available." (Id.). Regarding expert disclosures, the Government, acknowledging its duties under Rule 16(a)(1)(G), suggested that disclosures be made thirty (30) days before trial with rebuttal disclosures no later than ten (10) days before trial. (Id.).

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Defendant's Motion for Discovery and Inspection, [Docket No. 27]; his Motion for Discovery of Expert under Rule 16, [Docket No. 28]; and his Motion for Discovery Regarding Forensic Testing and Experts, [Docket No. 29], are granted as to any subsequently acquired materials or information which are specifically responsive to Rule 16(a)(1)(A)-16(a)(1)(E), which shall be disclosed to the Defense as soon as said responsive materials are discovered by the Government and in any event by no later than fourteen (14) days before trial, except with respect to any subsequently acquired forensic reports and expert disclosures, Rule 16(a)(1)(F)- 16(a)(1)(G), which shall be disclosed as soon as practicable and in any event by no later than thirty (30) days before trial, and rebuttal expert disclosures, which shall be disclosed by no later than ten (10) days before trial. VI. Defendant's Motio n for Disclosure of Early Jencks Act Material. [Docket No. 30].

Defendant moves the Court for an Order requiring the Government to disclose Jencks Act materials at least two weeks before trial. (See Def.'s Mot. for Disclosure of Early Jencks Act Material, [Docket No. 30]). The Government objects to Defendant's motion arguing that it cannot be required to make pretrial disclosure of Jencks Act materials. (See Gov't's Omnibus Response, [Docket No. 35], at pp. 5-6).

The Court recognizes the practical effect that disclosing Jencks Act materials only after a witness has actually testified in the Government's case -in-chief creates the prospect for unnecessary continuances and delays in the trial while the Defense is permitted a reasonable time to review the late disclosures. However, Defendant provides no citation to authority which would allow the Court to require early disclosure of Jencks Act material. Generally, the case law provides that the Court may not require the Government to make early disclosure of Jencks Act material. See, e.g., United States v. Alexander, 736 F. Supp. 968, 981 (D. Minn. 1990); United States v.

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White, 750 F.2d 726, 727 (8th Cir. 1984); United States v. Wilson, 102 F.3d 968, 971–72 (8th Cir. 1996).

Accordingly, Defendant's Motion for Disclosure of Early Jencks Act Material, [Docket No. 30], is denied. 5 VII. Defendant's Motion to Retain Rough Notes. [Docket No. 31].

Defendant requests an Order from the Court requiring any law enforcement agent to retain and preserve all rough notes taken as part of their investigations, whether or not the contents of such rough notes are incorporated in official records. (See Def's Mot. to Retain Rough Notes, [Docket No. 31]).

The Government asserts that Defendant's request for preservation of all rough notes is overbroad and vague but does not otherwise object to Defendant's request for the retention of rough notes. (See Gov't's Omnibus Response, [Docket No. 35], at pp. 6-7).

Defendant's M otion is granted regarding rough notes as to retention only at this time. If Defendant seeks production or disclosure of rough notes, he will need to bring a separate motion for such production. VIII. Defendant's Motion to Suppress Statements , Admissions, and Answers. [Docket No.

32]. Defendant moves the Court for an Order suppressing the statements made to FBI Special Agent Joshua Groth ("SA Groth") during the July 12, 2021, interview conducted while Defendant was in custody at the Cass County Detention Center.

5 Nevertheless, in its written response, the Government voluntarily agreed to provide all Jencks Act material to the Defense by no later than three (3) business days before trial. The Court encourages such voluntarily agreements.

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A. Statement of Facts 6 Defendant was arrested pursuant to a state court warrant and detained at the Cass County Detention Center ("CCDC") . (Tr. 19, 40-41, 54). Sometime thereafter, Defendant inquired with CCDC Jail Administrator Lieutenant Christopher Thompson ("Lieutenant Thompson") about obtaining a "furlough" to attend his father's funeral who had recently passed away. (Tr. 46). At the April 13, 2022, Motions hearing, Lieutenant Thompson testified that he informed Defendant that CCDC did not have the authority to provide him with a "furlough" because he was being held pursuant to a Minnesota Department of Correction ("DOC") warrant, but DOC would allow Defendant to attend the funeral if, at a two-hour minimum, he paid a fee of $260 for two officers to escort him to and from the funeral. (Tr. 45-46). Lieutenant Thompson then told Defendant that he was willing to further assist him and reduce the escort fee to $130 for only one officer escort. (Tr. 46). Lieutenant Thompson testified that he then observed Defendant placing several telephone calls from the facility to collect the escort fee. (Tr. 46-47).

On July 12, 2021, SA Groth was informed that, two days earlier, on July 10, 2021, a firearm had been

recovered from a bathroom at the Cedar Lakes Casino Hotel (the "July 10

th Incident") . (Tr. 18, 27-28). SA Groth was also informed that Defendant, who was being detained at CCDC on a warrant unrelated to the July 10 th

Incident, wanted to speak with law enforcement regarding drug-related activity in Cass Lake, Minnesota. (Tr. 18). After reviewing information related to the investigation of the July 10 th

Incident, SA Groth went to CCDC to speak with Defendant about both his report of drug-related activity in Cass Lake, Minnesota and the July 10 th

Incident. (Tr. 19, 28).

6 The facts contained in this section are derived from the testimonies of Special Agent Joshua Groth with the Federal Bureau of Investigations and Lieutenant Christopher Thompson with the Cass County Sheriff's Department at the April 13, 2022, Motions Hearings, as well as, Government's Exhibit 1, offered and admitted without objection at the Motions hearing in the present case.

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At approximately 5:00 p.m., SA Groth arrived at CCDC dressed in plain clothes and without a firearm. (Tr. 20, 24). SA Groth sat with Defendant in a glass, open room of the detention center; Defendant was not restrained. (Tr. 20).

SA Groth testified that there was some initial non-recorded conversation. Specifically, SA Groth introduced himself and informed Defendant of why he was there. (Tr. 21-22). Defendant then provided SA Groth with information regarding individuals involved in drug-related activity in the Cass Lake and Leech Lake areas. 7

(Tr. 21-22, 31). Defendant also informed SA Groth that his father had recently passed away, and that he wanted to attend the funeral, but needed money to do so. (Tr. 35). Defendant then asked SA Groth for assistance in attending the funeral. (Tr. 35). In response, SA Groth informed Defendant that he was unaware of CCDC's policy for funeral visits, but that he would speak with CCDC personnel and their respective supervisors to determine the policy for Defendant to attend. (Tr. 23-24, 36, 40).

During the above initial conversation, SA Groth did not ask Defendant any questions of substance about the July 10 th

Incident, and the entire substantive and material portion of the subsequent July 12, 2021, interview related to the July 10 th

Incident was recorded. (Tr. 38). At approximately 5:10 p.m., SA Groth started the recording and began interviewing Defendant with respect to the July 10 th

Incident. (Gov't's Ex. 1 , at 00:00-00:33). 8

At the outset of the interview, SA Groth informed Defendant of his rights as follows:

You do have the right to remain silent . . . Anything that you say or do can and will be held against you in court of law. . . . You do have the right to an attorney. . . if you cannot afford an attorney, one will be provided to you. Do you understand your rights, Joe?

7 SA Groth testified that he did not record this portion of the conversation because he was simply determining if the proffered drug activity tips and information was "worth [his] time or not to continue on" investigating. (Tr. 22, 32). 8 Government's Exhibit 1 is a thumb drive containing the audio recording of the July 12, 2021, interview of Defendant at the CDCC. At the April 13, 2022, Motions Hearing, the Government, without objection, offered the thumb drive audio recording into evidence as Government's Exhibit 1. (Tr. 15). The citations to the audio recordings are in a MM:SS (minutes:seconds) format.

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(Id. at 00:34-00:47). Defendant responded, "Yes." (Id. at 00:47-00:49). SA Groth then stated, "At this time I have a couple of questions in regards to an incident that were . . . some agents are working on," and he then asked, "Are you okay if I talk with you at this time? (Id. at 00:50-00:56). Defendant responded, "Yes." (Id.). SA Groth then asked Defendant whether he had any information about a short barrel shotgun and ammunition that were found at the Cedar Lakes Casino Hotel in Cass Lake, Minnesota. (Gov't's Ex. 1, at 00:57-1:20) . Defendant responded that he did not know the make or model of the firearm, but he admitted to being the one who "pretty much put it there." (Id. at 1:21-1:40). Defendant further explained that, after an incident with unknown individuals brandishing their weapons, he "feared for [his] life" and "pretty much [stole] the shotgun from [his] cousin's house . . . for his safety and protection." (Id. at 1:41-2:25). Defendant then described the firearm; stated that the prior incident with the unknown individuals was reported to local Cass Lake law enforcement; and provided that he obtained the firearm and the ammunition from his cousin's bedroom. (Id. at 2:26-7:30).

Defendant then recounted the events that led him to arriving at the Cedar Lake Casino Hotel and entering the men's restroom in the casino's lobby. (Id. at 7:31-13:29). Defendant specifically provided that he intended to dispose of the firearm by placing it in the outside portion of the metal garbage can container of the men's restroom, and then placing the ammunition inside of the garbage can. (Gov't's Ex. 1, at 13:30-16:17). SA Groth continued to question Defendant about the description of the firearm; the layout of his cousin's house ; what he did after leaving the firearm in the bathroom; and

whether he intended to shoot anyone in the casino. (Id. at 16:18- 31:46). The interview concluded at approximately 5:48 p.m. on July 12, 2021. (Id. at 31:46). Defendant was not arrested for the firearm charge at the conclusion of the interview. (Tr. 41).

SA Groth can be heard through the interview maintaining a conversational tone without raising his voice to yell or threaten Defendant. Likewise, Defendant maintained a conversational

tone, and he was clearly cooperative throughout the interview. SA Groth testified at the April 13, 2022, Motions Hearing that Defendant appeared to understand SA Groth, where he was, and what he was speaking about. (Tr. 22).

Before leaving CCDC, SA Groth testified that he attempted to speak with a jail supervisor, but because none were available, SA Groth left a message for a supervisor to call him. (Tr. 24-25, 36). Thereafter, Lieutenant Thompson called SA Groth. (Tr. 36, 47). SA Groth informed Lieutenant Thompson that Defendant wanted a "furlough" and that he told Defendant he "would put a good word in for him." (Tr. 47). Lieutenant Thompson advised SA Groth that, because Defendant was being held on a DOC warrant, a "furlough" was unavailable to Defendant, but that he had already informed Defendant of the escort policy and the required escort fee for the desired funeral visit. (Tr. 25, 47-48). The conversation ended, and SA Groth had no further contact with Lieutenant Thompson nor Defendant. (Tr. 25).

Lieutenant Thompson testified that, after learning Defendant had been unable to obtain the $160 escort fee, he ultimately escorted Defendant to the funeral on the morning of July 13, 2021, himself at no cost, as a favor to Defendant's family with whom he was acquainted. (Tr. 48, 58).

B. Standard of Review "[Miranda] prohibits the government from introducing into evidence statements made by the defendant during a custodial interrogation unless the defendant has been previously advised of his [F]ifth [A]mendment privilege against self-incrimination and right to an attorney." United States v. Chipps, 410 F.3d 438, 445 (8th Cir. 2005) (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)). Miranda warnings are thus required for official interrogations where a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way[.]" Stansbury v. California, 511 U.S. 318, 322 (1994) (quoting Miranda, 384 U.S. at 444). "Interrogation under Miranda includes not only express questioning but also its functional

equivalent, such as 'any word or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." United States v. Hull, 419 F.3d 762, 767 (8th Cir. 2005)

(quoting Rhode Island v. Innis, 466 U.S. 291, 300–01 (1980)).

A defendant is entitled to a Miranda warning prior to custodial interrogation. Miranda, 384 U.S. at 444-45. Interrogation for Miranda purposes includes "any questioning or conduct that the government officer should know is reasonably likely to elicit an incriminating response." United States v. McLaughlin, 777 F.2d 388, 390 (8th Cir. 1985). Whether an incriminating response is sought by an officer is determined "from the perspective of the suspect" and not by the officer's actual intent. United States v. Richardson, 427 F.3d 1128, 1132 (8th Cir. 2005).

A defendant may waive their rights, "provided the waiver is made voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444.

C. Analysis Defendant contends that all his statements regarding the firearm now at issue made during the July 12, 2021, interview were coerced through SA Groth's "offer of providing funeral assistance," and as such were not voluntary under the circumstances. (Mem. in Supp., [Docket No. 55]).

As noted above, Miranda warnings are required for official interrogations where a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way[.]" Stansbury, 511 U.S. at 322 (quoting Miranda, 384 U.S. at 444). To be subject to suppression under Miranda, a statement must be made while in custody and in response to interrogation. United States v. McGlothen, 556 F.3d 698, 701 (8th Cir. 2009) (citing United States v. Londondio, 420 F.3d 777, 783 (8th Cir. 2005)).

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It is undisputed that the questioning of Defendant regarding the short barrel shotgun during the July 12, 2021, interview constituted interrogation. (See Mem. in Supp. [Docket No. 55]; Mem. in Opp'n [Docket No. 62]). It is also undisputed that Defendant was being detained at the Cass County Detention Center, and therefore, was in custody during the July 12, 2021, interview. (See Mem. in Supp. [Docket No. 55]; Mem. in Opp'n [Docket No. 62]). The record clearly demonstrates that SA Groth advised Defendant of his Miranda rights at the outset of the interview concerning the gun and asked Defendant if he understood. (See Gov't's Ex. 1, at 00:34-00:49). After verbally acknowledging that he understood all his rights, Defendant agreed to answer SA Groth's questions concerning the firearm. (Id. at 0:00-00:49).

Accordingly, the only issues now before the Court regarding the July 12, 2021, interview is whether Defendant's waiver of his rights was made knowingly and intelligently, and whether his waiver and subsequent statements were made voluntarily. See generally, Miranda, 384 U.S. at 444, 475. The validity of a Miranda waiver requires consideration of two distinct inquiries, namely whether the waiver was voluntary "in the sense that it was the product of a free and deliberate choice rather than

intimidation, coercion, or deception[,]" and whether the waiver was knowingly and intelligently made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." United States v. Vinton, 631 F.3d 476, 483 (8th Cir. 2011) (internal citations omitted) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). "The government has the burden of proving the validity of the Miranda waiver by a preponderance of the evidence." United States v. Haggard, 368 F.3d 1020, 1024 (8th Cir. 2004).

1. Voluntariness Courts assess whether a waiver of rights pursuant to Miranda was made voluntarily by considering "the conduct of law enforcement officials and the suspect's capacity to resist any pressure." United States v. Contreras, 372 F.3d 974, 978 (8th Cir. 2004). The United States

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Supreme Court has previously explained "that coercive police activity is a necessary predicate to . . . finding that a confession is not 'voluntary,'" Colorado v. Connelly, 479 U.S. 157, 167 (1986), and the Eighth Circuit has read that holding to mean "that police coercion is a necessary prerequisite to a determination that a waiver was involuntary and not as bearing on the separate question whether the waiver was knowing and intelligent." United States v. Turner , 157 F.3d 552, 555 (8th Cir. 1998) (quoting United States v. Bradshaw, 935 F.2d 295, 299 (D.C. Cir. 1991)).

In determining whether a waiver or confession was made voluntarily, a court "looks at the totality of the circumstances and must determine whether the individual's will was ove rborne." United States v. Syslo, 303 F.3d 860, 866 (8th Cir. 2002). In considering the totality of the circumstances, a court reviews whether the statement was "extracted by threats, violence, or direct or implied promises, such that the defendant's will was overborne and his capacity for self - determination critically impaired." United States v. Sanchez, 614 F.3d 876, 883 (8th Cir. 2010) (internal quotation marks and citations omitted). "More specifically, [a court] consider[s], among other things, the degree of police coercion, the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition, and mental condition." Id. (citing Sheets v. Butera, 389 F.3d 772, 779 (8th Cir. 2004)).

Defendant argues that his will was overborne by coercive tactics because he felt pressure to provide a statement in exchange for SA Groth's implied promise to arrange Defendant's attendance at his father's funera l— an event which Defendant could not afford to go to at that time and which was of "obvious extreme importance" to him. However, the record does not reflect that SA Groth offered nor "impliedly promise[d]" to assist Defendant with attending the funeral . Instead, SA Groth told Defendant that he would communicate with CCDC personnel and supervisors to determine what the policy for the facility was in order for Defendant to attend the funeral. SA Groth ultimately did speak with Lieutenant Thompson, where he learned that

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Defendant had even prior to the July 12, 2021, interview already been informed by Lieutenant Thompson of the escort policy and fee. Following this conversation, SA Groth never followed up with Defendant nor did he speak further with Lieutenant Thompson on the matter. Moreover, while Defendant did ultimately attend his father's funeral, this had nothing to do with SA Groth but simply occurred because Lieutenant Thompson "thought [he] was doing a nice deed" for Defendant's family. (Tr. 58).

The Court's review of the audio recording of the July 12, 2021, interview related to the firearm at issue shows that Defendant did not appear unduly affected by his father's death; he spoke willingly, understood what was being asked of him, and responded appropriately to the question presented. Nor does the present record indicate that the environment in which the interview occurred was inherently coercive. SA Groth was not armed during the interview, and Defendant did not appear to be under the influence of any medications, drugs, or alcohol. Moreover, the July 12, 2021, interview concerning the shotgun, which only lasted about thirty minutes, was not coercive in its duration. See United States v. Mims, 567 F. Supp. 2d 1059, 1080 (D. Minn. 2008) (noting that interrogation lasting more than two hours was not coercive in duration).

Further, any offer by SA Groth made prior to the audio recording to inquire about the CCDC's policy in allowing Defendant to attend his father's funeral was not deceptive. SA Groth did ultimately inquire with Lieutenant Thompson. Further, SA Groth never promised Defendant that he would get him to the funeral. Indeed, even if SA Groth had not followed through with his promise to inquire as to the facility's policies concerning funeral attendance, " [t]he mere fact that an officer may have elicited a confession through a variety of tactics, including. . . playing on a suspect's emotions, using his respect for his family against him, deceiving the suspect, conveying sympathy, and even using raised voices, does not render a confession involuntary unless the overall

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impact of the interrogation caused the defendant' s will to be overborne." United States v. Boslau, 632 F.3d 422, 428 (8th Cir. 2011). Although Defendant's cooperation may have been subjectively motivated by his desire to attend his father's funeral, the Court finds that Defendant was not promised anything in exchange for his statement such that his waiver under Miranda was coerced or involuntary.

Moreover, even accepting that Defendant was grieving his father's death during the interview about the gun at issue, nothing in the present record indicates that he was impaired to the extent that his capacity was limited, or his will was overborne. See, e.g., United States v. Gabby, 532 F.3d 783, 788 (8th Cir. 2008) (quoting United States v. Casal, 915 F.2d 1225, 1229 (8th Cir. 1990)) ("Sleeplessness, alcohol use and drug use are relevant to our analysis, but 'intoxication and fatigue do not automatically render a confession involuntary.'").

In sum, the Court's review of the totality of the circumstances shown in the present record does not indicate that Defendant's will was in any way overborn. Nothing in the record now before the Court indicates that anything about Defendant's mental or physical condition critically impaired Defendant' s capacity for self-determination. Throughout the interview, SA Groth maintained a conversational tone and made no threats or promises to Defendant. See Mims, 567 F. Supp. 2d at 1080 (holding Miranda waiver voluntary where, among other factors, interview was conducted in a reasonable, conversational tone); see also United States v. Makes Room, 49 F.3d 410, 415 (8th Cir. 1995) (concluding no coercive tactics were used where, among other things, officers made no threats or promises to the defendant).

Therefore, on the present record, the Court concludes that Defendant's waiver of his Miranda rights prior to the July 12, 2021, interview about the short barrel shotgun was voluntary.

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2. Knowing and Intelligent Next, the Court must consider whether Defendant's waiver of his rights prior to the interview about the firearm on July 12, 2021, was knowingly and intelligently made. Vinton, 631 F.3d at 483. The evidence in the record regarding Defendant's understanding of his rights and presence of mind during the July 12, 2021, interview consists of the audio recording of the interview [Exhibit 1] and the hearing testimony of SA Groth [Tr.].

To the extent Defendant argues that his statements from the July 12, 2021, interview concerning the gun should be suppressed because the waiver of his rights under Miranda was invalid due to his purported grief after his father's passing, the Court disagrees .

On the present record, the Government offers sufficient evidence related to the July 12, 2021, interview for the Court to determine that Defendant's waiver of his Miranda rights at the outset of the interview about the firearm was not only voluntary, but it was also knowingly and intelligently made. Defendant was verbally advised of his Miranda rights, to which Defendant acknowledged that he understood. Defendant was then asked if he would be willing to answer questions, to which Defendant responded, "Yes." (Gov't's Ex. 1, at 00:50- 00:56). The Court finds that the verbal advisement of his Miranda rights and subsequent waiver given at the outset of the interview to Defendant by SA Groth fulfilled the requirements of Miranda. See 384 U.S. at 444; see also Butler, 441 U.S. at 473 (holding that a written waiver of rights pursuant to Miranda is not required and a defendant' s "understanding of his rights and a course of conduct indicating waiver" may be sufficient evidence that the defendant has waived his right to remain silent).

Moreover, nothing in the present record indicates that Defendant displayed any signs of confusion or the inability to understand his rights. To the contrary, Defendant talked openly and clearly for the duration of the recorded interview. Defendant provided appropriate and responsive answers to the questions posed. Defendant never declined to answer questions, never indicated

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that he no longer wished to talk, nor that he was unable for any reason to continue on with the interview about the short barrel shotgun. And there is no indication in the present record that Defendant was under the influence of drugs or alcohol or otherwise impaired in anyway such that he would have been unable to understand his rights.

Therefore, under the totality of the circumstances, the Court concludes that Defendant's waiver of his Miranda rights at the outset of the July 12, 2021, interview was knowing and intelligent.

Accordingly, this Court recommends that Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 32], be DENIED. IX. Conclusion

Thus, based on the foregoing and all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. The Government's Motion for Discovery, [Docket No. 17], is GRANTED, as set forth

above; 2. Defendant's Motion for Disclosure of 404(b) Evidence , [Docket No. 25], is

GRANTED, as set forth above; 3. Defendant's Motion to Compel Attorney for the Government to Disclose Evidence

Favorable to the Defendant, [Docket No. 26], is GRANTED, as set forth above; 4. Defendant's Motion for Discovery and Inspection, [Docket No. 27], is GRANTED, as

set forth above; 5. Defendant's Motion for Discovery of Expert under Rule 16, [Docket No. 28], is

GRANTED, as set forth above; 6. Defendant's Motion for Discovery Regarding Forensic Testing and Experts, [Docket

No. 29], is GRANTED, as set forth above; CASE 0:21-cr-00187-ECT-LIB Doc. 65 Filed 07/05/22 Page 21 of 22

7. Defendant's Motion for Disclosure of Early Jencks Act Material, [Docket No. 30], is

DENIED, as set forth above; 8. Defendant's Motion to Retain Rough Notes, [Docket No. 31], is GRANTED, as set

forth above; and Further, IT IS HEREBY RECOMMENDED THAT:

1. Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No.

32], be DENIED. Dated: July 5, 2022 s/Leo I. Brisbois Hon. Leo I. Brisbois U.S. MAGISTRATE JUDGE

N O T I C E Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals. Under Local Rule 72.2(b)(1), "A party may file and serve specific written objections to a magistrate judge's proposed findings and recommendation within 14 days after being served with a copy of the recommended disposition[.]" A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c). Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.

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