

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

3  
4  
5 UNITED STATES OF AMERICA,  
6 Plaintiff,

7 v.

8  
9 RHONDA FIRESTACK-HARVEY, LARRY  
10 HARVEY, MICHELLE GREGG, ROLLAND  
11 GREGG, and JASON ZUCKER,  
12 Defendants.

No. CR-13-24-FVS

ORDER GRANTING IN PART  
AND DENYING IN PART  
RHONDA FIRESTACK-HARVEY'S  
MOTION TO SUPPRESS  
STATEMENTS

13 **THE DEFENDANTS** have filed a number of motions. The Court  
14 considered their motions at a pretrial conference that was held on  
15 April 22 and 23, 2014. This order addresses Rhonda Firestack-Harvey's  
16 motion to suppress certain statements she allegedly made to law  
17 enforcement officers on August 9, 2012.

18 **BACKGROUND**

19 On August 8, 2012, a state superior court judge issued a warrant  
20 authorizing law enforcement officers to search a residence, buildings,  
21 and property that are located at 939 Clugston-Onion Creek Road,  
22 Colville, WA. A group of officers drove to 939 Clugston-Onion Creek  
23 Road on August 9th. They knocked on the front door of the residence  
24 at 10:47 a.m. Rhonda Firestack-Harvey answered. Stevens County  
25 Sheriff's Detective Loren A. Erdman explained who they were and why  
26 they were present. Officers walked through the residence, inspecting

1 each room in order to determine whether anyone else was inside. That  
2 done, Detective Erdman read the search warrant to Ms. Firestack-  
3 Harvey. She grabbed two medical marijuana authorization cards, which  
4 were nearby, and presented them to the officers. She told the  
5 officers, "We're in compliance" (or words to that effect). By  
6 "compliance," she seems to have meant compliance the Washington State  
7 Medical Use of Cannabis Act, chapter RCW 69.51A. *Cf. State v. Reis*,  
8 No. 69911-3-I, 2014 WL 1284863, at \*2-\*4 (March 31, 2014) (describing  
9 the State of Washington's marijuana laws). She began explaining to  
10 the officers why she thought they were in compliance. Just what she  
11 said is unclear. Detective Erdman interrupted her and advised her of  
12 her *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 478-79, 86  
13 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Initially, she did not express a  
14 desire to remain silent or to speak with an attorney. To the  
15 contrary, she seemed to want to convince the officers she was (or they  
16 were?) growing marijuana for medical purposes. She probably obtained  
17 additional marijuana authorization cards and presented them to the  
18 officers. It is unclear whose names are on the cards. The officers  
19 were skeptical. They told her she was growing more plants than state  
20 law permitted. Although the record is sketchy, the officers probably  
21 asked her about the names on the cards -- "Who are they?" and "Are you  
22 selling marijuana to them?" -- questions like that. Whereupon, she  
23 told officers she wanted to speak to an attorney. They ceased  
24 questioning her and allowed her to call her son. She sat down in a  
25 chair in the living room. The officers did not handcuff her, but,  
26

1 then again, they would not have allowed her to leave her residence.  
2 While seated in the living room, she allegedly made statements to law  
3 enforcement officers about her reasons for growing marijuana and what  
4 she intended to do with it. The officers left 939 Clugston-Onion  
5 Creek Road at 2:35 p.m. They did not arrest Ms. Firestack-Harvey.

#### 6 **RELIEF REQUESTED**

7 Rhonda Firestack-Harvey moves to suppress all of the statements  
8 she allegedly made to law enforcement officers. To begin with, she  
9 argues her alleged statements were obtained in violation of the  
10 protections established by *Miranda v. Arizona, supra*, and *Edwards v.*  
11 *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). In  
12 addition, she argues her alleges statements were involuntary. She  
13 claims she was compelled by state law to incriminate herself.

#### 14 **CUSTODIAL INTERROGATION**

15 The United States seems to concede Ms. Firestack-Harvey was not  
16 free to leave her residence from the moment the officers arrived until  
17 the moment they left. During that period, she was "seized" within the  
18 meaning of the Fourth Amendment. *United States v. Mendenhall*, 446  
19 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). However, as the  
20 Supreme Court explained in *Maryland v. Shatzer*, 559 U.S. 98, 112-13,  
21 130 S.Ct. 1213, 1224, 175 L.Ed.2d 1045 (2010), a Fourth Amendment  
22 "seizure" does not necessarily constitute "custody" within the meaning  
23 of *Miranda v. Arizona, supra*. A person is in "custody" when a law  
24 enforcement officer has placed her under arrest or the officer has  
25 restrained her freedom of movement in a manner that is associated with  
26

1 formal arrest. *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526,  
2 128 L.Ed.2d 293 (1994) (per curiam) (citations omitted). The parties  
3 disagree with respect to whether Ms. Firestack ever was in custody  
4 and, if so, when custody began. The Ninth Circuit has identified a  
5 number of factors that profitably may be considered in determining  
6 whether a person is in custody for *Miranda* purposes. See, e.g.,  
7 *United States v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir.), modified  
8 by 830 F.2d 127 (9th Cir.1987). Here, it is important to note: Ms.  
9 Firestack-Harvey was in her home (not, for example, a police station)  
10 during her interaction with law enforcement officers on August 9,  
11 2012. The encounter did not occur at night. It began about 10:47  
12 a.m. and ended about 2:45 p.m. The officers removed their weapons  
13 from their holsters when they approached Ms. Firestack-Harvey's front  
14 door, and they initially held their weapons in a ready position, but  
15 they did not point their weapons at her. Nor did they force their way  
16 into her home. They waited for her to open the door. When that  
17 happened, they explained their presence in matter-of-fact terms. They  
18 did not shout at her or threaten her. Although they would not have  
19 allowed her to leave the residence, they did not handcuff her. Given  
20 the preceding circumstances, Ms. Firestack-Harvey was not in custody  
21 when Detective Erdman advised her of her *Miranda* rights. Any  
22 statements she made to law enforcement officers prior to that time  
23 were not the product of custodial interrogation.

24  
25 **EDWARDS**

26 Ms. Firestack-Harvey did not immediately invoke any of her

1 *Miranda* rights. Instead, she continued to attempt to demonstrate she  
2 was (or they were?) complying with the state Medical Use of Cannabis  
3 Act. To that end, she presented a number of medical marijuana  
4 authorization cards. The officers challenged her assertion she was  
5 complying with the MUCA, and they began to question her about the  
6 names on the cards. At that point, she asked to speak to an attorney.  
7 Her request erected a barrier. "[A]n accused . . . having expressed  
8 his desire to deal with the police only through counsel, is not  
9 subject to further interrogation by the authorities until counsel has  
10 been made available to him, unless the accused himself initiates  
11 further communication, exchanges, or conversations with the police."  
12 *Edwards*, 451 U.S. at 484-85, 101 S.Ct. 1880. "The *Edwards* rule  
13 applies 'to interrogations, which consist of 'any words or actions on  
14 the part of the police (other than those normally attendant to arrest  
15 and custody) that the police should know are reasonably likely to  
16 elicit an incriminating response from the suspect.'" *Mickey v. Ayers*,  
17 606 F.3d 1223, 1235 (9th Cir.2010) (quoting *Rhode Island v. Innis*, 446  
18 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

20 The officers initially honored Ms. Firestack-Harvey's request to  
21 speak to an attorney. They allowed her to call her son, who is not an  
22 attorney, and they would have allowed her to call attorney. For  
23 whatever reason, she chose not to do so. The officers began searching  
24 the residence in earnest. Although the record is unclear, it appears  
25 they instructed Ms. Firestack-Harvey to remain in the living room of  
26 her residence. She complied with their instructions. From time to

1 time, officers passed through the room while she was sitting in a  
2 chair. She allegedly made statements explaining her decision to grow  
3 marijuana and the uses to which she intended to put the marijuana she  
4 grew. The United States must demonstrate she initiated the  
5 conversation and, in doing so, waived her right to counsel. *Oregon v.*  
6 *Bradshaw*, 462 U.S. 1039, 1044-45, 103 S.Ct. 2830, 77 L.Ed.2d 405  
7 (1983).

8 Given the record as it now stands, it is very difficult to  
9 determine how officers interacted with Ms. Firestack-Harvey after she  
10 asked to speak to an attorney. One of the officers who spoke to her  
11 is Stevens County Sheriff's Detective Michael D. Gilmore. He was  
12 present when Detective Erdman advised Ms. Firestack-Harvey of her  
13 *Miranda* rights. He heard her ask to speak with an attorney. At some  
14 point thereafter, he told her it appeared to him the marijuana-growing  
15 operation was a for-profit grow. He was cross-examined about his  
16 comment during the first day of the evidentiary hearing (*i.e.*, April  
17 22, 2014):

18 Mr. Niesen: And you expected that comment to elicit a  
19 response, did you not?  
20

21 Det. Gilmore: No.

22 Mr. Niesen: . . . she never responded to that?

23 Det. Gilmore: . . . I was there for a couple of hours, so  
24 there was small talk going on as we would go  
25 through; like, "How long are we going to be  
26 there? Why are you guys still here?" That

1 sort of thing.

2 . . . .

3 Det. Gilmore: And that comment would have been in response  
4 to that, to something of that nature.

5 Mr. Niesen: . . . did she respond to that comment?

6 Det. Gilmore: I don't recall her responding.

7 Mr. Niesen: And at the time you made the comment, she was  
8 still sitting in the . . . living room of the  
9 house?

10 Det. Gilmore: . . . actually, she did make the comment.

11 . . . .

12 Mr. Niesen: What did she say?

13 Det. Gilmore: She indicated that they weren't selling  
14 marijuana to anybody outside -- whatever, her  
15 immediate group was. And that they were just  
16 sending it over for -- to make food stuffs  
17 out of, to try to start up a business.

18 (Unofficial Transcript of Evidentiary Hearing at 33-34.)

19 The United States seems to concede Detective Gilmore discussed  
20 the marijuana grow with Ms. Firestack-Harvey after she asked to speak  
21 to an attorney. The United States also seems to concede Detective  
22 Gilmore told her that he thought the grow was "a for-profit grow."  
23 Detective Gilmore's comment was provocative. An objective law  
24 enforcement officer would expect a comment of that sort to elicit an  
25 incriminating response, and it did. In other words, Detective  
26

1 Gilmore's assertion that, in his opinion, the grow was "a for-profit  
2 grow" constituted interrogation. As such, his comment violated the  
3 *Edwards* rule unless the United States can show that prior to the time  
4 he made the comment, Ms. Firestack-Harvey had initiated conversation  
5 concerning the grow. The United States claims she did. According to  
6 Detective Gilmore, she asked the officers questions like "How long are  
7 you going to be here?" and "Why are you guys still here?" The Court  
8 has no reason to doubt she asked the questions attributed to her by  
9 Detective Gilmore. However, by themselves, such questions do not  
10 demonstrate she had changed her mind about speaking to an attorney.  
11 To the contrary, her questions appear to reflect mere impatience with  
12 the officers' presence in her home. Consequently, the Court concludes  
13 the comments allegedly made by Ms. Firestack-Harvey -- viz., "they  
14 weren't selling marijuana to anybody outside . . . her immediate  
15 group" and "they were just sending [marijuana] . . . to make food  
16 stuffs out of" -- must be excluded from her trial as violations of the  
17 *Edwards* rule.

#### 19 **VOLUNTARINESS**

20 Ms. Firestack-Harvey claims she was trying to comply with the  
21 state Medical Use of Cannabis Act ("MUCA"). MUCA creates exemptions  
22 from prosecution under the state Controlled Substances Act in state  
23 court. See *State v. Ellis*, --- Wn. App. ----, ----, 315 P.3d 1170,  
24 1173-74 (2014). MUCA is similar to an affirmative defense. See *id.*  
25 A person who seeks to invoke MUCA's protections must demonstrate he is  
26 complying with its requirements. Ms. Firestack-Harvey alleges she

1 made statements to the officers in an effort to comply with MUCA's  
2 terms. She claims she was effectively compelled to incriminate  
3 herself. That being the case, she argues the statements were  
4 involuntary within the meaning of the Fifth Amendment. Her argument  
5 is unpersuasive. In order to establish a Fifth Amendment violation,  
6 she must identify coercive police conduct. Coercive conduct "is a  
7 necessary predicate'" to a finding that a confession was given  
8 involuntarily. *United States v. Kelley*, 953 F.2d 562, 565 (9th  
9 Cir.1992) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct.  
10 515, 522, 93 L.Ed.2d 473 (1986)). Coercion can be blatant (e.g.,  
11 lengthy questioning, deprivation of food or sleep, or threats of  
12 physical harm) or it can be subtle (e.g., certain forms of  
13 psychological persuasion). *Id.* However, the existence of coercive  
14 police conduct is an indispensable element of a Fifth Amendment claim.  
15 To date, Ms. Firestack has failed to identify any conduct on the part  
16 of the police that could be considered coercive in the constitutional  
17 sense of the word. Thus, her involuntariness claim fails.

#### 19 **RULING**

20 The statements Ms. Firestack-Harvey allegedly made to law  
21 enforcement officers before she invoked her right to speak to an  
22 attorney were not the product of custodial interrogation. Nor were  
23 they involuntary. Consequently, they are not subject to exclusion  
24 from her trial under the Fifth Amendment. Not so the statements she  
25 allegedly made after she asked to speak to an attorney. The United  
26 States has failed to demonstrate she initiated conversation with any

1 law enforcement officer about the marijuana grow after that point.  
2 All of the statements she made about the marijuana grow after she  
3 asked to speak to an attorney -- e.g., "they weren't selling marijuana  
4 to anybody outside . . . her immediate group" and "they were just  
5 sending [marijuana] . . . to make food stuffs out of" -- must be  
6 excluded from her trial under the Fifth Amendment.

7 **IT IS HEREBY ORDERED:**

8 "[Rhonda Firestack-Harvey's] Motion to Suppress" (**ECF No. 206**) is  
9 **granted in part** and **denied in part**.

10 **IT IS SO ORDERED.** The District Court Executive is hereby  
11 directed to enter this order and furnish copies to counsel.

12 **DATED** this 29th day of April, 2014.

13  
14 s/Fred Van Sickle  
15 Fred Van Sickle  
16 Senior United States District Judge  
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