

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

RICHARD N. LABARE,

Defendant

Criminal No. 97-14-P-C

ORDER AFFIRMING IN PART AND VACATING IN PART THE
RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge having filed with the Court on September 18, 1997, with copies to counsel, his Recommended Decision on Motion to Suppress (Docket No. 36); and Defendant having filed his objection thereto on September 29, 1997 (Docket No. 37), to which objection the Government filed a response on October 17, 1997 (Docket No. 42); and this Court having reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; and this Court having made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision, and concurring with the recommendation of the United States Magistrate Judge that the Motion to Suppress be denied as to the Government's proposed testimony from the witnesses Arthur J. Mollo and William Brown, the Recommended Decision of the Magistrate Judge is in those respects hereby AFFIRMED.

A careful review of the record, however, leaves the Court persuaded that the testimony of the proposed witness Joseph Chaloux as to information he obtained from Defendant after March 11, 1997, must be suppressed as in violation of Massiah v. United States, 377 U.S. 201 (1964). The Magistrate Judge found that

Chaloux, of course, became a government agent for purposes of Massiah following his meeting with the authorities on March 11, 1997, because, like the informant in Massiah, as of that date he acted pursuant to specific instructions to gather information about the government's suspect.

Recommended Decision (Docket No. 36) at 12. My independent review of the record persuades me of the correctness of that finding.¹

The Magistrate Judge goes on, however, to conclude that,

[a]s to information gathered by Chaloux after [March 11], the defendant's bid for suppression fails, because Chaloux did nothing that could be viewed as deliberate elicitation of information from the defendant. The most Chaloux did was to ask benign follow-up questions, designed only to permit the conversations to continue in a normal manner. This does not go sufficiently 'beyond merely listening,' Kuhlmann [v. Wilson], 477 U.S. 436, 459 (1986)], to warrant suppression of the results of these conversations.

Id. (emphasis added).

¹The Magistrate Judge determined "that the burden rests with the defendant to establish a violation of the Massiah rule by a preponderance of the evidence." Recommended Decision, at 9-10. I agree with this conclusion.

I find that these conclusions by the Magistrate Judge are in error. It is clear to me, from my independent de novo review of the record in this case, that Chaloux was at the time of these post-March 11 conversations in the position of a government agent for purposes of Massiah analysis. The Magistrate Judge so agrees. The clear thrust of Massiah is to protect a defendant from "interrogation" by one who is acting as a government agent. Interrogation is the asking of questions for the purpose of eliciting incriminating information. Asking follow-up questions, however "benign" they may be, in an effort to keep the defendant engaged in an ongoing description of his criminal activity is the elicitation of incriminating evidence by the asking of those very questions; in short, it is "interrogation" for present purposes, and its admission at trial is proscribed upon timely objection.

Further, a careful review of the record indicates clearly to me that there was nothing "benign" about Chaloux's questions in this case. In several instances, Chaloux inquired directly about the existence of critical elements of Defendant's criminal activity which he was engaged in describing. As I read Massiah, any unsuspecting interrogation by a government agent is proscribed. It is not a question of weighing the seriousness of the mode of interrogation or the weight of the information obtained as the result of it in order to determine if it is proscribed. Simply put, if it is interrogation and it is conducted by a government agent, its admission in evidence is proscribed as infringing upon the defendant's right to counsel.

The Magistrate Judge erred by his determination that Chaloux's conduct did not go "sufficiently beyond mere listening . . . to warrant suppression of the results of these conversations."

(Emphasis added.)

Accordingly, I conclude that after March 11, 1997, Joseph Chaloux interrogated Defendant while acting as a government agent. All testimony from him derived from such interrogation must be suppressed, and Defendant's Motion to Suppress is, to that extent, to be granted.

The Court having determined that no further proceeding herein is necessary in the premises, it is ORDERED as follows:

- (1) The objection of the Defendant is hereby DENIED in part and GRANTED in part;
- (2) The Recommended Decision of the Magistrate Judge is hereby AFFIRMED in part and VACATED in part;
- (3) Defendant's Motion to Suppress is hereby GRANTED in part, to the extent that all testimony of Joseph Chaloux derived from conversations he had with Defendant after March 11, 1997 is hereby SUPPRESSED, and the Motion is in all other respects DENIED.

GENE CARTER
District Judge

Dated at Portland, Maine this 2d day of December, 1997.