

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

MITCHELL WALL,

Defendant

Criminal No. 00-77-P-C
Criminal No. 00-78-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Defendant Mitchell Wall moves to suppress statements that he made to a fellow inmate at the Cumberland County Jail.¹ Although Defendant initially invoked the Fifth, Sixth, and Fourteenth Amendments in support of his motions to suppress, he abandoned the Fifth and Fourteenth Amendment arguments at the beginning of the suppression hearing on these motions. Hence, this decision will address only Defendant's Sixth Amendment argument to suppress the statements. For the reasons that follow, the Court will deny Defendant's motions to suppress.

FACTS

Defendant Mitchell Wall has been indicted in two criminal cases. One case alleges that Wall knowingly and intentionally distributed cocaine, the use of which resulted in the death of Loretta Fortin. *See* Criminal No. 00-77-P-C (hereinafter the "Loretta Fortin case"). The second

¹ Defendant has filed motions to suppress in the two cases now before the Court. *See* Docket No. 14, Criminal No. 00-77-P-C; Docket No. 13, Criminal No. 00-78-P-C. The Government proposes to use the statements to prove both crimes. Defendant's motions and the Government's responses are identical in both cases, and the Court held one hearing to resolve the issues raised in the motions. This opinion will, therefore, dispose of the Sixth Amendment issue in both cases.

case charges that Wall knowingly and intentionally participated in a conspiracy to acquire and distribute Oxycodone and Oxycontin. *See* Criminal No. 00-78-P-C (hereinafter the “Oxycontin case”). Wall’s motions to suppress concern statements that he made during his detention at the Cumberland County Jail to Brian Griffin in September 2000. Griffin, a fellow inmate adjudicated in a related Oxycodone and Oxycontin conspiracy case,² was being held in the Medical Unit of the Cumberland County Jail when Wall came to the unit in early September for a physical screening. Griffin, who had not had any direct involvement with Wall prior to that date, overheard from his cell Wall’s name during the screening, and recognized it as the name of another individual charged in a related conspiracy.³ When Wall was subsequently placed in the medical unit cell next to Griffin’s, Griffin asked Wall whether he was Mitchell Wall and initiated conversation about their related conspiracy charges. Although Wall and Griffin could not see one another from their adjacent cells during this conversation, they were able to communicate through a metal grate located at the top of the wall separating their cells. During this conversation, Wall made a number of statements related to his cases. When Wall was brought into the medical unit approximately a week later, Griffin and Wall engaged in a second conversation, again through the metal grate separating their adjacent cells.⁴ During this conversation, Wall again made a number of statements

² *See* Indictment, Criminal No. 00-40-P-C (Defendant’s Exh. 2) (hereinafter “Griffin Indictment”).

³ Although Griffin testified that he recognized Wall as being charged in the same conspiracy, Wall and Griffin have been charged in different, but related, conspiracies. The judgment entered against Griffin concerns a conspiracy related to the unlawful acquisition and distribution of Oxycontin and Oxycodone in the Sanford area of Maine between July 1998 and September 1999, while the indictment against Wall charges him with involvement in a conspiracy relating to the unlawful acquisition and distribution of Oxycodone and Oxycontin in the Biddeford area of Maine between June 1999 and September 1999. *See* Griffin Indictment at 1-8; Indictment, Criminal No. 00-78-P-C (Defendant’s Exh. 7) at 1-4. Investigating Agent Bill Deetjen testified that some overlap between these two alleged conspiracies is believed to have occurred and that Griffin is one of the individuals whose activities overlapped between the two alleged conspiracies.

⁴ In between these two conversations, Wall and Griffin had a second encounter in the medical unit. This occurred a few days after the first conversation, when Wall was wheeled into the medical unit because he had complained of chest pains. As Wall passed by Griffin’s medical unit cell, they waved to one another. No conversation took place during this encounter.

It is unclear from the testimony and records exactly how many days passed between the first and second conversations between Wall and Griffin. Griffin testified that a few days passed between the first and second encounter, and that a few more days passed between the second and third encounter, when the second conversation took place.

related to his cases and asked Griffin to speak to his private investigator about Debra Leach, another individual allegedly involved in the cases. Griffin participated in this conversation by asking Wall questions about Loretta Fortin's use of cocaine on the night that she died, including whether she had injected herself with cocaine or had received injections from others in the apartment. Throughout this conversation, Griffin hastily took notes in his "jail journal."

Unbeknownst to Wall, on May 10, 2000, Griffin had signed a plea agreement with the United States Attorney's Office in which he agreed to

meet with attorneys and agents of the United States, as needed, to tell honestly and completely all that he knows or has heard about violations of federal and state laws, including but not limited to his involvement and the involvement of others in the offenses set forth in the indictment and to answer honestly and completely all related questions.

Agreement to Plead Guilty and Cooperate, Criminal No. 00-40-P-C (Gov't Exh. 1) ¶ 4. In exchange for Griffin's promise of cooperation, the United States Attorney's Office agreed to recommend a downward departure in his guideline sentence. At the plea agreement meeting, Griffin was told not to speak to any individuals involved in his case. The May 2000 agreement was not the beginning of Griffin's cooperation with the Government. Following an arrest for passing a forged prescription in September 1999, Griffin had met with Maine Drug Enforcement Agency Investigating Agent Bill Deetjen and United States Department of Health and Human Services Special Agent Eric Hafener and had agreed to cooperate in their investigation of the alleged Oxycontin/Oxycodone conspiracies. After the September 1999 meeting, Griffin had participated in a couple of buys and had made a few phone calls, all under the supervision and in the presence of Agent Deetjen. Griffin's cooperation in the fall of 1999 was sporadic, and it ended when Agent Deetjen experienced difficulties getting in contact with Griffin. Because of these communication difficulties, Griffin's cooperation ceased until the May 2000 meeting. At the

May 2000 meeting, Griffin provided Agents Deetjen and Hafener with information regarding individuals involved in the alleged conspiracies. A few days after the meeting, Griffin drove around Sanford with Agents Deetjen and Hafener in an attempt to identify the individuals he mentioned during the meeting.

Although he had been instructed by Agents Deetjen and Hafener, as well as the United States Attorney's Office, not to speak to any other individuals involved in his case, Griffin thought that the information he had learned from Wall would be helpful to him. He, therefore, tried to contact his attorney. Because he could not get in touch with his attorney, Griffin contacted Agent Deetjen and told him that he had some information about Wall but that he could not reach his attorney. Griffin did not reveal the substance of Wall's statements during this conversation. On September 15, 2000, Griffin and his attorney met with Agents Deetjen and Hafener. During that meeting, Griffin reported the details of what he had learned in his conversations with Wall. Griffin was told that he should not have engaged in the conversations with Wall and that he should not engage in any more such conversations. Subsequent to that meeting, the United States Attorney's Office filed a request with the United States Marshals Service that Griffin remain separated from other individuals charged in his conspiracy case or related conspiracy cases.⁵

Prior to their first conversation in the Cumberland County Jail Medical Unit, Griffin had not had any direct contact with Wall and the information that he possessed about Wall did not come from the Government. Griffin had learned the information from another individual, William Shrou, as well as from reading a newspaper article a couple of weeks before he first encountered Wall. Agents Deetjen and Hafener testified that they mentioned Wall's name during both the

⁵ Griffin, Agent Deetjen, and Agent Hafener testified that they understood that the United State's Attorney's Office, prior to Griffin's conversations with Wall, had filed a request to keep Griffin separated from other defendants. The parties agreed, however, that the United States Marshals Service records do not contain a separation request until after the September 15, 2000, debriefing.

September 1999 proffer meeting and the May 2000 plea agreement meeting. According to the agents' testimony, Wall's name appeared in lists of names presented to Griffin during those meetings to determine whether Griffin knew the named individuals. At the September 1999 meeting, Defendant was referred to as "Mitchell Wall" and presented amongst twenty or thirty other names; Griffin responded that he did not recognize the name. Defendant was referred to as "Mickie" during the May 2000 meeting,⁶ and Griffin stated that the name sounded familiar but that he did not know Mitchell Wall. Griffin testified that he does not recall Wall's name being mentioned during either meeting, but stated that it is possible that Wall's name was mentioned in the lists of individuals presented to him for recognition at the meetings because the agents "mentioned a lot of names and . . . went over them quickly." Transcript of Hearing on Motion for Suppression (Docket No. 21, Criminal Case No. 00-77-P-C).

DISCUSSION

The Sixth Amendment protects a defendant's choice to seek the assistance of counsel. *See Maine v. Moulton*, 474 U.S. 159, 171, 106 S. Ct. 477, 484 (1985). Under the Sixth Amendment, prosecutors and police bear "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.* Hence, the Sixth Amendment is violated through the use at trial of "evidence of [a defendant's] own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203 (1964). The use of an undercover informant instead of a police officer or other government employee to elicit incriminating statements from a defendant in the absence of counsel does not obliterate Sixth Amendment concerns; in fact, the Supreme Court has indicated that the use of an undercover informant to obtain incriminating statements may constitute an even more serious imposition on

⁶ Neither Agents Deetjen nor Hafener testified as to the number of individuals named at the May 2000 meeting.

Sixth Amendment rights because a defendant may “not even know that he was under interrogation by a government agent.” *Id.* at 206, 84 S. Ct. at 1203.

However, the use of an undercover informant to obtain incriminating statements does not automatically result in a Sixth Amendment violation. The Supreme Court has explained that a violation does not occur “whenever—by luck or happenstance—the state obtains incriminating statements from the accused after the right to counsel has attached.” *Moulton*, 474 U.S. at 176, 106 S. Ct. at 487. In order for the Sixth Amendment to require suppression of a defendant’s statements to a government informant, a defendant must demonstrate that after the attachment of his or her Sixth Amendment right to counsel, the government either “intentionally created” or “knowingly exploited” a situation in which the defendant would make incriminating statements to an informant in the absence of counsel. *Moulton*, 474 U.S. at 177, 106 S. Ct. at 488 (suppressing statement because government had violated Sixth Amendment rights through knowing exploitation of a situation); *United States v. Henry*, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189 (1980) (suppressing statement because government had violated Sixth Amendment rights through intentional creation of a situation). A defendant can establish the intentional creation of a situation by demonstrating that the informant acted as a government agent and deliberately elicited incriminating statements within the meaning of *Massiah*. *See Henry*, 447 U.S. at 270, 100 S. Ct. at 2187 (“The relevant question is whether under the facts of this case a Government agent ‘deliberately elicited’ incriminating statements from Henry within the meaning of *Massiah*.”). In the First Circuit and elsewhere, an undercover informant acts as a government agent within the meaning of *Massiah* only if the government has in some way focused his or her attention on a defendant. *See United States v. LaBare*, 191 F.3d 60, 65 (1st Cir. 1999) (adopting approach of Courts of Appeals for the Second and Eighth Circuits in holding that a “lack of governmental focus

on the defendant preclud[es] a successful *Massiah* objection to information collected by the prisoner-witness on his own”); *Moore v. United States*, 178 F.3d 994, 999 (8th Cir. 1999); *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997) (holding that informant “becomes a government agent . . . only when the informant has been instructed by the police to get information about the particular defendant”), *cert. denied*, 522 U.S. 976 (1997). *See also Henry*, 447 U.S. at 272 n.8, 100 S. Ct. at 2187 n.8 (identifying as significant fact that government’s affidavit made clear that the agent’s discussions with jailhouse informant singled out defendant as the inmate in whom the agent had a special interest). A defendant must demonstrate that the “informant and police took some action, beyond merely listening,” in order to establish the deliberate elicitation prong of a Sixth Amendment violation. *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 106 S. Ct. 2616, 2630 (1986). *See also Henry*, 474 U.S. at 271, 100 S. Ct. at 2187 (holding that informant’s testimony that he “had ‘some conversations’” with the defendant while in prison and that the defendant’s incriminatory statements “were ‘the product of this conversation’” demonstrated that informant was “not a passive listener”) . A defendant may also prevail on a Sixth Amendment motion to suppress statements made to a government informant if he demonstrates that the government knowingly exploited “an opportunity to confront the accused without counsel being present,” or that the government “must have known” of the likelihood that an informant would obtain incriminating statements from a defendant. *Moulton*, 474 U.S. at 176, 176 n.12 106 S. Ct. at 487, 487 n.12. *See also Henry*, 447 U.S. at 271, 100 S. Ct. at 2187 (reasoning that even if the court accepted the government agent’s affidavit that he did not intend the informant to take affirmative steps to obtain incriminating evidence from the defendant, “he must have known that such propinquity likely would lead to that result”).

At the time that Wall encountered Griffin in the Medical Unit of the Cumberland County Jail, Wall's Sixth Amendment right to counsel had attached. *See LaBare*, 191 F.3d at 64. However, Wall has established neither the intentional creation nor the knowing exploitation of a situation in which Griffin would likely obtain incriminating statements from him in the absence of counsel. Fatal to Wall's intentional creation claim is the Court's determination that Griffin did not serve as the Government's agent within the meaning of *Massiah*. Griffin's plea agreement with the Government did not in any way focus his attention on Wall; nor did any circumstances surrounding the execution of the plea agreement or any other interaction between Griffin and Agents Deetjen and Hafener. *See LaBare*, 191 F.3d at 64-65. While the plea agreement language emphasizing that Griffin's promise included but was "not limited to his involvement and the involvement of others in the offenses set forth in the indictment" may arguably have focused Griffin's attention on other defendants charged in his case, the plea agreement does not mention Mitchell Wall. Although Wall's name was mentioned to Griffin during the September 1999 proffer interview and the May 2000 plea agreement meeting, his name appeared amongst lists of other individuals, and the officers did not signal in any way a particular interest in Wall. By mentioning Wall's name at the meetings, the Government ran the risk of focusing Griffin's attention on Wall; however, Griffin testified that he does not remember whether Wall's name was mentioned at either of these meetings. Griffin's conduct towards Wall during Wall's stay at the Medical Unit at the Cumberland County Jail indicates that Griffin was focused on Wall. However, this focus resulted from Griffin's reading of a newspaper article that mentioned Wall in the context of the Oxcontin/Oxycodone conspiracies rather than from any action by the Government. The Court does find that Griffin did deliberately elicit incriminating statements from Wall by initiating a conversation about their related Oxycotin cases and asking questions about Loretta Fortin's use

of drugs. However, this finding alone will not lead the Court to suppress Wall's statements to Griffin. Both prongs of the intentional creation test must be established in order for the Court to suppress statements under the Sixth Amendment. As stated above, the Court does not find that Griffin acted as a government agent within the meaning of *Massiah*.

Wall has also failed to establish the Government's knowing exploitation of a situation in which Griffin was likely to obtain incriminating statements from him in the absence of his counsel. Although the Government's assertion that the United States Attorney's Office requested the segregation of Griffin from other individuals charged in the Oxycontin/Oxycodone conspiracies lacks substantiation from the records, the DEA agents involved in the investigation of this case testified that they believed that a segregation order existed and that they had no knowledge of the conversations between Griffin and Wall until Griffin contacted Agent Deetjen after the conversations. Unlike the facts in *Moulton*, in which police officers arranged to record a meeting between the defendant and an undercover informant, *see* 474 U.S. at 176-77, 106 S. Ct. at 487-88, the police officers had no knowledge that Griffin would have the opportunity to speak with Wall and made no effort to exploit the possibility. Although *Moulton* provides for the suppression of statements in situations in which officers should have known of the likelihood that a statement would result, given the officers' understanding of the existence of a segregation order and instructions to Griffin not to speak to other individuals involved in his case, the Court does not find that the Government should have known of the likelihood of a conversation between Wall and Griffin.

CONCLUSION

Because the Defendant has not demonstrated that the Government intentionally created or knowingly exploited a situation in which Wall would make statements in the absence of counsel,

the Court determines that Wall's Sixth Amendment right to counsel will not be violated by the use at trial of statements that Wall made to Brian Griffin while at the Cumberland County Jail Medical Unit in September 2000. Accordingly, the Court **ORDERS** that Wall's Motion to Suppress these statements be, and it is hereby, **DENIED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 31st day of January, 2001.

CASE #: 00-CR-77-ALL

MITCHELL WALL (1)
defendant

NEALE A. DUFFETT, ESQ.
[COR LD NTC]
CLOUTIER, BARRETT, CLOUTIER &
CONLEY
465 CONGRESS STREET
8TH FLOOR
PORTLAND, ME 04101
775-1515

U. S. Attorneys:

HELENE KAZANJIAN, ESQ.
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

CASE #: 00-CR-78-ALL

MITCHELL WALL (1)
defendant

NEALE A. DUFFETT, ESQ.
[COR LD NTC]
CLOUTIER, BARRETT, CLOUTIER &
CONLEY
465 CONGRESS STREET
8TH FLOOR
PORTLAND, ME 04101
775-1515

U. S. Attorneys:

HELENE KAZANJIAN, ESQ.
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

