UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	***Criminal No. 04-57-P-H***
	)	
LEROY MOSLEY, JR., et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

Defendants Leroy Mosley, Jr. and Gerald Beaman, each charged in a two-count indictment with conspiracy to distribute, and possess with intent to distribute, fifty grams or more of a substance containing cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count I) and possession with intent to distribute fifty grams or more of a substance containing cocaine base and aiding and abetting such conduct, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1) (Count II), and defendant Derek Rojas, charged only with the offenses described in Count II of that indictment, *see* Indictment (Docket No. 49), seek to suppress statements made and evidence seized during and following a vehicle stop in South Portland, Maine on March 15, 2004, *see* Motion To Suppress, etc. ("Mosley Motion") (Docket No. 61); Defendant Beaman's Motion To Suppress, etc. ("Beaman Motion") (Docket No. 66); Defendant Rojas' Motion To Suppress Stop of Vehicle and Statements ("Rojas Motion") (Docket No. 68). An evidentiary hearing was held before me on September 7, 2004 at which all three defendants appeared with counsel. I now recommend that the following findings of fact be adopted and that all three motions to suppress be denied.

I. Proposed Findings of Fact

On March 13, 2004 Scarborough, Maine police officer Mark Roberts informed his colleague Steven Thibodeau, a Scarborough police officer assigned as a federally deputized agent to a drug task-force unit of the United States Drug Enforcement Agency ("DEA"), that he had received a report of suspicious activity at the TownePlace Suites ("TownePlace"), a Scarborough hotel. Roberts told Thibodeau that the TownePlace night auditor had reported that there was a great deal of foot traffic late in the evening to and from a room rented to a Derek Rojas, whom the night auditor said had a vehicle with Massachusetts license plates, and that the Rojas room's occupants had not allowed hotel employees to enter to clean the room. According to Roberts, the night auditor was concerned that there might be some drug activity going on in the room. Roberts also informed Thibodeau that he (Roberts) had recently arrested a male in the parking lot of the TownePlace who was found to be in possession of crack cocaine and who had come from Rojas's room.[1]

That Monday, March 15, Thibodeau, accompanied by Ernest MacVane, III, a Windham, Maine police officer also assigned to the DEA as a federally deputized task-force agent, drove to the TownePlace to investigate further. The agents spoke with the TownePlace manager, who confirmed that the night auditor had made essentially the same report to her concerning the Rojas room. She then told the agents that the Rojas party no longer was staying there, having moved to an adjacent sister hotel, the Residence Inn, on March 8 after the TownePlace had been unable to accommodate Rojas's request for an extended stay.

[1] On cross-examination, defense counsel established, by referring Thibodeau to a report authored by Roberts, that the arrest to which Roberts had referred had been made on March 7, 2004 and that Roberts did not mention either the Towne Place or Rojas in his report. However, Thibodeau testified that he never previously had read Roberts' report. He reiterated on cross-examination that Roberts had told him that (i) the individual whom Roberts arrested had come from the TownePlace and (ii) a hotel employee told Roberts that the individual had come from Rojas's room.

She noted that a black male and two females had moved Rojas's belongings from the TownePlace to the Residence Inn.[2] She said the night auditor had described Rojas as a black male who wore glasses; she gave no description of any other individual associated with Rojas.

Thibodeau asked the manager to phone the Residence Inn to inquire if the agents could interview any of its employees. The manager did so and informed the agents that, according to "Steve," the Residence Inn manager with whom she had spoken, the individuals staying in the Rojas room were being evicted, and one of them was at the front desk at that moment. The TownePlace manager explained that, per the Residence Inn manager, the ground for the eviction was that the Residence Inn was not comfortable with the number of occupants in the room and that, in contravention of hotel policy, the person to whom the room had been rented, Rojas, was not present during the move into the room.

Thibodeau and MacVane departed the TownePlace and drove across the parking lot to the Residence Inn front entrance – a trip that MacVane estimated took about thirty seconds. Thibodeau noticed a sport-utility vehicle ("SUV") – which he observed to be a brown Nissan Xterra and which MacVane testified was tan or brown – occupied by two persons, parked with its engine running in such a manner as to straddle all of the handicap-parking spaces in front of the Residence Inn. MacVane, who was dressed in plainclothes (jeans and a t-shirt) with his badge and gun hidden from view, got out and entered the hotel lobby and pretended to wait in line.[3] He observed three individuals at the front desk: two apparent

[2] Thibodeau initially testified that he had been told that two males and a female had moved the Rojas belongings and that the move had taken place either on Saturday, March 13, or earlier the same morning that the agents arrived at TownePlace (Monday, March 15). However, when presented on cross-examination with a copy of his own report of investigation dated March 19, 2004, he agreed that his earlier testimony as to those two points was incorrect.

[3] On cross-examination, defense counsel established that Thibodeau omitted any mention of MacVane's visit to the Residence Inn lobby from his March 19 report of investigation and from a probable-cause affidavit he prepared for the court on March 15, mentioning that detail for the first time during grand-jury testimony on May 12. Nonetheless, both Thibodeau and MacVane testified at the evidentiary hearing held before me that MacVane did go into the lobby, and MacVane detailed what transpired there. I find that testimony credible.

hotel employees behind it and one apparent customer, a black male, in front of it. A woman employee was assisting the customer, who was discussing room charges, while a male employee wearing a suit and tie was standing further back behind her.

As MacVane entered, the male employee made eye contact with him, gesturing with his eyes toward the black male at the front desk. MacVane assumed the male employee was the Residence Inn manager with whom the TownePlace manager had just spoken. MacVane responded by likewise rolling his eyes toward the black male customer. The male employee nodded. The black male customer gathered his paperwork and belongings and exited the lobby. MacVane followed him out.

During the two or three minutes MacVane was inside the hotel, Thibodeau remained in his vehicle. He phoned Scarborough police dispatch and asked for a check of the SUV's Massachusetts license plates. Dispatch reported that the plates were registered to a Woburn, Massachusetts rental company for a gray newer-model Nissan Xterra. Thibodeau thought he might have been told it was a 2003 or 2004 model, but at hearing he could not recall which.[4] As Thibodeau was still on the phone with dispatch, he observed a black male leave the Residence Inn and get into the rear passenger side of the SUV. As the SUV began to pull away, MacVane exited the hotel, reentered the driver's side of the agents' vehicle and began following the SUV.

MacVane conveyed to Thibodeau the substance of what he had learned at the hotel. Thibodeau decided that the information from the hotels and from dispatch (that the plates were registered to a gray, versus brown, Xterra) justified stopping the SUV; however, inasmuch as he and MacVane were in

[4] On cross-examination, defense counsel asked Thibodeau to circle and mark his initials near the color sample in a Nissan Xterra 2004 brochure that most closely matched the color of the SUV he observed in front of the Residence Inn. He did so, and the brochure as marked was admitted without objection. *See* Dft's Exh. 3. Thibodeau circled the color "Granite KY2," an ambiguous color that one reasonably could construe either as gray or as brown. *See id*.

plainclothes and riding in an unmarked vehicle, they could not, per applicable policy, themselves effectuate the stop. Accordingly, as the agents left the Residence Inn parking lot, Thibodeau radioed Scarborough dispatch to request that a marked Scarborough police cruiser stop the SUV.

The SUV continued down Payne Road, which became Maine Mall Road at the South Portland city line. Just before the intersection of Maine Mall and Gorham roads in South Portland, about a mile beyond the Scarborough town line, two marked Scarborough police cruisers passed Thibodeau and MacVane with their blue lights flashing and stopped the SUV at the intersection. Prior to the stop, Thibodeau had been in constant contact with Scarborough dispatch as to his location and that of the SUV.

Following the stop, one uniformed Scarborough officer, Sgt. O'Malley, approached the driver's side to question the driver, while another, officer Guay, approached the passenger side.[5] Neither O'Malley nor Guay had his gun drawn. MacVane joined O'Malley in interviewing the driver, and Thibodeau asked Guay to have the rear-seat passenger step out so that he (Thibodeau) could interview him.

MacVane introduced himself to the driver, who identified himself as Derek Rojas. MacVane asked if Rojas had been smoking marijuana in the vehicle. Rojas said he had smoked some the previous night, retrieved a small, partially smoked marijuana cigarette from the SUV's center console and handed it to MacVane, who secured it in an evidence bag. MacVane then asked Rojas if the officers could search his vehicle. Rojas replied, "Go ahead."

MacVane approached the front-seat passenger, whom MacVane recalled introduced himself as "Beaman," and asked him if he would mind stepping out of the vehicle. Beaman did so. MacVane told Beaman he would like to pat him down. Beaman replied, "Go ahead," and stretched his arms out.

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[5] In the absence of testimony or other evidence regarding the spelling of O'Malley's and Guay's names, I have spelled (*continued on next page*)

MacVane felt a large bulge at Beaman's waistband and retrieved several individual packages of what appeared to be crack cocaine. MacVane then handcuffed Beaman and placed him in one of the officers' vehicles.

As this was transpiring, Thibodeau asked the back-seat passenger his name and requested some identification. The passenger said his name was Leroy Mosley and produced a Florida picture identification so indicating. Thibodeau queried what Mosley was doing in Maine, whereupon Mosley replied that he was visiting his girlfriend and that the SUV's driver was his cousin Derek Rojas. Mosley gave a name for the front-seat passenger that Thibodeau was unable to recall other than that it was not Beaman.

Guay requested that Scarborough dispatch run a check of the names of the three SUV occupants. Dispatch reported that there was a "possible warrant" out of Massachusetts for Mosley.[6]

Meanwhile, South Portland police officer Jeff Caldwell arrived at the scene with a drug-sniffing dog and offered assistance.[7] After MacVane obtained Rojas's oral consent to search the vehicle, which Rojas said he had rented from Enterprise Rental, the officers asked Caldwell to search the vehicle using the dog. Caldwell did so, after which he told Thibodeau the dog had "indicated" on a couple of spots – a laundry basket in the rear seat of the vehicle and a map pocket near a passenger seat.

Inasmuch as the scene of the stop, the Maine Mall area, was very busy – with a good deal of vehicular and foot traffic – Thibodeau and MacVane elected not to continue their search of the SUV there. Instead, they transported the three defendants and the SUV to a DEA office in Portland. MacVane

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them phonetically. No first names were supplied for either of these officers.

[6] Thibodeau explained that Mosley was reported to have a "possible warrant" because, although the initial information retrieved by dispatch indicated he did have a warrant outstanding, police must then call the agency that reported the information to verify whether it is current and correct, a process that he said takes some time.

[7] In the absence of testimony or other evidence regarding the spelling of this name, I have spelled it phonetically.

estimated that a total of five or ten minutes elapsed from the time the SUV was stopped to the time the defendants were taken to the DEA office.

At the DEA office, Thibodeau asked Rojas to sign a written consent to search the vehicle, and Rojas obliged. *See* Gov't Exh. 1. Thibodeau then searched the SUV, finding a large amount of a substance he believed to be crack cocaine in the map pocket of the rear passenger seat. He conveyed this information to MacVane. Thibodeau also learned, while at the DEA office, that the warrant for Mosley no longer was active and that the correct license plates were in fact affixed to the SUV. He verified the latter fact by retrieving and reviewing the Enterprise Rental agreement.

Thibodeau returned to Rojas and advised him of his *Miranda* rights, reading verbatim from a DEA-13A form. *See* Gov't Exh. 2.[8] Rojas indicated he understood those rights. In response to Thibodeau's questions, he denied any involvement with the crack cocaine.

MacVane separately met with Mosley. Consistent with his practice, MacVane explained to Mosley that he would pass on to the prosecutor any help Mosley might give, but that it was not up to him (MacVane) to decide whether that help would result in leniency. Mosley seemed to MacVane to understand this. MacVane then advised Mosley of his *Miranda* rights, reading verbatim from a DEA-13A form. *See id*. Mosley said he understood each right. He agreed to waive his rights and speak to MacVane.[9] Mosley told MacVane that he had been staying in Maine for about two weeks and selling crack cocaine to customers in the area. He said Rojas, his source for the crack cocaine, had supplied him

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[8] Per *Miranda v. Arizona*, 384 U.S. 436 (1966), an accused must be advised prior to custodial interrogation "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 478-79. The DEA-13A form conveys these rights. *See* Gov't Exh. 2.

[9] On cross-examination, MacVane denied that Mosley seemed "a little slow." He testified that he did not ask Mosley whether he had a mental illness. On redirect examination, he described Mosley's demeanor during questioning as very (*continued on next page*)

with a total of eight ounces (two ounces twice a week for two weeks). He identified a female who had been assisting him in selling the cocaine and agreed to make controlled purchases from her.

MacVane next separately advised Beaman of his *Miranda* rights in the same fashion. Beaman also indicated he understood those rights and agreed to speak with MacVane. However, MacVane observed that Beaman was "scared," "nervous" and "mildly resistive."[10] MacVane went back to Mosley, whom he had found to be "very cooperative," and asked him to talk to Beaman.[11] Mosley agreed, and MacVane brought him into the interview room where Beaman was being held. In the presence of MacVane and another officer, Mosley and Beaman had a conversation. Mosley explained to Beaman that he was cooperating and why – because he (Mosley) had a lot to lose given that this was a federal charge and previous charges had been filed against him. He urged Beaman to cooperate. Beaman said something to the effect that he was concerned about his reputation and did not want to be thought of as a "rat." Mosley urged him to think about himself and do what was right. MacVane returned Mosley to a separate room and resumed his interview with Beaman. At that point, Beaman told a story similar to Mosley's, naming Rojas as his cocaine source and detailing a cocaine-distribution schedule similar to the one Mosley had described. He also told MacVane that Rojas possessed an assault weapon.

II. Discussion

Mosley, Beaman and Rojas move to suppress, as "fruit of the poisonous tree," all evidence seized and statements they made to police following the assertedly unconstitutional stop of their SUV on March

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nice and pleasant and said Mosley gave no indication he was having problems understanding what was being said.

[10] MacVane testified, "He was nervous. He wanted to cooperate, he didn't know how to cooperate, he didn't know what we were looking for."

[11] On cross-examination, MacVane admitted that he told Mosley why he wanted him to speak with Beaman, but he said he could not remember the substance of that conversation. On redirect examination, MacVane said that he brought Mosley in to speak with Beaman to encourage cooperation and that he likely told Mosley, in substance, that Beaman was hesitant (*continued on next page*)

15, 2004. *See* Mosley Motion at 3-4; Beaman Motion at 4-6; Rojas Motion at [2]-[5]; *see also, e.g.*, *United States v. Kimball*, 25 F.3d 1, 5-6 (1st Cir. 1994) ("[I]f the initial stop of the vehicle was illegal, evidence seized by virtue of that stop, such as the tools in this instance, may be subject to exclusion under the 'fruit of the poisonous tree' doctrine.") (citing *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963)).[12]

In addition, counsel for Beaman affirmed at hearing that his client continues to press an alternative Fourth Amendment argument that the evidence in question should be suppressed on the basis of the allegedly illegal extraterritorial stop of the SUV in South Portland by the Scarborough police. *See* Beaman Motion at 6-7.[13]

Finally, Beaman seeks to suppress his post-arrest statements on the ground that they were coerced and, therefore, involuntary, *see id*. at 8, while Mosley seeks to suppress his post-arrest statements on the ground that his waiver of *Miranda* rights was neither voluntary, knowing nor intelligent, *see* Mosley Motion at 4-5.[14]

The government rejoins that (i) at the time of the stop, officers had probable cause to arrest the defendants or, at the least, reasonable articulable suspicion to effectuate a so-called "*Terry* stop," whereupon they quickly developed probable cause to arrest, (ii) the extraterritoriality argument fails on several grounds, among them that a state-law violation cannot support suppression pursuant to the Fourth

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and maybe he could encourage him to cooperate.

[12] At hearing, counsel for all three defendants confirmed that the government had correctly characterized them as challenging the search of the SUV solely on fruit-of-the-poisonous-tree grounds. *See* Government's Objection to Defendants' Motions To Suppress, etc. ("Objection") (Docket No. 74) at 10 n.5.

[13] In his papers, Rojas also sought suppression on the basis of the asserted extraterritorial stop. *See* Rojas Motion at [5]. However, when all three defense counsel were asked at hearing whether any of them continued to press this basis for suppression, only counsel for Beaman responded in the affirmative.

[14] At hearing, counsel for Rojas withdrew his client's arguments that (i) his statements to police were involuntary, and (ii) his waiver of *Miranda* rights was neither voluntary, knowing nor intelligent. *See* Rojas Motion at [1], [5].

Amendment, (iii) Beaman's statements were voluntary and thus are admissible, and (iv) Mosley's *Miranda* waiver was knowing, intelligent and voluntary and, thus, his statements are admissible. *See* Objection at 6-18.

I find that the government has carried its burden of demonstrating that (i) agents effectuated a proper *Terry* stop of the SUV, (ii) even assuming *arguendo* that Scarborough officers' extraterritorial stop was impermissible, such a state-law violation does not implicate Beaman's federal constitutional rights and cannot support suppression of evidence pursuant to the Fourth Amendment, (iii) Beaman's statements were voluntary, and (iv) Mosley's *Miranda* waiver was voluntary, knowing and intelligent. Accordingly, all three defendants' motions to suppress should be denied.

I address each of these bases for suppression in turn.

A. Validity of *Terry* Stop

As the First Circuit has observed:

> In *Terry v. Ohio*, [392 U.S. 1 (1968)], the Supreme Court first recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. This authority permits officers to stop and briefly detain a person for investigative purposes, and diligently pursue a means of investigation likely to confirm or dispel their suspicions quickly.

United States v. Trueber, 238 F.3d 79, 91-92 (1st Cir. 2001) (citations and internal punctuation omitted). The validity of an investigative *Terry* stop hinges on "whether the officer's actions were justified at their inception, and if so, whether the actions undertaken by the officers following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officers during the stop." *Id*. at 92 (citations and internal punctuation omitted). An "objective reasonableness standard" governs. *United States v. Moore*, 235 F.3d 700, 703 (1st Cir. 2000).

The government bears the burden of demonstrating the constitutionality of warrantless seizures and searches, including purported *Terry* stops. *See, e.g., United States v. Link*, 238 F.3d 106, 109 (1st Cir. 2001) ("Where a defendant challenges the constitutionality of a warrantless seizure undertaken on the basis of suspicion falling short of probable cause, the government bears the burden of proving that the seizure was a Terry-type investigative stop.") (citation and internal punctuation omitted).

In their memoranda of law, all three defendants argue, *inter alia*, that Thibodeau and MacVane lacked reasonable, articulable suspicion to stop the SUV inasmuch as they relied on little more than an educated guess, or a hunch, that there was a nexus between (i) the information they had gleaned regarding Rojas, and (ii) the occupants of the SUV. *See* Mosley Motion at 3-4; Beaman Motion at 4-6; Rojas Motion at [2]-[5]; *see also, e.g., United States v. Maguire*, 359 F.3d 71, 76 (1st Cir. 2004) ("To withstand scrutiny [in the context of a *Terry* stop], an officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch. In evaluating the validity of a *Terry* stop, we consider the totality of the circumstances, mindful that the concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules.") (citations and internal quotation marks omitted).

As is apparent from the defendants' memoranda, and as counsel for Beaman noted at hearing, the defendants were unaware when they filed the instant motions that MacVane purportedly had gone into the Residence Inn hotel lobby and engaged in the non-verbal exchange he described with the male hotel employee (assumedly the manager).[15] In the circumstances, all three defense counsel understandably attacked this new information, inviting the court to find unworthy of credence either (i) the testimony that

[15] Defense counsel did not suggest that the timing of their receipt of this information raised any issue other than one (*continued on next page*)

MacVane went into the lobby at all, or (ii) the testimony that the hotel employee seemingly recognized MacVane, who was dressed in jeans and a t-shirt, as a federal agent and attempted to convey meaningful information to him.

I have proposed that the court find that MacVane did enter the Residence Inn lobby and make the observations he described at hearing. MacVane reasonably inferred that (i) the male hotel employee was "Steve," the hotel manager, (ii) Steve, who had just spoken with the TownePlace manager, knew that MacVane was a law-enforcement officer despite his attire, and (iii) Steve was communicating nonverbally that the black male checking out of the hotel was either Rojas or an associate of his.

Given that (i) Thibodeau and MacVane had information suggestive that Rojas and/or his associates were engaged in drug-dealing activity (*i.e.*, the high volume of foot traffic in and out of Rojas's room, the refusal to let cleaning staff into the room, the arrest of a person found to be in possession of cocaine who was said to have come from Rojas's room), (ii) the Residence Inn employee signaled that the black male departing the inn was Rojas or one of his associates, and (iii) the SUV had Massachusetts license plates, as the TownePlace manager had said Rojas's vehicle did, the agents had sufficient reasonable, articulable suspicion to stop the vehicle for further investigation. *See, e.g.*, *Maguire*, 359 F.3d at 76 ("The first part of the [*Terry*] inquiry is satisfied if the officers can point to specific and articulable facts which, taken together with rational inferences derived from those facts, reasonably show that an investigatory stop was warranted."). Alternatively, as counsel for the government posited at oral argument, officers possessed reasonable, articulable suspicion to stop the SUV on the basis of the apparent discrepancy between the reported color of the vehicle to which the plates were registered (gray) and the color as observed by the

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of the credibility or significance of the information.

agents (brown). In Maine, attachment of false plates to a vehicle is a Class E crime. *See* 29-A M.R.S.A. § 2104(1).

The defendants do not appear to argue that once the SUV was stopped, officers' actions exceeded the scope of a permissible *Terry* stop or they lacked probable cause ultimately to effectuate the defendants' arrests. In any event, I find no fault with the officers' actions leading to those arrests. As an initial matter, I observe that the officers did not immediately swoop in and place the defendants under arrest. Officers neither drew their weapons nor immediately handcuffed the defendants. In the course of identifying the SUV occupants and running checks on them, the officers rapidly learned that (i) the SUV's driver was Rojas, (ii) Rojas admitted to having smoked a marijuana cigarette the previous evening (the remnants of which he produced), (iii) there was a possible warrant outstanding for Mosley's arrest, (iv) Beaman was carrying what appeared to be cocaine (per a consent search of his person), and (v) a drug-detection dog had alerted to the presence of drugs in two locations in the SUV (per a consent search of the SUV). By this point – which MacVane estimated was no more than ten minutes into the stop – agents had developed probable cause to arrest Mosley on the outstanding warrant, Rojas for marijuana possession in violation of 21 U.S.C. § 844(a), and Beaman for cocaine possession in violation of section 844(a).[16]

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[16] Simple possession of marijuana, a Schedule I controlled substance, *see* 21 U.S.C. § 812(c) (Sched. I)(c)(10), carries a term of imprisonment of not more than one year, a fine of a minimum of $1,000, or both, *see id*. § 844(a); *see also, e.g., United States v. Houston*, 364 F.3d 243, 249 (5th Cir. 2004) (simple possession of marijuana is a misdemeanor under federal law). In my view, agents also had probable cause to arrest Rojas for cocaine possession following the discovery of the suspected cocaine on Beaman's person, given that (i) Rojas was the driver of the SUV, (ii) agents had prior information that the hotel room was rented to Rojas and occupied by several individuals, there was high foot traffic in and out of Rojas's room and its occupants did not want cleaning staff in there, and (iii) agents had been told that an individual who was arrested and found in possession of cocaine in the hotel parking lot was said to have come from Rojas's room. *See, e.g., United States v. Carlos Cruz*, 352 F.3d 499, 510 (1st Cir. 2003) ("Constructive possession exists when a person knowingly has the power and intention at a given time to exercise dominion and control over an object either directly or through others. Constructive possession may be proved by demonstrating defendant's power and intent to exercise ownership, dominion, or control over the contraband itself, or over the area in which the contraband was concealed. Constructive possession may be sole or joint and may be achieved directly or through others.") (citations and internal quotation marks omitted).

Thus, to the extent the defendants predicate their motions to suppress on an asserted lack of reasonable, articulable suspicion to stop the SUV, the motions should be denied.

B. Extraterritoriality of Stop

Beaman next argues that evidence and statements should be suppressed as a result of the Scarborough officers' illegal extraterritorial stop of the SUV in South Portland. *See* Beaman Motion at 6-7. He acknowledges that an extraterritorial stop is valid to the extent it qualifies as a "fresh pursuit" pursuant to 30-A M.R.S.A. § 2671(2), *see id*.; however, at hearing, his counsel argued that (i) Thibodeau did not request that Scarborough officers stop the SUV until he already was in South Portland, (ii) none of the officers (including Thibodeau and MacVane) had a reasonable, articulable suspicion of criminal activity that would justify stopping the SUV, and (iii) in any event, the Scarborough officers themselves had no independent basis to effectuate the stop – they merely blindly carried out orders.

I need not consider whether the extraterritorial stop in question was permissible pursuant to 30-A M.R.S.A. § 2671(2). As the government points out, even assuming *arguendo* that it was not, such a state-law violation does not implicate a defendant's federal constitutional rights and cannot support suppression of evidence pursuant to the Fourth Amendment. *See* Objection at 14; *see also, e.g., United States v. Jones*, 185 F.3d 459, 462-63 (1st Cir. 1999) (holding that whether officer had authority to effectuate arrest under Louisiana's "de facto officer" doctrine irrelevant in context of motion to suppress evidence on Fourth Amendment grounds; observing that Supreme Court has instructed that "the admissibility of evidence [in such a case] depends on the legality of the search and seizure under *federal law*. . . . Whether the Fourth Amendment has been violated is determined solely by looking to federal law on the subject.") (citations and internal quotation marks omitted) (emphasis in original). Accordingly, Beaman's motion to suppress on this basis should be denied.

C. Voluntariness of Beaman's Statements

I turn next to Beaman's argument that his statements should be suppressed on the basis that they were elicited by coercive police activity: namely, MacVane's enlistment of Mosley's aid in encouraging Beaman to cooperate. *See* Beaman Motion at 8.

When a defendant seeks to suppress statements on the basis that they were made involuntarily, the government bears the burden of showing, based on the totality of the circumstances, that investigating agents neither "broke" nor overbore the defendant's will. *Chambers v. Florida*, 309 U.S. 227, 239-40 (1940). As this language suggests, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary[.]'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). *See also, e.g., Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) (in context of voluntariness of confession, "[t]he relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.") (citation omitted).

Neither Beaman nor the government cites caselaw considering a fact pattern such as this, *see* Beaman Motion at 8; Objection at 18, nor do I find any. At hearing counsel for Beaman posited, and I agree, that for purposes of the brief jailhouse discussion in question, Mosley can be characterized as a government, rather than a private, actor. *See, e.g., United States v. Lamb*, No. CRIM.04-49 ADM/RLE, 2004 WL 1328266, at *1 (D. Minn. June 15, 2004) ("The constraints of the Fourth and Fifth Amendments do not apply to purely private activity. Accordingly, even the most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. Only where the government controlled or encouraged the conduct at issue, such that the

private individual acted as an instrument or agent of the government, will the Constitution protect the defendant.") (citations and internal punctuation omitted); *United States v. Darling*, No. 401CR328JCHDDN, 2001 WL 1864782, at *4 -*5 (E.D. Mo. Sept. 18, 2001) ("In certain circumstances, . . . the government can exercise such control over a private actor that a 'private' action can fairly be attributed to the government for purposes of the Fifth Amendment. The test is whether in light of all the circumstances, the [individual] acted as an instrument or agent of the government. A defendant can meet this test by showing that the government exercised such coercive power or such significant encouragement that it is responsible for the[] conduct, or that the exercised powers are the exclusive prerogative of the government.") (citations and internal punctuation omitted).

In this case, Mosley encouraged Beaman to cooperate, in the presence of MacVane and another officer, only because MacVane asked him to do so. While MacVane did not tell Mosley what to say, in my view he provided significant enough encouragement that Mosley's conduct should be attributed to the government.

That fact nonetheless begins, rather than ends, the inquiry: whether, in light of all of the circumstances, Mosley's conduct (attributable to the government) broke or overbore Beaman's will. I conclude that it did not. MacVane, whom I found to be a forthright and credible witness, testified, in effect, that after hearing and affirming that he understood his *Miranda* rights, Beaman wanted to cooperate but had some concerns about doing so. There is no evidence that Beaman at any point asked to confer with counsel or with anyone else or asked that the questioning be stopped. Nor is there any evidence that Beaman was ill, under the influence, that his mental capacities otherwise were compromised, or that his relationship with Mosley was such that he was particularly susceptible to Mosley's influence.

While Mosley encouraged Beaman to cooperate – to do the right thing and not to be concerned that he would develop a reputation as a "rat" – he did not threaten Beaman or convey promises of leniency. This type of conversation, when engaged in by a law enforcement officer, has been found insufficiently coercive to overbear a suspect's will. *See, e.g.*, *United States v. McCaster*, 193 F.3d 930, 934 (8th Cir. 1999) ("The fact that the government encouraged McCaster to cooperate, and then allowed him to remain at home rather than booking him, does not establish the kind of coercive police activity that renders a confession involuntary. Tactics such as these will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. The fact that McCaster had been given the Miranda warning is another factor that weighs in favor of the finding that the statement was voluntary.") (citations omitted); *United States v. Pelton*, 835 F.2d 1067, 1073 (4th Cir. 1987) ("Agents may properly initiate discussions on cooperation, and may indicate that they will make this cooperation known. General encouragement to cooperate is far different from specific promises of leniency.") (citation omitted). Given the existence of evidence that Beaman indicated a desire to cooperate from the outset, and the lack of evidence that the overall investigation overbore Beaman's will – for example, because Beaman suffered from a mental condition or was particularly vulnerable to Mosley's suasion – I see no reason to deviate from that outcome here.

For these reasons, I recommend that Beaman's motion to suppress statements on the basis of their involuntariness be denied.

D. Validity of Mosley's *Miranda* Waiver

Mosley finally argues that his *Miranda* waiver was invalid inasmuch as he cannot read, did not know what the papers said that he signed, the interrogation lasted for more than two hours and he takes a

powerful medication that makes it difficult for him to understand what is going on around him. *See* Mosley Motion at 4-5.

The government bears the burden of proof by a preponderance of the evidence that a purported *Miranda* waiver was voluntary, knowing and intelligent. *See, e.g.*, *Connelly*, 479 U.S. at 168. A waiver is considered "voluntary" if it was "the product of a free and deliberate choice rather than intimidation, coercion and deception"; it is "knowing and intelligent" if "made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon." *United States v. Rosario-Diaz*, 202 F.3d 54, 69 (1st Cir. 2000) (citations and internal quotation marks omitted). The question whether a given waiver was voluntary, knowing and intelligent is examined with reference to "the totality of the circumstances and the facts surrounding the particular case including the background experience and conduct of the accused." *Id*. (citation and internal quotation marks omitted).

To the extent that Mosley contends that his waiver was involuntary, there is no evidence that coercion of any kind was employed to obtain it. To the extent that he contends that his waiver was neither knowing nor intelligent, there is no evidence that he is illiterate or takes medications, and MacVane denied that he appeared "slow." The testimony of MacVane that he read Mosley his *Miranda* rights aloud and that Mosley said that he understood each of them stands uncontradicted.

The government accordingly carries its burden of demonstrating that Mosley's waiver of his Miranda rights was voluntary, knowing and intelligent. Mosley's motion to suppress on this basis should be denied.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motions to suppress evidence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of September, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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