

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
v.	)	<b>Criminal No. 04-08-P-S</b>
	)	
<b>WILLARD JOHN ALLEN,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

Willard John Allen, charged with one count of 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, and one count of possessing, 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), seeks to suppress statements made and materials seized following a stop of his vehicle in Lewiston, Maine on January 4, 2004. *See* Second Superseding Indictment (“Indictment”) (Docket No. 98); Defendant’s Motion To Suppress (“Motion”) (Docket No. 74).<sup>1</sup> Evidentiary hearings were held before me on August 24 and 25 and September 8, 2004 at which the defendant appeared with counsel.

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<sup>1</sup> For sentencing purposes, the Indictment charges that with respect to Count One, Allen conspired to distribute and possess with intent to distribute at least 150 grams of cocaine base, and with respect to Count Two, he possessed with intent to distribute 201.8 grams of cocaine base and aided and abetted such conduct. *See* Indictment.

*(continued on next page)*

Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the Motion be denied.

### **I. Proposed Findings of Fact**

At approximately 9:30 a.m. on Sunday, January 4, 2004, Roland Godbout, a Maine Drug Enforcement Agency (“MDEA”) special agent, received a report from Karen Whelan, supervisor of the Lewiston-Auburn 911 Dispatch Center, regarding suspected drug trafficking in Lewiston.<sup>2</sup> Whelan told Godbout that an anonymous caller, who claimed to have provided Godbout information in the past, stated that a black male from New York known as “Curt” was selling crack cocaine (also known as cocaine base) from Room 12 of the Morningstar Inn (“Morningstar”) in Lewiston.

About an hour later Godbout and fellow MDEA agent Matt Cashman went to the Morningstar, a motel on Lisbon Street in Lewiston, to establish surveillance.<sup>3</sup> After driving through the Morningstar parking lot and identifying Room 12, Godbout parked across the street, about three or four hundred feet away, facing the doors of the motel (including the door to Room 12). At about 11:20 a.m. Godbout and Cashman observed a car pull up in front of Room 12 with its engine running. Two males exited the vehicle and knocked on the door of Room 12. The door opened, and they went inside. The agents observed that within less than ten minutes, the same two males exited the room, got back in the vehicle and began to head toward in-town Lewiston. Godbout and Cashman began following the vehicle, which accelerated to a rate of 75 to 80 miles per hour in a 45-mile-per-hour zone. The agents requested that uniformed Lewiston Police Department (“LPD”) officers effectuate a stop of the vehicle. LPD officers soon did so, identifying

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<sup>2</sup>In the absence of any evidence regarding the spelling of Whelan’s name, I have spelled it phonetically.

the driver as David Moody and the passenger as Jeff Dillingham.<sup>4</sup>

Moody was discovered to have been driving while his license was suspended and was placed under arrest. At the scene and then later at the Lewiston police station, Godbout questioned Dillingham. Dillingham initially told Godbout that he had gone to the Morningstar to visit Willard Allen in Room 16. When Godbout revealed to Dillingham that MDEA agents had observed the two men entering Room 12, Dillingham told a different story: that Moody had asked him to meet with Curt and procure some crack cocaine. Dillingham said that Moody had intended to swap a computer and a DVD player (both of which Godbout observed in the vehicle) for crack cocaine, but that Curt had claimed he had none to sell. Dillingham was searched, and approximately 3.5 grams of crack cocaine were found on his person. Dillingham said that he had bought the crack cocaine from Curt at Room 12 of the Morningstar. He told Godbout that he had known Curt for a couple of months and that Curt had lived at Dillingham's home and sold crack cocaine from there until Curt became nervous and moved to a motel to avoid police contact.

Upon finishing this interview, Godbout contacted Gregory Boucher, an agent assigned to "HIDA"—the High Intensity Drug Trafficking Area Task Force of the U.S. Drug Enforcement Administration—passed along the information he had gleaned, and requested that HIDA undertake continued surveillance of Room 12 of the Morningstar. Boucher and a fellow HIDA agent, Barry Kelly, drove to Lewiston, where they were further briefed by Godbout and Cashman. At about 3 p.m. Boucher and Kelly took over surveillance of the Morningstar from an LPD officer, positioning their unmarked vehicle in the same spot Godbout had occupied across the street from the motel. From there they had what Boucher described as "a very clean

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<sup>3</sup> In the absence of any evidence concerning the spelling of Cashman's name, I have spelled it phonetically.

<sup>4</sup> In the absence of any evidence concerning the spelling of these names, I have spelled them phonetically.

visual” of Room 12.

At about 3:10 p.m. Boucher observed a white male and a black male exit Room 12 carrying dark-colored duffel bags and place them in the back of a dark-colored Isuzu Rodeo. The men then got into the Isuzu and, with the white male at the wheel, proceeded to drive away. Boucher drove the agents’ vehicle into the motel parking lot, passing the Isuzu as it went in the opposite direction. As the cars crossed paths, their occupants exchanged glances. The Isuzu pulled out onto Route 196 heading toward in-town Lewiston, whereupon the agents turned around and began to follow it. From a distance of about two car lengths behind the Isuzu, Boucher observed the passenger looking over his shoulder and into the rearview mirror. The Isuzu then abruptly turned right onto South Lisbon Road.<sup>5</sup>

As the agents continued to follow, Boucher and Kelly saw the Isuzu driving “erratically,” sometimes exceeding the posted speed limit by ten or fifteen miles per hour, sometimes swerving and taking additional abrupt turns as both driver and passenger continued to look backward. At one point, after the Isuzu turned onto Alfred Plourde Parkway, its driver signaled he was making a right-hand turn and pulled into the right lane, then moved into the left lane, signaled he was making a left turn and turned left. It appeared to Boucher, based on his training and experience, that the Isuzu occupants were conducting what he termed a “heat run” – a deliberate attempt to avoid law-enforcement surveillance. Kelly, as well, inferred that the Isuzu was trying to lose the agents’ surveillance.

As Boucher drove, Kelly was in constant phone contact with Cashman, to whom he was relaying

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<sup>5</sup> On cross-examination, Boucher initially testified that the Isuzu accelerated to about 53 miles per hour in a 45-mile-per-hour zone as it made the turn onto South Lisbon Road. When pressed by defense counsel, he conceded that the Isuzu could not have accelerated to that speed so close to the Morningstar (about one hundred feet away) or have negotiated the turn at that speed. However, he continued to maintain that he observed the Isuzu take the corner at an unsafe rate of *(continued on next page)*

his observations. Within approximately two minutes after the agents began following the Isuzu, shortly after it made its initial turn onto South Lisbon Road, Cashman, then the lead agent in charge of the case, told Kelly that he was going to call the LPD to request that uniformed police make a felony stop.

After the Isuzu made a final turn onto Scribner Boulevard, two marked LPD cruisers – one occupied by LPD officers Raymond Roberts and Thomas Murphy and another by LPD officer Justin Kittredge – activated their flashing lights and pulled it over into the parking lot of a Jamie K’s convenience store.<sup>6</sup> Boucher estimated that the Isuzu had traveled a distance of five miles or less since leaving the Morningstar and had made a total of about five or six turns.<sup>7</sup> He had not observed the Isuzu to have run any stop signs or red lights.

Prior to joining in the chase of the Isuzu, Roberts had been told over the radio that the vehicle had been trying to evade MDEA agents, having started in one direction on a main road, switched to back roads and then pulled again onto a main road. When Roberts first spotted the Isuzu, it was traveling west on Pleasant Street, a two-lane road. He observed it make an abrupt right turn at a four-way stop sign onto Scribner Boulevard, failing to stop while continuing to travel at a rate of ten to fifteen miles per hour. Murphy likewise observed the Isuzu make a sharp right turn onto Scribner Boulevard without stopping at the stop sign.<sup>8</sup>

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speed.

<sup>6</sup> In the absence of any evidence as to the spelling of Kittredge’s name, I have spelled it phonetically.

<sup>7</sup> On cross-examination, Boucher conceded that, given the configuration of the streets in the area in which the Isuzu was traveling, its driver could have made many more turns than he did.

<sup>8</sup> Allen testified that on New Year’s Eve he had been jumped by several people outside of a bar and beaten, resulting in a fracture of his right orbital, *see* Dft’s Exh. 2 (photograph of Allen’s face, showing his eye swollen shut, taken at Cumberland County Jail on January 4, 2004), and counsel for the government stipulated at hearing that Allen was injured and treated for that injury. Allen testified that he had checked into Room 16 of the Morningstar to evade the individuals who had beaten him, and that as of January 4 his eye was swollen shut and he still was in pain. *See id.* He testified that (*continued on next page*)

After Murphy and Roberts stopped the Isuzu, Roberts exited his cruiser with gun drawn and commanded the driver over a public-address system to throw the keys out of the car, put his hands up in the air, exit, turn three hundred and sixty degrees and kneel with his back to Roberts. The driver complied.

Murphy handcuffed the driver, escorted him to Kittredge's cruiser and placed him in the back seat. Murphy rejoined Roberts, who commanded the Isuzu's passenger to exit, put his hands up in the air, rotate and kneel. The passenger complied, whereupon Murphy handcuffed him and placed him in the back of Murphy's and Roberts' cruiser.

At about the same time as this was transpiring other officers arrived at the scene, including Godbout, who had been apprised of the stop, and Timothy Morin, an LPD K-9 officer who had heard about the stop on the radio as he was going off shift and decided to stand by to offer assistance if any were needed. Morin was in uniform and had his dog with him in a clearly marked K-9 unit vehicle.

Godbout was accompanied by Dillingham's girlfriend, who had confirmed in an interview

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while at the Morningstar, he ran into Curtis Thurman, whom he knew socially through Dillingham, and told him if he needed anything to let him know. He said that on January 4 a woman named Carla, a mutual friend of Thurman's and his, asked him to give Thurman a ride downtown. He helped Thurman load bags into his Isuzu Rodeo (not knowing what was inside them) and departed to take Thurman to a laundromat. He testified that when his Isuzu crossed paths in the Morningstar parking lot with another vehicle, he glanced inside it and feared the occupants might be the people who had jumped him on New Year's Eve. Per Allen, when he saw that the vehicle was following him, he made a series of six turns, taking a route that he knew had few traffic lights, to avoid being cornered and beaten again. *See* Dft's Exh. 3 (drawing by Allen of his route from Morningstar on Lisbon Street to Jamie K's on Scribner Boulevard). However, he stated that during this approximately five- or six-mile drive, which he estimated took less than fifteen minutes, he followed the speed limit, used his blinkers and otherwise operated his vehicle lawfully. Thurman also testified at hearing, essentially corroborating Allen's testimony that Allen (i) did not know there was cocaine in one of Thurman's bags, (ii) was merely giving him a ride to a laundromat, (iii) thought the MDEA agents were the people who had beaten him up, and (iv) drove "fine," neither speeding, failing to stop at stop signs nor driving erratically, while being followed. On cross-examination of Thurman, counsel for the government established that he had received a call on the morning of January 4 tipping him off that Dillingham had been arrested and found in possession of crack cocaine. This casts serious doubt on the veracity of Allen's and Thurman's version of events on departing the Morningstar; however, even were I to credit their testimony that Allen thought the MDEA agents were the people who had beaten him up, I still would find incredible Allen's and Thurman's testimony that Allen operated his vehicle lawfully while he was, by his own admission, seeking to evade the people who were following him.

subsequent to Dillingham's arrest that she had observed Curt selling drugs from Dillingham's apartment. She had agreed to accompany Godbout to the scene of the stop to identify Curt. Upon arrival at Jamie K's Godbout observed a black male in the parking lot whom Dillingham's girlfriend identified as Curt (and whom officers identified at the scene as Curtis Thurman), and saw a man he recognized from prior routine patrol dealings as Willard Allen sitting handcuffed in the back of one of the marked LPD cruisers.<sup>9</sup>

Godbout, together with Kelly, went to the cruiser in which Allen was sitting. Godbout read Allen his *Miranda* rights verbatim from a card that he carried with him. *See* Gov't Exh. 1.<sup>10</sup> Allen was fidgety – rocking and moving – and appeared to Godbout to be nervous and anxious; however, he also seemed to Godbout and Kelly to understand what Godbout was saying. As Godbout read each right, Allen indicated by speaking and nodding that he understood it.<sup>11</sup> He agreed to speak with the agents. Godbout and Kelly observed that Allen answered questions appropriately and did not appear to be confused.<sup>12</sup>

Kelly asked Allen if there were any drugs in the Isuzu. Allen said that he did not have any drugs but that if there were any, they would be located in the duffel bags in the rear of the vehicle. Allen further

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<sup>9</sup> Defense counsel established on cross-examination that, to the best of Godbout's recollection, none of his previous encounters with Allen had involved drugs, and Godbout had not heard during the three years he had been assigned to the MDEA that Allen was involved with drugs.

<sup>10</sup> 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 form used by Godbout conveys these rights. *See* Gov't Exh. 1.

<sup>11</sup> Allen testified that during the reading of *Miranda*, and throughout the whole process of the January 4 encounter with law enforcement, he was scared because of the nature of the felony stop (given that guns and laser lights had been pointed at him), in pain because of the injuries to his face, and edgy because he had not taken prescribed psychotropic medications that help keep him calm. However, he stated on direct examination that he understood what was going on, and agreed on cross-examination that, as a result of numerous prior dealings with law enforcement, he understood what *Miranda* rights were, and there was nothing confusing about the way Kelly delivered his *Miranda* rights on the evening in question.

<sup>12</sup> Allen testified that upon being read his *Miranda* rights he asked for an attorney, and either Godbout or Kelly told him no attorney was available because it was Sunday. Kelly denied that Allen requested an attorney or that Kelly told him that one was not available. I find that denial credible.

commented that drugs, if any, would not be in his duffel bag but that of Curtis Thurman. Because there were several duffel bags in the back of the Isuzu, Kelly asked Allen if he would step out of the vehicle and point out Thurman's bag. Godbout and Kelly then walked Allen over to the car. Kelly asked Allen why he thought that, if there were any drugs, they would be in that bag. Allen responded that, at the Morningstar, Thurman had not allowed him to touch a certain bag. When the three reached the rear of the vehicle Allen, who was still handcuffed, pointed with a head shrug to a black duffel bag, saying, "That bag right there." Godbout and Kelly walked Allen back to the cruiser and asked for his consent to search the vehicle. Allen responded, "Yeah, go ahead, I've got nothing to hide."<sup>13</sup> Godbout told Morin that Allen had consented to a search and requested that Morin search the vehicle with his drug-detection dog.<sup>14</sup>

Morin got his dog out of his vehicle and commanded him to search for drugs. The dog alerted to the possible presence of drugs in the duffel bags in the rear of the vehicle. Godbout searched the bag that Allen had earlier pointed out and found multiple packages of a substance he recognized as cocaine base. Inside the bag was a receipt from the Morningstar bearing Curtis Thurman's name. Godbout advised other agents and officers of this find.

Murphy, Roberts and Kittredge transported Allen and Thurman in separate cruisers to the Lewiston

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<sup>13</sup> Allen described the consent-to-search discussion quite differently, testifying that Godbout and Kelly told him that the dog had already hit on a couple of spots in his vehicle, that they wanted his permission to do a search and that if he did not give that permission he could be charged with obstruction of justice, whereupon, feeling intimidated, he replied, "Whatever." He testified that the statement, "Whatever," was meant to show defiance and that he never consented to the vehicle search. Thurman testified that he observed the dog searching the vehicle within approximately five to seven minutes after the stop took place, which defense counsel argued militated in favor of a finding that the dog search took place prior to the obtaining of Allen's consent. However, given the credible testimony of Godbout, Kelly and Morin that the K-9 search took place after Allen had given consent to search, and Godbout's and Kelly's credible denials that they threatened to charge Allen with obstruction of justice or that his response to the request to search was, "Whatever," I decline to credit Allen's version of this conversation.

<sup>14</sup> At hearing, defense counsel stipulated to the qualifications of Morin and his dog. Morin testified that Godbout told him that he had obtained consent to search the vehicle, stating, "I make sure of that before I do anything."

police station. At about 4:45 p.m. Kelly again interviewed Allen in a room at the station. Kelly reminded Allen that his *Miranda* rights still were applicable and that he could stop answering questions at any time. Allen said that he understood his rights and that he still wanted to speak to agents. He proceeded to make statements he now seeks to suppress, among them that when he and Thurman spotted the agents at the Morningstar, they thought they might be police, that Thurman instructed Allen to lose them, and that Thurman told him to stop or slow down and dump a duffel bag but then decided against it.<sup>15</sup>

## II. Discussion

In his motion, Allen articulates three bases for suppression of statements made and materials seized as a result of the stop, search and arrest on January 4, 2004: (i) that he was arrested without probable cause, (ii) that he did not consent to the search of his vehicle, and (iii) that he did not make a knowing, intelligent and voluntary waiver of his *Miranda* rights. *See* Motion at [2]-[4].<sup>16</sup> In a multi-tiered rejoinder, the government counters that:

1. Agents had probable cause to stop and arrest Allen. *See* Government's Objection to Defendant's Motion To Suppress ("Objection") (Docket No. 83) at 6-7. Therefore, the search of Allen, his vehicle and containers within the vehicle (including Thurman's duffel bags) was lawfully performed incident to a valid arrest. *See id.* at 7.

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<sup>15</sup> Allen testified that during this interview Kelly told him that it would greatly help him if he were to say that Thurman asked him to stop or slow down and throw out a bag, whereupon Allen protested, "What am I supposed to do? Lie to you?" I do not find this testimony credible.

<sup>16</sup> In his brief, Allen does not expressly state that he challenges the validity of his *Miranda* waiver. *See* Motion at [4] ("In order to relinquish a right voluntarily, the choice must be deliberate and freely made absent intimidation, coercion or deception. When official coercive conduct is apparent, a defendant's mental condition may be a significant factor in the voluntariness calculus.") (citations omitted). However, he relies for these propositions on citation to *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), *see id.*, which concerns the validity of a waiver of *Miranda* rights. *See Connelly*, 479 U.S. at 169-70.

2. In any event, Allen voluntarily consented to a search of his vehicle (including containers therein). *See id.* at 7-9. To the extent his consent to search cannot reasonably be construed to have encompassed the duffel bag in which cocaine was found, he has no standing to object to that search, having disavowed ownership in the bag. *See id.* at 9-10.

3. In any event, agents had probable cause to search the vehicle and any containers therein for the presence of contraband. *See id.* at 10-12.

4. In any event, to the extent agents lacked probable cause to pull the vehicle over, they possessed at the least sufficient reason to effectuate a brief investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). *See id.* at 12-13.<sup>17</sup>

5. Allen's post-arrest statements are admissible inasmuch as he made a voluntary, knowing and intelligent waiver of his *Miranda* rights. *See id.* at 14-16.

I find that (i) officers had probable cause to arrest Allen for driving to endanger, in violation of 29-A M.R.S.A. § 2413, as of the time his Isuzu was stopped, (ii) the Isuzu and its contents were validly searched incident to a lawful arrest or, alternatively, based on probable cause to suspect that the vehicle contained contraband, and (iii) Allen knowingly, intelligently and voluntarily waived his *Miranda* rights. I therefore do not consider the additional bases on which the government seeks to justify the arrest of Allen and the search of his vehicle.

### **A. Arrest and Search**

As an initial matter, the government posits that agents validly stopped Allen's Isuzu and effectuated

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<sup>17</sup> At hearing, counsel for the government elaborated on this point, contending that, even assuming *arguendo* that officers lacked probable cause to arrest Allen at the outset of the stop, they had probable cause to arrest Thurman and (*continued on next page*)

his arrest inasmuch as, based on personal observation, they had probable cause to believe that he had committed a crime, namely driving to endanger in violation of 29-A M.R.S.A. § 2413. *See id.* at 6-7.<sup>18</sup> For purposes of this discussion I assume *arguendo* that Allen was subject to either an official or a *de facto* arrest immediately upon exiting from his vehicle.

When a defendant challenges a warrantless arrest for lack of probable cause, a court must scrutinize the “totality of the circumstances,” with “the government bear[ing] the burden of establishing that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a reasonable person in believing that the individual had committed or was committing a crime.” *United States v. Reyes*, 225 F.3d 71, 75 (1st Cir. 2000) (citations omitted). “[T]hough probable cause requires more than mere suspicion, it does not require the same quantum of proof as is needed to convict.” *Logue v. Dore*, 103 F.3d 1040, 1044 (1st Cir. 1997).

Pursuant to Maine law, “[a] person commits a Class E crime if, with criminal negligence as defined in Title 17-A, that person drives a motor vehicle in any place in a manner that endangers the property of another or a person, including the operator or passenger in the motor vehicle being driven.” 29-A M.R.S.A. § 2413 (footnote omitted). “Criminal negligence,” in turn, is defined as follows:

- A. A person acts with criminal negligence with respect to a result of his conduct when he fails to be aware of a risk that his conduct will cause such a result.

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therefore the precautions taken with respect to Allen were reasonable. I need not reach this argument.

<sup>18</sup> As defense counsel noted at hearing, speeding (unless excessive) and failing to stop at a stop sign are civil infractions, not crimes. *See State v. Berube*, 669 A.2d 170, 171 (Me. 1995) (“Speeding is a civil offense unless the vehicle exceeds the speed limit by 30 miles an hour or more.”); 29-A M.R.S.A. § 2074(3) (“A person commits a Class E crime if that person operates a motor vehicle at a speed that exceeds the maximum rate of speed by 30 miles per hour or more.”); 29-A M.R.S.A. § 2057(7) & (10) (criminalizing failure to yield that results in collision; not criminalizing simple failure to stop at stop sign).

**B.** A person acts with criminal negligence with respect to attendant circumstances when he fails to be aware of a risk that such circumstances exist.

**C.** For purposes of this subsection, the failure to be aware of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to him, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

17-A M.R.S.A. § 35(4); *see also, e.g., State v. Tempesta*, 617 A.2d 566, 567 (Me. 1992) (“Like civil negligence, criminal negligence is defined in terms of unreasonable risk created by the actor’s conduct when judged objectively. In order to find criminal negligence, however, a fact-finder must determine not only that the defendant lacked ordinary care or that he failed to provide against the ordinary occurrences of life, but also that his conduct manifested a higher degree of carelessness, going beyond the civil definition of negligence.”) (citations and internal quotation marks omitted).

At hearing, defense counsel posited that Allen’s conduct could not reasonably have been believed to involve the requisite gross deviation from the ordinary standard of care. I am unpersuaded. As defense counsel suggested at hearing, and inasmuch as appears from my own research, the Law Court has thrice had occasion to consider whether conduct amounted to criminally negligent driving to endanger. *See State v. Haven*, 791 A.2d 938, 939-40 (Me. 2002) (evidence sufficient to support defendant’s conviction for operating a watercraft to endanger when, while operating a large power boat with a powerful engine on a very crowded lake in fair weather, “he unnecessarily accelerated his boat in such a manner to cause the bow to rise out of the water and create a blind spot[,]” after which he struck a brightly colored paddle boat that should have been clearly visible even before he started his boat); *Tempesta*, 617 A.2d at 567-68 (evidence was insufficient to establish that driver who traveled in left-hand lane of slushy two-lane road, as a result of which he splattered windshields of oncoming traffic, was criminally negligent when he was driving at speed

limit and reasonably believed he could not safely pull into right lane because a car was in his blind spot); *State v. Davis*, 398 A.2d 1218, 1220 (Me. 1979) (conviction for driving to endanger set aside, and case remanded for further proceedings, when conviction appeared to be based solely on driver’s choice to drive over a bridge that was unsuitable and dangerous for vehicles, and it was not clear that trial justice had “taken into account . . . why defendant was in the dangerous place and the extent to which, once there, defendant sought to avoid allowing the risks of danger to materialize.”).

On the facts as I have proposed they be found, agents reasonably could have believed that Allen was driving to endanger – that is, engaging in conduct more akin to that described in *Haven* than that at issue in *Tempesta* and *Davis*.

As an initial matter, agents and LPD officers observed the Isuzu traveling erratically: sometimes exceeding the posted speed limit by ten or fifteen miles per hour, sometimes swerving and taking abrupt turns as both driver and passenger continued to look backward, failing to heed a stop sign and, on one occasion, pulling into a right-hand lane and then abruptly switching to a left-hand lane. While there is no evidence that anyone was hurt or any property damaged as a result of these maneuvers, one cannot seriously question that Allen was operating the Isuzu in such a manner as to endanger property and/or persons.<sup>19</sup>

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<sup>19</sup> While there is no case on point in Maine, I take comfort that courts in other jurisdictions have found erratic or evasive driving sufficient to constitute driving to endanger. *See, e.g., Commonwealth v. Poillucci*, 705 N.E.2d 626, 630 (Mass. App. Ct. 1999) (“Viewing the evidence in the light most favorable to the Commonwealth – the defendant was speeding and weaving in and out of traffic, and he ran through a stop sign and drove on an island’s curb – there are facts enough to withstand a motion for a required finding on the driving to endanger charge.”); *Travis v. Commonwealth*, 457 S.E.2d 420, 423 (Va. Ct. App. 1995) (“Because appellant was weaving within his own lane and into the other lane, the circumstances support a finding that his driving ‘of itself . . . endanger[ed] the life, limb, or property of another.’”) (citing Va. Code Ann. § 46.2-357(B)(2)).

What is more, a reasonable officer in the agents' shoes readily could have concluded that the Isuzu's reckless operation was predicated solely on a desire to avoid law-enforcement apprehension, given (i) the tip that a black male, Curt, was dealing cocaine from Room 12 of the Morningstar, (ii) the arrest of one of his customers, who was found in possession of crack cocaine after he had been observed departing Room 12 and who eventually stated that the cocaine had come from Curt, (iii) the observation that a black male and a white male had exited Room 12 with duffel bags that they placed in the rear of the Isuzu, (iv) the exchange of glances in the Morningstar parking lot between agents in the unmarked vehicle and the occupants of the Isuzu, and (v) the nearly immediate commencement of erratic driving, with both driver and passenger looking backward over their shoulders.

Unlike the defendant in *Tempesta*, who had remained in the left-hand lane for safety reasons, or the defendant in *Davis*, whose motives in traversing the dangerous bridge and manner of crossing it were not taken into consideration, Allen reasonably could have been inferred to have been carelessly exposing people and property to danger simply to evade law enforcement. Such conduct would involve a deviation from the standard of care as great, if not greater, than that in issue in *Tempesta*, in which, for no apparent reason, the defendant carelessly neglected to take a good look in front of him and gunned his boat forward in a crowded lake.

Inasmuch as law-enforcement officers had probable cause to believe that Allen was committing the crime of driving to endanger in violation of 29-A M.R.S.A. § 2413, they properly stopped the Isuzu and effectuated his arrest.<sup>20</sup>

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<sup>20</sup> At hearing, defense counsel argued that it was significant, for purposes of probable-cause analysis, that Cashman made the decision to effectuate the felony stop shortly after the Isuzu pulled out of the Morningstar, when Boucher and Kelly (*continued on next page*)

This, in turn, is dispositive of Allen’s challenge to the search of his vehicle and its contents. As the government notes, *see* Objection at 7, officers may validly search a suspect’s person and vehicle incident to a lawful arrest, *see, e.g., United States v. Fiasconaro*, 315 F.3d 28, 37 (1st Cir. 2003) (“It is also well established that the defendant’s lawful arrest permits the police to search his person and the passenger compartment of his vehicle.”); *United States v. Infante-Ruiz*, 13 F.3d 498, 502 n.1 (1st Cir. 1994) (“[W]hen a police officer makes a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the car’s passenger compartment and any containers found within it. The ‘passenger compartment’ has been interpreted to mean those areas reachable without exiting the vehicle and without dismantling door panels or other parts of the car.”) (citations and internal quotation marks omitted).

In any event, as the government alternatively argues, *see* Objection at 10-12, agents had at least one other legitimate basis to search the Isuzu and its contents inasmuch as they had probable cause to believe the vehicle contained contraband. The Supreme Court has defined probable cause for a search as “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). As the First Circuit recently observed:

A warrantless search of an automobile will be upheld if officers have probable cause to believe that the vehicle contains contraband.

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had observed only the first of the turns Allen took (with respect to which Boucher conceded he had overestimated the Isuzu’s speed). However, the point at which the agents subjectively decided they had probable cause is immaterial; what matters is whether, from an objective standpoint, they had probable cause to effectuate the arrest as of the time it was made. *See, e.g., United States v. Garner*, 338 F.3d 78, 80 (1st Cir. 2003) (“Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time and not on the officer’s actual state of mind at the time the challenged action was taken.”) (citation and internal punctuation omitted); *United States v. Link*, 238 F.3d 106, 109 (1st Cir. 2001) (“Probable cause exists if, at the time of the arrest, the collective knowledge of the officers involved was sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense.”) (citation and internal quotation marks omitted).

The government bears the burden of proving the lawfulness of the search. Specifically, the government must demonstrate that law enforcement officers had a belief, reasonably arising out of circumstances known to the seizing officer, that the vehicle contained that which by law is subject to seizure and destruction. Our focus is on what the agents knew at the time they searched the car.

*United States v. Lopez*, No. 03-1767, slip op. at 6-7 (1st Cir. Aug. 19, 2004) (citations, internal punctuation and footnote omitted).

In this case, Godbout received an anonymous tip that a black male named Curt was selling cocaine from Room 12 of the Morningstar. Through surveillance, which led to the arrest and interview of Dillingham and the interview of his girlfriend, Godbout was able to corroborate the tip in its entirety. Most significantly, he discovered crack cocaine on the person of Dillingham, who had been observed departing Room 12 and eventually confessed that Curt was his source. This information, in turn, was passed on to Boucher and Kelly.

Boucher and Kelly then observed a black male and a white male exit Room 12 with duffel bags that they placed in the Isuzu, glance at them as the cars crossed paths in the Morningstar parking lot, depart the lot and immediately begin what agents perceived as evasive maneuvers. Under all of the circumstances, the agents reasonably could have believed that the black male was Curt and that the driver of the Isuzu was trying to lose them precisely because the vehicle contained contraband, namely cocaine or cocaine base. *See, e.g., Gates*, 462 U.S. at 244-45 (“It is enough, for purposes of assessing probable cause, that corroboration through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay.”) (citation and internal punctuation omitted).

When Godbout arrived at the scene of the stop within moments after it had been effectuated,

Dillingham's girlfriend positively identified the black male she saw in the Jamie K's parking lot as Curt. Under all of the circumstances, Godbout had probable cause, prior to requesting that the K-9 officer perform a search of the Isuzu, to believe that the vehicle contained cocaine or cocaine base.

Inasmuch as I conclude that Allen's arrest and the search of his vehicle and its contents were lawful, his motion to suppress on these bases should be denied.

## **B. Validity of *Miranda* Waiver**

Allen also contests the validity of his waiver of his *Miranda* rights. *See* Motion at [4]. 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).

### **1. Voluntary**

As the First Circuit has noted, while mental history or state is pertinent to a voluntariness inquiry, "the precedents still require some degree of coercion or trickery by government agents to render a statement involuntary." *United States v. Santos*, 131 F.3d 16, 19 (1st Cir. 1997); *see also, e.g., Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) ("A confession or other admission is not deemed coerced or

involuntary merely because it would not have been made had the defendant not been mentally defective or deranged. The relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.”) (citation omitted).

The only evidence of arguably coercive *Miranda*-waiver tactics adduced at hearing was Allen’s testimony that he asked for an attorney, whereupon either Kelly or Godbout told him that no attorney was available because it was Sunday. In the face of Kelly’s denial that any such conversation transpired, I found Allen’s testimony regarding that point not to be credible and have recommended that the court so find. In short, there is no credible evidence that coercive tactics were employed to obtain Allen’s waiver of his *Miranda* rights.

## **2. Knowing and Intelligent**

There is no dispute that Allen was suffering from a facial injury during the stop of Isuzu on January 4, 2004. He also testified that he remained in pain from that injury and that he had not taken prescribed psychotropic medications that calm him – testimony that was consistent with officers’ observations that he appeared fidgety, nervous and was rocking back and forth during the time *Miranda* warnings were administered.

Nonetheless, the fact that a suspect happens to be in a weakened mental state does not necessarily mean that he or she is incapacitated from making a knowing and intelligent waiver. *See, e.g., United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002) (“Medical records indicating that a suspect had been given narcotics, with no supporting evidence as to the effects of those narcotics (on the individual or even in general) are not sufficient to render a waiver of *Miranda* rights unknowing or unintelligent. Were we to find Cristobal’s waiver not knowing and intelligent based on these facts and with no evidence of the effects of

the medication on him, we would essentially be stating that whenever a defendant can show that he was given medication, his *Miranda* waiver was *per se* ineffective. This is a step we are quite unwilling to take.’) (footnote omitted); *Matney v. Battles*, 26 Fed. Appx. 541, 544 (7th Cir. 2001) (given that defendant was familiar with criminal justice system, appeared in taped interview to be responsive and speaking clearly and seemed unimpaired to officers, lower court did not err in finding he intelligently waived *Miranda* rights despite his assertion that combination of low IQ, intoxication and past organic brain injury prevented him from understanding those rights).

Kelly and Boucher testified that Allen was read each of his rights and indicated by nodding and speaking that he understood them, that his responses to questions were appropriate and that he did not appear confused. Allen himself admitted that, as a result of prior encounters with police, he was familiar with *Miranda*, that there was nothing confusing about the manner in which Kelly advised him of his rights on the evening in question, and that he understood what was going on.

I therefore recommend that the court find Allen’s waiver of his *Miranda* rights to have been voluntary, knowing and intelligent and deny his motion to suppress his statements on this basis.

### **III. Conclusion**

For the foregoing reasons, I recommend that the defendant’s motion 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, within ten (10) days after being served with a copy thereof. A responsive memorandum 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 20th day of September, 2004.

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

**Defendant(s)**

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