

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
v. ) Crim. No. 04-11-B-W  
)  
ALTON SHERMAN )  
RICHARD RODRIGUE )  
)  
Defendants )

**RECOMMENDED DECISION ON MOTIONS  
TO SUPPRESS**

Alton Sherman and Richard Rodrigue have each filed a motion to suppress evidence seized as the result of the execution of a state search warrant at a camp located at Knight's Landing in Brownville, Maine. (Docket Nos. 25 & 26.) Each defendant raises the identical two grounds for suppression, complaining first that the affidavit in support of the warrant does not contain specific facts sufficient to support a probable cause finding and second that the officers failed to execute the warrant properly in accordance with the "knock and announce" rule. I now recommend that the court adopt the following proposed findings of fact and **DENY** the motions to suppress even though the officers technically violated the knock and announce rule.

**A. Probable Cause to Search**

The facts underlying probable cause for the issuance of the state court search warrant are set forth in paragraphs A-O of the June 10, 2002, affidavit of Guy E. Dow, Deputy Sheriff for the Piscataquis County Sheriff's Department. (Gov't. Ex. # 1.) Both defendants argue the Dow affidavit fails to establish the necessary nexus between the criminal activity, marijuana cultivation, and the Knight's Landing residence. I am

satisfied under the deferential standard of review set forth in Illinois v. Gates, 462 U.S. 213, 238 (1983), that the issuing magistrate properly found a fair probability that contraband or evidence of a crime would be found inside the camp, given that on two occasions instrumentalities of a crime were observed parked adjacent to the place to be searched.

On May 24, 2002, Deputy Dow learned that a Maine drug enforcement agent had seen a large Ryder truck on a logging road in an isolated area of Piscataquis County. The next day another law enforcement officer followed the truck's tire tracks to the end of the logging road where he located a large deposit of Pro-Mix potting soil near an old railroad bed. On May 27 the first officer found another large deposit of soil in the same general area. On May 29 the second officer flew over the area and observed a "large grow area" and a red car parked at the end of the road. Later that same afternoon the officer was dropped off near where the logging road intersected the old railroad bed. He then observed a similar red car coming out of the logging road. When he checked the registration plates on the red car he discovered that they belonged, according to the Department of Motor Vehicles, to an expired registration on a white Caprice automobile.

The next day the officer went to the site of the potting soil and took photos of the Pro-Mix. He also went to the "large grow area" where he had first seen the red car from the air. There was Pro-Mix potting soil spread out on the ground and approximately 100 marijuana plants growing in containers. At the "large grow area" they also noticed a white Polaris ATV and discovered a beaten ATV path from the grow site to where the Pro-Mix had originally been stored. On June 1 a law enforcement officer located a maroon Subaru on a gravel road "about 5 miles from the RR bed and the road where the

ATV, Garden intersects." This car was identified as the previously described "red car." It was found to contain loose potting soil in the rear portion of the vehicle and it had two flat front tires. By running the VIN through the Department of Motor Vehicles, the officers learned that the maroon Subaru with that VIN was registered to David Smith of Edgecomb, Maine.

Between June 3 and June 7 the officers continued sporadic surveillance of the area. On June 3 the marijuana had not yet been transplanted from its containers, but the officers observed that the white Polaris ATV had been moved. Using the engine serial number they learned that it was originally sold to an individual in Whitefield, Maine. On June 4 the maroon Subaru was still there but the registration plate had been removed. On June 6 the maroon Subaru was still there but both front tires had been replaced, although there was still no registration on the vehicle. The same day the officers went to the potting soil location and observed that the quantity of soil had been substantially reduced. As they were leaving this area they met a small black vehicle heading into the area, bearing registration plates GTOCRUZ, the registration for a black truck registered to Richard Rodrigue. An officer left in the area observed the small black vehicle come back out of the area loaded with Pro-Mix potting soil. The officers were unable to follow the vehicle, so they chose to go to the grow site where they discovered that the ATV was gone and that the marijuana plants had not yet been transplanted.

Finally on June 7 law enforcements officers returned to the grow site and discovered the marijuana had been transplanted. They confiscated 85 plants and some Pro-Mix, confirming that the lot numbers on the bags of Pro-Mix matched the lot numbers of the potting soil at the site of the first potting soil "depo." A local police

officer informed the officers that he had observed (at an unknown time) a black Volkswagen and a white Polaris ATV parked at a camp at Knight's Landing. On June 10 Deputy Dow went to Knight's Landing and saw the black vehicle with the GTOCRUZ plates and a white Polaris ATV (similar to the one seen at the marijuana grow site) parked behind this camp. Armed with this information, Deputy Dow obtained the search warrant.

Sherman and Rodrigue argue that the best case presented by the Government establishes only a nexus between the two vehicles and the marijuana cultivation operation. The Government says that because those two vehicles were seen parked adjacent to this camp on two separate occasions, there was a sufficient nexus between the camp and the marijuana growing operation, giving rise to probable cause to search the camp.

With regard to the "nexus" element, the task of a magistrate in determining whether probable cause exists is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is 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). In order to establish probable cause, the facts presented to the magistrate need only "warrant a man of reasonable caution" to believe that evidence of a crime will be found. Texas v. Brown, 460 U.S. 730, 742, (1983) (plurality opinion). The probable cause standard "does not demand showing that such a belief be correct or more likely true than false."

United States v. Feliz, 182 F.3d 82, 86 (1st Cir. 1999).

The question of probable cause to search the camp on these facts may well be a close call. However, "in a doubtful or marginal case, the court defers to the issuing magistrate's determination of probable cause." United States v. Barnard, 299 F.3d 90, 93 (1st Cir. 2002). This case is such a one and I believe it is appropriate to defer to the

issuing magistrate's "common-sense" conclusion. United States v. Zayas-Diaz, 95 F.3d 105, 111 (1st Cir. 1996).<sup>1</sup>

## **B. Execution of the Search Warrant – the Knock and Announce Rule**

### *1. The findings of fact*

My findings of fact regarding the execution of this warrant are succinctly stated in Government Exhibit #2, the police report prepared by Guy Dow following the execution of the warrant. Dow related that he went to the Knight's Landing camp with representatives of the Piscataquis County Sheriff's Office, the Milo police and the Brownville police at 9:15 a.m. on June 11, 2002, for the purpose of executing the search warrant. According to Dow, "I knocked on the door to the camp and opened it. I entered the camp and shouted 'Sheriff's Office, Search Warrant!'" His testimony at the suppression hearing essentially restated those facts, with one modification regarding the timing and identification of the person making the initial announcement. Dow continued to maintain that he himself made his announcement once he had opened the door and entered the residence.

Deputy Dow and Lt. Robert Young of the Sheriff's Department testified that the night prior to the suppression hearing in front of me they met together and discussed the case. Lt. Young testified that as a result of Dow refreshing his recollection he now remembers that before entry was made into the camp, Dow knocked at the door and then Chief Lyford of the Milo Police Department announced, "Piscataquis County Sheriff's Office, Search Warrant" and then after a 5 to 7 second pause, Dow and the Chief entered the camp followed by Young. Young testified that he remembered these events now, two

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<sup>1</sup> In any event the Government has argued the good-faith exception as set forth in United States v. Diehl, 276 F.3d 32, 42 (1st Cir. 2002). I do not reach the applicability of that exception to these facts because I find that there was probable cause under the deferential standard of review.

years later, because when Dow reminded him of the procedure, he then recalled that he had found it extraordinarily unusual at the time for the Chief to be announcing on behalf of the Sheriff's Department. However, he had apparently forgotten that fact until reminded of it by Dow. In his June 2002 police report Young reported the following on this issue: "Upon arrival we knocked on the door, stated that we were the Sheriff's Office and had a search warrant, waited several seconds and then opened the door." (Gov't. Ex. No. 3) (emphasis added).

Chief Lyford also testified at the suppression hearing in front of me. He confirmed that he was present at the scene to assist with the execution of the search warrant. He also recalled that Guy Dow and he were the first two officers into the camp and that Young was somewhere immediately behind them. He recalled specifically that Guy Dow opened the door. The Chief recalled that someone announced, "sheriff's department, search warrant," five to seven seconds prior to the entry, but he could not remember exactly who that may have been. Lyford also testified that he has never told anyone or suggested to anyone that he was the individual making the announcement prior to entry. He did not deny that he could have made the announcement as testified by the other officers, but he did not affirm that he did so. Chief Lyford made it clear that he was present only to assist the Sheriff's Department.

Based on the testimony presented, I find the following facts to be more likely than not the most accurate version of what occurred. Dow and Chief Lyford were on the porch and Young was a short distance away, off to the side of the porch. Dow knocked on the door, waited several seconds (five being the outside maximum), turned the knob, found the door unlocked, crossed the threshold, and did so, announcing, "Sheriff's

Department, search warrant!" I do not affirmatively find that any other announcement of purpose and identity was made by any other officer prior to entry. The time that elapsed from the initial knock until Dow made his "announcement" inside the camp was very brief, no more than several seconds. Both defendants were in the camp, one sleeping in the loft and one on a couch inside the main part of the camp.

## 2. *Conclusions of law*

When a defendant challenges the reasonableness of an entry under the knock and announce rule, the Government has the burden to show that the officers' actions were reasonable. See United States v. Holmes, 175 F. Supp. 2d 62, 73-76 (D. Me. 2001); accord State v. Reynoso-Hernandez, 2003 ME 19, ¶ 17, 816 A.2d 826, 832. In Wilson v. Arkansas, 514 U.S. 927, 936-937 (1995), the United States Supreme Court made crystal clear that under the Fourth Amendment officers executing a search warrant could make a forcible unannounced entry into a residence only on a showing of reasonable cause to believe that a suspect might otherwise escape, destroy evidence, or threaten the safety of the executing officers or the public. After announcing their presence, officers must give the occupants of a dwelling a reasonable time to respond. What is a "reasonable time" is decided on a case-by-case basis, giving due consideration to the totality of the circumstances confronted by the officers executing the warrant. United States v. Banks, \_\_\_ U.S. \_\_\_, 124 S.Ct. 521, 526-527 (2003). The United States Supreme Court held long ago that 18 U.S.C. § 3109<sup>2</sup> prevents a law enforcement officer from knocking and

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<sup>2</sup> The statute states: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." The statute has no direct applicability to this case because no federal law enforcement personnel were involved in this investigation or search.

then opening an unlocked door without the requisite prior announcement of purpose and authority. See Sabbath v. United States, 391 U.S. 585, 587-588 (1968). The Banks rule makes it clear that Fourth Amendment principles correspond to the requirements of § 3109. Banks, 124 S. Ct. at 529 (“[Section] 3109 implicates the exceptions to the common law knock-and-announce requirement that inform the Fourth Amendment itself.”). A judge of this court has already held, even prior to the Banks decision, that knocking, waiting no more than three to five seconds, opening an unlocked door, crossing the threshold, and then announcing the purpose and authority for the intrusion is an unconstitutional entry into a constitutionally protected area. Holmes, 175 F. Supp. 2d at 76.

The Government presented this case and argued the evidence as though the difference between Dow’s first version of the execution of the warrant and the second version presented at the motion to suppress hearing was of some constitutional moment. I cannot accept that analysis. This case did not involve a risk of escape, a threatened destruction of evidence, or any articulated perceived threat to the officers.<sup>3</sup> The officers

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<sup>3</sup> The Government made much of the fact that firearms were found in the camp while executing the search warrant. I have to wonder how many camps in rural Maine do not contain some type of firearm. In this case, unlike Sargent, the officers had no specific knowledge prior to the entry that the occupants were armed or particularly dangerous. I am not in any way diminishing the inherent dangers associated with executing a search warrant. In fact the execution of every warrant carries with it a degree of risk. There is a valid law enforcement need to execute search warrants cleanly, safely and efficiently. Everything the officers did at the time of the execution of this warrant avoided damage to property or danger to the safety of any person. The issue, as I have framed it in this case, is whether the reasonableness of the officers’ actions under the circumstances of the particular case negates technical compliance with the knock and announce rule. Requiring rigid adherence to a formulaic application of the knock and announce rule puts the court in the untenable position of second guessing decisions made instantaneously by officers on the scene charged with the difficult task of executing a search warrant without endangering human life or needlessly damaging personal property. This search simply involved none of the common factors associated with the need for a "no-knock" warrant. Nor did any exigency arise after the officer knocked that would have authorized his unannounced crossing of the threshold. I do recognize that once an officer announces his purpose, the time period for response is thereby probably shortened because the occupants are alerted to the presence of the search warrant. However, in this case I find as a fact that even that recognized “exigency” did not occur prior to entry into the dwelling. When Dow knocked at the door the occupants had no reason to necessarily suspect the police were there with a search warrant. Unless the

were executing a straightforward search in conjunction with a marijuana cultivation investigation. There was no evidence of violence or the likely destruction of drugs inside the residence. This camp, on the shore of a remote lake, was surrounded by upward of six or more law enforcement officers. Escape was not an option. The rule of Wilson strictly applied to the facts of this case makes it impossible for me to find that making the knock and announcement at the closed door of the camp and waiting for an outside maximum of five seconds would have justified a forcible entry under the totality of the circumstances of this case. In my view the *de minimis* nature of the difference in this case between making entry across the unlocked threshold after knocking but before announcing, and making entry within five seconds or less of a knock and announcement, cannot have any constitutional relevance. It simply would elevate form over substance. Under either version of the facts, the officers crossed the threshold before it was reasonable to infer they had been refused entry or any exigency had ripened under the totality of the circumstances. This case does not present a scenario such as United States v. Sargent, 319 F.3d 4, 10-12 (1st Cir. 2003), where a five second wait was deemed reasonable because the defendant was believed to be heavily armed, in possession of a quantity of easily disposable drugs, and was possibly alerted to the presence of the police.

The Banks rule is clear.

Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one. But in a case like this, where the officers knocked and announced their presence, and forcibly entered after a reasonable suspicion of exigency had ripened, their entry satisfied § 3109 as well as the Fourth Amendment, even without refusal of admittance.

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Sargent five second rule has become a de facto per se standard for reasonableness in every type of drug case imaginable, the time period here between Dow's knock on the door (and even assuming a contemporaneous announcement by Lyford at that moment) and the entry was so extremely brief that it does not comport with the requirements set forth in other cases.

Banks, 124 S. Ct. at 529.

Even under the Government's version of the evidence I cannot find that any reasonable suspicion of exigency ripened before entry. This search occurred relatively early in the morning with no sign of life coming from inside the camp, suggesting the occupants either were not home or were still in bed. The police did not know who resided in the subject residence and I am willing to concede that the uncertainty about the identity of the occupants might have shortened the wait period after a proper knock and announce, but officers' decision to proceed with the search before obtaining more information about the putative occupants can hardly be said to have created an "exigency." They simply had no articulated reason to suspect that an armed assailant awaited their arrival. Nor did they have any reason to believe, at that point in time, that the occupants knew that the investigation of a marijuana growing operation miles from the camp had led the police to Knight's Landing. According to Chief Lyford the occupants of the camp would not have been able to see the road from the door where entry was made, making it even more unlikely that the occupants would have been alerted to the arrival of the officers. Furthermore, the case was a marijuana cultivation case, not a crack cocaine investigation. While the case is not the proverbial "search for a piano" case described in Justice Souter's Banks opinion, the warrant legitimately sought items connected to a 'low tech' drug cultivation operation, not small pills or powdery substances subject to quick disposal. Those facts support the conclusion that more than several seconds would have been required to fairly comply with the intent of the knock and announce rule on the basis of the totality of the circumstances known to the officers at the time of entry. Had they unreasonably torn the door from its hinges, this case would

not be a difficult one for me to resolve. I would comfortably recommend that the evidence seized should be suppressed.

However, trial courts have not always rigidly applied the exclusionary sanction to what might be denominated technical violations of the knock and announce rule. The Second Circuit has explained the three valid reasons for the “knock and announce” rule.

We have enunciated three reasons for the "knock and announce" rule: "(1) the reduction of potential for violence to both the police officer and the occupants of the house into which entry is sought; (2) the [avoidance of the] needless destruction of private property; and (3) a recognition of the individual's right of privacy in his house."

United States v. Alejandro, 368 F.3d 130 (2d Cir. 2004) (quoting United States v. Brown, 52 F.3d 415, 421, (2d Circuit 1995)). The court concluded that gaining entry by a ruse after the issuance of a search warrant, involving a knock but no proper announcement of authority and purpose, did not violate the Fourth Amendment, even though allowing law enforcement officers to dissemble in order to obtain entrance might be seen as significantly eroding an individual’s right of privacy in his house. Id. at 136. The United States District Court in Massachusetts has also endorsed the notion of gaining entry by ruse as being permissible. United States v. Legault, Crim. No. 03-10251-RGS, 2004 WL 1517486, 2004 U.S. Dist. LEXIS 12526 (D. Mass. July 8, 2004).

The officers here did not enter through either a forcible entry that destroyed property or a ruse that significantly eroded privacy interests. Guns were not drawn at the moment of entry, and in fact, the officer only drew a weapon when the occupant in the loft did not immediately respond to his request to come downstairs. Even then there was no confrontation or real danger to any person. It is true the officers crossed the threshold without first being formally refused entry and in the absence of any exigency, thereby

technically infringing upon the occupants' privacy interest. However, pursuant to the search warrant, the privacy interest in this camp was subject to much a greater intrusion than merely crossing the threshold.

Higher courts have failed to provide bright line guidance as to how the knock and announce rule is to be applied. While all seem to agree that the principle has been enshrined in the Fourth Amendment, it is left to police officers and trial courts to implement it in a reasonable way. If I could find as a fact that the police officers waited seven, or maybe ten seconds, after announcing and before opening the unlocked door, suddenly these same facts would arguably become constitutionally reasonable. Because in this case the lead officer knocked at the door, tried the knob and, finding it unlocked, crossed the threshold to announce his authority and purpose, it does not follow that the mechanistic operation of the knock and announce rule requires the evidence be suppressed. The rule of Banks mandates no such result.

The Fourth Amendment says nothing specific about formalities in exercising a warrant's authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be "secure ... against unreasonable searches and seizures." Although the notion of reasonable execution must therefore be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.

United States v. Banks, 124 S.Ct at 524-525. In my view the search conducted at Knight's Landing was not unreasonable under the totality of the circumstances. There was no property damaged nor were any safety concerns created by the manner of entry. Therefore evidence garnered as a result of that search should not be suppressed. The core

values of the Fourth Amendment were not violated by the manner and methods used to search this camp.

**Conclusion**

Based upon the foregoing, I recommend that the Court **DENY** the motions to suppress. (Docket Nos. 25 & 26.)

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 of 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.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated July 20, 2004

**Case title:** USA v. SHERMAN et al

**Other court case number(s):** None

**Magistrate judge case number(s):** None

**Date Filed:** 02/11/04

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**Assigned to:** JUDGE JOHN A.  
WOODCOCK JR.

**Referred to:**

**Defendant(s)**  
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ALTON SHERMAN (1)

represented by **WENDY D. HATCH**  
LAW OFFICE OF DONALD F.

BROWN  
36 PENN PLAZA  
BANGOR, ME 04401  
207-941-2102  
Email: wdh@donbrownlaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: CJA Appointment*

**Pending Counts**

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21:846=MD.F CONSPIRACY TO  
POSSESS WITH INTENT TO  
MANUFACTURE/DISTRIBUTE  
MARIJUANA - 21:846 and  
841(a)(1)  
(1)

21:841B=MM.F MARIJUANA -  
MANUFACTURE - 21:841(a)(1)  
(2)

18:924C.F POSSESSION OF  
FIREARM IN FURTHERANCE  
OF DRUG CRIME - 18:924(c)  
(3)

18:922K.F POSSESSION OF  
FIREARM WITH  
OBLITERATED SERIAL  
NUMBER - 18:922(k)  
(4)

21:853.F - CRIMINAL  
FORFEITURES 21:853(a)  
(5)

**Highest Offense Level (Opening)**

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Felony

**Terminated Counts**

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None

**Disposition**

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**Disposition**

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**Highest Offense Level  
(Terminated)**

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None

**Complaints**

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None

**Disposition**

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**Assigned to:** JUDGE JOHN A.  
WOODCOCK JR.

**Referred to:**

**RICHARD RODRIGUE (2)**

represented by **LEONARD I. SHARON**  
SHARON, LEARY & DETROY  
90 MAIN STREET  
P.O. BOX 3130  
AUBURN, ME 4212-3130  
(207) 782-3275  
Email: lenny@sldlaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Pending Counts**

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21:846=MD.F CONSPIRACY TO  
POSSESS WITH INTENT TO  
MANUFACTURE/DISTRIBUTE  
MARIJUANA - 21:846 and  
841(a)(1)  
(1)

21:841B=MM.F MARIJUANA -  
MANUFACTURE - 21:841(a)(1)  
(2)

18:924C.F POSSESSION OF  
FIREARM IN FURTHERANCE  
OF DRUG CRIME - 18:924(c)

**Disposition**

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(3)

18:922K.F POSSESSION OF  
FIREARM WITH  
OBLITERATED SERIAL  
NUMBER - 18:922(k)

(4)

21:853.F - CRIMINAL  
FORFEITURES 21:853(a)

(5)

**Highest Offense Level (Opening)**  
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Felony

**Terminated Counts**  
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None

**Disposition**  
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**Highest Offense Level  
(Terminated)**  
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None

**Complaints**  
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None

**Disposition**  
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**Plaintiff**  
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USA

represented by **DANIEL J. PERRY**  
OFFICE OF THE U.S.  
ATTORNEY  
DISTRICT OF MAINE  
P.O. BOX 2460  
BANGOR, ME 4402-2460

945-0344  
Email: dan.perry@usdoj.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*