



firearms and other related materials. In January 2004, ATF Agent Michael Oppenheim applied for and obtained a search warrant from the United States District Court in Boston, Massachusetts. In the course of executing that search warrant the officers discovered a serial number plate that included the same serial number as the obliterated serial number from the firearm at issue in this case. Thus the evidence seized in Boston corroborates the identification testimony regarding Fowler's possession of this particular firearm in the Maine case.

Included within the affidavit in support of the Massachusetts search warrant was information about an incident that occurred in October 2003 in Maine and involved Fowler and a silver 2003 Jeep Wrangler. That incident is the subject matter of this motion to suppress. Fowler contends that the Jeep was illegally searched without a warrant and without probable cause. Based upon the doctrine of "fruit of the poisonous trees" Fowler urges the court to suppress statements he made to a Maine State Trooper who investigated the Jeep incident and the items seized pursuant the Boston search warrant. I now recommend that the court adopt the following proposed findings of fact and **DENY** the motion to suppress to the extent it seeks to suppress the serial number plate recovered in Massachusetts and the entirety of the statements made by Fowler to Bustard during two telephone calls. However, I recommend that the court **GRANT** that portion of the motion which seeks to suppress the interior contents of an *Uncle Henry's* guide,<sup>2</sup> a notebook, and a gun and related firearm paraphernalia taken from duffel bags in the Jeep. I also recommend that the statements made by Fowler to the Maine State Trooper during two telephone calls be redacted to exclude any mention of the firearm found in the Jeep.

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<sup>2</sup> *Uncle Henry's* is a Maine-based but regionally distributed "Swap or Sell It Guide." See Uncle Henry's, Inc. v. Plaut Consulting Co., Inc., \_\_\_ F.3d \_\_\_, 2005 U.S. App. LEXIS 3017, \*2, 2005 WL 407394, \*1 (1st Cir. Feb. 22, 2005) ("Uncle Henry's is a Maine corporation based in Augusta that publishes a "Swap or Sell It Guide." While best known in Maine, the guide is also distributed throughout New England and parts of Canada.")

## **Proposed Findings of Fact**

### ***Incident in Township 16***

Richard A. Decarteret is the town assessor and fire chief in Eddington, Maine. He is also a 100% disabled American veteran who apparently is well known in the Clifton/Eddington/Beddington area as a person who knows his way around local woods roads and is available to assist with “odd jobs” that may arise. Late one evening in October 2003 Decarteret received a call from William (“Bill”) Zissulis, a person known to Decarteret. Zissulis had received a telephone call from a friend of his identified as Mike Smith, who was stuck in the mud somewhere along a power line off a woods road in Township 16 (“T 16”), Maine. Decarteret inferred, from Zissulis’s comments, that the person stuck in the mud was an older man who worked for the paper companies “cruising timber.”<sup>3</sup> Given that it was late at night, raining, and windy, Decarteret determined that since he himself was not a young man and his health was not all that great, the “timber cruiser” would have to camp in his car until morning and then Decarteret would go rescue him. Based upon Zissulis’s description of the power line, Decarteret felt confident he would be able to locate the fellow.

The next morning, before the sun had come up, Decarteret set off for T 16. Being a prudent man, before he set forth he called Courtney Hammond, a Maine State Forest Ranger, to advise him of his mission. He chose Hammond because he felt certain Hammond, who also knew his way around woods roads, would be able to find him if he did not return within a few hours. Decarteret told Hammond he would call him again when he returned home. Hammond,

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<sup>3</sup> Decarteret explained, at some length, that “cruising timber” was no longer a common practice but that in the “old days” people would go out and measure trees and examine the species in order to determine the approximate value of the timber on a wood lot prior to a cut. While it was all very interesting, it has nothing to do with this motion. Decarteret allowed as how he did not know how he came to have this impression that Fowler was a timber cruiser, except that he thinks Zissulis told him that the fellow stuck in the mud worked for the “company.” Zissulis said he did not know him all that well.

who was awoken by the call, promptly went back to sleep and Decarteret drove out to T 16 to the approximate location provided by Zissulis. The power line in question is off a paper company road eight or nine miles from the main paved road. When Decarteret arrived at the scene Fowler was standing by the paper company road. It was still rainy and windy. The vehicle, which was a silver 2003 Jeep Wrangler, was some distance from the logging road, down over a hill, where there was just a trail that had been cut through the brush to service the power line. Decarteret loaned Fowler a hydraulic jack to use to try to free the Jeep, but given the weather and circumstances Decarteret elected to remain in his vehicle.

After about twenty minutes Decarteret decided he would go check on Fowler. Decarteret had decided that given the Jeep's location and the surrounding terrain the chances of getting it out of there were slim to none. As Decarteret walked down the hill toward where Fowler was working on the Jeep something caught his attention out of the corner of his eye. Suddenly he realized that a second individual, an young African American male, was standing behind some trees out of his line of vision. Up until this point in time Decarteret had no reason to believe that anyone was with Fowler. He was extremely unnerved by this development and determined that he wanted to get out of there as quickly as possible. Decarteret advised the two men that there was no way they were going to get the vehicle freed from the mud and that if they wanted a ride out of the woods they would have to come with him now as he intended to leave.

The two men elected to go with Decarteret. Decarteret was so unnerved by their demeanor and the attendant circumstances that he pulled out his shotgun and placed it across the dashboard. Decarteret's thinking was that this would prevent an "ambush." The two young men decided they wanted to go to Ellsworth, some eighteen miles distant, to the hospital because Fowler had injured himself while trying to get the Jeep unstuck. Decarteret engaged Fowler in

small talk, trying to ascertain why the Jeep had Vermont license plates and exactly what work Fowler did for the “company.” He quickly realized that Fowler had no knowledge of tree species and was not a timber cruiser. The African American individual said nothing during the ride to Ellsworth.

Before getting into Ellsworth they stopped at a garage because Decarteret wanted to call his wife to let her know where he was. At that point he did not call Hammond because it would have been a toll call to Cherryfield, Maine, where Hammond lived. When they got to the hospital in Ellsworth Decarteret took \$100.00 from the significant wad of cash Fowler had as payment for his trouble and drove back home to Eddington.

In the meantime, Courtney Hammond had gotten up at his usual time and proceeded to work around 8:00 a.m. Hammond is a forest ranger with the Maine State Forest Service. He is assigned to the Downeast District, working out of Jonesboro, Maine, and covering a district stretching from Calais to Castine. He has contact with a communications system through a regional dispatch center located in Old Town, Maine. Hammond contacted regional dispatch to see if they had heard from Decarteret. They had not, and when, at Hammond’s request, they called Decarteret’s home, no one answered. Hammond then drove to Decarteret’s residence and found no one at home. More than three hours had elapsed since Hammond had first been awoken by Decarteret’s call. He knew that Decarteret had physical problems and that he drove a two wheel drive truck, so Hammond decided to try to find the location in T 16 to make sure everything was alright.

When Hammond found the location the Jeep was still mired in the mud. There were tracks on the road that Hammond thought probably had been made by Decarteret, but no one was at the scene. He observed that the Jeep had a Vermont license plate and a Maine inspection

sticker. When he used his radio to check on the vehicle's registration, the Vermont plate came back as not on file. Hammond then determined that he needed to find out whose vehicle it was. He observed a business card on the front seat and he opened the door and retrieved the card. While he had the door open a cell phone on the front seat rang. Hammond answered it and the person on the other end asked for Mike. When Hammond advised the caller that Mike was not there the line went dead, whether because the person hung up or because of the extremely poor reception Hammond was unable to say. The business card appeared to belong to a Michael Smith who was identified as a sales representative for a stone company in Massachusetts. There was a phone number on the card. Hammond had his dispatch call the company to obtain information about how to contact Smith. The company representative said Smith did not work for them, but they appeared to know who he was and said they would try to get a phone number for him and relay it to the Maine authorities. Hammond left the scene having obtained from the vehicle only the information contained on the business card.

Hammond still had not heard from Decarteret but he left a message for Decarteret to contact him as soon as he came home. A short time later Decarteret did make contact with Hammond and told him about his experience, including the African American, the ride to the hospital in Ellsworth, and all of the other details, which Decarteret described as "odd, real odd." Hammond pretty much agreed with Decarteret's assessment. At this point Hammond had formed the suspicion that the vehicle might be stolen so he decided it was time to call in the Maine State Police. He placed a call to Trooper Bustard, the local state trooper who patrols in the area in question and described the circumstances to him. Bustard and he did not arrive at a course of action at that point in time. Around 2:00 p.m. that same afternoon an individual identifying himself as Michael Smith called Hammond's regional dispatch to tell them that he

had made arrangements to go back out to his Jeep and would be there later that afternoon to retrieve it. When Hammond got this information he called Trooper Bustard back and they then agreed to meet at the woods road around 4:00 p.m.

Hammond arrived first and waited in his vehicle at a turnout on the main part of the woods road. Trooper Bustard arrived about twenty to thirty minutes later, parked his cruiser in the turnout and proceeded in Hammond's vehicle down to the power line where the Jeep was mired in the mud. By now it was getting dark and almost three hours had elapsed since the individual who identified himself as Smith had called the forest service regional dispatch to say that he was returning to retrieve his vehicle. Hammond and Bustard parked the forest service vehicle and walked down the power line to inspect the Jeep.

Trooper Bustard opened the door of the vehicle to get the VIN number from the door post to write it down so that he could relay it to headquarters when he returned to his cruiser. He also searched through the passenger compartment looking for documents or papers that might reveal something about the identity of the owner. Bustard seized a number of items from inside the passenger compartment including ads from an *Uncle Henry's* guide, the cell phone, another business card and a notebook that appeared to have telephone numbers and names in it.<sup>4</sup> All of the items seized by Bustard were taken with the intent of identifying the owner/occupants of the vehicle. Both men suspected the vehicle might be stolen or that other criminal activity was afoot.

While Bustard was searching through the passenger compartment, Hammond went around to the back of the vehicle. Hammond discovered when he opened the rear door that there

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<sup>4</sup> It appears that the papers taken from the Jeep have turned out to be significant evidence because Oppenheim's affidavit relates that there was a notebook containing "several pages of what appeared . . . to be notations regarding firearms transactions" and an *Uncle Henry's* magazine in which there "were handwritten annotations on firearms advertisements [that] pertained to advertisements for, among others, several Glock pistols . . . and a Thompson sub-machine gun." (Oppenheim Aff., ¶ 22.)

were some small duffel bags thrown into the back of the vehicle. He opened two of the bags and found holsters, ammunition, and some “speed loaders,” but no identification information.

Trooper Bustard joined him at the rear of the vehicle and opened a third bag wherein he found a 40 caliber handgun. The handgun was seized along with the other items previously identified.

Hammond and Bustard left the area.

Some time later that day or the next Decarteret received a second call from Bill Zissulis who told him that he picked Fowler up in Ellsworth and returned to the scene of the Jeep late that afternoon. As he approached the area a Maine state police cruiser was parked at the side of the woods road. Fowler directed Zissulis to stop and then Fowler walked over the hill and toward the power line. In a few minutes he returned and said that his vehicle was gone and he wanted to go back to Ellsworth.

### ***Trooper Bustard's Continuing Investigation***

Alden Bustard has been a trooper with the Maine State Police for over ten years. He works primarily in the Hancock County area. When Hammond first called him and related what he then knew about the Jeep and its occupants, Bustard agreed with the “odd, real odd” assessment. His first thought upon inspecting the exterior of the Jeep was that the vehicle might well be stolen given that the Vermont registration plates did not match the Maine inspection sticker that was attached to the vehicle. The further discovery of the guns in the vehicle and the failure of “Smith” to return to the scene as he had told the forest service dispatch he would do, only increased Bustard’s suspicions regarding this vehicle and its occupants. He left the scene, leaving the Jeep still mired in the mud, but determined that he would continue his investigation. Bustard testified, and I believe him, that even if they had not found the gun and ammunition, he

intended to attempt to establish the vehicle owner's identity and purpose because of all the suspicious circumstances surrounding the incident.

The next afternoon Bustard learned about Zissulis's phone call to Decarteret and surmised that "Smith" had been at the scene when he and Hammond were searching the Jeep, but he had elected not to speak with them. At this point Bustard spoke directly with Zissulis and Zissulis explained that he had known Smith since early October when he had sold him a 40 caliber handgun. Bustard also made contact with the stone company in Massachusetts and spoke with Lane Chase, the owner. The owner told him Smith had been employed as a caretaker for his elderly mother for a short period of time, but that Smith was "strange" and "no one he would want around his mother." Bustard also used the VIN number to learn that the silver Jeep was registered to a Michael Smith in York County, Maine. Smith was wanted on a warrant for negotiating bad checks out of Kittery, Maine. On November 5 Trooper Bustard spoke to Detective Hackett who had handled that investigation. Hackett explained to Bustard that Smith had a record for trafficking in firearms and that he did not really live in Maine but used a Maine address to register motor vehicles. Hackett had investigated Smith on the bad check charges which related to worthless instruments he had written in connection with his attempts to register various vehicles in Maine. Bustard contacted the Lynn, Massachusetts, police department but they were unable to provide him with additional information about Fowler/Smith. As Bustard developed more information regarding this incident he returned to the scene. The Jeep had been removed, but Bustard and other law enforcement officers searched the surrounding area because they were concerned about the possibility of a body being buried in the woods or other evidence of criminal conduct being in the area. They found nothing.

Eventually, after he assembled all of this information, Trooper Bustard made telephone contact with Fowler. Bustard told Fowler that he was holding his property, including the gun, and he wanted to make arrangements to return it to him. During this first phone call Fowler told him he had received the gun in the Jeep in a trade with Zissulis but that it was actually Zissulis's gun. Zissulis had previously told the officer that Fowler had told Zissulis that Fowler had sold the 40 caliber gun he bought from Zissulis. Zissulis maintained that the 40 caliber gun found in the Jeep was not the same gun as the one he previously sold to Fowler. Fowler went on to explain that the Jeep had been borrowed by his friend John Willows from Belfast who had been riding around the countryside in it looking for a place to go deer hunting. Willows had gotten stuck and called Fowler who was in Bangor at the time. Fowler then said he took a taxi out to T 16 to assist Willows to try to get the Jeep out of the mud. Fowler told Bustard that a couple of days later he finally got Jordan's Garage from Ellsworth to come out to the scene and tow the vehicle away. Fowler said he was coming back to the area the following weekend and would contact the Trooper about getting his property back.

Fowler did not make contact with Trooper Bustard that weekend so the following week Bustard again called Fowler about getting his property back. (Bustard knew of the active York County warrants and was hoping to lure Fowler to Maine in order to arrest him on those warrants.) During this second conversation Fowler told Bustard that the gun actually belonged to his friend Jeff Willows (previously identified as John) and that he, Fowler, did not feel he should come to Maine to pick up somebody else's gun. He also told Bustard he had no contact information for Willows. Bustard had no further contact with Fowler.

### *The challenged search warrant*

Some months later, in January 2004, Special Agent Michael Oppenheim of the Bureau of Alcohol, Tobacco, Firearms and Explosives presented to United States Magistrate Judge Robert B. Collings in Boston, Massachusetts, a thirty-three paragraph, twenty page affidavit in support of a search warrant to search Fowler's apartment in Lynn, Massachusetts. The serial number plate for the Lamoine gun was recovered pursuant to this search. Included within the affidavit were the following paragraphs pertaining to the events in Maine in October 2003:

21. Through my investigation I have learned of an incident involving FOWLER that occurred on October 26, 2003 in Maine. On that occasion, FOWLER was apparently operating the aforementioned silver Jeep Wrangler, but in this instance that vehicle bore Vermont license plate number 37058. The jeep became stuck in the mud along a power line in Township 16 ("T16"), Maine. That resulted in FOWLER placing a telephone call for assistance to an acquaintance of his named William Zussulis [sic]. Zussulis [sic] then sought the help of fire department personnel, who in turn contacted the Maine Forestry Service. Because of the suspicious nature of the location of the stuck vehicle, the Maine Forestry Service notified the Maine State Police. After first querying the Jeep's license plate via a law enforcement computer system and learning that the plate was listed as not on file, Maine State Police Trooper Alden Bustard was dispatched to the scene.

22. Upon arrival at T16, Trooper Bustard located the Jeep; no people were present. He observed that, although the vehicle bore a Vermont license plate, it had a Maine inspection sticker. In an effort to determine the identity of the Jeep's owner, Trooper Bustard opened an unlocked door and entered it. Upon doing so, he observed, among other items, a notebook opened to a hand drawn map of the area. The notebook also had several pages of what appeared to Trooper Bustard to be notations regarding firearms transactions. Also in the vehicle were handwritten annotations on firearms advertisements in an edition of *Uncle Henry's*. The annotations pertained to advertisements for, among others, several Glock pistols, as well as pistols by a number of other manufacturers, and a Thompson sub-machine gun. In a duffel bag behind the rear seat of the passenger compartment, Trooper Bustard found a loaded Smith & Wesson .40 caliber semi-automatic pistol bearing serial number TFL0088. In another bag located behind the rear seat, he found a quantity of .40 caliber ammunition and four magazines loaded with .40 caliber ammunition. Trooper Bustard seized all of the items for safekeeping until he could identify and locate the owner of the vehicle.

23. Two days later, on October 28, 2003, Trooper Bustard contacted Zussulis [sic]. Zussulis [sic] advised Trooper Bustard that FOWLER, who was known to him as Michael Smith, had called him late on October 26, 2003 for help in freeing FOWLER'S stuck Jeep. Zussulis [sic] stated that, when he was unable to locate FOWLER, he contacted local fire officials for assistance. Zussulis [sic] further related that the next day, on October 27, 2003, Zussulis [sic] picked up FOWLER and a black male in Ellsworth, Maine and, following FOWLER'S directions, they proceeded to the area of the Jeep. Upon nearing the vehicle, Zussulis [sic] reported, he and FOWLER observed a police cruiser on the side of the road, but FOWLER did not want to stop. Zussulis [sic] then dropped off FOWLER and the black male at a rental car company in Ellsworth.

24. Zussulis [sic] also stated to Trooper Bustard that he had known FOWLER since he had sold FOWLER a firearm in a private sale on October 8, 2003. Zussulis [sic] later provided Trooper Bustard with a receipt for the transaction, which reflected that, on that date, Zussulis [sic] sold a Glock, Model 27, .40 caliber semi-automatic pistol bearing serial number CZS494US. The receipt listed the buyer as Michael W. Smith, with an address of P.O. Box 467, Springvale, Maine. That is the same address information contained on the driver's license FOWLER had shown to John Clough in order to purchase a firearm from Clough in December 2002.

25. Trooper Bustard spoke with FOWLER via cellular telephone on November 8 and 11, 2003, in an effort to arrange for FOWLER to pick up his property. FOWLER initially stated that the Smith & Wesson pistol found in his Jeep belonged to Zussulis [sic] and that he (FOWLER) did not want to come to the State Police office to pick up a firearm that was not his. After Zussulis [sic] was queried by the trooper and denied ownership of the weapon, FOWLER subsequently stated that the firearm belonged to an individual named Willows, as to whom he provide two different first names. FOWLER admitted to Trooper Bustard that the loaded .40 caliber magazines found in his Jeep were his. He stated that he would meet with Trooper Bustard to pick up his other property, but as of this date, he has not done so. In their conversations, FOWLER also stated that he met Zussulis [sic] when he was considering buying a Glock pistol from Zussulis [sic], but he asserted that he did not actually make the purchase.

(Application and Aff. for Search Warrant, Docket No. --, Ex. A, Elec. Attach. 4, Bates ## 75-

78.)<sup>5</sup> Within the affidavit Oppenheim also described his surveillance activities vis-à-vis Fowler, the information about the Clough sale of the firearm and the arrest warrant I issued for Fowler in connection with the present case, and Fowler's prior history of twice being convicted for firearms offenses as a result of ATF investigations. (Id., ¶¶ 3-12, Elec. Attach. 3, Bates ## 65-

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<sup>5</sup> The application and affidavit are also available in a paper file.

71.) The affidavit stated that the most recent of the prior firearms convictions involved Fowler purchasing a number of firearms in Maine, obliterating the serial numbers, and reselling them in the Boston area. In that case during a search of Fowler's residence, vehicles, and storage facility officers recovered approximately twenty firearms, a large quantity of ammunition, and chemicals used to obliterate serial numbers. (Id., ¶ 13, Bates ## 71-72.) Oppenheim also provided information regarding Smith/Fowler's motor vehicle registrations and licenses in Maine and Massachusetts and his misuse of social security numbers to obtain those documents. (Id., ¶¶ 14-17, Elec. Attach. 3 & 4, Bates ## 72-74.)

### **Discussion**

According to Fowler's memorandum of law, he is seeking to suppress all of the evidence seized during the search of his Jeep while it was mired in the mud in Township 16, all statements made by him during telephone conversations with Trooper Bustard relating the Jeep's contents, and all evidence seized from the search of his Massachusetts residence. (Docket No. 48 at 1-2.) As for evidence obtained from the Jeep mired in the mud in Township 16, Fowler contends that there was "insufficient cause to support the warrantless vehicle search." (Id. at 2.) As for statements he made to Trooper Bustard and the evidence obtained in the search of his residence, Fowler contends that this evidence must be suppressed because its acquisition was tainted by the unconstitutional search of his Jeep in Township 16. (Id. at 2.) With respect to the premises search, Fowler maintains that the affidavit submitted in support of the search would not have established probable cause if the information related to the search of his Jeep were stricken from the affidavit. (Id. at 2.)

**A. The search and seizure of the defendant's vehicle, personal papers and effects**

Fowler argues that the search of the duffel bags found in the Jeep was unreasonable because the mere facts that the vehicle's Vermont license plate was not on file and that it had an inspection sticker from Maine did not give rise to probable cause that the vehicle was stolen or contained evidence of a crime. (Id. at 5.) Furthermore, Fowler argues that the officers did not need to root through the bags to discover the identity of the vehicle's owner because the business card suggested that Michael Smith was the owner and the officers could have determined whether the vehicle was reported stolen by tracing the Jeep's VIN. (Id.) Finally, Fowler argues that there was no basis for the officers to think that the vehicle was abandoned because they were on notice that he was making an effort to remove the vehicle from the mud. (Id. at 5-6.)

In response, the Government justifies the warrantless searches conducted by Hammond and Bustard based on separate facts and circumstances. As for the limited entry Hammond made into the Jeep during his first visit to it, the Government argues that the search was a reasonable limited intrusion to obtain identification information about the owner of the vehicle. (Docket No. 60 at 9-10.) As for the more thorough search that Hammond and Bustard jointly performed later that evening, the Government maintains that the officers had probable cause to search the vehicle and its contents because of a reasonable belief that the vehicle "was stolen or otherwise involved in criminal activity" (Docket No. 60 at 11), based on the facts that, among other things, one of the occupants appeared to be from Massachusetts, the vehicle had a Vermont license plate, a Maine inspection sticker and a Kittery dump sticker, there had been a black man in the vehicle who appeared to have been trying to avoid detection by Decarteret, at least initially, and

the man claiming ownership of the Jeep had failed to come back to get the car that evening as he had represented he would. (Id. at 10-11.)

As for the very limited search conducted by Hammond on his first visit to the vehicle, there is no material evidence to suppress. The only "evidence" Hammond obtained from his entry into the vehicle was the name Michael Smith, acquired from the business card. It would seem that this evidence was in plain view as well. Hammond testified that he could see the business card sitting on the vehicle's front seat. Even the defendant appears to concede that the search would have been reasonable had it ceased upon acquisition of the business card. (Docket No. 48 at 5.) According to the defendant, his identity would have been confirmed, in any event, by tracing the Jeep's VIN through the state Motor Vehicles Bureau.<sup>6</sup> (Id.)

As for the second search of the Jeep and its contents, the parties agree that the officers' search of the duffel bags was only reasonable if they had probable cause to believe that the vehicle and its contents contained evidence of criminal activity. (Id. at 5; Docket No. 60 at 7, both citing, inter alia, Chambers v. Maroney, 399 U.S. 42, 47-48 (1970).) However, as for the search of books and/or papers located in the rear passenger compartment, the Government contends that probable cause to search was not necessary (Docket No. 60 at 7-9), whereas Fowler maintains that any entry into the vehicle required probable cause under the circumstances (Docket No. 48 at 5-6).

In my view, the facts and circumstances known to Bustard and Hammond at the time they conducted the second search of the vehicle and seized its contents would have given rise to only a reasonable suspicion that the vehicle might be stolen, not to probable cause to believe that it was stolen or that it otherwise contained evidence of criminal activity. Hammond himself

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<sup>6</sup> There was no evidence introduced at the hearing that tracing the VIN necessarily would have yielded ownership information.

testified that after his first visit to the vehicle he only suspected that the vehicle might be stolen, based on the Vermont plate, Maine inspection sticker and Massachusetts business card. The additional information that Decarteret subsequently supplied to Hammond and that Hammond shared with Bustard did not transform this suspicion into probable cause. The fact that "Smith" was not a "company man" may have been odd to Decarteret (although he allowed as how he did not know how he ever came to have the impression that Smith was a company man), but neither Hammond nor Bustard testified as to having any concern over whether the vehicle occupant worked for a paper company. The apparent failure of "Smith" to return to the scene later that afternoon or early evening as he indicated he would is, perhaps, a little suspicious, but it was raining out and "Smith" would presumably have to arrange for transportation, his Jeep being unavailable to him, and for a tow truck or some other assistance to extract his vehicle, which was mired up to the frame. These circumstances would tend to make his nonappearance more or less reasonable under the circumstances. At the time of the search none of the officers knew of Smith's aborted return to the Jeep and thus that fact cannot be part of the probable cause calculus. Moreover, given the option, one would presumably prefer to extract a vehicle from mud on a dry rather than rainy day. Finally, the fact that there had been "a black man" present at the scene who acted suspicious and made Decarteret uneasy, is simply not enough to generate probable cause to believe that the vehicle was stolen or contained contraband. Because the officers did not have probable cause to believe the vehicle was stolen or contained contraband, the search of the duffel bags was not a reasonable search under the Fourth Amendment. United States v. Ross, 456 U.S. 798, 800, 817 (1982) (describing the vehicle-container issue as a "troubled area" of Fourth Amendment jurisprudence but holding that officers may conduct a probing search of compartments and containers in a vehicle so long as they have probable cause to believe that the

vehicle contains contraband somewhere within). Accordingly, I recommend that the court exclude the gun and other items taken from the duffel bags located in the rear luggage area of the Jeep.

A question remains whether the officers, despite lacking probable cause to search the vehicle, nevertheless had a reasonable basis for seizing and searching the notebook and *Uncle Henry's* guide located in the rear passenger compartment of the Jeep. The Government argues for an exception to the probable cause standard, contending that the books and papers were justifiably taken from the Jeep in order to determine the vehicle owner's or vehicle occupants' identities in connection with their suspicion that the vehicle could be stolen. (Docket No. 60 at 7-9.) I consider this a close question but conclude that the seizure and general search of these papers went beyond the scope of a limited inspection for purposes of discovering identification information.<sup>7</sup> Neither the officers' testimony nor the relevant precedent and authorities support the recognition of as broad an exception to the probable cause standard as would be required in this case in order to justify officer Bustard's general perusal and seizure of the *Uncle Henry's* guide and the notebook.

As for the officer's testimony, Hammond appears to have been content, on his first visit, to infer that the business card on the front seat identified an occupant of the vehicle. Subsequent

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<sup>7</sup> The Government's presentations during the evidentiary hearing and in its memorandum are both limited to the probable cause exception that exists for obtaining identification or documents proving vehicle ownership or registration. The government has not argued and the officers did not testify that they would have reviewed the papers for any other reason. Thus, I do not address the issue of whether it may have been reasonable for the officers to have temporarily seized the items pending further investigations, without promptly "searching" them, on the chance that their subsequent investigation might have afforded probable cause to comprehensively search the items, see, e.g., *Segura v. United States*, 468 U.S. 796, 806-808 & n.6 (1984) (discussing cases involving circumstances in which it is reasonable to seize personal property but not necessarily to search it), or might otherwise have afforded an opportunity to conduct a more comprehensive search of the kind that transpired in *United States v. Strahan*, 674 F.2d 96 (1st Cir. 1982), once the officers determined that an arrest warrant had been issued for Smith or that all of the ordinary avenues for determining vehicle ownership or whether the Jeep was reported as stolen (such as a VIN trace) had come to a dead end. Trooper Bustard did not testify as to the precise time at which he searched through the papers, but my inference from his testimony is that it was shortly after removing them from the Jeep and before he had obtained any additional information from Decarteret, Detective Hackett or other sources.

information made available to Hammond by Decarteret, who had himself spoken with Zissulis, and by the officer on dispatch, who reported the call from "Michael Smith," would have tended to corroborate that the person claiming the vehicle was the same person identified on the business card. Furthermore, the officers were not exactly forthcoming in their testimony about any effort to obtain registration papers from the glove box, the normal location for registration documents, or to trace the VIN to determine whether the vehicle had been reported stolen. In fact, Bustard could not recall whether he even looked in the glove box. In other words, the officers' testimony does not support a finding that the normal preliminary efforts were made to determine vehicle ownership prior to seizing and rummaging through the personal books and papers found in the rear passenger area of the vehicle.

As for the law, the Government cites LaFave's treatise on search and seizure law for the proposition that it is permissible for officers "to make a limited search of a vehicle in an effort to determine ownership." 2 Wayne R. LaFave, *Search and Seizure* § 7.4(d) at 584 (West 1978). According to LaFave, an officer should be permitted to look for evidence of ownership in an apparently abandoned vehicle,<sup>8</sup> or in a vehicle in which the occupant has denied the existence of any such documents, but only in those areas of the vehicle where such evidence is reasonably expected to be found. *Id.* at 585. The reported federal cases that support the proposition, and which are cited by the Government, are United States v. Kelly, 267 F. Supp. 2d 5, 13-14 (D.D.C. 2003), and United States v. Ferri, 357 F. Supp. 487, 490 (W.D. Wis. 1973), both of which support LaFave's proposition. In Kelly, the court found that officers were justified to enter a vehicle and search the glove box for papers that might identify the vehicle's injured and incoherent driver for purposes of discovering any necessary medical information and that they

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<sup>8</sup> There is no reasonable basis for the officers in this case to maintain that the vehicle was abandoned. The occupant had contacted dispatch to indicate that he was planning to remove the vehicle that very day.

were also authorized to search the glove box a second time to discover evidence of the ownership of the vehicle, 267 F. Supp. 2d at 9, 13. See also id. at 14 (indicating that "such a search is limited to the places where a registration would usually be found – specifically, the glove compartment of the vehicle"). Similarly, in Ferri, the court held that a limited search of a vehicle's glove box was justified to secure the vehicle's registration card incident to a seizure of the vehicle. 357 F. Supp. at 489-90. This case differs from both Kelly and Ferri because the search extended beyond the usual places where vehicle ownership information or documents might be found to the interior pages of the *Uncle Henry's* guide and a notebook, both of which were innocuous items and would not likely contain vehicle registration papers or other evidence of ownership. Moreover, even if papers in the back seat might have been appropriate objects to look at for purposes of determining the identity of one or more of the vehicle's recent occupants, there is no logical basis to conclude that the *Uncle Henry's* guide would have contained such information or that, if such information were to be found in the notebook, it would be found anywhere other than on the outside or inside cover of the notebook. In other words, the exception discussed by LaFave and put into practice by the federal courts does not amount to a general license to scrutinize the contents of books and papers without there being any testimony in the record tending to establish that the officers had a reasonable basis to think that the books and papers were of a kind apt to contain ownership or identification information. Accordingly, "balancing [the] intrusion on . . . Fourth Amendment interests against [the search's] promotion of legitimate governmental interests," Delaware v. Prouse, 440 U.S. 648, 654 (1979), I conclude that the interior pages of the *Uncle Henry's* guide and notebook should be excluded in addition to the gun and related items taken from the duffel bags in the rear of the vehicle.<sup>9</sup>

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<sup>9</sup> The fact that Trooper Bustard saw an *Uncle Henry's* guide in the back seat of the vehicle is, of course, admissible and is relevant evidence for purposes of evaluating whether the Oppenheim affidavit demonstrated

**B. Fowler's statements to Trooper Bustard**

According to Fowler, the court should suppress all incriminating statements he made to Trooper Bustard over the phone on November 5, 2003, concerning the firearm and ammunition taken from the vehicle because they would not have been obtained but for the unlawful search that produced the firearm and ammunition. (Docket No. 48 at 7.) In response, "[t]he Government acknowledges that if the Court suppresses the evidence recovered from the search of the Jeep, any portion of Defendant's statements relating directly to that evidence would be suppressed, as well[,] . . . includ[ing] Defendant's admission . . . that the handgun found in the truck was his, and that he had acquired it from William Zissulis [and Fowler's later] statements . . . relating to the handgun and to the magazines found in the truck." (Docket No. 60 at 11 n.1.) However, the Government maintains that the balance of Fowler's statements during his phone conversations with Bustard would be admissible (*Id.* at 11-12) and I agree. Even if the gun had not been discovered, I find that Trooper Bustard still would have contacted both Zissulis and Fowler in the course of conducting a follow-up investigation, as outlined below.

**C. Even without Fowler's admission regarding the handgun and ammunition contained in the Jeep, Special Agent Oppenheim's affidavit contained ample evidence to support a finding of probable cause to search Fowler's residence.**

Fowler contends that all evidence seized from his premises must be suppressed as fruit of the poisonous tree. According to Fowler, "the warrant affidavit rests its probable cause demonstration so heavily upon the warrantless vehicle search that without such information probable cause to search the Defendant's premises is lacking." (Docket No. 48 at 9.)

An affidavit serving as the basis for issuance of a search warrant is sufficient when it demonstrates probable cause: that the totality of the circumstances set forth in the affidavit gives

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probable cause to search Fowler's residence. The circumstances of the Clough incident reflect that Fowler sought to acquire handguns in private transactions with Maine residents who advertised handguns in the *Uncle Henry's* guide.

rise, in a trustworthy fashion, to a fair probability that a search of the target premises will uncover evidence of a crime. United States v. Jewell, 60 F.3d 20, 23 (1st Cir. 1995); United States v. Spinosa, 982 F.2d 620, 625-26 (1st Cir. 1992). The court must give the affidavit a common-sense and realistic interpretation rather than a hypertechnical one and must also give great deference to the judicial officer who first concluded that the affidavit set forth probable cause. Spinosa, 982 F.2d at 626. Because evidence seized during an illegal search should not be included in a warrant affidavit, "a reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." United States v. Vasey, 834 F.2d 782, 788 (9th Cir. 1987); see also United States v. Holmes, 175 F. Supp. 2d 62, 68 (D. Me. 2001) (same); United States v. Trzaska, 111 F.3d 1019, 1026 (2d Cir. 1997) (same); United States v. Herrold, 962 F.2d 1131, 1138 (3d Cir. 1992), cert. denied, 506 U.S. 958 (1992) (same); cf. Franks v. Delaware, 438 U.S. 154, 171 (1978) ("[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.").

Based on the curious nature of the "odd, real odd" incident in Township 16, Bustard certainly would have conducted a follow up investigation, regardless of the discovery of the handgun and ammunition, which would have led to Bustard's conversation with Zissulis, in which Zissulis revealed that he had met Smith/Fowler in connection with a handgun sale earlier that month, and to his conversations with both Detective Hackett and Fowler. The concern that the conversations with Fowler were tainted by the Fourth Amendment violations has already been resolved in Fowler's favor. Of the remaining conversations with Zissulis and Detective Hackett, it is not obvious that either was tainted by the illegal search of the duffel bags that

produced the handgun, magazine and ammunition. To the contrary, Zissulis's revelation about his gun transaction with Fowler came to the surface in connection with Zissulis's explanation about how he had first come to know Smith/Fowler, rather than in response to pointed questioning concerning the gun found in the Jeep. Therefore, with respect to Zissulis's statements, the connection between the prior illegality and the challenged evidence was sufficiently "attenuated" to dissipate any "taint." United States v. Paradis, 351 F.3d 21, 32 (1st Cir. 2003). This piece of the Township 16 puzzle reflected that, as of October 2003, Fowler was still acquiring guns in Maine for resale in Massachusetts, and when added to Oppenheim's averments concerning Fowler's prior convictions, his *modus operandi*, the Clough gun purchase that arose by virtue of an *Uncle Henry's* ad, Mrs. Clough's photo identification of Smith/Fowler as the purchaser of the Clough gun, the warrant that issued from this court, and the discovery of the Clough gun with an obliterated serial number during the Roxbury arrest, provided ample probable cause for issuance of the warrant to search Fowler's Massachusetts premises. Indeed, even in the absence of the evidence gathered as a result of the officers' investigation of the Township 16 incident, Oppenheim's affidavit would support a finding by a magistrate that there was a fair probability that evidence of the crimes alleged would be discovered on Fowler's premises.

### **Conclusion**

For the foregoing reasons, I **RECOMMEND** that the court **GRANT** Fowler's motion to suppress, **IN PART**, by excluding from evidence the gun, related gun paraphernalia, and the contents of both the notebook and *Uncle Henry's* guide seized during the search of the Jeep, as well as all gun-related statements Fowler made to Trooper Bustard in subsequent telephone

conversations concerning the same. However, in all other respects I recommend the court **DENY** the motion.

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: March 8, 2005

**Defendant**

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*also known as*  
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**Pending Counts**

18:922G.F FELON IN POSSESSION  
- 18:922(g)(1) and 924(a)(2)  
(1)  
42:408.F - MISUSE OF SOCIAL  
SECURITY NUMBER -  
42:408(a)(7)(B)  
(2)

**Disposition**

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition**

**Highest Offense Level  
(Terminated)**

None

**Complaints**

18:922G.F - Felon in Possession

**Disposition**

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**Plaintiff**

USA

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