

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 08-119-P-S</b>
	)	
<b>KEVIN MURPHY a/k/a</b>	)	
<b>KEVIN WHITFORD,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

Kevin Murphy, also known as Kevin Whitford, charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(e), stealing a firearm from a licensed dealer in violation of 18 U.S.C. § 922(u) and 924(i)(1), and knowingly possessing a stolen firearm in violation of 18 U.S.C. § 922(j) and 924(a)(2), *see* Indictment (Docket No. 12), moves to suppress evidence seized and statements obtained on November 19, 2007, assertedly in violation of his rights under the Fourth, Fifth, and Fourteenth amendments to the United States Constitution, *see* Motion To Suppress Evidence (“Motion”) (Docket No. 18) at 1. An evidentiary hearing was held before me on October 29, 2008, at which the defendant appeared with counsel. The government tendered two witnesses and offered three exhibits, which were admitted without objection. The defendant offered three exhibits, which were admitted without objection. At the close of the evidence, counsel for both sides argued orally. I now recommend that the following findings of fact be adopted and that the Motion be denied.

**I. Proposed Findings of Fact**

Jeffrey Shisler had begun his shift as a patrolman for the Kittery Police Department (“KPD”) when, at about 2:30 p.m. on November 19, 2007, he received a report from his

dispatcher that someone had stolen an AR-15 assault rifle from the Kittery Trading Post (“Trading Post”). The suspect was described as being a white male approximately 6 feet tall wearing black and white checkered “chef style” pants and a wool hoodie, possibly also checkered.<sup>1</sup> The suspect was reported to have last been seen driving southbound on Route 1 in a gray Ford Taurus with the Massachusetts license plate number 4157YR. Shisler, who was wearing a KPD uniform and driving a marked cruiser, headed in the direction of the Trading Post, about a mile south on Route 1. Shisler’s progress was delayed by heavy traffic. As he was approaching the entrance to the Trading Post, his dispatcher informed him that the suspect had been spotted in the Tanger One parking lot. Shisler made his way to that parking lot, which was across the street from, and slightly south of, the Trading Post. As he pulled into the Tanger One lot with his cruiser lights flashing, he spotted a white male (later identified as the defendant) approximately six feet tall, wearing checkered black and white pants, standing near a van in the parking lot, engaged in a conversation with another male. The van was parked next to a Ford Taurus with a license plate number matching that provided by Shisler’s dispatcher.

As Shisler circled around the area of the parking lot where the two men were standing, the defendant, who was wearing a button-down wool sweatshirt with the hood pulled up, began to walk toward the heavily trafficked Route 1. Shisler stopped his cruiser, got out, and told the defendant to stop. The defendant glanced toward Shisler and kept walking. Shisler then drew his service weapon and ordered the defendant to the ground. The defendant complied. Shisler then ordered the male with whom the defendant had been conversing, who had gotten into the van, to show his hands. The van occupant complied. Shisler, who at that point was alone, handcuffed the defendant’s hands behind his back and left him prone on his stomach on the

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<sup>1</sup> Shisler described “chef pants” as being similar to gym pants with a tie waistband.

asphalt while he went to speak with the occupant of the van.<sup>2</sup> Shisler explained to the van occupant that he was responding to a report that someone had stolen a rifle from the Trading Post and asked him if he knew anything about it. The van occupant said that he did not. He explained that the defendant was a stranger who had approached him, told him that he was waiting for his wife to come out of the store, and asked him if he could borrow his cell phone. The van occupant had permitted the defendant to do so, and the defendant had made a call.

About three or four minutes after Shisler had first stopped the defendant, while he was still questioning the van occupant, backup arrived in the form of KPD Detective Steve Hamel, followed shortly thereafter by KPD Sergeant Russ French and KPD Officer Donald Truax. Hamel, who has worked as a narcotics detective for the KPD for 20 years, was conducting drug surveillance when he overheard on his portable radio a series of KPD dispatcher's reports concerning the Trading Post incident. As he was driving past the Tanger One parking lot, he observed Shisler dealing by himself with what looked like two separate incidents, so he decided to pull in to assist him.

Hamel, who never wears a uniform or drives a marked cruiser, was in plainclothes as was his custom. As he drove into the Tanger One parking lot, he observed Shisler talking to the van occupant, and also observed the defendant lying handcuffed face-down on the ground. Hamel noticed immediately that the defendant matched the description of the suspect in the Trading Post robbery. He parked next to the prone defendant, got out of his vehicle and spoke briefly with Shisler to advise him that he would handle the suspect on the ground. He then approached the defendant and told him that he was going to sit him up on a curb so that he would be more comfortable given how cold it was that day. The defendant affirmed that he was cold. Hamel

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<sup>2</sup> Shisler agreed on cross-examination that it was fair to say that, as of this point in time, the defendant was not free to leave. Shisler testified that he did not recall asking the defendant, while handcuffing him, where the gun was. However, on cross-examination, he allowed that he "may have."

assisted him to a sitting position on a curb and then crouched beside him. Shisler saw Hamel approach the defendant and sit him up, although he could not overhear their conversation.

Hamel identified himself and asked the defendant's name. The defendant told him he was Kevin Murphy. The defendant asked what was going to happen to him. Hamel told the defendant that he would be up-front and honest with him and that it was his opinion, given that the defendant exactly matched the description of the Trading Post suspect, that he would be placed under arrest for theft of an assault rifle. Hamel said that uniformed police would talk to the defendant shortly, but that, if in the meantime he wished to talk to Hamel, he could do so. However, Hamel explained that before asking any questions concerning the assault rifle or having any conversation pertaining to it, he would have to give the defendant *Miranda* warnings.<sup>3</sup>

The defendant asked what would happen with any information he might give Hamel. Hamel said that he would pass on to the prosecutor at the state level, where the defendant would be arraigned first, the fact that the defendant's cooperation had led to recovery of the assault rifle. He also explained that if the case "went federal," he would advise the federal prosecutor of the same fact. The defendant, who shared with Hamel that he previously had been incarcerated for 20 years in federal prison, expressed a desire to keep the matter at the state level. Hamel indicated that, if the defendant were able to assist him, that might help in keeping the charges down to theft of the gun.

While crouching alongside the defendant, Hamel gave him oral *Miranda* warnings from memory, pausing to ask after each if he understood it. After recitation of the first warning, the

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<sup>3</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.

defendant remarked, "I know my rights." However, Hamel told him that he had to explain each one to him and question whether he understood it. He proceeded to do so.

The defendant and Hamel engaged in some small talk, after which the defendant agreed to cooperate with Hamel but said that he wanted a cigarette first. Hamel obtained a cigarette from the defendant's pocket and helped him to smoke it. Hamel told the defendant that his top priority was to make sure that the firearm did not fall into the wrong hands and that he was concerned that a child might find it. The defendant said that he did not want the aggravation of being in trouble again. After some further small talk, he told Hamel that he would take him to the gun after he finished smoking a second cigarette. That was the first time that the defendant mentioned the gun to Hamel. Hamel helped the defendant to smoke a second cigarette, then assisted him to a standing position. The defendant then walked with Hamel directly to the location of the firearm, which was hidden inside a white Trading Post bag underneath grass and leaves in a brushy area behind the Tanger One outlet store.<sup>4</sup> Hamel, who had been at the scene for about 20 minutes, returned with the defendant, placed him in Shisler's cruiser, notified other officers that the gun had been found, and left to return to his surveillance. Other officers photographed the gun in the location in which it had been found and secured it. *See Gov't Exh. 3.*

While Hamel attended to the defendant, Shisler continued to question the van occupant, receiving his permission to check his cell phone. Shisler deduced that the defendant had dialed a number with a Massachusetts exchange. The van occupant relayed that, from what he could overhear of the conversation, the defendant had phoned a woman and advised her to meet him at

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<sup>4</sup> French initially accompanied Hamel and the defendant, but his attention was diverted when members of the news media attempted to photograph the trio, raising a concern for Hamel and French that Hamel's undercover work would be compromised. French stopped to speak with photographers. It is unclear whether he then rejoined the defendant and Hamel, but whether he did so is immaterial to the outcome hereof.

the entrance to the Trading Post. The van occupant denied having seen any firearm.

After Hamel, Truax, and French arrived at the scene, others gathered there, including Scott Cataldi, a Trading Post security officer with whom KPD officers had developed a close working relationship and were in regular contact. Shisler did not recognize any bystanders besides Cataldi, although he observed that one man was wearing a polo shirt adorned with Trading Post insignia. Shisler greeted Cataldi but did not have a conversation with him or any other bystander. French informed Shisler that Trading Post employees had identified the man in handcuffs as the individual who had stolen the firearm. Shisler did not speak to any employee-witnesses himself and did not recall any of his KPD colleagues having done so.

While Shisler was still questioning the van occupant, French informed him that the defendant was going to walk Hamel over to the place where he had left the gun. Shisler observed Hamel and French walking with the defendant, who was still in handcuffs. French later returned and informed Shisler that officers had located the firearm and were going to photograph the area in which it had been located and the firearm itself. Ultimately, French secured the firearm and turned it over to Shisler.

After the firearm was located, Hamel brought the defendant, whom he identified as Kevin Murphy, to Shisler. Shisler drove the defendant, who was handcuffed and seated in the back seat of Shisler's cruiser, a distance of less than a mile to KPD headquarters. This was the first time that Shisler had actually spoken to the defendant, apart from ordering him to get to the ground. The two had minimal conversation on the drive to the police station, mostly centering on the defendant's questions regarding the process that he was to undergo and whether he might be able to be bailed from jail that night. Shisler did not recall the defendant saying anything about the firearm-theft incident during that ride. Shisler brought the defendant to the booking area of the

police station, unhandcuffed him, and read him his *Miranda* rights, requesting that he provide an oral response as to whether he understood each of them. The defendant agreed to waive those rights and speak to Shisler.

Shisler memorialized the reading of the rights and their waiver on a form that the defendant signed. *See* Gov't Exh. 1. Shisler then interviewed the defendant. The defendant told Shisler, in substance, that the theft of the firearm was a crime of opportunity. He happened to be shopping with his wife at the Trading Post, his wife left, and he looked over at the gun counter and saw a rifle unsecured on a rack. He was down on his luck and had had difficulty finding employment in the wake of prior felony convictions, so he made a split-second decision to seize the firearm in the hope of selling it for some quick cash. The rifle was not an assault rifle. Someone other than Shisler transported the defendant to the York County Jail following the interview.

## II. Discussion

In his Motion, the defendant identified three bases for suppression, that:

1. Shisler placed him under *de facto* arrest without probable cause, in violation of his Fourth Amendment rights, by pointing a gun at him, ordering him to the ground, and handcuffing him. *See* Motion at 4-6. As a result, any evidence thereafter seized or statements subsequently taken must be suppressed as “fruit of the poisonous tree.” *See id.* at 6-7;<sup>5</sup>

2. The defendant was interrogated by Shisler and Hamel while in custody without benefit of *Miranda* warnings, as a result of which any statements elicited from him must be suppressed. *See id.* at 7-8; and

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<sup>5</sup> “Under the ‘fruit of the poisonous tree’ doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the Government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation.” *United States v. Rivas*, 157 F.3d 364, 368 (5th Cir. 1998).

3. The defendant was subjected to an unnecessarily suggestive and unreliable show-up identification procedure in violation of his Fifth and Fourteenth amendment due-process rights, as a result of which any reference to or use of that identification should be suppressed. *See id.* at 8-11.

At the conclusion of the defendant's hearing, his counsel withdrew the third of these points, reserving the right, without objection from counsel for the government, to raise it again *via an in limine* motion.

In a conference that I held with counsel just prior to commencement of the defendant's hearing, defense counsel raised a new due-process issue concerning possible destruction of evidence. His concerns, as raised in that conference and later at the hearing, centered on the KPD's inability to produce footage of a videotape that purportedly had been made of Shisler's interrogation of the defendant, on seeming gaps in surveillance-tape evidence that police had obtained from Trading Post personnel, and on the alleged disappearance of the defendant's wallet, containing his attorney's business card, on the day of his arrest. However, at the conclusion of the defendant's hearing, his counsel withdrew this new point as well, reserving the right, without objection from counsel for the government, to raise it at trial.

Finally, at the conclusion of the hearing, defense counsel raised another new point: that his client's statements were obtained involuntarily as a result of Hamel's offer of leniency.

The defendant therefore continues to press three points in support of the instant Motion: that he was placed under *de facto* arrest without probable cause; was interrogated while in custody without benefit of *Miranda* warnings; and, made statements involuntarily as a result of Hamel's promise of leniency.

The government bears the burden of proving (i) *Miranda* compliance, *see, e.g., United*

*States v. Barone*, 968 F.2d 1378, 1384 (1st Cir. 1992), (ii) the voluntariness of a confession, *see, e.g., United States v. Jackson*, 918 F.2d 236, 241 (1st Cir. 1990), and (iii) the lawfulness of warrantless searches and seizures, *see, e.g., United States v. Ramos-Morales*, 981 F.2d 625, 628 (1st Cir. 1992). For the reasons that follow, I conclude that the government meets its burden with respect to each of the defendant's points.

#### **A. *De Facto* Arrest**

The defendant first contends that, in violation of his Fourth Amendment rights, he was placed under *de facto* arrest in the absence of probable cause when Shisler pointed a gun at him, ordered him to the ground, and handcuffed him. *See* Motion at 4-6. The government rejoins that the defendant initially was not arrested but, rather, properly detained on reasonable suspicion, and that he ultimately was lawfully arrested with probable cause. *See* Government's Objection to Defendant's Motion To Suppress ("Objection") (Docket No. 21) at 3-6. I agree.

The First Circuit has observed:

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

*United States v. Trueber*, 238 F.3d 79, 91-92 (1st Cir. 2001) (citations and internal punctuation omitted). As the First Circuit has further elaborated:

The law governing investigative stops is well understood. A law enforcement officer ordinarily may not stop someone and restrain his freedom to walk away unless the officer has a reasonable and articulable suspicion of criminal activity. The reasonable suspicion test has been described as an intermediate standard requiring more than unfounded speculation but less than probable cause. At a minimum, the officer must have a particularized and objective basis for suspicion. When determining the legitimacy of an investigative stop, a court must undertake a contextual analysis using common sense and a degree of deference to the

expertise that informs a law enforcement officer's judgments about suspicious behavior.

An investigative stop also must be reasonably related in scope to the circumstances which justified the interference in the first place. If a law enforcement officer reasonably suspects criminal activity, he may briefly question the suspect about his concerns. If he has a reasonable basis to suspect that the subject of his inquiry may be armed, he also may frisk the suspect and undertake a limited search of the passenger compartment of any vehicle in which he is sitting. Once again, context is vital in determining the permissible scope of an investigative stop.

*United States v. Cook*, 277 F.3d 82, 85 (1st Cir. 2002) (citations and internal quotation marks omitted).

“[A]n investigatory stop constitutes a *de facto* arrest [for which probable cause is required] when a reasonable man in the suspect's position would have understood his situation, in the circumstances then obtaining, to be tantamount to being under arrest.” *Flowers v. Fiore*, 359 F.3d 24, 29 (1st Cir. 2004) (citations and internal quotation marks omitted).

As counsel for the government posited at hearing, Shisler had a particularized and objective basis for detaining the defendant in the Tanger One parking lot. First, the defendant matched the unusual and detailed description of the suspect as being a white male, approximately six feet tall, wearing black and white checkered chef pants and a hoodie sweater or sweatshirt. Second, the defendant was found where the suspect last was reported to have been seen, in the Tanger One parking lot. Third, the defendant was standing next to a car fitting the description of the car in which the suspect was seen driving from the Trading Post, including the exact license plate number. In these circumstances, Shisler had reasonable, articulable suspicion warranting detention of the defendant for further questioning.

Nonetheless, when Shisler, who was unmistakably a police officer, attired in his uniform and riding in a patrol car with blue lights flashing, attempted to do just that, the defendant ignored him and continued walking in the direction of the heavily trafficked Route 1. This

conduct served not only to bolster suspicion that the defendant had committed the Trading Post theft, *see, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (“Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”), but also to justify Shisler in taking more aggressive action to detain him.

As counsel for the government argued at hearing, the use of devices such as drawn weapons and handcuffs to stop a suspect who will not stop voluntarily and who poses a potential safety threat does not in itself convert a *Terry* stop into a *de facto* arrest. *See, e.g., United States v. Maguire*, 359 F.3d 71, 78 (1st Cir. 2004) (“Dorrance’s use of his weapon when he encountered Maguire was permissible during an investigatory stop. It is well established that the use or display of a weapon does not alone turn an investigatory stop into a *de facto* arrest.”); *United States v. Navarrete-Barron*, 192 F.3d 786, 791 (8th Cir. 1999) (in light of dangerous nature of suspected crime of drug trafficking and good possibility driver or passenger had weapon, limits of *Terry* stop were not exceeded when suspect was handcuffed while officers searched truck; “Several other circuits also have found that using handcuffs can be a reasonable precaution during a *Terry* stop.”); *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1030 (10th Cir. 1997) (“[A] *Terry* stop does not automatically elevate into an arrest where police officers use handcuffs on a suspect or place him on the ground. Police officers are authorized to take such steps as are reasonably necessary to protect their personal safety and to maintain the status quo during the course of a *Terry* stop.”) (citations and internal punctuation omitted); *United States v. Le*, 377 F. Supp.2d 245, 254 (D. Me. 2005), *aff’d*, 471 F.3d 1 (1st Cir. 2005) (“Of course, officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures without transforming a *Terry* stop into an arrest. This includes drawing weapons

when reasonable, such as when officers are faced with a report of an armed threat. The First Circuit has also allowed the reasonable use of handcuffs and backup officers as the situation requires.”) (citations and internal quotation marks omitted).

I am persuaded that in the circumstances that Shisler faced, his forcible stop and handcuffing of the defendant did not turn the *Terry* stop into a *de facto* arrest. The defendant, who was believed to have stolen an assault rifle, was heading into a heavily trafficked area. Shisler at the time was alone, did not know whether the van occupant had anything to do with the reported theft, and was obliged to deal with both individuals simultaneously. He was justified in forcibly detaining the defendant at gunpoint, ordering him to the ground, and handcuffing him.

Backup officers, including Hamel, quickly arrived. Within a fairly quick span of time, 20 minutes in all by Hamel’s reckoning, officers had learned additional information that, in combination with what they already knew, more than sufficed to provide probable cause to believe that the defendant had committed the Trading Post theft. This included the second-hand report that Trading Post employee bystanders had identified the defendant as the thief, the report of the van occupant that the defendant was a stranger who had approached him, asked to use his cell phone, and made arrangements to meet a woman outside of the Trading Post, and, most significantly, the defendant’s disclosure to Hamel of the location of the firearm. *See United States v. Vongkaysone*, 434 F.3d 68, 73-74 (1st Cir. 2006) (“Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing a crime. The inquiry into probable cause focuses on what the officer knew at the time of the arrest, and should evaluate the totality of the circumstances. Probable cause is a common sense, nontechnical conception that deals with the factual and practical considerations of everyday life

on which reasonable and prudent men, not legal technicians, act.”) (citations and internal punctuation omitted); *United States v. Winchenbach*, 197 F.3d 548, 555-56 (1st Cir. 1999) (an officer’s determination that a crime has been committed need not be “ironclad” or even “highly probable”; it need only have been “reasonable” to satisfy the standard of probable cause).

In short, Shisler had reasonable suspicion to detain the defendant for further questioning. He reasonably ordered him to the ground and handcuffed him given the defendant’s initial non-compliance, possible safety concerns, and Shisler’s initial status as the lone officer dealing with two possible suspects. Within less than half an hour, officers had developed more than sufficient information to provide probable cause for the defendant’s arrest, which occurred when he was placed in the back of Shisler’s patrol car for transport to the KPD police station. In the circumstances, the defendant’s forcible detention prior to the development of probable cause for his arrest did not transgress his Fourth Amendment rights.

### **B. *Miranda* Compliance**

The defendant next argues that he was subjected to custodial interrogation by Shisler and Hamel without benefit of *Miranda* warnings. *See* Motion at 7-8. Per *Miranda*, 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 obligation of an officer to administer *Miranda* warnings attaches “only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (citations and internal quotation marks omitted). Whether a person can be considered to have been in custody depends on all of the circumstances

surrounding the interrogation, but “the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *Id.* (citation omitted).

“As a general rule, *Terry* stops do not implicate the requirements of *Miranda*, because *Terry* stops, though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates *Miranda* warnings.” *United States v. Streifel*, 781 F.2d 953, 958 (1st Cir. 1986) (citation and internal quotation marks omitted). However, “a person who has been *Terry* stopped must be advised of his *Miranda* rights if and when he is subjected to restraints comparable to those of a formal arrest.” *Id.* (citations and internal quotation marks omitted).

At hearing, counsel for the government contended that there was no *Miranda* violation because (i) no *Miranda* warning was required before Hamel questioned the defendant incident to the *Terry* stop, (ii) regardless, Hamel, in an abundance of caution, supplied a *Miranda* warning before questioning him, and (iii) Shisler again administered *Miranda* warnings before questioning the defendant at the police station.

I, too, discern no *Miranda* violation in the circumstances of this case. Even assuming *arguendo* that the defendant was in custody for *Miranda* purposes from the moment he was handcuffed by Shisler, there is no evidence that anyone other than Hamel subjected him to interrogation at the scene, and Hamel did not interrogate him until after he had given him oral *Miranda* warnings.<sup>6</sup> Shisler again administered *Miranda* warnings at the station, and memorialized their administration in writing, before proceeding to interrogate the defendant there.

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<sup>6</sup> On cross-examination, Shisler testified that he had no recollection of asking the defendant at the scene about the location of the gun, but he might have. I decline to find from this weak testimony that Shisler made any such inquiry. In any event, there is no evidence that the defendant responded to any such inquiry by Shisler.

The government carries its burden of proving *Miranda* compliance.

### **C. Voluntariness of Statements**

I turn to the question of whether the defendant's statements nevertheless were made involuntarily. Involuntary confessions violate the due-process clauses of the Fifth and Fourteenth amendments. *See, e.g., United States v. Genao*, 281 F.3d 305, 310 (1st Cir. 2002). In the face of a defendant's claim that his confession was extracted involuntarily, the government bears the burden of showing, based on the totality of the circumstances, that investigating agents neither "broke" nor overbore his will. *Chambers v. Florida*, 309 U.S. 227, 239-40 (1940). As this language suggests, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary[.]'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). *See also, e.g., Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) (in context of voluntariness of confession, "[t]he relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers.") (citation omitted).

In this case, the defendant contends that the police overbore his will, and extracted a confession from him, by a promise of leniency. I am unpersuaded. The evidence adduced at hearing suggests that the defendant made a calculated choice to speak with Hamel in a bid to minimize the damage flowing from the Trading Post incident. The defendant, who was no stranger to criminal proceedings, asked Hamel several questions and took a few minutes to smoke cigarettes, make small talk, and think, before agreeing to take Hamel to the firearm. He was cognizant that the theft with which he was likely to be charged might subject him to federal charges. He accordingly expressed a desire to keep the matter at the state level. Hamel indicated that, if the defendant were able to assist him, that might help in keeping the charges down to theft of the gun. However, Hamel did not unequivocally promise that the defendant would not be

charged with a federal crime and did not suggest that he, himself, had the power to make such a decision.

The First Circuit has expressed doubt that even a false promise that a suspect would not be prosecuted undermines the voluntariness of a confession. *See United States v. Byram*, 145 F.3d 405, 408 (1st Cir. 1998) (“[I]t would be very hard to treat as *coercion* a false assurance to a suspect that he was not in danger of prosecution.”) (emphasis in original). Hamel’s comment, which was neither demonstrably false nor a promise to do anything more than relay the defendant’s cooperation to prosecutors, which might help him stave off federal charges, does not qualify as coercive police activity. *See, e.g., United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) (“A promise to bring any cooperation on the part of the defendant to the prosecuting attorney’s attention does not constitute a coercive promise sufficient to render any subsequent statements involuntary and inadmissible.”).<sup>7</sup>

The defendant points to no other police conduct as undermining the voluntariness of his statements to police on November 19, 2007, and I find none. I am satisfied that any statements that the defendant gave to officers on the day in question were in fact made voluntarily.

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<sup>7</sup> At hearing, defense counsel cited two cases in support of his client’s bid for suppression on involuntariness grounds, *United States v. Pascucci*, Crim. No. 06-58-B-W, 2007 WL 420209 (D. Me. Feb. 1, 2007) (rec. dec., *aff’d* Mar. 21, 2007), and *United States v. Veilleux*, 846 F. Supp. 149 (D.N.H. 1994). In *Veilleux*, a defendant’s statements were deemed involuntary when an officer elicited them after deliberately refraining from giving him *Miranda* warnings and then falsely reassuring him that, in the absence of such warnings, his statements could not be used against him. *See Veilleux*, 846 F. Supp. at 152, 155. In *Pascucci*, Magistrate Judge Kravchuk cited *Veilleux* for the proposition that “[a]n officer’s promise that everything the defendant said was ‘off the record’ and would not be used against him is the type of coercive police activity that could render a statement involuntary in certain circumstances.” *Pascucci*, 2007 WL 420209, at \*4. However, Magistrate Judge Kravchuk did not find that officers had made any such promise to Pascucci. *See id.* Hamel’s comment that the defendant’s cooperation might help avoid federal charges is clearly distinguishable and comparatively benign.

### III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress 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 16th day of November, 2008.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

#### Defendant (1)

**KEVIN MURPHY**  
*also known as*  
**KEVIN WHITFORD**

represented by **CLIFFORD STRIKE**  
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