

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal No. 97-14-P-C</b>
	)	
<b>RICHARD N. LABARE</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

The defendant is charged with violating the felon-in-possession statute, 18 U.S.C. § 922(g), and the government alleges that he is amenable to sentencing as an armed career criminal pursuant to 18 U.S.C. § 924(e). He seeks the suppression of testimony from three government witnesses who were incarcerated with the defendant following his arrest and to whom the defendant allegedly made inculpatory statements. An evidentiary hearing was held on September 4-5, 1997. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

**I. Proposed Findings of Fact**

This case arises out of the shooting of cab driver Merritt Warren in the parking lot of a Portland office building on February 8, 1997. Police arrested the defendant in nearby Westbrook on February 27, 1997 in connection with an unrelated incident. The following day, the defendant appeared in state court on a complaint charging him with attempted murder and robbery, and also made an initial appearance in this court in connection with the pending federal firearms charge. The defendant has remained incarcerated at the Kennebec County Jail in Augusta since that date, awaiting trial on both the federal and state charges. The state and federal authorities have been cooperating on the defendant's prosecution, and at all relevant times he has been represented by

counsel in both proceedings. While at the Kennebec County Jail, the defendant became acquainted with the three fellow inmates whose testimony he now seeks to suppress. He knew none of the three until they came to be together in the jail. Each inmate was known by the government to be an informant, and each gave information to the government — both about the defendant and about other cases — in the hope that such cooperation would cause the criminal sanctions imposed on them to become more lenient.

**a. Arthur J. Mollo**

At the time of the defendant's arrest, fellow inmate Arthur J. Mollo was in the Kennebec County Jail awaiting trial on a charge of violating the federal felon-in-possession statute.<sup>1</sup> Because of his prior criminal record, Mollo was susceptible to being sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e). Mollo met with federal investigators on February 28, 1997 to give them information about his case and about other criminal activity, unrelated to the defendant, of which Mollo had knowledge. Although the subject of Mollo's providing information about fellow Kennebec County Jail inmates was discussed, Mollo was not yet acquainted with the defendant as of that date. Nothing in the record supports a finding that anyone present at the February 28 meeting mentioned the defendant or otherwise suggested to Mollo that he could or should obtain information from or about the defendant. In any event, an assistant U.S. Attorney instructed Mollo not to actively seek information from fellow inmates, and reminded Mollo that he was not an agent of the

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<sup>1</sup> Mollo was arrested on or about January 22, 1997 and was incarcerated for approximately a month thereafter at the Cumberland County Jail in Portland. Although he was transferred to the Kennebec County Jail just prior to the defendant's arrest, nothing in the record suggests that the two events are related. Mollo's transfer to the Augusta facility stemmed from an altercation with another prisoner in the Portland lockup.

government. Rather, the assistant U.S. attorney told Mollo simply to listen to whatever he heard in the jail and then to report any information about criminal activity.

On March 11, 1997 Mollo formally agreed to plead guilty to the charged offense. His written plea agreement with the government included a provision obligating him to disclose to the government “all that he knows or has heard about violations of federal and state laws,” both related and unrelated to the charge on which he was changing his plea. Govt. Exh. 1 at 2. The agreement provided that the government was free to seek, and the court could impose, any lawful sentence in connection with the charged offense.

During their time together at the Kennebec County Jail, Mollo and the defendant had extensive discussions about the defendant’s case, in which the defendant allegedly made statements that were highly inculpatory. Although Mollo cannot be said to have interrogated the defendant during their discussions, neither did he remain entirely silent during their conversations about the defendant’s case. Instead, he would move the conversation along by asking follow-up questions.

On March 31, 1997 Mollo wrote a letter to the U.S. Attorney’s office indicating that he wanted to share information he had received from the defendant about the Warren shooting. Thereafter, Mollo met in Portland with the federal and state officials who were handling the investigation. At the meeting, Assistant U.S. Attorney Jonathan Chapman reminded Mollo not to take active steps to obtain information from the defendant.

The court ultimately sentenced Mollo to 156 months’ incarceration. Pursuant to 18 U.S.C. § 3553(e) and section 5K1.1 of the Sentencing Guidelines, this represented a 12-month downward departure from the mandatory 15-year sentence for armed career criminals. The basis for this downward departure was Mollo’s cooperation in the investigation of the defendant.

### **b. Joseph Chaloux**

Inmate Joseph Chaloux was sentenced to six months' incarceration in January 1997 on a state court burglary conviction. He remains incarcerated pending trial on a burglary charge in New Hampshire state court. Chaloux met the defendant in the Kennebec County Jail's "C Block," which is where inmates are initially held for classification upon their arrival at the facility. According to Chaloux, the defendant immediately began discussing his case with Chaloux, making numerous inculpatory statements in the process.

On March 5, 1997 Chaloux met at the jail with Agent Michael Kelly of the FBI's Augusta office. Also present at the meeting were two law enforcement officers from South Carolina. Chaloux discussed information he purported to have about homicides in South Carolina and Oklahoma. Both homicides are unrelated to the defendant's case. Prior to the March 5 meeting, Kelly was aware of the Warren shooting but was not familiar with the details of the case. At the meeting, following the discussion of the unrelated matters, Chaloux indicated he had information to share about the Portland shooting. His objective in cooperating with the authorities was to cause his sentence to be reduced.

The following day, Assistant U.S. Attorney Jonathan Chapman wrote to Chaloux's attorney in New Hampshire indicating a desire to interview Chaloux about the defendant's case. Chapman communicated a willingness to "make his cooperation known to any authorities to whom he wishes such information disseminated." Govt. Exh. 4. The requested interview took place on March 11, 1997. Chaloux gave the federal and state authorities an extensive account of the defendant's activities on the date of the shooting and his alleged motives for committing the crime. Chapman

instructed Chaloux not to question the defendant, but only to listen in the event the defendant chose to make further revelations. The investigators also told Chaloux they could be of no assistance to him in getting his previously imposed sentence reduced. A week after the March 11 meeting, Chaloux filed a motion in Maine Superior Court seeking reduction of his burglary sentence.

Several days later, Chaloux wrote a letter to Detective Gil Turcotte of the Kennebec County Sheriff's department, expressing concern about his safety but also indicating that he had more information to share about the defendant's case. This led to a meeting with Chapman on or about March 22, 1997 at which Chaloux reported that the defendant was making efforts to construct a false alibi. Chaloux also stated that the defendant had told him how he and an accomplice had disposed of the weapon used to shoot Warren.

### **c. William Brown**

The final Kennebec County Jail inmate whose testimony the defendant seeks to suppress is William Brown. On January 27, 1997 this court sentenced Brown to incarceration for 156 months in connection with his violation of the felon-in-possession statute. As with Mollo, Brown was sentenced as an armed career criminal but received a downward departure of 24 months from the mandatory sentence of 15 years in light of his cooperation with the government. The cooperation that led to this departure was unrelated to the defendant's case and Brown was not acquainted with the defendant as of Brown's sentencing.

When sentenced, Brown was incarcerated at the Cumberland County Jail in Portland. He was transferred to the federal prison in Otisville, New York on February 19, 1997. The federal authorities in Portland quickly determined that this transfer had been in error because they required

Brown's further presence in Maine in connection with a criminal investigation — unrelated to the defendant's case — in which Brown was cooperating with the government. Accordingly, on February 27, 1997 Deputy U.S. Marshal Thomas Folan and another agent drove from Portland to Otisville and returned with Brown to Portland where he was placed once again at the Cumberland County Jail. During the drive back to Portland, Brown and the federal agents engaged in casual conversation. During the conversation, Brown inquired about Warren, who was a former neighbor of Brown's in Portland. Although Brown was aware that Warren had been shot, he was not then acquainted with the defendant and was not then in a position to provide any assistance in the investigation of the Warren shooting. Since February 27 was also the date of the defendant's arrest, the authorities — including Folan — were well aware that the defendant was the suspect in the Warren shooting, something Folan deliberately did not disclose to Brown. Instead, Folan urged Brown to keep his "ear to the ground" about the Warren shooting. Suppression Hearing Transcript, Vol. I (Docket No. 31b) at 182.

Brown spent only a week at the Cumberland County Jail upon his return from Otisville. Officials at the Cumberland County Jail asked the federal authorities to have Brown transferred elsewhere.<sup>2</sup> Folan made the decision to move Brown to the Kennebec County Jail, although the marshals could also have placed him at the Maine Correctional Center in Windham, a facility that is closer to Portland than is the Kennebec County Jail in Augusta. Notwithstanding the suggestion by the defendant that Folan deliberately housed Brown at the Kennebec County Jail so as to place

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<sup>2</sup> Folan's testimony was that the jail officials in Portland asked to have Brown sent elsewhere because he had lodged a formal complaint about one of the jail's guards and an investigation was pending, thus causing tensions in the jail. Brown's testimony was simply that he had made an insubordinate remark to a guard. What is undisputed is that Brown's transfer was the result of circumstances inside the Cumberland County Jail and were unrelated to the defendant.

him in contact with the defendant, I credit Folan's testimony at hearing that the decision to place the defendant at the Augusta facility was coincidental. Folan's assertion to that effect is particularly credible in light of the fact that the federal authorities did not initiate Brown's transfer, and in light of Folan's additional testimony that he was not aware of the housing arrangements at the Kennebec County Jail and had no input in the decisions of Kennebec County Jail officials as to where a particular inmate is housed within that facility.

Brown met the defendant when he was moved from the Kennebec County Jail's classification unit to the "B Block" which housed the defendant, Mollo and Chaloux, among others. Upon meeting the defendant, Brown asked him whether he was the person who shot Warren. The defendant's response was noncommittal: "see — everyone says I did it." *Id.* at 211. Soon, however, Brown and the defendant fell into close confederacy and the defendant spoke frequently with Brown about the defendant's case. According to Brown, the defendant explained his motive for committing the shooting and even sought to enlist Brown's assistance in recruiting a witness who would testify falsely to an alibi for the defendant. Brown gave the defendant a letter Brown had written falsely stating that he had sold three weapons to a confederate of the defendant. According to Brown, this was an effort to gain the defendant's confidence by appearing to help the defendant place the blame for the shooting elsewhere.

By letter dated March 18, 1997 Brown informed his attorney that he had information about the Warren shooting, and instructed his counsel to contact the U.S. Marshals. The federal and state authorities involved in the investigation of the Warren shooting interviewed Brown in Portland on March 25, 1997. According to the government's memorandum in opposition to the suppression motion, Brown disclosed what he had learned from the defendant at the jail, and agreed to cooperate

further. It appears that he did so, upon his return to the jail. However, at hearing the government indicated on the record that it would not seek to introduce any testimony at trial from Brown concerning anything the defendant may have told him after Brown's March 25 meeting with the investigators. Accordingly, I make no recommended findings concerning what was apparently extensive contact between Brown and the defendant after that date.<sup>3</sup>

## II. Legal Discussion

Thirty-three years ago, the Supreme Court held in *Massiah v. United States*, 377 U.S. 201

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<sup>3</sup> Among the matters concerning which I make no recommended findings is the defendant's contention that Brown had extensive discussions with the defendant about discovery materials furnished to the defendant by the state and federal prosecutors. The record reflects that no discovery was turned over to the defendant until April 3, 1997, more than a week after Brown's March 25 meeting with the investigators. In his post-hearing memorandum, the defendant points out that a 14-page affidavit, laying out the results of the government's investigation of the Warren shooting, was made part of the record in this court when a criminal complaint was filed on February 27, 1997. *See* Criminal Complaint and Affidavit of Paul Kelley (Docket No. 1). The defendant implies that the informants read this document and discussed it with him prior to March 25. The record supports such an inference as to Mollo and Brown, but not Chaloux. However, in my opinion, the result of the suppression motion does not turn on whether any of the informants reviewed the complaint and attached affidavit.

There was also considerable testimony at hearing concerning efforts by the state prosecutors, with the knowledge if not the approval of their federal counterparts, to withhold from the defendant for as long as possible certain discovery materials that would have put the defendant on notice that Chaloux was sharing his statements with investigators. Normal state-court practice would have been to furnish such materials to the defendant at his arraignment on March 13, 1997 or soon thereafter. In this instance, following an *ex parte* discussion with the prosecutor, the state court ordered certain materials impounded that would have otherwise been subject to automatic disclosure under Rule 16(b) of the Maine Rules of Criminal Procedure. In this proceeding, the government could lawfully withhold such evidence under the Jencks Act, 18 U.S.C. § 3500(a), until the direct testimony of the relevant witness at trial. Understandably, the state and federal authorities feared for the safety of Mollo, Chaloux and Brown in the event the defendant learned of their cooperation.

I agree with the defendant's suggestion at hearing that these actions are properly attributed to the government for purposes of the instant motion. I also agree with the defendant that a more reliable method of assuring the safety of the informants would have been to separate them from him — indeed, the government ultimately did so — and that the government chose the course of action it did to promote witness safety without cutting off the information pipeline.

(1964), that it is inconsistent with the Sixth Amendment for the government to use an informant to interrogate a criminal defendant, after the right to counsel has attached, when the informant is deliberately seeking to elicit incriminating statements. *Id.* at 206. However, subsequent case law has clarified that the Sixth Amendment is not automatically violated whenever the government happens to obtain incriminating information from an informant after the attachment of the defendant's Sixth Amendment rights. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985); *United States v. Henry*, 447 U.S. 264, 276 (1980) (Powell, J., concurring)). "Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459.

Here, the government and the defendant agree that *Massiah* and its progeny state the appropriate rule. They disagree, however, over which side must carry the burden of proving whether the challenged evidence was obtained in violation of the Sixth Amendment.<sup>4</sup> Citing the above-referenced language from *Kuhlmann*, the government would place the burden with the defendant. Relying by analogy on case law arising under the Fifth and Fourteenth Amendments, the defendant contends the government must prove there was no violation of the *Massiah* rule. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986) (state must prove waiver of *Miranda* right against uninformed self-incrimination by preponderance of the evidence).<sup>5</sup>

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<sup>4</sup> At hearing, the government assumed the burden of going forward with evidence concerning the admissibility of the challenged testimony, while reserving the question of the ultimate burden of proof.

<sup>5</sup> Although the defendant contends the burden of proof lies with the government, he does not argue for a more stringent quantum of proof than the preponderance standard applied in *Connelly*.

I agree with the government that the burden rests with the defendant to establish a violation of the *Massiah* rule by a preponderance of the evidence. The defendant points out that *Kuhlmann* was a post-conviction proceeding, in which the burden is always on the petitioner to demonstrate an entitlement to relief, and that the Supreme Court’s reference to what a defendant must establish should be understood as applying only to that procedural context. However, the same cannot be said of *Moulton*, another important benchmark in the *Massiah* line of cases. *Moulton* was a direct appeal in which the Supreme Court rejected the argument that the government must have intentionally set up the encounter between the informant and the defendant. *Moulton*, 474 U.S. at 174-76. The Court determined that knowing exploitation of such an opportunity by the government is sufficient to establish a violation. *Id.* at 176. In so holding, the Supreme Court made the observation that

[d]irect proof of the [government’s] knowledge will seldom be available to the accused. However, as *Henry* makes clear, proof that the [government] “must have known” that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation.

*Id.* at 176 n.12 (quoting *Henry*, 447 U.S. at 271). I can reach no other conclusion than that, regardless of the procedural posture of the particular case, it is implicit in the Supreme Court’s elucidation of the *Massiah* principle that the defendant must carry the ultimate burden of proof.<sup>6</sup>

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<sup>6</sup> The defendant’s analogy to the burden of proof in the *Miranda* context is unpersuasive. The government bears the burden of establishing a knowing and intelligent waiver of the right against self-incrimination for reasons that are unique to situations in which the authorities may have induced a defendant to violate his right against self-incrimination, i.e., because the government “is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation.” *Tague v. Louisiana*, 444 U.S. 469, 470-71 (1980) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)). On the other hand, in other constitutional contexts the burden of proof is assigned to the defendant who seeks a suppression ruling. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980) (defendant challenging search on Fourth Amendment grounds bears burden of proving that search illegal and that defendant had legitimate expectation of privacy) (continued...)

The record reflects that all of the statements made by the defendant to Mollo, and much of what the defendant said to Chaloux, was information obtained by these informants before either of them had met with government agents to discuss the information the defendant was sharing. Although both witnesses had been in touch with the government about cooperating generally, and both were well aware that such cooperation could be of benefit to them, there is nothing in the record to suggest that either Mollo or Chaloux had been instructed, encouraged or even invited to obtain information from the defendant. Under the rule adopted in several circuits, most recently the Second, that alone would be fatal to the defendant's contention that his Sixth Amendment rights were violated in connection with any statements he made to Mollo or Chaloux before their respective meetings with investigators about him. *See United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997) (collecting cases), *petition for cert. filed* (U.S. Jul. 31, 1997) (No. 97-5692). The Third Circuit has adopted, or at least suggested, a somewhat more restrictive view, holding that the government *may* violate the Sixth Amendment by incarcerating a pretrial detainee in close proximity with another inmate who has a propensity for informing on his cellmates. *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994). Under this view, the result turns on whether the government has mounted "a deliberate effort to obtain incriminating information." *Id.* (citing *Henry*, 447 U.S. at 271). The First Circuit has not spoken to the question, but even if it adopted a *Brink*-type formulation there is still

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<sup>6</sup>(...continued)  
(citations omitted); *United States v. Marshall*, 109 F.3d 94, 97-98 (1st Cir. 1997) (defendant must persuade court that exculpatory evidence existed that government failed to produce in discovery); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994) (defendant must prove that his Fourth Amendment rights, as opposed to those of someone else, were violated); *but see United States v. Bonilla Romero*, 836 F.2d 39, 45 (1st Cir. 1987) (defendant bears initial burden of production, but government has ultimate burden of persuasion, on suppression motion alleging illegal warrantless search and seizure).

no Sixth Amendment problem with anything said by the defendant to Mollo or Chaloux prior to their meetings with the investigators. The record simply does not support a determination that the government took any conscious steps to put the defendant in proximity to these informants prior to the meetings.

Chaloux, of course, became a government agent for purposes of *Massiah* following his meeting with the authorities on March 11, 1997 because, like the informant in *Massiah*, as of that date he acted pursuant to specific instructions to gather information about the government's suspect. See *Massiah*, 377 U.S. at 202-203 (describing informant's active and knowing participation in federal investigation). As to information gathered by Chaloux after that date, the defendant's bid for suppression fails because Chaloux did nothing that could be viewed as deliberate elicitation of information from the defendant. The most Chaloux did was to ask benign follow-up questions, designed only to permit the conversations to continue in a normal manner. This does not go sufficiently "beyond merely listening," *Kuhlmann, supra*, to warrant suppression of the results of these conversations.

Brown's role is similar to that of Mollo in that all of the allegedly inculpatory evidence the government seeks to admit through Brown was gathered by him prior to his meeting with the authorities to discuss the defendant's case. Brown's testimony is nevertheless somewhat more problematic given that the government, through Folan, knew at the time it placed Brown at the Kennebec County Jail that Brown had an interest in the Warren investigation and had even specifically urged Brown to keep his "ear to the ground" about the case. Nevertheless, having credited Folan's testimony that his placement of Brown at the same facility as the defendant was purely coincidental, I must conclude that the defendant has failed to establish "knowing exploitation

by the [government] of an opportunity to confront the accused without counsel being present.” *Moulton*, 474 U.S. at 176. In contrast to the situations presented by such cases as *Moulton* and *Brink*, too much was left here to “luck or happenstance” to permit the court to determine that the government sought to interrogate the defendant through Brown, at least as to any conversations Brown had with the defendant prior to his March 25, 1997 meeting with the investigators.<sup>7</sup> *Id.* (police suggested to informant that he record conversations with defendant); *Brink*, 39 F.3d at 424 (government knowingly placed informant in same cell as pretrial detainee).

### III. Conclusion

For the foregoing reasons, and in light of the government’s stipulation at hearing concerning evidence it does not intend to introduce at trial, 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.*

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<sup>7</sup> In arguing to the contrary, both as to Brown and the other two informants, the defendant asks the court to apply by analogy the Ninth Circuit’s reasoning in *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981). *Walther* is a Fourth Amendment case, and its discussion of when an airline employee who searches passenger baggage becomes a government agent for purposes of search-and-seizure analysis is of no assistance here given the existence of directly applicable Supreme Court case law.

I also note that, notwithstanding the extensive hearing testimony about the withholding of discovery, as discussed *supra* at note 3, the defendant advances no theory in his post-hearing memorandum as to how these efforts, though surely calculated to forestall the revelation that his jailhouse confidants were government informants, are relevant for Sixth Amendment purposes. I therefore do not discuss this aspect of the hearing record.

*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 18th day of September, 1997.*

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*David M. Cohen*  
*United States Magistrate Judge*