UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BUFORD O'NEAL FURROW, JR., Defendant.	CASE NO. CR 99-838(A) NM Order Granting in Part and Denying in Part Defendant's Motion to Suppress Post-indictment Statements and Derivative Evidence

I. INTRODUCTION

Criminal defendant Buford O'Neal Furrow, Jr. ("Defendant") has been charged in a sixteen-count indictment filed on December 2, 1999 for the alleged murder of a U.S. postal worker, Joseph Ileto, the alleged shooting of five individuals at the North Valley Jewish Community Center ("NVJCC"), and various gun possession offenses. Pending before the court is Defendant's motion to suppress post-indictment statements and derivative evidence obtained during Defendant's pretrial detention in Los Angeles's Metropolitan Detention Center. At issue in this motion are three types of evidence, specifically:

1) a handwritten note in which Defendant threatened to kill fellow inmate Raul Lopez and his "angel protectors" found on October 27, 1999 during a routine strip-search of Defendant;

2) oral threats of violence against Lopez and prison guards communicated to Dr. Burris during counseling sessions on October 27, 1999 and November 12, 1999.

3) two letters Defendant handed to a corrections officer May 16, 2000 for delivery to
(a) Dr. Burris, a staff psychologist at MDC, and
(b) Dr. Burris, U.S. Attorney General Janet Reno, and other government officials;[1]

II. RELEVANT FACTUAL BACKGROUND

Since his arraignment on August 11, 1999, Defendant has been detained in the Special Housing Unit ("SHU") of the Metropolitan Detention Center ("MDC") in Los Angeles pending trial.[2] A visible video camera inside Defendant's cell helps prison authorities monitor his activities. All six of the cells in the area where Defendant is housed contain such cameras. These cameras relay but do not record images of in-cell activity.

All MDC inmates are strip-searched after every visit to ensure that they do not possess contraband. Accordingly, correctional officers strip-searched Defendant October 27, 1999, after a visit from his attorneys. During the search, Officer David Phillips discovered a handwritten note in the pocket of Defendant's uniform.[3] The note contained threats directed toward Raul Lopez, an MDC inmate who worked as an orderly in the SHU, and other SHU staff. Prior to discovery of

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[1] Although the government has not definitively decided what evidence it intends to present at trial, it has identified the preceding statements as evidence it may seek to introduce in its case in chief. Opp., at 2.

[2] On August 19, 1999, the government filed an indictment charging Defendant with two capital offenses and other felonies. On December 2, 1999, the government filed a sixteen-count First Superseding Indictment.

[3] Officer Phillips turned over the note to the SHU Lieutenant who also participated in the search.

the note, Officer Phillips had never discussed Defendant with any government agency or individual charged with prosecuting or investigating Defendant's case.

That day, SHU staff related the discovery of the threatening note to Psychological Services. In response, Dr. Maureen Burris, a prison psychologist, went to Defendant's cell to meet with him in order to assess the risk he posed to the safety of others and to offer supportive counseling to minimize that risk. Burris Decl. ¶2. According to Dr. Burris, corrections staff often ask for a prison psychologist to speak with an inmate "to address behavior that raises [prison] safety and management concerns."[4] Id. During her first meeting with Defendant, Dr. Burris explained that she was required to submit a monthly report about their conversations to prison authorities and to disclose any statements threatening the security of the facility. In Defendant's October 27, 1999 meeting with Dr. Burris, he stated that "he could not rest until he had killed Lopez and the unit staff." Id. ¶3; Gov.'s Exh. A. During their November 12, 1999 counseling session, Defendant repeated his threat against Lopez. Gov.'s Exh. B. On each occasion, Dr. Burris prepared a memorandum describing Defendant's statement. Dr. Burris had no prior contact concerning Defendant with government authorities responsible for prosecuting or investigating his case.[5] Gov.'s Exhs. A & B.

In early January 2000, federal prosecutors requested from Lieutenant Cole,

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[4] According to Dr. Burris, pretrial detainees are not required to submit to interviews with prison psychologists, and Defendant would not have suffered any reprisal for refusing to speak with her. Dr. Burris does not claim to have advised Defendant of either fact.

[5] As Dr. Burris notes in her declaration, she was not acting at the behest of the United States Attorney's office. Accordingly, she did not advise Defendant that any statements he made might be turned over to prosecutors for use against him at trial. Nor was Defendant's counsel notified that Dr. Burris intended to initiate such counseling sessions "to assess the potential threat" Defendant posed to MDC staff and fellow inmates. Burris Decl. ¶ 2.

an MDC Special Investigative Agent, information regarding Defendant's conduct during his detention at MDC for purposes of evaluating his future dangerousness. On January 21, 2000, Lt. Cole furnished federal prosecutors and investigators with approximately 40 pages of reports describing Defendant's behavior at MDC. Those reports included a copy of the handwritten note found during the October 27, 1999 strip-search and Dr. Burris's memoranda regarding the threatening statements Defendant made during her counseling sessions with him. The government produced all of this material in discovery.

On May 16, 2000, as SHU Lieutenant Stan Colvin came by to collect Defendant's food tray after dinner, Defendant handed two letters to Lt. Colvin through the food tray slot in his cell door and asked Lt. Colvin to deliver them. This is the standard method MDC inmates use to mail letters. One letter was addressed to Dr. Burris; the other was addressed to "Dr. Burris, Lt. on up the line to Washington, D.C. (J. Reno)." Colvin Decl. ¶3. Lt. Colvin followed standard procedure, conveying the letters to the MDC Operations Lieutenant. Id. ¶5. At the time Lt. Colvin received these letters from Defendant, he had never discussed Defendant with federal prosecutors or investigators. Id. ¶6.

Defendant now moves to suppress these post-indictment statements and related evidence on the grounds that they were obtained in violation of his rights to the assistance of counsel under the Sixth Amendment and to due process under the Fifth Amendment.[6]

III. DISCUSSION

A. Legal Standard

Although a prisoner does not shed his constitutional rights at the jailhouse

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[6] Although Defendant raises the Fourteenth Amendment's guarantee of equal protection in support of his motion to suppress, he fails to articulate any basis for his equal protection claim. Mot., at 9.

door, neither is he entitled to the full panoply of rights afforded unincarcerated persons. See Bell v. Wolfish, 441 U.S. 520, 536 (1978). Prisoners may enjoy only "those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." Hudson v. Palmer, 468 U.S. 517, 523 (1984) (prison inmates have no reasonable expectation of privacy in their cells under the Fourth Amendment). As the Hudson court recognized, an inmate's rights must often be weighed against the need to maintain institutional security: "[P]rison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors. They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." Id. at 526-27.

1. Sixth Amendment

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . to have the assistance of counsel for his defense." U.S. Const., Amend. VI. "The Sixth Amendment guarantees the accused, at least after initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Maine v. Moulton, 474 U.S. 159, 176 (1985); see also Moran v. Burbine, 475 U.S. 412, 431 (1986) (Sixth Amendment right to counsel attaches once formal charges have been filed.).

In the Massiah line of cases, the Supreme Court held that the government violates the Sixth Amendment when it deliberately elicits incriminating information from a defendant outside the presence of counsel. See Massiah v. United States, 377 U.S. 201 (1964) (government violated Sixth Amendment by using post-indictment statements defendant made to codefendant who was secretly cooperating with narcotics agents); United States v. Henry, 447 U.S. 264 (1980) (government violated Sixth Amendment by seeking to use defendant's confession to jailhouse informant placed in cell with defendant); Maine v. Moulton, 474 U.S. 159 (government violated Sixth Amendment by enlisting codefendant to stimulate

incriminating conversations with defendant and recording those conversations).

In Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986), the Supreme Court held that no Sixth Amendment violation occurred where a fellow inmate merely listened to defendant's jailhouse confession and reported what he heard to police. "[T]he primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." Id. at 459 (reviewing Massiah and its progeny).

> Thus, the Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.[7]

Maine v. Moulton, 474 U.S. at 176.

In Estelle v. Smith, 451 U.S. 454, 466 (1981), the Supreme Court held that a capital defendant's Sixth Amendment right to counsel was violated when prosecutors introduced at the penalty phase of his trial testimony as to defendant's future dangerousness offered by a psychiatrist who had conducted a court-ordered competency examination. Noting that the decision whether to submit to a psychiatric evaluation "is 'literally a life or death matter' and is 'difficult . . . even for an attorney,'" the Court concluded, "[i]t follows logically from our precedents that a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.'" Id. (citation omitted). In Powell v. Texas, 492 U.S. 680 (1989), the Court reaffirmed the principles set forth in Estelle, finding the defendant was deprived of his Sixth Amendment right to counsel when

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[7] Because a defendant will seldom be able to prove through direct evidence that the government knowingly interposed itself between him and counsel, "proof that the State '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." Maine v. Moulton, 474 U.S. at 176 n.12.

psychiatric examinations were performed by state experts, without notice to the defendant or his attorney that the examinations would encompass the issue of future dangerousness.

2. Due Process

The Fifth Amendment states that no person shall "be deprived of life, liberty, or property without due process of law." U.S. Const., Amend. V. The Supreme Court held in Bell v. Wolfish, 441 U.S. 520 (1979), that the conditions and restrictions of pretrial detention are constitutional as long as they do not amount to punishment of the detainee. Id. at 535. The Court noted that the "legitimate operational concerns [of correctional authorities] may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial." Id. at 540. More recently, the Supreme Court has announced the following standard for constitutional challenges to prison rules: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penalogical interests." Turner v. Safley, 482 U.S. 78, 89 (1987).

B. Application

Defendant moves for a blanket suppression of statements and derivative evidence obtained from MDC staff or inmates, citing the Sixth Amendment right to the assistance of counsel and due process. Mot., at 4. However, Defendant does not identify the offending statements he seeks to suppress.[8] Nor does he offer any evidence that "prosecutors have used MDC staff members to elicit statements

[8] In its opposition, the government identifies the post-indictment statements and related evidence it plans to offer at trial. As noted above, the evidence was acquired in a variety of ways.

and collect evidence from Mr. Furrow."[9] Id. (without citation). Instead, he argues that "[t]he conditions of [his] confinement during pretrial detention increase the risk of improper elicitation or stimulation of post-indictment statements." Mot., at 7 (citing Henry, 447 U.S. at 274 ("[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover agents.")).

The court declines Defendant's invitation to ban all post-indictment statements derived from his interaction with MDC staff, regardless of whether they are voluntary or coerced, spontaneous or stimulated by government agents. The better approach is to examine each post-indictment statement the government intends to offer at trial in context, to determine whether it was deliberately elicited in violation of Defendant's constitutional rights.

1. Sixth Amendment Right to Counsel

There is no question that Defendant's Sixth Amendment right to counsel had attached when Defendant made the disputed statements, as a federal indictment was issued against him on August 19, 1999.

a) Handwritten Note Found During October 27, 1999 Strip-Search of Defendant

MDC policy requires staff to search SHU inmates for contraband after every visit. Such a policy is reasonably related to legitimate penalogical purposes. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court expressly recognized the government's duty "to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees." Id. at 540; see also

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[9] Defendant alleges a secret conspiracy between MDC officials and federal prosecutors. Defendant analogizes MDC staff to government informants, reasoning that, as paid employees of the government, they have a strong interest in assisting prosecutors by inducing Defendant to make incriminating statements. Mot., at 6. This argument insults public employees and, ultimately, proves too much.

Hudson v. Palmer, 468 U.S. 517, 526-27 (1984) (Corrections officials "must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today.").

Pursuant to this policy, Defendant was searched after an October 27, 1999 visit from his attorney. The search was conducted in accordance with standard procedure. Phillips Decl. ¶5. Defendant was first instructed to disrobe and then searched by two correctional officers. MDC staff removed a handwritten note "protruding from the top pocket of defendant's orange jumpsuit." Id. In no way could this search be construed as "a knowing exploitation by the State of an opportunity to confront the accused" outside the presence of counsel. Maine v. Moulton, 474 U.S. at 176. MDC staff had no reason to believe such a routine search would yield any information concerning Defendant's future dangerousness. Only by "luck or happenstance" did MDC staff find such evidence on Defendant's person. Kuhlmann, 477 U.S. at 459. Because the search did not constitute an "investigatory technique[] [that is] the equivalent of direct police interrogation," it does not raise Sixth Amendment concerns. Kuhlmann, 477 U.S. at 459.

b) Defendant's Statements to Dr. Burris during October 27, 1999 and November 12, 1999 Counseling Sessions and Burris Memoranda

Defendant cites Estelle v. Smith, 451 U.S. 454, 466 (1981), in support of his argument that admission of statements Defendant made during his counseling sessions with Dr. Burris would violate his Sixth Amendment right to counsel.[10]

[10] In his Reply, Defendant asserts for the first time his Fifth Amendment right against self-incrimination as a basis for suppressing his statements to Dr. Burris. Reply, at 6. As the government has not had an adequate opportunity to respond to this argument and the court grants Defendant's motion to suppress his statements to Dr. Burris on Sixth Amendment grounds, the court does not address the belatedly raised Fifth Amendment issue.

Reply, at 5-6. In Estelle, the Supreme Court addressed the issue "whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in [a court-ordered pretrial] psychiatric examination" to determine his competency to stand trial. 451 U.S. at 471 n.14. The Court answered that question in the affirmative. Because the government improperly used the psychiatrist's testimony to prove future dangerousness at the penalty phase of the trial, the Court affirmed an earlier decision vacating defendant's death sentence.

> Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty.

Id. at 466 (citations omitted).

Relying on Bey v. Morton, 124 F.3d 524 (3d Cir. 1997), the government argues that no Sixth Amendment violation occurred because MDC staff were not working in concert with prosecutors to acquire evidence for use at trial. Opp., at 10. In Bey, 124 F.3d 524, the defendant admitted his guilt in several casual conversations with Pearson, a prison guard, prior to reversal of his conviction. The Third Circuit affirmed the trial court's decision to allow the prison guard to testify on retrial, finding no Sixth Amendment violation. The Bey court relied on two factors: 1) Pearson was not responsible for collecting information for use in the prosecution of defendant's case and was not cooperating with anyone who had that responsibility;[11] 2) Pearson's conduct did not suggest deliberate elicitation. 124 F.3d at 531. The government emphasizes the former, but gives short shrift to the latter.

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[11] Distinguishing Massiah and Estelle, the Bey court noted that "Pearson, while a state actor, was not a state actor deliberately engaged in trying to secure information from the defendant for use in connection with the prosecution that was the subject matter of counsel's representation." 124 F.3d at 531.

First, the fact that an individual did not gather evidence against the defendant on instructions from prosecuting authorities is not dispositive of whether such evidence is deliberately elicited. The Supreme Court made this clear in Estelle:

> That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

451 U.S. at 467.

Although Dr. Burris did not "deliberately set out to secure information for use in a pending prosecution,"[12] "the determinative issue is not the informant's subjective intentions, but rather whether the federal law enforcement officials created a situation which would likely cause the defendant to make incriminating statements."[13] Dr. Burris may have initiated contact with Defendant for the sole purpose of assessing the threat he posed to MDC security; however, the government's subsequent attempt to use the contents of their discussions as evidence of Defendant's future dangerousness renders those sessions the functional equivalent of a custodial interrogation conducted outside the presence of counsel. If Dr. Burris is permitted to testify at the penalty phase of Defendant's trial, her role would expand well beyond merely advising prison

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[12] Bey, 124 F.3d at 530.

[13] United States v. Harris, 738 F.2d 1068, 1071 (9th Cir. 1984). Moreover, "[t]o allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah." Maine v. Moulton, 474 U.S. at 180.

authorities of the risk Defendant poses to fellow inmates and MDC staff. She would be actively participating in the government's efforts to prosecute Defendant by advising the jury with respect to factors bearing on its decision whether to impose the death penalty. Yet Defendant was not informed that his sessions with Dr. Burris would influence whether, if convicted, he should be sentenced to death.[14] Cf. Estelle, 451 U.S. at 467, 471. As a result, defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. at 571.

Second, the factual circumstances of this case distinguish it from Bey. Significantly, the prison guard in Bey neither initiated contact with the defendant nor asked him questions designed to induce incriminating utterances. Nor did he take notes or compile any reports of his conversations with the defendant. Lastly, he only disclosed the confession five years later, when questioned by the prosecution. Bey, 124 F.3d at 531; cf. United State v. York, 933 F.2d 1991 (7th Cir. 1991) (informant did not report incriminating information to FBI until several months after his conversations with defendant).

By contrast, Dr. Burris contacted Defendant for the express purpose of evaluating his future dangerousness, a factor that looms large in the sentencing phase of his trial. Thus, it was not by mere "luck or happenstance" that the government obtained these incriminating statements. Maine v. Moulton, 474 U.S.

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[14] Although Dr. Burris explained to Defendant that she was required to submit a monthly report based on their sessions to prison authorities and to disclose statements threatening the security of the facility, she never apprised him of his Sixth Amendment right to counsel, or that his statements might be turned over to prosecutors for use against him.

at 176.[15] By engaging Defendant in conversation about his violent intentions toward Lopez and unit staff, Dr. Burris was certain to elicit statements relevant to a jury's determination of his future dangerousness. Unlike the guard in Bey, Dr. Burris prepared written summaries of the two sessions in which Defendant threatened to kill Lopez and MDC guards, and those reports were promptly provided, at prosecutors' request, a mere two months after they were created.

The government contends that this case is distinguishable from Massiah and its progeny because Defendant knew he was dealing with an agent of the state, rather than a fellow inmate. Opp., at 21; Bey, 124 F.3d at 531. However, this factor was not decisive in Estelle, where the Supreme Court suppressed statements made during a psychiatric examination arranged by the state's attorney. 451 U.S. at 457-58. Here, Defendant, reasonably believing he was communicating with a psychologist rather than an investigator, "exercis[ed] no judgment as to whether counsel's advice should be sought." Bey, 124 F.3d at 530.

In short, the critical issue is not whether, at the time of her interviews, Dr. Burris was acting in concert with prosecutors to dupe Defendant into making incriminating statements. Clearly she was not. She was, however, initiating inquiries into an area the Supreme Court has recognized as "a matter of life or death," without Defendant's counsel having had an opportunity to advise him

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[15] The government seeks to distinguish Defendant's October 27, 1999 statements to Dr. Burris from his November 12, 1999 statements to her, noting that the latter followed two weeks of counseling sessions between Defendant and Dr. Burris. Opp., at 21 (citing Burris Decl. ¶4). As these sessions were triggered by Dr. Burris's self-initiated meeting with Defendant for the purpose of assessing his future dangerousness, the court can discern no reason for treating Defendant's November 12, 1999 statements any differently than his October 27, 1999 statements.

whether to speak with Dr. Burris.[16] Use of such statements to prove Defendant's future dangerousness in the penalty phase of his trial would make meaningless the guarantee that Defendant be afforded the assistance of counsel "when he faces decisions that may have a crucial effect on his trial." Smith v. Estelle, 602 F.2d 694, 709 (5th Cir. 1979), aff'd sub nom., Estelle v. Smith, 451 U.S. 454 (1981).

c) Letters Addressed to Dr. Burris and U.S. Attorney General J. Reno et al.

The means by which the government obtained Defendant's letters do not give rise to a Sixth Amendment violation, as there is no indication that Lt. Colvin conspired with prosecutors to gather evidence against Defendant.[17] Moreover, the factual circumstances surrounding Defendant's interaction with Lt. Colvin on May 16, 2000 do not support a finding of deliberate elicitation. First, Lt. Colvin regularly collects dinner trays from inmates. Colvin Decl. ¶2. These routine visits were not designed to elicit incriminating information from Defendant for use in connection with Defendant's trial.

Second, like the prison guard in Bey v. Morton, Lt. Colvin never sought to gain information from defendant. 124 F.3d at 526. Lt. Colvin never engaged Defendant in conversation regarding the charges leveled against him. Rather, Defendant initiated the May 16, 2000 encounter by asking Lt. Colvin to deliver the letters for him.[18] Colvin Decl. ¶3. Moreover, the government did nothing to stimulate these communications. The letters in question were completely

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[16] As noted above, the government insists Defendant had the absolute right not to speak with Dr. Burris. It appears uncontested that no one advised him of that right.

[17] As noted above, Defendant's unsupported assertion that MDC staff were acting on instructions from prosecutors is not sufficient to establish a Sixth Amendment violation.

[18] Defendant even invited Lt. Colvin to read the letters. Lt. Colvin declined. Colvin Decl. ¶¶3-4.

unsolicited. The government was the passive recipient of Defendant's voluntary admissions. See Kuhlmann v. Wilson, 477 U.S. 436 (1986) (finding no Sixth Amendment violation where a fellow inmate merely listened to defendant's confession and reported what he heard to police); Bey, 124 F.3d at 530 ("Massiah-type situations [are those where] the state has deliberately set out to secure information for use in a pending prosecution . . . .").

Defendant does not claim that his mail was intercepted. Cf. United States v. Workman, 80 F.3d 688 (2d Cir. 1996) (prison officials had good cause for intercepting mail from defendant to his co-conspirators). If anything, Defendant's complaint stems from the fact that his letters reached their intended destination. Defendant clearly meant for his letters to reach the eyes of federal law enforcement personnel, as they were addressed to Dr. Burris, U.S. Attorney General Janet Reno, and other government employees.

These facts show that the missives were not obtained through secret "investigatory techniques [that are] the equivalent of direct police interrogation." Kuhlmann, 477 U.S. at 459 (describing such methods as "the primary concern of the Massiah line of decisions"). Thus, their admission at trial does not offend the Sixth Amendment. See Maine v. Moulton, 474 U.S. at 176 ("[T]he Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached.").

2. Fifth Amendment Right to Due Process

Defendant's due process claim is based on the proposition that prosecutors have exploited the conditions of his detention "to gain a tactical advantage at the capital trial." Mot., at 10. First, he issues a broad objection to the prosecution's use of correctional authorities to investigate him. However, Defendant has offered no evidence in support of his theory that MDC staff have conspired with prosecutors to gather evidence for use at trial. Absent a particularized showing

that the government has used the conditions of Defendant's confinement as investigatory tools, the court cannot conclude that Defendant's due process rights have been violated.

Defendant further objects to "prison authorities' use of 24-hour camera surveillance and other monitoring,"[19] and seeks to restrict such monitoring to "legitimate penalogical purposes."[20] Mot., at 10. Common sense dictates that potentially dangerous detainees should be subject to constant supervision. See Hudson, 468 U.S. at 527-28 ("[C]lose and continual surveillance of inmates and their cells [is] required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security."). Twenty-four-hour video surveillance facilitates such supervision.

Prosecutors did not request that MDC staff install video cameras in Defendant's cell or conduct around-the-clock surveillance of Defendant. Instead, these safeguards predated Defendant's arrival at MDC and apply to all cells in the detention area where Defendant is housed. Such measures are clearly designed to enhance institutional security, not to gather evidence for use in connection with Defendant's prosecution. See id. Notably, none of the statements the government seeks to offer at trial were obtained through such surveillance or other monitoring.

The court thus finds that the video surveillance of which Defendant

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[19] Defendant does not further define the term "other monitoring."

[20] As the government points out, Defendant does not challenge the 24-hour camera surveillance as an unconstitutional condition per se. Opp., at 24. The court notes that such a challenge would necessarily fail. See Bell v. Wolfish, 441 U.S. at 537 ("Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. . . . Loss of . . . privacy [is an] inherent incident[] of confinement in [a pretrial detention] facility.").

complains is reasonably related to the legitimate penalogical purposes — specifically, the need to ensure a secure environment for inmates, staff, and visitors. See Turner v. Safley, 482 U.S. 78 (rule allowing extrafamilial, nonlegal inmate-to-inmate correspondence only if it was in best interest of parties upheld as reasonably related to legitimate security concerns of prison officials); Hudson v. Palmer, 468 U.S. at 526-27 (societal interest in the security of its correctional facilities outweighs prisoner's interest in privacy of his cell).

IV. CONCLUSION

For the reasons set forth above, the court finds that the note discovered on Defendant during a routine strip search and the letters Defendant gave to an MDC corrections officer do not constitute statements deliberately elicited by the government in violation of Defendant's constitutional rights. Accordingly, they may be introduced, if relevant, at the trial or penalty phase of the case. In contrast, the court determines that introduction of Defendant's oral statements made in the course of interviews initiated by Dr. Burris without defendant being advised of his right to consult with counsel would violate Defendant's Sixth Amendment right to the assistance of counsel. Accordingly, those statements may not be used in the government's case in chief in the guilt or penalty phase of the trial.

IT IS SO ORDERED.

DATED: August 19, 2000

Nora M. Manella
United States District Judge