IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	
	)	**CASE NO. 11-20304-CR-UNGARO/TORRES**
ALEXEI GOMEZ,	)	
Defendant.	)	

DEFENDANT GOMEZ'S FIRST PARTICULARIZED
MOTION TO SUPPRESS EVIDENCE AND BRIEF IN SUPPORT

COMES NOW the Defendant Alexei Gomez (hereinafter "Gomez"), by and through undersigned counsel, pursuant to Fed.R.Crim.P. 12(b)(3)(C), and moves this Court for an evidentiary hearing, and an order suppressing the evidence illegally seized by law enforcement agents, along with the fruits thereof, pursuant to a warrantless search of his cell phone in violation of Defendant's Fourth Amendment rights.

As grounds thereof, Defendant alleges that a warrantless search of his cell phone was conducted in violation of his right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment of the United States Constitution in the following particulars:

I.
STATEMENT OF FACTS

Mr. Alexei Gomez (hereinafter "Gomez") worked as a real estate agent for Choice One Companies (hereinafter "Choice One"). He, as well as other real estate agents, customarily received packaged paperwork regarding the sale of properties. Thus, it was not unusual for Choice One employees to accept shipments for one another. This was the case during Gomez's

entire tenure and it is precisely what occurred on April 05, 2011. At approximately 4:30 p.m. a package addressed to Gomez arrived at the front desk of the Choice One building. Since Gomez was not present, his employer accepted it. Gomez's employer informed the courier that Gomez had taken the week off and was currently out of town. At the urging of the courier, Gomez's employer called Gomez and insisted that he pick up the package. Gomez responded that he was not expecting a delivery. Nevertheless, he agreed to retrieve the package later that day. Gomez's employer relayed that information to the courier.

Unbeknownst to Gomez the box had been intercepted earlier that day. The package, bearing the delivery address of Mr. Alexei Gomez, 18400 Franjo Road, Cutler Bay, Florida 33157, U.S.A., had arrived at a DHL Airways ("DHL") hub. The waybill indicated that it was sent by Mr. Diego Calvo, Del mall Dorado 125 metros este, Guadalupe, San Jose 506, Costa Rica. Upon its arrival, Homeland Security Investigations ("HSI") Special Agents and officers from the United States Customs and Border Protection ("CBP") took custody of the package and inspected its contents. It contained two kilos of cocaine hidden within a horse saddle. As a result, a controlled delivery of the package was arranged. Prior to the controlled delivery, HSI special agents did not obtain an anticipatory search warrant. Once the package was delivered, special agents continued to conduct surveillance of the Choice One building for approximately 3 hours, during which time they did not obtain a search warrant.

At approximately 7:40 p.m. Gomez entered the Choice One building. He had expected a small package similar to those he usually received but instead found a large cardboard box. Gomez verified that it was addressed to him and then placed the box in the trunk of his car. Gomez then took his usual work route on the way to the store. This entailed driving through certain neighborhoods in search of properties to buy or sell. At 8:00 p.m. Gomez was stopped at

the intersection of US-1 and 167 Street, in Miami, Florida, when HSI Special Agents surrounded his vehicle and ordered him out. Gomez was thrust onto the ground as his arms were cuffed behind him. He was then placed in the back seat of a police car.

The officers entered Gomez's vehicle and moved it to a gas station. They then searched the interior of the vehicle. The package was found, unopened, in the trunk of the car. Also, Gomez's cell phone was taken from the dashboard of the car. The officers proceeded to search through its call log, voice messages, and text messages. At this time, Gomez's cell phone received a call from an individual named "Javier Blue." Special Agents then began a conversation via text message with "Javier Blue," using Gomez's phone and identity. Special Agents told "Javier Blue" that Gomez's car had overheated in order to lure him to the gas station. Once "Javier Blue" arrived he was arrested and identified as Javier Almeida (hereinafter "Almeida"). Both men were taken to the police station at approximately 10:15 p.m.

Gomez was charged in a four-count indictment alleging that he did knowingly and intentionally conspire to import a controlled substance into the United States, knowingly and intentionally import a controlled substance into the United States, knowingly and intentionally conspire to possess with intent to distribute a controlled substance, and knowingly and intentionally possess with intent to distribute a controlled substance. Defendant expects the Government to introduce evidence of the information seized, including the text messages from his cell phone and any derivative evidence, against him at trial. Therefore, Defendant moves this Court for an order to suppress all evidence resulting from the illegal search and seizure of his cell phone.

II.
ARGUMENT

A.
LAW ENFORCEMENT OFFICERS CONDUCTED A WARRANTLESS SEARCH OF GOMEZ'S CELL PHONE

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. As a testament to the fundamental nature of this right, it is a constitutional precondition that a search warrant be issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id*. In other words, the Constitution requires "that the deliberate, impartial judgment of a judicial officer…be interposed between the citizen and the police." *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963). The absence of this requirement may allow the privacy of an individual to hinge on the hasty judgment of an overzealous law enforcement officer. For that reason, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment –subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347 (1967).

It is uncontroverted that law enforcement agents did not obtain a warrant prior to arresting Gomez, searching his vehicle, or searching his cell phone. There were no circumstances preventing them from obtaining a warrant at any time during the course of the investigation. First, law enforcement agents could have obtained an anticipatory search warrant prior to conducting the controlled delivery of the package. Furthermore, they had plenty of opportunity to obtain a warrant during the course of their three-hour surveillance of the Choice One building. Moreover, law enforcement agents could have obtained a warrant prior to

searching through Gomez's phone during the course of Gomez's two-hour detainment at the intersection. Finally, a warrant could have been obtained once Gomez's cell phone was in police custody at the police station. Yet, at each of these intervals, the agents chose to supplant the judgment of a neutral magistrate for their own. As in *Katz*,

> [t]hey were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized.

Katz, 389 U.S. at 356. As a result, the fruits of the warrantless search of Gomez's cell phone must be suppressed unless it can be shown that this case falls within one of the exceptions to the warrant requirement.

B.
GOMEZ HAS STANDING TO CHALLENGETHE LEGALITY
OF THE WARRANTLESS SEARCH OF HIS CELL PHONE

As a threshold matter, an individual must have standing to challenge the validity of a government search. *Rakas v. Illinois*, 439 U.S. 128 (1978). Since "the Fourth Amendment protects people, not places," its protection is personal in nature. *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, "the capacity to claim protection of the Fourth Amendment depends upon whether the person who claims the protection … has a legitimate expectation of privacy in the place invaded." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Pursuant to this standard, the inquiry is twofold: (1) whether the individual has manifested a subjective expectation of privacy; (2) whether the expectation is one which society is willing to recognize as "reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967); *Kyllo v. United States*, 533 U.S. 27, 28 (2001).

The circumstances surrounding the search of Gomez's cell phone indicate that he had a reasonable expectation of privacy in the information contained therein. Gomez purchased the

cell phone in question for his personal use and had the right to exclude others from viewing its contents. The fact that Gomez's phone was not password protected is irrelevant because "[o]ne of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas*, 439 U.S. at 143 n.12. Therefore, Gomez expected that his voice and text messages would be free from governmental intrusion.

Gomez's expectation is widely recognized in today's society. As such, it is one that society is prepared to recognize as "reasonable." This is exemplified by the fact that most people keep their cell phones on their person or in a nearby area. Also, text and voice messages are automatically stored in inboxes so that they may not be subject to plain view. As technological advances allow for the multiplicity of storage space and available functions, cell phones will contain more and more personal information. The totality of that information is not expected to be available to the general public. Therefore, since Gomez had an expectation of privacy regarding the contents of his cell phone, an expectation that is considered "reasonable" by today's society, he has standing to challenge the warrantless search.

C.
THE WARRANTLESS SEARCH OF GOMEZ'S CELL PHONE
IS NOT RECTIFIED BY AN EXCEPTION TO THE FOURTH AMENDMENT

The Court has enumerated certain exceptional circumstances in which the warrant requirement is abrogated. Where a search is conducted without a warrant, the prosecution bears the heavy burden of proving the facts that justify the search under one of the recognized exceptions. *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Defendant anticipates that the Government will attempt to justify the warrantless search of his cell phone by claiming that it falls under one of the accepted exceptions to the warrant requirement. Those exceptions that are relevant

to the facts at hand are: search incident to arrest and exigent circumstances. Here, the Government is unable to meet its burden under either of the exceptions.

1.
SEARCH INCIDENT TO ARREST EXCEPTION

A search incident to a lawful arrest is among the exceptions to the Fourth Amendment's warrant requirement. *Weeks v. United States*, 232 U.S. 383 (1914). This exception is strictly limited by its underlying justifications. In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court reasoned:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape … In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. An the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule … There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 762-63. In short, a search incident to an arrest must serve either of two purposes: officer safety and evidence preservation. Furthermore, the extent of the search is limited to the *person* of an arrestee and the *area* within his control.

The latter phrase was first interpreted in connection with a search of the interior of a vehicle in *New York v. Belton*, 453 U.S. 454 (1981). In that case, the Court upheld the search of a jacket found inside a vehicle and belonging to one of its recent occupants. Thus, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460. Moreover, "the police may also examine the contents of any containers found within the passenger compartment" regardless of the possibility that they will contain a

weapon or evidence of the arrestee's criminal conduct. *Belton*, 453 U.S. at 461. The word "container" was defined as "any object capable of holding another object," including "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *Belton*, 453 U.S. at 461 n.4.

Nevertheless, the Court, in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), carved out a situation in which the sweeping *Belton* rule is inapplicable. Consequently, "[i]f there is no possibility that the arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 129 S. Ct. at 1716. In other words, the exception applies "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 129 S. Ct. at 1719. Noting that such a situation rarely occurs the Court created an exception to the exception when "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 n.4. In such circumstances "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 129 S. Ct. at 1719. Consequently, the applicability of the Court's holding in *Gant* is contingent upon the likelihood of discovering "offense-related evidence." *Gant*, 129 S. Ct. at 1719.

The facts in the case at hand are most analogous to those in *Gant* rather than *Belton*. In *Belton*, a lone police officer stopped a vehicle containing four occupants. Without handcuffing the arrestees he attempted to separate them by having them sit in different areas of the highway. The court found that their proximity to the vehicle and the fact that they were unsecured prevented the officer from having exclusive control over the vehicle and its contents. Thus, the

Belton court was presented with what the *Gant* court referred to as a "rare case." Gant, 129 S. Ct. at 1719 n.4. On the other hand, *Gant* involved the apprehension of three arrestees by five officers. The search of the vehicle commenced only after the arrestees had been handcuffed and locked in three separate police cars. Since the arrestees were outnumbered and secured, the Court concluded that there was no possibility of access to the vehicle and its contents. In the instant case, the extent to which Gomez was secured was much greater than in *Gant*. Gomez was the only person in his vehicle when numerous officers apprehended him. Clearly, he was outnumbered. Thereafter, Gomez was thrust onto the ground and handcuffed before being locked in the back of a police car. Furthermore, the officers moved the vehicle to another location before searching it. As a result, Gomez had no possibility of access to the vehicle during the search.

Yet the *Gant* court conditioned its holding on the probability of finding evidence of the offense of arrest. In that case, the vehicle's occupant was arrested for a traffic violation. The Court conceded that in such cases "there will be no reasonable basis to believe the vehicle contains relevant evidence." *Gant*, 129 S. Ct. at 1719. This case is distinguishable in that the officers knew that the vehicle contained the DHL package. Therefore, the question of whether or not Gomez's cell phone was illegally searched incident to his arrest is contingent upon whether or not a cell phone is a "container." Since the Supreme Court and the eleventh circuit have yet to consider the issue, lower federal courts are left to decide between two contradictory approaches.

The United States District Court for the Southern District of Florida has declined to provide an exception to the warrant requirement for searches of cell phones. *United States v. Wall*, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008). In that case, DEA agents searched two cell phones found on the defendant's person after his arrest. In affirming the suppression of

incriminating text messages, Judge Zloch, then Chief Judge of the District, held that "[t]he search of the cell phone cannot be justified as a search incident to lawful arrest." *Wall*, 2008 WL 5381412 at 3. In so holding, the *Wall* court soundly rejected the Fifth Circuit's contrary holding in *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). In *Finley*, the court upheld the post-arrest search of a cell phone found on the defendant's person by analogizing cell phones to pagers. In *Wall*, the court found that "the *Finley* court did not explain why cell phones should be treated the same as pagers for the purposes of the Fourth Amendment."

The court reasoned that the twin *Chimel* rationales –officer safety and evidence preservation– do not justify an exception for cell phone searches. First, "[t]he content of a text message on a cell phone presents no danger of physical harm to the arresting officers or others." *Wall*, 2008 WL 5381412 at 3. Also, regarding the potential for destruction of evidence, the court found that "if a text message is not deleted by the user, the phone will store it." *Wall*, 2008 WL 5381412 at 3. In fact, the cell phone in question contained messages that were up to two months old. Thus, the government "failed to establish that the text message at issue would have been destroyed absent intervention." *Wall*, 2008 WL 5381412 at 4. Since evidence preservation is closely associated with the exigent circumstances exception to the warrant requirement, the court also found that the search was not justified by exigent circumstances.

2.
EXIGENT CIRCUMSTANCES EXCEPTION

The exigent circumstances exception excuses noncompliance with the warrant requirement in emergency situations demanding immediate attention. *Payton v. New York*, 445 U.S. 573, 590 (1980). The Supreme Court has carefully delineated the sort of situations requiring exigency. They include danger of flight or escape, loss or destruction of evidence, risk of

personal injury or death, mobility of a vehicle, and hot pursuit. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). These situations share a common factor – obtaining a search warrant is not feasible. In this case, there is nothing in the record to indicate that a crisis situation existed such that the exigent circumstances exception would allow for a warrantless search of Gomez's cell phone.

Since Gomez was secured in the back of a police car there was no risk of flight or injury. Moreover, he was unable to destroy any evidence that may have been contained in his cell phone. Just as in *Wall*, "the threat that text messages would be destroyed was extinguished once law enforcement gained sole custody over the phone." *Wall*, 2008 WL 5381412 at 4. Therefore, law enforcement agents could have obtained a search warrant prior to reading Gomez's text messages and listening to his voice messages. Consequently, the exigent circumstances exception does not apply to the case at hand.

D.
CONCLUSION

The information seized from Defendant's cell phone should be suppressed because law enforcement agents failed to obtain a search warrant and because this case does not fall under one of the recognized exceptions to the warrant requirement. Since the exclusionary rule is intended to effectuate the guarantees of the Fourth Amendment, it mandates that the evidence seized, and the fruits thereof, be suppressed.

WHEREFORE**,** the Defendant respectfully requests that this Honorable Court grant an evidentiary hearing, and suppress the improperly obtained evidence against Defendant in this case.

Respectfully submitted,

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