UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20304-CR-UNGARO/TORRES

UNITED STATES OF AMERICA

vs.

ALEXEI GOMEZ, et al.,

Defendants.
_____/

UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION TO SUPPRESS

The United States, by and through the undersigned Assistant United States Attorney, hereby files this response to Defendant Gomez's First Particularized Motion to Suppress Evidence and Brief in Support (DE 37).

SUMMARY OF ARGUMENT

Defendant moves to suppress evidence from a search of his cell phone by law enforcement shortly after his drug-related arrest. Defendant contends that reviewing his call history, answering post-arrest calls from a co-conspirator, and sending text messages to a co-conspirator violated his Fourth Amendment right to be free from unreasonable searches. This motion should be denied. Under the circumstances presented here, the search was reasonable.

First, the warrantless search was reasonable because exigent circumstances existed. The agents answered calls to the defendant's phone and sent text messages only after all of the following had occurred: (1) the defendant had picked up a package in his name that law enforcement knew contained two kilograms of cocaine; (2) the defendant drove in a very evasive and erratic manner after picking up the package; (3) upon being stopped, the defendant provided

inconsistent answers to law enforcement about his true destination; and (4) upon arrest, the defendant's cell phone received numerous, repeated calls from one individual—"Javier Blue". Under such circumstances, there was probable cause to believe that the cell phone contained evidence of drug trafficking. Consistent with the relevant case law, exigent circumstances justified answering calls from "Javier Blue" because law enforcement had no time to obtain a warrant and risked losing evidence. Finally, the agents acted reasonably in sending text messages from defendant's cell phone to secure the capture of "Javier Blue" who asked whether the "package" had arrived.

Moreover, the review of the phone's call history was reasonable because it was a brief search contemporaneous with the defendant's arrest. Consistent with the relevant case law, law enforcement may briefly check the contents of a drug trafficker's cell phone (such as call history) in a search incident to arrest to determine whether it contains evidence relevant to the drug-related arrest.

Finally, regardless of the propriety of the warrantless search, the evidence from the cell phone should not be suppressed because law enforcement later obtained a search warrant for the cell phone after the defendant's arrest. The information is admissible under the independent source doctrine because the officers had probable cause sufficient to support a warrant prior to a search of the phone.

FACTUAL BACKGROUND

I. The Cocaine Shipment to the Defendant

On April 5, 2011, Customs and Border Protection ("CBP") officers in Miami noticed unusual densities in a twenty kilogram package shipped from Costa Rica. A canine alerted CBP officers to the presence of narcotics in the package. The package was opened and CBP officers

discovered a horse saddle inside the package. The officers drilled the horse saddle and found a white powdery substance that field-tested positive for cocaine and weighed approximately two kilograms.

The shipping manifest on the package indicated that the shipper was Servicio Internacionales de Carga in San José, Costa Rica and that the recipient was Alexei Gomez (the defendant) at a business address in Miami, Florida. Special agents traveled to the business address on the package and found that it was associated with Choice One, a real estate company. Further investigation revealed that the defendant was employed by Choice One as a realtor. The agents ran a check in the Florida driver's license database and obtained a picture of the defendant and learned his home address.

On April 5, 2011, at approximately 4:30 p.m., special agents delivered the package containing the horse saddle and narcotics to Choice One. An employee at Choice One informed the agents that the defendant was not in the office. Later, at the request of the agents, the defendant's employer left the defendant a voice mail stating that a package had been delivered to the office. The defendant's employer subsequently informed special agents that the defendant returned his call and that he would be picking up the package later that evening.

II. The Cocaine Pick-Up by the Defendant

Special agents continued to conduct surveillance at the Choice One building until approximately 7:40 p.m. of that same day when the defendant arrived and entered the building. The defendant exited the building several minutes later carrying what appeared to the DHL package containing the horse saddle and cocaine. The defendant drove away from the business followed by law enforcement. Upon leaving the Choice One building, the defendant undertook a series of "heat runs"—quick repeated turns in an effort to elude anyone following him. The

defendant continued driving in this evasive and erratic manner for several minutes even as he drove on a major thoroughfare (U.S. 1). The defendant was subsequently stopped by law enforcement at approximately 8:00 p.m. around U.S. 1 and Southwest 167th Street in Miami, Florida.

Law enforcement officers stopped the defendant and asked him where he was coming from and why he was driving in such an erratic manner. The defendant said his employer had called him earlier and left a message that a package had arrived for him. He said that he was driving home. Law enforcement asked the defendant to provide his home address. The agents told the defendant that he was traveling in the wrong direction of his home.[1] The defendant then claimed that he was looking at real estate properties (at ~8:00 pm) and that he was also picking up ice cream for his daughter before returning home. Officers asked the defendant about the package and the defendant claimed he did not know what was in the package and subsequently invoked his right to an attorney.

III. The Ringing Cell Phone

Law enforcement officers searched the defendant's car incident to arrest. In that search, the officers found the defendant's cell phone car and placed it on top of the car.

After seizing the phone, law enforcement reviewed the call history on the cell phone and noticed calls from Costa Rica (where the package had been sent from). Also, shortly after seizing the phone, the defendant's cell phone received numerous calls. In a span of about fifteen minutes, the defendant received at least five separate calls. Law enforcement did not answer the

[1] The defendant's business address is on approximately SW 184th Street. The defendant's home address is on approximately SW 202nd Street. The defendant was stopped on approximately SW 167th Street. He had clearly traveled in the opposite direction (northbound rather than southbound) of his home after leaving the business.

first four calls. However, on the fifth call, a special agent picked up the defendant's phone and answered an incoming call from a caller identified on the screen of the cell phone as "Javier Blue" who had made several previous calls. The individual asked whether the "package had been picked up." Special agents informed the individual via text message, using the defendant's cell phone, that the package had arrived and advised the individual to meet at a BP gas station at US-1 and SW 167th Street in Miami, Florida. Javier Blue responded via text message that he was on his way to pick up the package.

On that same day, at approximately 9:30 p.m., a Toyota vehicle arrived at the BP parking lot. An individual, later identified as Javier Almeida, got out of the Toyota and walked towards the defendant's car. This individual was later stopped by law enforcement and law enforcement confirmed that the individual was the "Javier Blue" who had called the defendant. He was searched, found with approximately $3,500 in cash in a rubber band on his possession, and arrested by law enforcement.

ANALYSIS

Defendant seeks to suppress evidence from a post-arrest search of his cell phone on the ground that law enforcement conducted an unreasonable search.[2] The basic principles governing

[2] There is no dispute that law enforcement properly seized this cell phone. The Supreme Court has held that law enforcement may search a vehicle incident to lawful arrest when "it is reasonable to believe evidence relevant to the crime or arrest might be found in the vehicle." Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009). The defendant' cell phone was found in a search of his vehicle incident to a drug-related arrest. This cell-phone seizure was plainly permissible under Eleventh Circuit precedent. United States v. Fuentes, 368 Fed. App'x 95, 98 (11th Cir. 2010) (interpreting Gant to permit the search of a vehicle and seizure of items, including cell phones, incident to a drug-related arrest); see also United States v. Cole, 09-CR-412, 2010 WL 3210963, at *16-17 (N.D. Ga. Aug. 11, 2010) (upholding seizure of cell phone found in defendant's car incident to drug-related arrest); United States v. Garcia-Aleman, 10-CR-29, 2010 WL 2635071, at *11-12 (E.D. Tex. June 9, 2010) (same); United States v. Reynolds, 08-CR-143, 2009 WL 1588413, at *3 (E.D. Tenn. June 4, 2009) (same).

the analysis of this inquiry are well-established. A search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). A warrantless search is unreasonable unless justified by one of the established and well-delineated exceptions. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

Accordingly, there are two questions that the court must confront in answering this question. The first question is whether the defendant can claim a violation of a reasonable expectation of privacy. The second question is whether an exception to the warrant requirement justified the violation.

I. Defendant Has A Reasonable Expectation of Privacy in Incoming Phone Calls and Text Messages On His Cell Phone

Defendant contends that law enforcement violated his reasonable expectation of privacy by reviewing call history, answering incoming post-arrest phone calls from a co-conspirator, and sending post-arrest text messages from his cell phone to a co-conspirator.

Courts have held that an individual has a reasonable expectation of privacy in the call history on a cell phone. See De La Paz, 43 F. Supp. 2d at 372 (finding legitimate expectation in fact of calls and identity of callers to cell phone); United States Finley, 477 F.3d 250, 259 (5th Cir. 2007) (finding legitimate expectation of privacy in call history on cell phone). This holding should apply here except to the extent that the identification of an incoming call or incoming text message is visible on the screen of a lawfully-seized phone in plain view without manipulation of the phone. Illinois v. Andreas, 463 U.S. 765, 771 (1983) ("The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner's privacy interest in that item is lost.").

The question of whether a reasonable expectation of privacy is violated by law enforcement answering one's phone is a closer question. The Eleventh Circuit has found that "no privacy interest" applies to a phone communication for which the individual was not a party. United States v. Vadino, 680 F.2d 1329, 1335 (11th Cir. 1982) (no implication of privacy implicated when officers answer another's telephone while lawfully on premises); see also United States v. Passarella, 788 F.2d 377, 380 (6th Cir. 1986) (same); United States v. Kane, 450 F.2d 77, 84-85 (5th Cir. 1971) (same). Other circuits have reached the opposite result with respect to conventional phones. United States v. Ordonez, 737 F.2d 793, 810-11 (9th Cir. 1983) (holding that one can challenge law enforcement's answering of one's phone under the Fourth Amendment); United States v. Fuller, 441 F.2d 755, 760 (4th Cir. 1971) (same); United States v. Stiver, 9 F.3d 298, 302-03 & n.8 (3d Cir. 1993) (assuming *arguendo* an expectation of privacy).

The few opinions confronting the issue with respect to cell phones have all found that a reasonable expectation of privacy is violated by law enforcement answering a defendant's lawfully seized cell phone. De La Paz, 43 F. Supp. 2d at 373 (reasonable expectation of privacy violated by law enforcement answering defendant's cell phone even if lawfully seized); State v. Carroll, 778 N.W.2d 1, 12 (Wis. 2010) (same); United States v. Davis, 10-CR-339, 2011 WL 1337372 (D. Or. Apr. 7, 2011) (same). The De La Paz Court provided the following analogy. A plumber has been given the key to a tenant's apartment and permitted access. As the court noted, a tenant would be justified in feeling that an expectation of privacy had been violated if the plumber answered the tenant's phone without consent[3] and the tenant would be even more

[3] This analysis seems to overstate the issue. If the plumber had answered a tenant's phone and identified himself as the plumber, the tenant would be hard-pressed to complain that this amounts to a violation of a reasonable expectation of privacy.

justified in feeling his expectation of privacy violated if the plumber carried on a conversation with the caller pretending to be the tenant. 43 F. Supp. 2d at 372.

An individual's right to privacy in text messages has been recognized by courts. City of Ontario v. Quon, 130 S. Ct. 2619, 2626 (2010) (assuming that employee had expectation of privacy in text messages on cell phone); United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007) (reasonable expectation of privacy in text messages on cell phone). Indeed, this office has previously conceded that an individual has a reasonable expectation of privacy in text messages on their cell phones. See United States v. Wall, 08-CR-60016, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) (Zloch, J.) (noting that government did not contest that viewing of text messages on defendant's cell phone constituted a search).

Applying these principles to the instant matter leads to the following result. The defendant did not have a reasonable expectation of privacy in incoming calls that were in plain view on the lawfully-seized cell phone, but did have a reasonable expectation of privacy in the call history on his phone. The defendant likely had a reasonable expectation of privacy in the content of phone communications on his cell phone intended for him. Further, the defendant had a reasonable expectation of privacy in the text message communications on his phone.

II. The Warrantless Search of the Defendant's Cell Phone Was Justified Under Well-Recognized Exceptions to the Warrant Requirement

There is no dispute that law enforcement reviewed the call history, answered phone calls from a co-conspirator, and sent text messages to the co-conspirator without first obtaining a warrant. The issue is whether law enforcement was justified in doing so. Although courts have applied varying exceptions to justify the result, the case law "trend[s] heavily in favor" of permitting post-arrest warrantless searches of a cell phone under circumstances such as those

presented here. United States v. Cole, 09-CR-412, 2010 WL 3210963, at *16 (N.D. Ga. Aug. 11, 2010) (citing cases) (internal quotation and citations omitted).[4]

In this case, two separate exceptions to the warrant requirement justified the search of the defendant's cell phone in this case: exigent circumstances and search incident to arrest.

A. Exigent Circumstances Justified the Search of Defendant's Cell Phone

The exigent circumstances exception permits a warrantless search provided both probable cause and exigent circumstances exist. United States v. Pantoja-Soto, 739 F.2d 1520, 1523 (11th Cir. 1984). Both existed here to justify the search of defendant's cell phone.

Law enforcement had probable cause to believe that defendant's phone was connected to illicit drug activity. The Eleventh Circuit and numerous other circuits have recognized that cell phones are a "known tool of the drug trade." United States v. Nixon, 918 F.2d 895, 900 (11th Cir. 1990); United States v. Portalla, 496 F.3 23, 27 (1st Cir. 2007); United States v. Lazcano-Villalobos, 175 F.3d 838, 844 (10th Cir. 1999). As such, courts have consistently found

[4] Most of the courts have adopted the rationale that it is permissible to search a cell phone in a brief search incident to arrest for evidence. See United States v. Murphy, 552 F.3d 405, 410-12 (4th Cir. 2009) (upholding search incident to arrest of cell phone); United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (same); Silvan W. v. Briggs, 309 Fed. App'x 216, 225 (10th Cir. 2009) (same); United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) (same); United States v. McCray, 08-CR-231, 2009 WL 29607, at *4 (S.D. Ga. Jan. 5, 2009) (same); (United States v. Gates, 08-CR-42, 2008 WL 5382285, at *13 (D. Me. Dec. 19, 2008) (same); United States v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) (same). Other courts have upheld the search as justifiable based on exigent circumstances. United States v. Young, 278 Fed. App'x 242, 245-46 (4th Cir. 2009) (upholding search of cell phone based on manifest need to preserve evidence); United States v. Salgado, 09-CR-454, 2010 WL 3062440, at *4 (N.D. Ga. June 12, 2010) (upholding search of cell phone because "data on the phone could have been altered, erased, or deleted remotely"); United States v. Santillan, 571 F. Supp. 2d 1093, 1104 (D. Ariz. 2008) (upholding search because agents had "reason to believe that access to the defendant's cell phone was necessary to preserve safety and prevent the destruction of evidence"). Finally, other courts have upheld the search under the automobile exception. United States v. Cole, 09-CR-412. 2010 WL 3210963 at *17 (N.D. Ga. Aug. 11, 2010) (upholding search of cell phone by analogizing cell phone to a container); United States v. Garcia-Aleman, 10-CR-29, 2010 WL 2635071, at *12 (E.D. Tex. June 9, 2010) (same).

probable cause sufficient to justify a search of a defendant's cell phone following a drug-related arrest. United States v. Quintana, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) (collecting cases). In so holding, courts recognize that cell phones may be used to communicate with others participating in drug trafficking and, consequently, there is a "reasonable probability that information stored on the device" contains evidence of the arrestee's crime. Id.

In this case, in addition to the general principle, there is little doubt that defendant's cell phone likely contained evidence relating to drug trafficking. Defendant was arrested driving in an evasive manner after having picked up a package that law enforcement knew contained two kilograms of cocaine. Upon being stopped by law enforcement, the defendant gave inconsistent about his true destination. After his arrest, the cell phone received numerous calls in a brief span from the same caller ("Javier Blue").[5] Under such facts, there was certainly a fair probability that the phone and, in particular, the post-arrest calls would contain evidence of defendant's drug-related activity.

As for exigent circumstances, it is significant that the only two cases addressing the issue have found that answering a defendant's cell phone following a drug-related arrest was justified by exigent circumstances. De La Paz, 43 F. Supp. 2d at 375; Carroll, 778 N.W.2d at 14; cf. Davis, 2011 WL 1337372, at *5 (no exigent circumstances justified answering defendant's cell phone in context of reckless driving arrest, but suggesting that drug-trafficking arrest would present a different situation).

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[5] The fact that the call came from a name that appears to be a nickname is probative that it was related to drug trafficking. See, e.g., United States v. Marin-Buitagro, 734 F.2d 889, 895 (2d Cir. 1984) (recognizing that "[n]arcotics traffickers commonly use aliases"); United States v. Benjamin, 10-CR-131, 2011 WL 2621311, at *8 (E.D. Pa. July 5, 2011) ("[I]t is common for individuals to be known by an alias in the drug trafficking world.")

In De La Paz, agents had lawfully seized a cell phone incident to an arrest of an individual for a narcotics conspiracy. While the agents were processing the defendant's arrest, the defendant's phone rang nine times and the agents answered it each time. On each call, the caller asked for the defendant by his drug-dealing nickname. The defendant unsuccessfully sought to have evidence of those calls suppressed. The court concluded that it was reasonable to believe that—having arrested the defendant for a narcotics conspiracy—that calls to his phone would provide evidence of his criminal activity. Moreover, it was reasonable to answer these calls given the impossibility of timely obtaining a warrant and the risk of losing evidence by leaving those calls unanswered. As the De La Paz Court noted, the "Fourth Amendment does not require . . . agents to ignore potential evidence that might disappear." Id. at 375-76.

Similarly, in Carroll, the Wisconsin Supreme Court found that both probable cause and exigent circumstances justified answering the phone of a defendant arrested and suspected of involvement in drug-related activity. Law enforcement answered incoming calls to defendant's cell phone pretending to be the defendant and one caller to the phone placed an order in code for narcotics. The court found that exigent circumstances justified answering the call because of the "fleeting nature of a phone call." 778 N.W. 2d at 14. The Court noted that if the call was not picked up, the "opportunity to gather evidence is likely to be lost, as there is no guarantee–or likelihood–that the caller would leave a voicemail or otherwise preserve the evidence." Id.

As in these cases, so too here. The argument for exigent circumstances here is even stronger than the above cases given the fact that law enforcement only answered the phone after repeated post-arrest calls from the same individual—"Javier Blue." Cf. De La Paz, 43 F. Supp. 2d at 375 (upholding search where phone rang nine times and law enforcement answered phone each time). All modern cell phones have a caller ID and voicemail function. Repeated calls to

the same number indicate an urgent situation. Under the facts here, it was reasonable to assume that the urgent situation involved a drug co-conspirator wanting to know the whereabouts of the drugs and, therefore, answering the phone was reasonable.[6]

Finally, exigent circumstances also justified law enforcement communicating by text message with the co-conspirator to preserve evidence.[7] Indeed, the actions of law enforcement are all the more reasonable when compared with the alternative. Had law enforcement not answered the phone and not sent text message communications, it would have sent a message to the co-conspirator that something was amiss and allowed him to elude detection. "Delaying for an appreciable period of time while obtaining a warrant would have only let the trail go cold." United States v. Kreimes, 649 F.2d 1185, 1192-93 (5th Cir. 1981). Law enforcement, thus, acted reasonably in sending text messages from the defendant's phone to secure the co-conspirator's capture and prevent him from fleeing. Cf. United States v. Morales, 868 F.2d 1562, 1575-76 (11th Cir. 1989) (upholding warrantless entry based on exigent circumstances because officers believed that inhabitants in home may have learned of arrest of associates and would destroy narcotics or flee); United States v. Forker, 928 F.2d 365, 370 (11th Cir. 1991) (upholding warrantless entry because officers believed that defendant had learned of co-conspirator's arrest).

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[6] A finding that law enforcement acted reasonably in answering the call comports with a well-established line of cases in the context of conventional telephones. Federal courts have uniformly found that an agent's conduct in answering a defendant's telephone does not violate the Fourth Amendment where the telephone is connected to illicit activity and where agents are lawfully on the defendant's premises. United States v. Vadino, 680 F.2d 1329, 1335 (11th Cir. 1982); United States v. Stivers, 9 F.3d 298, 302 (3d Cir. 1993); United States v. Passarella, 788 F.2d 377, 380-81 (6th Cir. 1986); United States v. Ordonez, 737 F.2d 793, 810 (9th Cir. 1984).

[7] The mere fact that the police used a ruse and pretended to be the defendant does not alter the analysis. Storck v. City of Coral Springs, 354 F.3d 1307, 1319 (11th Cir. 2003) (noting that Supreme Court has "long recognized" the permissibility of ruses and subterfuge by law enforcement).

B. The Search Incident to Arrest Exception Justified the Search of the Cell Phone

Another exception to the search warrant requirement exists for searches conducted incident to a lawful arrest. Cupp v. Murphy, 412 U.S. 291, 295 (1973). Roughly contemporaneous with an arrest, it is reasonable to search an arrestee to disarm the suspect and to preserve evidence. United States v. Diaz-Lizaraza, 981 F.2d 1216, 1222 (11th Cir. 1993). A lawful arrest does not destroy a person's interest in the privacy of their belongings, but "it does—for at least a reasonable time and to a reasonable extent—take his privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." United States v. Edwards, 415 U.S. 800, 808-09 (1974).

The Eleventh Circuit has not yet considered the scope of the search incident to arrest exception with respect to cell phones.[8] The Eleventh Circuit, however, has found that law enforcement has the right to search and inspect wallets, papers, and similar items seized from arrestee to determine whether they have evidentiary value. United States v. Richardson, 764 F.2d 1514, 1527 (11th Cir. 1985) (upholding search of wallet and papers); Diaz-Lizaraza, 981 F.2d at 1222-23 (upholding search of address book). Moreover, the Court has also upheld law enforcement's limited search of an electronic pager incident to arrest. Diaz-Lizaraza, 981 F.2d at 1222-23.

Several courts have analyzed the scope of the search incident to arrest exception with respect to cell phones. These courts have consistently upheld warrantless searches of cell phones contemporaneous with a drug-related arrest. United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (permitting warrantless review of text messages and other electronic data incident to

[8] See United States v. Allen, 416 Fed. App'x 21, 25 (11th Cir. 2011) (noting that the question remains "unanswered" in this circuit).

arrest); Finley, 477 F.3d at 253-55 (permitting warrantless review of call records and text messages incident to arrest); United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) (permitting warrantless review of call records and contacts incident to arrest); United States v. Santillan, 571 F. Supp. 2d 1093, 1102 (D. Ariz. 2008) (permitting warrantless review of call records incident to arrest); United States v. Gates, 08-CR-42, 2008 WL 5382285, at *13 (D. Me. Dec. 2008) (permitting warrantless review of contents of cell phone "substantially contemporaneous" with arrest).

The thrust of these cases is that a brief inspection of a cell phone contemporaneous with a drug-related arrest is permissible based on the need to collect and preserve evidence. The logic of these decisions is that a drug trafficker's cell phone is likely to contain evidence relating to drug trafficking and therefore can be briefly searched, just like a wallet or address book, at the time of arrest for relevant evidence of drug trafficking. [9]

The review of the call history on the defendant's cell phone contemporaneous with his arrest falls squarely in line with the cases mentioned above and should be found reasonable. Accordingly, it should be permitted under the search incident to arrest exception.

[9] The approach stops short of permitting a full-blown comprehensive and exhaustive search of the cell phone given the vast amount of potential electronic data available in the cell phone. See, e.g., United States v. McCray, 08-CR-231, 2009 WL 29607, at *4 (S.D. Ga. Jan. 5, 2009) (noting that comprehensive and exhaustive search of cell phone incident to arrest would raise potentially distinct issues); cf. Adam M. Gershowitz, The iPhone Meets the Fourth Amendment, 56 U.C.L.A. L. Rev. 27 (2008) (advocating a brief-inspection rule for cell phones in a search incident to arrest).

C. Defendant's Arguments In Support of Suppression Are Without Merit

Defendant makes two primary arguments to support his claim that the search should be suppressed. Each of these arguments is without merit.

First, defendant relies on the decision in United States v. Wall, 08-CR-60016, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008) to argue that the warrantless search was improper. In Wall, the agents arrested a defendant for drug trafficking. The defendant's phone was seized in a search incident to arrest. After the arrest and, critically, during the booking process, a DEA agent performed a search of the cell phone and recovered and photographed several incriminating text messages. The Court suppressed the evidence of the text messages. 2008 WL 5381412, at *3.

Wall is plainly distinguishable. In Wall, the search did not occur contemporaneous with the arrest, but well after the arrest was complete during the booking process. No exigent circumstances existed at the time of booking to justify the search. Moreover, the testimony elicited from law enforcement tended to show that the search of the cell phone was purely investigatory and the court therefore held that the officers could and should have sought a warrant. In stark contrast to Wall, the agents here conducted a search of the defendant's cell phone roughly contemporaneous with the arrest to preserve evidence and to prevent the fleeing of co-conspirators.

Law enforcement made a decision here in the heat of the moment following the arrest. This was not a wide-ranging inventory search conducted at leisure like in Wall. There is a crucial distinction between these two situations and the officers should be entitled to latitude in such a situation. See generally Thornton v. United States, 541 U.S. 615, 632 (2004) ("When officer safety or imminent evidence concealment or destruction is at issue, officers should not

have to make fine judgments in the heat of the moment. But in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling.") (Scalia, J., concurring in the judgment).

Second, defendant argues that law enforcement should have obtained an anticipatory search warrant to search the cell phone. Defendant contends that law enforcement should have obtained an anticipatory search warrant after dropping off the package at defendant's employer (~4:30 p.m.) and before defendant picked up the package (~7:40 p.m.). An anticipatory search warrant is appropriate only where contraband is on a "sure course" to a known destination. United States v. Nixon, 918 F.2d 895, 903 (11th Cir. 1990). Even assuming that an anticipatory search warrant could have been obtained in that brief period, there was no obligation to obtain an anticipatory search warrant because law enforcement did not know the intended destination of the narcotics. Moreover, law enforcement cannot be required to obtain a warrant to account for the remote possibility that an arrestee's phone might ring. De La Paz, 43 F. Supp. 2d at 375 (noting the impracticality of requiring an anticipatory search warrant based on mere possibility that arrestee's cell phone might ring).

III. The Evidence Is Admissible Under the Independent Source Doctrine

Even if the search of the defendant's cell phone did not qualify as a search authorized due to exigent circumstances or a search incident to arrest, the evidence would still be admissible under the independent source exception to the exclusionary rule. Law enforcement obtained a search warrant for the defendant's cell phone on April 13—eight days after the defendant's arrest. (Ex. 1). The search warrant was based on the following facts: (1) the defendant picked up a package of cocaine in his name; (2) the defendant drove in an erratic and evasive manner after picking up the package; (3) upon being stopped, the defendant provided inconsistent

answers about his true destination; (4) upon arrest, the defendant's phone received several calls from the same numbers; (5) after several rings, a special agent answered the call and the caller asked whether the package had arrived; (6) the special agent sent text messages to the caller to meet at a gas station; and (7) the caller who had sent the text messages arrived at the gas station.

The independent source doctrine derives from the principle that "when the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." Murray v. United States, 487 U.S. 533, 537 (1988). Where an application contains tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause. Id. at 542. The test is two-prong. First, the officers must show that no information gained from the illegal entry influenced the decision to seek a warrant. Id. Second, there must be a showing that the facts, excluding anything obtained from the illegal entry, suffice to support a finding of probable cause. Id.

Both prongs can be met in this case (assuming law enforcement's search was unreasonable). An inference can certainly be drawn that the officers would have sought a search warrant after the repeated calls to the cell phone from the same number following defendant's arrest to determine whether there had been previous communication from that number or other incriminating evidence. Moreover, facts 1-4 above (even excluding facts 5, 6, and 7) set forth sufficient evidence to establish probable cause to support a warrant. United States v. Jauregui, 10-CR-272, 2011 WL 753120, at *3 (D. Minn. Feb. 9, 2011) (finding similar facts sufficient to establish probable cause); United States v. Reynolds, 08-CR-143, 2009 WL 1588413, at *2 (E.D. Tenn. June 4, 2009) (same); United States v. Wiseman, 158 F. Supp. 2d 1242, 1249 (D. Kan.

2001) (same). Accordingly, the evidence from the defendant's cell phone should be admissible pursuant to the independent source doctrine.

CONCLUSION

The evidence of the co-conspirator's calls to the defendant's cell phone and the co-conspirator's attempt to purchase narcotics from the defendant should be admissible in this case. Law enforcement had exigent circumstances justifying answering the defendant's cell phone and sending text messages to the co-conspirator (specifically, the need to preserve evidence and to prevent the co-conspirator's flight). Moreover, consistent with well-established precedent, law enforcement was justified in undertaking a limited search of the phone's call history under the search incident to arrest exception. Finally, regardless of the propriety of the search, the evidence should be admissible under the independent source doctrine.

WHEREFORE, the United States respectfully requests that this Court deny Defendant's Motions to Suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, including exhibits, was electronically filed with the Court's CM/ECF system on July 20, 2011.

By: /s/ Michael N. Berger
Assistant United States Attorney