UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 09-CR-20264-KING

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUNIOR SYLVIN, et al.

Defendants.
_____/

DEFENDANT'S FIRST MOTION TO SUPPRESS INTERCEPTED WIRE COMMUNICATIONS AND REQUEST FOR *EVIDENTIARY* HEARING

COMES NOW the Defendant, JUNIOR SYLVIN, by and through his undersigned attorney and on behalf of his co-defendants, by and through their respective counsel, all of whom are aggrieved parties, and pursuant to the Fourth Amendment to the United States Constitution and 18 U.S.C. 2518(1)(a), respectfully move this Honorable Court for the entry of an Order suppressing from use as evidence any intercepted communications acquired in conjunction with the wiretap orders entered In the Matter of the Application of United States of America, MISC. No. 08-34 , S.D. Fla., the extension thereof, its derivative, and for an evidentiary hearing herein.

In support thereof, Defendant has filed simultaneous herewith a copy of the Affidavit supporting the wiretap application. (see Defendant JUNIOR SYLVIN's Notice of Filing Affidavit in Support of Application for Wire Interception **(MISC. No. 08-34)** [Hereinafter **Def. Ex. 1**].

As grounds therefore, Defendant states as follows:

I.

PREFACE

1. The Defendant is charged in seven (7) counts of the Superseding Indictment herein with alleged violations of Title 21, USC, Section 841 (a)(1), 846; 841(b)(1)(B), conspiracy and possession with intent to distribute cocaine and crack cocaine, one (1) count of Title 18, United States Code 922 (g)(1), possession of a firearm affecting interstate commerce and one (1) count of Title 18, United States Code, Section 924(c)(1)(A), carrying a firearm during a drug trafficking crime/crime of violence. The so-defendants are also charged with various counts of these alleged violations of law.

2. In summary, the prosecution had no necessity to obtain or apply for wire interceptions in this case. By the time the prosecution sought wire interceptions, it had:

a. already been investigating the Defendants and their alleged 68th Street Boys Drug Trafficking Organization [DTO] since April 2007 (hence some **twenty (20) months** prior to this application on November 17, 2008 (see Def. Ex. 1, **Affidavit in Support of Application for Wiretap** at pg.11 [Bate Stamp [Hereinafter BS 734] said Wire Tap was extended on approximately December 22, 2008 (approximate date due to switch in subjects telephone);

b. already identified alleged *lead defendant*, JUNIOR SYLVIN, co-defendants FRANTZ STERLIN and TARVUS DANIELS as well as several unindicted co-conspirators (see Def. Ex. 1 at pg. 3) [BS 726];

c. already done extensive background checks on all of the aforementioned targets (see Def. Ex. 1 at ppg. 7-9) [BS 730-732];

d. already made a determination regarding the above referenced individuals' alleged roles in the conspiracy (that was to be charged), this determination has remained consistent throughout the eventual wiretaps, and was not altered by them, ie. "SYLVIN receives multiple kilograms of cocaine", "STERLIN is a lieutenant within the 68th St. Boys DTO," "DANIELS is one of the individuals that assists in the sale of crack cocaine," etc. (see Def. Ex. 1 at pg. 3) [BS 726];

e. already received oral and written reports regarding this as well as other investigations from other DEA agents as well as other law enforcement organizations (see Def. Ex. 1 at pg. 3) [BS 726];

f. already obtained and reviewed pen register and trap and trace information on the defendants' phones (see Def. Ex. 1 at pg. 3) [BS 726];

g. already reviewed subpoenaed telephone records (see Def. Ex. 1 at pg. 3) [BS 726];

h. already conducted physical surveillance of the targets by numerous federal agents (see Def. Ex. 1 at pg. 3) [BS 726];

i. already completed other investigations by DEA and other law enforcement agencies (see Def. Ex. 1 at pg. 3) [BS 726];

j. already conducted **"multiple interviews of individuals familiar with the 68th Street Boys DTO"** and were allegedly able to determine the quantity of cocaine that the DTO was alleged to have been moving (see Def. Ex. 1 at pg. 12) [BS 735];

k. already successfully utilized a **confidential source** [CS 1] who had **"provided reliable information as to the 68th Street Boys DTO."** CS 1 had been "**assisting MPD (Miami Police Department) *infiltrate* an area of Miami**, FL that has been saturated with illegal narcotics by making multiple crack purchases from the area" (see Def. Ex. 1 at pg. 13) [BS 736] and ***had specifically identified a building in which the DTO was allegedly operating from*** as *well as the modus operandi at the location* (see Def. Ex. 1 at pg. 17) [BS 740]; **further that SYLVIN had approached CS 1 to find out if CS 1 "*knew anyone that would sell him (SYLVIN) a kilogram of cocaine*" since his (SYLVIN's) normal source of supply was currently sold out** (see Def. Ex. 1 at pg. 18 [BS 741];

l. already successfully introduced a ***second* confidential source** [CS 2] who had "made multiple purchases from STERLIN, **which has assisted LEOs in the infiltration of the 68th Street Boys DTO"** (see Def. Ex. 1 at pg. 13) [BS 736] additionally, STERLIN had **confided in CS 2** that he had "dumped" his phone because he was being "chased," that he (STERLIN) was waiting on a new shipment of cocaine and **that CS 2 *should keep checking with him (STERLIN) in regards to the cocaine*** (see Def. Ex. 1 at pg. 741) [BS 741];

m. already had information provided by a ***third* confidential source** [CS 3] "for several years (that had) **led to numerous arrests as well as large seizures of illegal narcotics and U.S. currency**," additionally CS 3 had **enabled LEOs to secure search warrants on two locations which resulted in numerous arrests and the seizure of marijuana, crack cocaine and a firearm.** (see Def. Ex 1 at ppg. 13, 14) [BS 736, 737];

n. already had obtained "***reliable detailed*** information" from **a Confidential Defendant** (CD 1) on the illegal narcotics activities associated with the 68th Street Boys DTO (see Def. Ex. 1 at pg. 14 [BS 737] *including residences allegedly utilized by them* for said activities (see Def. Ex. 1 at pg. 16) [BS 739];

o. already obtained **"*reliable and detailed information*"** from a **second Confidential Defendant** (CD 2) (see Def. Ex. 1 at pg. 15 [BS 738] and had **positively identified the defendants/targets by photograph** *and distinguished their respective roles in the DTO* which "coincided with what LEOs already knew about the organization" (see Def. Ex. 1 at pg 17) [BS 740];

p. already obtained **"*reliable and detailed information*"** from a **third Confidential Defendant** (CD 3) (see Def. Ex. 1 at pg. 16) [BS 739] and CD 3 had worked for the ultimate supplier of the cocaine in this case 9KENYON RUMPH) who allegedly provided the narcotics to SYLVIN, ***as well as the vehicle the supplier utilizes to deliver the narcotics*** (see Def. Ex. 1 at pg. 17) [BS 740];

q. already made an undercover purchase of cocaine utilizing CS 3 at a location believed to be utilized by the 68th Street Boys DTO (see Def. Ex. 1 at pg. 19) [BS 742];

r. already **made at least six (6) undercover narcotics purchases from STERLIN** utilizing CS 2 who set each transaction with ***consensual telephone conversations*** that were **monitored and recorded** (see Def. Ex. 1 at pg. 19-26) [BS 742-749];

s. already had allegedly made at least one (1) undercover narcotics purchase of two (2) ounces of cocaine from SYLVIN (see Def. Ex. 1 at pg. 26) [BS 749];

t. already placed **at least two (2) consensually monitored and recorded telephone calls between CS 1 and DANIELS wherein SYLVIN and the distribution of cocaine was discussed** (see Def. Ex. 1 at pg. 27, 28) [BS 750, 751];

u. already utilized CS 1 to place a consensual telephone call t o SYLVIN wherein ***again*** **SYLVIN asked CS 1 if he (CS 1) could get SYLVIN cocaine, that he (SYLVIN) was waiting on CS 1 to get cocaine and further *that CS 1 asked SYLVIN if he would go half on one half a kilogram of cocaine*** and SYLVIN agreed to meet to discuss it (see Def. Ex. 1 at pg. 29) [BS 752];

v. already been advised BY CS 1 that SYLVIN had allegedly come into possession of two (2) kilograms of cocaine, had sold same **but that he would put future amounts aside for CS 1** (see Def. Ex. 1 at pg. 29, 30) [BS 752, 753];

w. already had **analyzed approximately nine thousand six hundred and forty three (9,643) telephone calls** from the pen register and trap and trace devices (see Def. Ex 1 at pg. 30) [BS 753];

NEED FOR INTERCEPTION

3. The Government's allegations in their "Need for Interception" section in the Affidavit for Application for Wire Taps on November 17, 2008 (see Def. Ex. 1 at pg. 36) [BS 759] is *untenable and clearly unsustainable* as documented in the remainder of the Application itself. A breakdown of their claims [**and the facts that disprove them]** are as follows [emphasis added]:

-"Based on my knowledge of the facts of this investigation, my experience, and upon information contained in this affidavit, I believe that the interceptions of wire communications of the TARGET SUBJECTS and others yet unknown occurring over

the TARGET TELEPHONE, are the ***only* available law enforcement technique** that has a reasonable likelihood of revealing and of securin g evidence needed to establish the full scope and nature of the TARGET OFFENSES being investigated, including determining:

(1) the identity of all the members of the organization" [**the Government had already identified (and made undercover purchases from) the two co-defendants (SYLVIN, STERLIN), other co-defendants (DANIELS), other unindicted co-conspirators as well as the source of the cocaine RUMPH (who for reasons known to the Government, has not been charged in this Indictment**)];

(2) all of the importation routes, transportation routes, locations used to conceal narcotics (including cocaine) and narcotics proceeds :

-as for "**importation** routes", **[the Government states in their affidavit that an individual named KENYON RUMPH is the ultimate supplier of the cocaine charged in this case, that RUMPH supplied SYLVIN (see Def. Ex. 1 at pg. 17) [BS 740] with the cocaine that is charged herein. RUMPH is not charged in this Indictment (for reasons only known to the Government). If for example RUMPH, is one of the Cooperating Defendant's (a fact that needs to be determined at a hearing on this motion) then the Government would have had full access to the importation routes in this case), *it should also be noted that no other "importation route" has been uncovered by utilizing the wire taps that were eventually authorized*];**

-as for "transportation routes" [**the Government had been investigating this alleged DTO for some twenty (20) months, had determined the main participants**

and had investigated their backgrounds, including their *residences*. The Government had surveillance of these individuals, knew the vehicles they drove and where they frequented. Hence, the Government had the ability to (and did) follow the subjects and hence had already determined many of their "transportation routes"];

-as for "locations used to conceal narcotics (including cocaine) and narcotics proceeds" [**the Government had already determined not only the target's residences, but their prior criminal histories (documented in the Affidavit) LEO's could have easily cross referenced the addresses in the Court files with the information provided by the CSs and CDs. Additionally LEOs had been informed by their Confidential Sources and Confidential Defendant's as to various locations at which the DTO was allegedly operating, point in fact, the Government was able to make undercover buys at some of these locations and from the two main Defendants in this case prior to the Application for Wire Tap), ie. *had specifically identified a building in which the DTO was allegedly operating from*** as *well as the modus operandi at the location*] (see Def. Ex. 1 at pg. 17) [BS 740];

"(3) all of the assets purchased from the proceeds derived from the sale of narcotics" [**even after the wire tap, (as far as assets go) the Government has seized a 2001 Chevrolet Monte Carlo and a 2007 Buick, vehicles that were either seen being used by the defendants and/or on their property), something they could have done prior to the Wire Tap since they had already identified the targets, surveilled their activity including driving the vehicle(s) and made undercover purchases of cocaine**];

"(4) reveal evidence of homicides and likely assist in the prevention of future ones" [**upon information and belief, no evidence of any homicides was ever uncovered by the Wire Tap conversations), *it should be noted that this, wholly unsubstantiated allegation might weigh very heavily on a Court's determination to grant a Wire Tap Application***];

-Law Enforcement has not yet been able to fully identify the majority of individuals operating in the 68th Street Boys DTO…and the key players in the DTO" [**prior to the November 17, 2008 Application for Wire Tap, the Government had identified the *alleged* main defendant, SYLVIN, his alleged supplier RUMPH, SYLVIN'S alleged lieutenant, STERLIN as well as an alleged worker, DANIELS. LEOs had also identified an individual named ANSLEY VICTOR who resided at 935 NW 80th St., although ANSLEY VICTOR was not charged herein, his brother, CHRIS VICTOR (who lived at the same address) was, a fact that was easily ascertainable once the address was uncovered by LEOs),** *it should also be noted that this address was allegedly utilized by SYLVIN during his undercover sale of cocaine to CS 1 on June 18, 2008 (well before the Application in November of 2008)*; hence the remainder of the co-defendants that were identified through the wire taps were OTHELLO (who is a fugitive), THOMPSON, BYTHOL (who is not alleged to be part of the 68th Street Boys DTO and was the only defendant granted bond based on this fact (see DE #46), TAYLOR (a smaller player charged in the overall conspiracy) and LOUIS (who was only charged in a Superseding Indictment based on evidence found pursuant to a Search Warrant executed on the day all of the defendants were

arrested herein; *Hence the key players in the DTO had been identified prior to the Application*.

3. The Government alleged in their Application that the "type of information which the United States is seeking in this investigation, is guarded and is only supplied to people on a need to know basis, in order to protect the shipments of the narcotics and drug proceeds, or the precise manner in which they launder their drug proceeds." (see Def. Ex. 1 at pg. 38) [BS 761]. [**This is clearly boilerplate language having nothing to do with this investigation. There are no *shipments* of narcotics involved in this case, and there are absolutely no allegations of money laundering anywhere in the indictment or the Discovery].**

-The Government alleged in their Application that: "With the limited information developed to date by the Cs's and the CD's, and without evidence obtained from court authorized intercepts, the objectives of this investigation cannot be accomplished." **[To the contrary, LEOs had already made seven (7) undercover purchases from two of the lead defendants in the case. The Wire Taps never did expose any Targets that were higher up in the chain of distribution or any significant assets that could not be seized without the Wire Taps. Additionally, and more importantly, the investigation prior to the November , 2008 Wire Tap Application revealed that not only would SYLVIN and STERLIN deal with the CSs and CDs in this case, that they were willing to work with them,** ie. LEOS had utilized CS 1 to place a consensual telephone call to SYLVIN wherein ***again* SYLVIN asked CS 1 if he (CS 1) could get SYLVIN cocaine, that he (SYLVIN) was waiting on CS 1 to get cocaine and further *that CS 1 asked SYLVIN if he would go half on one half a kilogram of***

cocaine and **SYLVIN agreed to meet to discuss it** (see Def. Ex. 1 at pg. 29) [BS 752]; **been advised BY CS 1 that SYLVIN had allegedly come into possession of two (2) kilograms of cocaine, had sold same but that he would put future amounts aside for CS 1** (see Def. Ex. 1 at pg. 29, 30) [BS 752, 753]; STERLIN had **confided in CS 2 that he had "dumped" his phone because he was being "chased," that he (STERLIN) was waiting on a new shipment of cocaine and that CS 2 *should keep checking with him (STERLIN) in regards to the cocaine*** (see Def. Ex. 1 at pg. 741) [BS 741]; **Lastly, CS 1 had requested to work for SYLVIN in the drug trade and SYLVIN is alleged to have responded that he would think about it**. Hence, clearly the Government was in a position without the wire taps to facilitate numerous transactions with the defendants in the case , to infiltrate this organization at its alleged highest level and could have, and should have explored these options, short of a wire tap].

In summary, as a practical matter, by November 17, 2008, before the Title III application, the prosecution had already identified the lead co-conspirators through pen registers, trap and trace devices, surveillance as well as additional traditional investigative techniques. Additionally, and more importantly here, law enforcement had utilized *no less than* three (3) Confidential Sources and three (3) Confidential Defendants who were already established as buyers and/or sellers in this DTO. Any one of these individuals (or any combination thereof) were *more than* capable of introducing an undercover agent into this DTO. Several of these individuals had already placed consensually monitored and recorded telephone conversations and made at least seven (7) undercover narcotics purchase from two (2) of the lead defendants in this case. Two

of the Confidential Informants had already approached the lead Defendants to not only make additional purchases *but to actually work in the organization*. Hence, there was no necessity for a Title III interception and application.

II.

STANDING

4. The Defendant (as are his co-defendants who were also recorded on the wire taps))is an aggrieved person within the meaning of 18 U.S.C. 2510(11) and 2518(10) in that he is named as an "interceptee" and a person whose wire communications were intercepted. Defendant, JUNIOR SYLVIN was actually the individual whose phones were tapped.

III.

GROUNDS FOR CHALLENGE

Failure to comply with statutory requirements.

5. Title III specifically provides that a defendant may move to suppress the fruits of a wire or oral intercept on the grounds that: "(i) the communication was unlawfully intercepted; [or] (ii) the order of authorization or approval under which it was intercepted is insufficient on its face…." 18 U.S.C. § 2518(10)(a); see also 18 U.S.C. § 2515 (preventing disclosure of wiretap evidence obtained "in violation of this chapter").

6. "The procedural steps provided in the Act require 'strict adherence.'" *United States v. Kalustian*, 529 F.2d 585, 588 (9th Cir. 1976) (citing *United States v. Giordano*, 416 U.S. 505 (1974), and **'utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III.'** *Id*. at 589." *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001)[emphasis added]. These technical statutory requirements examine the **sufficiency** of the application on its face – without *Franks* analysis. See, generally, *Giordano*, 416 U.S. 505. [emphasis added].

7. **An affidavit in support of an application for a wiretap order must *demonstrate*, *inter alia,* that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."** 18 U.S.C. § 2518(1)(c)&(3)(c). [emphasis added].

8. This necessity requirement is distinct from the probable cause requirement of 18 U.S.C. § 2518(3)(a)&(b). Its purpose is "to ensure that the relatively intrusive device of wiretapping 'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Mitchell,* 274 F.3d 1307, 1309 (10th Cir. 2001) (quoting *United States v. Castillo-Garcia,* 117 F.3d 1179, 1185 (10th Cir.1997), *cert. denied sub nom., Armendariz-Amaya v. United States,* 522 U.S. 962 (1997)). Traditional law enforcement techniques include: (1) **standard visual and audio surveillance**; (2) **questioning and interrogation of witnesses or participants** (including the use of grand juries and the grant of immunity if necessary); (3) use of search warrants; and most importantly, with apropos as to this case, (4) ***infiltration of conspiratorial group by undercover agents and/or informants.*** *Mitchell,* 274 F.3d at 1310. (Emphasis added).

9. The broad contours of these challenges are summarized below.

IV.

"NECESSITY" SHORTCOMINGS AS A CHALLENGE TO ELECTRONIC INTERCEPTIONS

A. Necessity and normal investigative techniques.

10. The first of this "substantive" attack to the wiretap is the necessity requirement. Because wiretaps are so extraordinarily invasive, Congress intended the procedure to be used only when traditional investigative methods had been tried and have failed. See *Giordano*, 416 U.S. at 515 ("These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.").

11. In this particular case, long before law enforcement authorities sought a wiretap application on November 17, 2009, six (6) confidential sources/defendants, with extensive knowledge of, and ties to, the alleged DTO were utilized for intelligence as well as seven (7) (monitored and recorded) undercover narcotics purchases. These confidential sources/defendants were heralded by the Government as being "reliable" and having "detailed" information regarding the 68th Street Boys DTO. Additionally, that

some of the CS's/CDs had provided fruitful information that had resulted in multiple search warrants, arrests and seizures of illegal contraband.

12. Consequently, from the consensual conversations recorded between CS 1 and SYLVIN and CS 2 and STERLIN, clearly the CSs had obtained the these two conspirator's confidences. They previously did make, and were open to make, additional purchases, they kept open a line of communication, SYLVIN had agreed to "partner" with CS 1 on a half kilogram and was contemplating having CS 1 work with/for him. Nowhere in the Discovery is there any indication that these "open doors" were ever explored (never tried, nor alleged to have been unlikely to succeed). The confidential sources/defendants were able to engage in all kinds of conversations about drug activity, both past and prospectively future. There was no real need to engage in any wiretap.

13. As evidenced by the supporting affidavit, LEOs had begun debriefing and/or utilizing the CSs/CDs as early as January 24, 2007, **some twenty (20) months** before the warrant application (see Def. Ex. 1 at pg. 16) [BS 739]. Title III requires that a wiretap application include "a **full and complete statement** as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). [emphasis added]. The fact that a *bare assertion* is made to this effect, as here, which is actually contradicted by the facts outlined in the remainder of the Affidavit, runs afoul of the Statute.

14. Similarly, a wiretap order must reflect a determination that the procedure is necessary: "Upon such application the judge may enter an *ex parte* order …

authorizing … interception of … electronic communications … If the judge determines on the basis of the facts submitted by the applicant that … normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S .C. § 2518(3)(c)(3). These two sections together make up the so-called necessity requirement for granting a wiretap order. The statutory language suggests that before finding that a wiretap is necessary, the court must find that alternative methods have been tried or would not have succeeded. Electronic interceptions are not permitted if "traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 & n. 12 (1974). Here, those normal procedures were e xceedingly successful as outlined above.

15. The "necessity" section of the referenced affidavits state, without sufficient factual foundation and in a conclusory manner, that grand jury immunization of Targets or prospective witnesses, would not be successful. Again, this is a wholly *conclusory* statement, not consistent with that which is contained in the Affidavit. Clearly, the Government themselves have immunized numerous prospective targets and/or witnesses by not prosecuting any of the three (3) CSs or t hree (3) CDs. In addition to admitting their involvement in the drug trade, at least one CD, CD 3 admitted to LEOs that he had worked for KENYON RUMPH, who allegedly supplied multi-kilogram quantities of cocaine to SYLVIN as well as others. Hence, neither CD 3 or RUMPH is charged in this Indictment and without knowing, what if any deal RUMPH may or may not have avoid indictment herein, clearly multiple individuals were, in fact, approached, questioned, debriefed, etc. by LEO's belying the fact that a Grand Jury could not have been used as an investigative tool herein. Additionally, in numerous statements

throughout the Affidavit for Application for Wire Tap it is acknowledged that at various times the Targets knew or believed that Law Enforcement was watching them and they would either change a time and location for a transaction, "dump" a phone, etc. Hence the Government's alleged concern that a Grand Jury would cause the Targets to become more cautious or to flee, is without merit and contradicted by their own progress in the investigation prior to seeking the wire taps.

16. As for infiltrating the DTO with Undercover Agents (see Def. Ex. 1 at pg 40, 41) [BS 763,764], again the Government provides a *wholly conclusory* statement as to why this would not work. "No undercover agents have been able to infiltrate this organization. Based on my knowledge and experience in investigating drug trafficking organizations, I have learned that these organizations go to great lengths to compartmentalize their operations. This is done in an effort to construct as many layers of insulation as possible between each component of the organization, thus preventing the penetration of the organization or threats to its operational integrity." The Affidavit goes on to say that even if Undercover Agents *were* able to infiltrate the organization they would "not likely be exposed to all subjects of the organization in order to effectively obtain admissible evidence needed to prosecute the offenses under investigation." (see Def. Ex. 1 at pg 41) [BS 764]. [all emphasis added]. [**The facts contained throughout the remainder of the Affidavit belie these blank assertions based on the Agent's "experience." First, affiant had been a Special Agent of the DEA for two (2) years when executing the affidavit, second, there are no statements and/or allegations that are specific to this particular "organization" that would indicate that these bald assertions are true or even likely. Third, the**

fact that LEOs were able to debrief six (6) different CSs/CDs over a twenty (20) month period and get reliable and detailed information, then utilize several of them to make undercover buys of multiple ounces of cocaine from two of the alleged lead conspirators as well as options for future purchase and potential employment in the DTO, contradicts the assertion that an Undercover Agent could not have been employed. Additionally, the fact that at least one of the CSs in this case had discussed employment in the DTO with SYLVIN, (who is allegedly the lead conspirator and supplier to most of his co-defendants), indicates that at the very least, CS 1 could have been in a position between SYLVIN and any or all his co-defendants, therefore *identifying everyone*.]

17. Additionally, based on the monitored and recorded consensual ca lls to SYLVIN, STERLIN and DANIELS, as well as the undercover buys from SYLVIN and STERLIN, there was ***more than sufficient evidence*** to arrest and confront SYLVIN, STERLIN and DANIELS by November 17, 2008. There should also be a question as to not only whether the grave intrusion of wire taps were necessary to arrest the remaining, lesser involved co-defendants and seize minimal property that could have been seized anyway, but at what cost to society is there in leaving what the Government believes to be an active DTO operating from November 17, 2009 through two (2) series of wire taps and continuing until April of 2009?

18. Clearly "normal investigative procedures" were employed and were successful herein. Even more clearly, additional "normal investigative procedures" were available to the Government rather than to utilize the gravely intrusive use of wire taps. Moreover, as of the time the wiretap order was entered, the prosecution had more than

sufficient evidence to prosecute this case. Other co-conspirators' criminal participation was fully known as a result of consensual tape recordings, the use of a body bugs, the use of six (6) confidential sources who made seven (7) undercover narcotics purchases and other traditional investigatory techniques.

B. Specificity and boilerplate language.

19. The government's supporting affidavits merely use boilerplate *conclusory* language. Circuit courts have rejected the government's increasing use of boilerplate language in support of its necessity showing. The Ninth Circuit explains the government cannot simply rest on generalizations, but instead, "[M]ust allege ***specific circumstances*** that render normal investigative techniques particularly ineffective or the application must be denied…. The reason for requiring specificity is to prevent the government from **making *general* allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the *particular* investigation** in which the wiretap is sought. *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985) (emphasis added) (internal citations omitted). Followed by, *United States v. Carrazana*, 921 F.2d 1557, 1565 (11th Cir. 1991). [emphasis added].

20. The Government herein follows the usual form, stating in individual paragraphs that the different ordinary investigatory techniques would not be successful. As in all form interception applications and affidavits, the prosecution addresses, (in addition to those discussed above) Analysis of Toll Records (see Def. Ex 1 at ppg. 39,

40) [BS 762, 763] and Physical Surveillance (see Def. Ex 1 at ppg. 38, 39) [BS 761, 762].

21. The prosecution concludes that surveillance would not be successful because on one occasion SYLVIN noticed a Gold Honda that was an undercover vehicle. The remainder of the Affidavit indicates that there had been significant successful surveillance throughout the investigation and the LEOs involved in this case had no problem completing surveillance of the seven (7) undercover narcotics purchases from SYLVIN and STERLIN. Additionally, after the wire was up, LEOs again had no problem completing surveillance of the targets in this case. As one specific example, on the night of December 8, 2008, LEOs followed SYLVIN for hours until they decided to pull him over. There were numerous other occasions in which LEOs surveilled the targets of this investigation *and/or confronted them on the street*. Some of these instances are contained in the Affidavit, while others are not. Hence, to claim that physical surveillance would not work, belies the fact that it did, in fact work, for months, and none of the targets of this investigation ever fled or reduced their activity based on suspicions about a pending investigation (Although co-defendant OTHELLO is a fugitive, upon information and belief, he simply wasn't located where he was expected to be on the day all defendants were arrested and has since avoided capture).

22. Addressing the Analysis of Toll Records, clearly after evaluating over 9,000 calls, the Government was able to analyze which target was calling the other and at what frequency. Clearly, the toll records and pen register information proved to be extremely helpful in, (1) establishing the relationships between the conspirators, (2) determining the dates they spoke by phone, and, (3) ***perhaps most importantly,***

concluding whether calls were made to co-conspirators in a temporal setting consistent with the two lead conspirators' simultaneous or nearly simultaneous meeting with the confidential sources.

23. While the government, in satisfying the necessity requirement, need not exhaust all alternative means of investigation, **"neither should it be able to ignore avenues of investigation that appear both fruitful and cost-effective."** *Id*. As the Court in *Ippolito*, 774 F.2d at 1486, observed, "We would flout the statutory intent that wiretaps be used only if necessary, were we to sanction a wiretap simply because the government pursued some 'normal' investigative strategies that were unproductive, when more fruitful investigative methods were available." *Id*. [emphasis added].

24. The government cannot skirt the necessity requirement by simply informing the court of the investigating agents' conclusions regarding whether or not traditional investigative techniques will suffice to expose the crime.

25. Requisite necessity cannot be shown by "bare conclusory statements that normal techniques would be unproductive." *United States v. Ashley*, 876 F.2d 1069, 1072 (1st Cir. 1989). The contents of the Application herein contain bare conclusory statements. In those instances wherein a specific allegation is made, it is dwarfed by overwhelming evidence to the contrary as set forth in each and every category above.

26. The affiant cannot rely on "mere boilerplate recitations of the difficulties of gathering usable evidence," in place of *specific factual* allegations explaining why a normal investigation will not succeed. *United States v. Kerrigan*, 514 F.2d 35, 38 (9th Cir. 1975). [emphasis added].

27. However, this is exactly the type of conclusory recitations that appear throughout the interception under review, as well as the predicate interceptions also described herein.[1]

28. Lest the requirements of section 2518 be rendered "nullities," one Court held that "[t]he government may not cast its investigative net so far and so wide as to manufacture necessity in all circumstances." *United States v. Blackmon*, 273 F.3d 1204, 1211 (9th Cir. 2001). This is exactly what transpired here.

29. The law enforcement officials conducting this investigation are extraordinarily successful and skilled in understanding and proving the relationships by and between conspirators through track and trace pen register information as well as through obtaining information directly from telephone carriers. They also have the ability to learn about co-conspirators by simply instructing the confidential sources in how, what, and when to ask certain questions during the undercover purchases.

30. In this case, there was no necessity for a wiretap particularly in light of the obvious ability of the CSs to conduct undercover transactions with the alleged lead conspirator and his alleged lieutenant. This becomes even more evident considering that SYLVIN and STERLIN left the door open for CS 1 and CS 2, respectively to not only buy/sell additional narcotics but to possibly work in the DTO.

31. As evidence in the Affidavit one or more of the CSs/CDs kept in contact with SYLVIN, STERLIN and/or DANIELS throughout the entire conspiracy, as seen by

[1] But see, *United States v. Sklaroff*, 552 F.2d 1156, 1159 (11th Cir. 1977) (rejecting Ninth Circuit's rule against boilerplate language in favor of a more "common sense" approach to § 2518(1)(c) requiring a factual predicate. (reversed on other grounds).

numerous indications that the CSs had either met with or spoke to the Targets at various times throughout the course of the alleged crime.

32. The confidential sources and SYLVIN, STERLIN and DANIELS maintained these continuous or semi-continuous conversations through November 17, 2009 and beyond.

33. During the referenced periods of time, as evidenced by some of the discovery provided, the prosecution was able to obtain quite a number of hours of videotaped surveillance, toll and phone records, as well as tape recordings of various conversations by and between conspirators.

34. Thus, "necessity" in this case is essentially a manufactured conclusion. The conclusion stems from statements concerning the difficulty of conducting normal investigative techniques notwithstanding substantial results from the otherwise extraordinarily successful investigatory techniques employed before the Application including, but not limited to: physical surveillance, video tapes, consensual monitored and recorded phone calls, toll records, six (6) "reliable" CSs/CDs with direct information on the DTO and no less than seven (7) undercover narcotics purchases.

35. The Affidavit in support of the Application does not contain a "full and complete statement *explaining specifically* why other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed, if tried or to be too dangerous." Section 2518(1)(c). The statement in the affidavit relative to this topic is inconclusive and contradictory.

36. The exhaustion or necessity requirement of Title III has devolved without disciplined analysis from a cogent standard based on the statutory language to an

imprecise concept, which is calculated to be compatible with the stated objective of law enforcement in seeking Title III interceptions.

37. The unrealistic objective as stated in the Affidavit and endorsed in the Application manipulates the necessity component by diminishing it to a nominal consideration, contrary to the intent of the Congress which enacted Title III. That since the decision in *United States v. Ramirez-Encarnacion*, 291 F.3d 1219 (10th Cir. 2002), which directs that District Court Judges litigate the "necessity" component of Title III , law enforcement has designed its affidavits in support of applications for interceptions of wire communications by including unrealistic objectives which engenders the unquestionable (and mostly unquestioned) need for electronic surveillance.

38. Here, by the time the application was sought, the Government had already gathered enough evidence to arrest and charge many of the allegedl y higher end conspirators.

39. Defects in the Title III procedures as described in the foregoing paragraphs relate to a central requirement of the statutory scheme which provide for electronic surveillance. Therefore, suppression of evidence is warranted.

***FRANKS V. DELAWARE* VIOLATION**

40. The Defendant suggests that a hearing pursuant to *Franks v. Delaware* is required to afford the Court with a full exposition of the defects listed above, but in addition to said defects, said hearing is required by the existence of an apparent *Franks* Violation as set forth below. 438 U.S. 154 (1978).

41. Upon information and belief, it is apparent from the Discovery provided herein, that at least one of the CSs in this case, CS 1 (who was respo nsible for several

controlled calls and an undercover buy from SYLVIN which were used as a basis for the Wire Taps), was working "both sides of the fence" herein. Upon information and belief, at the very least, this CS (CS 1) was conducting drug transactions with the targets of this investigation as well as others during the time period in which they were being utilized by the Government herein as a "reliable" informant. This fact was either known to the LEOs in this case, or *should have been known* due to their extensive investigation which included Pen Registers and Physical Surveillance prior to the Application (as well as the actual telephone conversations leading up to the Extension Application) . In that this information was not brought to the attention of the Court when considering the Application herein (or the extension thereof), this would clearly be a ***significant omission*** that would effect the Court's determination and therefore a *Franks* violation that should result in suppression of the wire tap con versations.

As specific evidence of this violation, a review of the Discovery in this case indicates a wire tap conversation (Intercept 5837) reflected on page 5 of the First Progress Report [BS 693] (see Defendant's Exhibit 2). This conversation, which took place on January 3, 2009, is reflected to have been between Defendant, JUNIOR SYLVIN and an individual who registered his phone to the name RED BOY. The conversation reflects a discussion between the parties surrounding the attem pted purchase of two or three ounces of Heroin by "RED BOY" from SYLVIN. ***A review of this telephone call next to the controlled calls made by CS 1 on June 18, 2008 reveal that RED BOY and CS 1 are one and the same person.*** Hence, CS 1 was purchasing narcotics from SYLVIN while being recorded on a wire tap that he caused to be authorized. It should be noted that the undercover purchase was also for two (2) or

three (3) ounces, obviously an amount that was usual between the parties. Additionally, upon information and belief, CS 1 and "RED BOY" are both considered "red" skinned African American males in their group and CS 1 does utilize the nick name "RED BOY" on occasion. What makes this situation even more egregious is that a review of the Discovery at BS 450 (see Defendant's Exhibit 3) indicates that RED BOY (phone number 786-362-9326) and SYLVIN communicated telephonically some sixty–six (66) times between December 30, 2008 and January 7, 2009. Additionally, upon information and belief, this individual had utilized two other cell phones during the course of this investigation and apparently dealt with the Defendant's) herein regularly *prior to* and after the Wire Tap Application was made (see Def. Ex. 3 at BS 449). These facts were either known to law enforcement or should have been known to them based on the extensive investigation in this case. These facts were never brought to the attention of the issuing judge prior to the first Application or the Extension thereof hence result in a serious omission and clear *Franks* violation.

ALTERNATIVE ARGUMENTS

42. Alternatively, the communications were unlawfully intercepted.

43. Alternatively, the Orders of authorization or approval under which the communications were intercepted are facially insufficient.

44. Alternatively, that the interceptions are not in conformity with the Orders, authorization or approval.

V.

CONCLUSION

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line

> is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression whe n compared with wire tapping.

Olmstead v. United States, 277 U.S. 438, 476 (1928).

> Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and-what is more important-without attending illegality.

Berger v. New York, 388 U.S. 41, 63 (1967).

WHEREFORE, the Defendant, JUNIOR SYLVIN and on behalf of his co-defendants who are also aggrieved parties, prays the relief requested be granted including, but not limited to the suppression of wire tap conversa tions from the original as well and the parties be permitted to address additional suppression issues. The Defendant also respectfully requests hearing on this motion as well as a ny further relief that this Court may deem just and proper.

Respectfully submitted,

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By: **s/ Barry S. Greff**
Barry S. Greff

CERTIFICATE OF CM/ECF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to AUSA Russell Koonin on the 24th day of August, 2009 and to all other parties by ECF on August 26, 2009.

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By: **s/ Barry S. Greff**
Barry S. Greff