UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.09-20264-CR-KING/BANDSTRA

UNITED STATES OF AMERICA,

v.

JUNIOR SYLVIN, et. al.,

Defendants.
_____/

UNITED STATES RESPONSE TO DEFENDANT JUNIOR SYLVIN'S MOTION TO SUPPRESS INTERCEPTED WIRE COMMUNICATION AND FOR DISCLOSURE OF CONFIDENTIAL INFORMANTS

The United States of America, by and through the undersigned Assistant United States Attorney, hereby responds to defendant, Junior Sylvin's Motion to Suppress Intercepted Wire Communications and for Disclosure of Confidential Informants.[1] Defendant's Motions should be denied because there was an obvious necessity for the wire interception, there was not a Franks violation that warrants a hearing, and disclosure of the confidential informant is not relevant or helpful to the defense.

FACTUAL BACKGROUND:

There was a long term investigation into a Drug Trafficking Organization (DTO) in the Little Haiti area of Miami, known as the 68th Street Boys. Pursuant to that investigation, a judicially authorized Title III wiretap was authorized by the Honorable Cecilia M. Altonaga for target Junior Sylvin's telephone on November 18, 2008, which lasted for 30 days. Reauthorization was granted on Sylvin's original phone, as well as a second phone of his on December 22, 2008. Interception

[1]The government has combined the responses, as defendant's Motion for Disclosure of the Confidential Informant is predicated on the argument he presented in his Motion for Disclosure of Wire Intercepts.

was terminated on January 8, 2009.

Original Application:

The original Affidavit in Support of the Application for Target Telephone 1 was submitted on November 17, 2008, and interception was authorized by The Honorable Cecilia M. Altonaga on this date. **[Ex. 1].** Pursuant to the application, Special Agent Rainwater established that in his experience, cellular telephones are used by criminals to communicate with one another in furtherance of their drug trafficking trade. ¶3. Agent Rainwater identified the sources of information that had currently been utilized, including information gathered from law enforcement, review of pen registers, review of toll records, surveillance, and other investigation. ¶5. As set forth in paragraph six, the known targets were Junior Sylvin, Frantz Sterlin, Kenyon Rumph, Tarvus Daniels, and Ansley Victor. ¶6. Sylvin was identified as the head, Sterlin a lieutenant, Rumph a supplier, and Daniels and Victor as assisting in the production of the crack cocaine.[2] This was all based on the agent's *belief*, based on information gathered thus far.

The background of the Target Subjects was further laid out in the affidavit. Sylvin was described as responsible for supplying multiple kilograms of cocaine to Sterlin and *others as yet unidentified.* ¶14. Sterlin was known to receive kilograms of cocaine from Sylvin based on information from *a reliable confidential informant.* ¶15. Rumph, Daniels, Ansley Victor and Desrouleaux's supposed positions were also based on information gathered from the *investigation to date.* ¶¶16-19.

Agent Rainwater then set forth the overview of the current investigation. ¶22. He stated that the Drug Trafficking Organization (DTO) known as the 68th Street Boys had been under

[2]Clarens Desroulerux was also named as a Target Subject. ¶10.

investigation since April, 2007. Agent Rainwater referenced homicides that were believed to have stemmed from drug gang warfare involving this DTO. Agent Rainwater also set forth that based on information given to him, he believed that the 68th Street DTO was responsible for distributing large amounts of cocaine in the South Florida area.

Agent Rainwater then detailed the background on the cooperating sources. CS1 was noted to be providing information in the instant investigation as well as in another MPD investigation. ¶23. CS2 provided information and also made multiple drug purchases from Sterlin. ¶24. CS3 was a often used CS in other investigations, and also provided background information. ¶ 25. Agent Rainwater also obtained information from three cooperating defendants. ¶¶ 26 & 27. In each instance where Agent Rainwater indicated that he obtained information from either a CS or CD, the full extent of their criminal history was set forth in the affidavit. ¶¶23-28.

Agent Rainwater then detailed the *background* information he learned from the CSs and CDs, including a stash house location at 8000 NW 10th Avenue, Miami, FL.¶31. Agent Rainwater then detailed two events where a CS advised that he had a conversation with Sylvin about drug supply, and another CS had a conversation with Sterlin about dropping phones and acquiring a new one. ¶¶33, 34.

Agent Rainwater then went on to detail monitored controlled calls and drug buys that occurred with the known targets during the course of the investigation. Agent Rainwater detailed a series of small individual crack cocaine buys from August 2007 through August 2008, from Sterlin, the various conversations that were had with Sterlin, and the phone numbers associated with Sterlin, including when two phones were taken temporarily from him upon his arrest. ¶¶35-49.[3]

[3]None of these buys occurred with CS1.

Agent Rainwater then detailed monitored controlled calls and one controlled crack cocaine purchase of two ounces of crack cocaine by CS1 from Sylvin on June 18, 2008. ¶¶50-51. The affidavit then detailed a series of recorded calls with Daniels in reference to this drug transaction. ¶¶52-53, and then a recorded call to Ansley Victor on October 25, 2008. ¶54.

The affidavit then set forth the controlled and monitored calls made by CS1 to Sylvin in regards to the purchase of narcotics, ¶55, the receipt of a text message by CS1 from Sylvin indicating that Sylvin had a supply of drugs, ¶56, and another monitored conversation where Sylvin indicated to CS1 that he previously had 22 ounces, but had recently run out of supply. ¶ 57.

Then, the affidavit, per standard and necessary procedure to apply for a TIII wiretap, analyzed the call pattern and toll analysis for the Target Telephone. It noted the high volume of calls during the relevant time frame, ¶60, and the many contacts between the Target Telephone and the phone numbers associated with the other known targets. ¶¶61, 62, 63, 64, 65. The affidavit then went on to detail the high volume of calls between the Target Telephone and numbers that were not known to law enforcement. ¶¶66, 67,68. Of course, the content of any of these thousands of calls was not known to law enforcement. Simply, it was that the high volume of these calls, to both known and unknown targets, and the fact that many of these phones were registered to unknown names, that was indicative, based on the Agent's prior training and experience (coupled with common sense), that the Target Telephone was associated with drug dealing. ¶69.

Agent Rainwater then went on to explain why there was a need for interception. He succinctly set forth that while some members of the DTO had been identified, not all of them had; that while surveillance had been conducted, all the drug routes, stash locations, and the like, had not been identified; that the proceeds of the drug dealing had not been identified; and that evidence

associated with homicides, from which this investigation into this DTO originally stemmed (see ¶ 22), had not yet been fully uncovered.

Agent Rainwater then went on to detail why alternative investigative techniques were not sufficient to accomplish these specific and worthy goals. As detailed above, and as set forth in the affidavit, law enforcement utilized confidential sources. Given their familiarity with the targets and the streets in general, the CSs provided background information. Acting on this background information, law enforcement employed the CSs to make monitored and controlled calls and buys to the targets, whose use was to support probable cause for the application. As stated, these were all small controlled buys, individuals transactions on various street corners. Save except a new phone number on certain instances, no further information was gleaned from these buys. No connections were established beyond the instant transaction, and no further information was gathered as to the scope of the DTO. ¶73.

Physical surveillance was then explained. Agent Rainwater specifically detailed an example of when law enforcement was spotted by Sylvin. Given the experience of the targets in drug trafficking, they were obviously very adept at spotting law enforcement. Particularly in the area where they were residing and dealing drugs, Agent Rainwater explained that the DTO was well aware of which vehicles belonged in the area, and which did not.¶¶74,75. Agent Rainwater detailed two different situations, on June 18, 2008 and September 7, 2007 where law enforcement was spotted.[4]

Agent Rainwater then went on to explain the limited use of toll records. Toll records simply

[4]Agent Rainwater estimates that law enforcement was identified by the targets approximately 10 times during the course of the investigation.

indicate that a high volume of calls are occurring between the Target Telephone and other telephone numbers, some associated with known targets, some not, and many in fake names. Thus, this information, while of value to apply for a TIII wire intercept, is otherwise quite limited. ¶76.

Agent Rainwater then went on to explain, again, quite obviously, and with the consultation of the undersigned, that Grand Jury subpoenas and the like would alert the targets to existence of the investigation, causing them to become more cautious (thus potentially ruining the opportunity for a TIII intercept) or cause the targets to flee. Moreover, even if called in to testify, the likelihood of a target testifying was minimal.¶77.

Agent Rainwater then explained why undercover agents could not be utilized. Quite different from a confidential source, who is known to the targets, has associated with the targets, and who had gained the trust of the targets from many years of association, an undercover agent would have to be introduced. Any drug trafficker worth his salt would immediately become suspicious of such a person, thus the likelihood of such an introduction was nominal, at best. Moreover, even if the undercover agent was able to infiltrate the organization, given that drug trafficking organizations have many layers, the usefulness of the agent would be limited.¶78. Finally, Agent Rainwater explained that search warrants would alert the targets to the investigation, thus thwarting it. ¶79.

Agent Rainwater completed the affidavit by assuring that the proper minimization procedures would occur, and then requesting the necessary technicalities to be ordered so as to permit the interception. ¶¶80-86.

On November 17, 2008, at 3:15 p.m, the Honorable Cecilia M. Altonaga authorized the interception. Interception began on November 18, 2008, at 10:00 a.m., and continued through December 17, 2008.

ReAuthorization and Second Application:

After the thirty day interception of Target Telephone 1, a reapplication for Target Telephone 1 was submitted, which was coupled with an application to intercept Target Telephone 2. **[Ex. 2].** In this application, Special Agent Rosenfeld, co-case agent on this matter, detailed new information on targets not detailed or known in the original application, including Emmanuel Othello, Niko Thompson, Michael Paul Boothe, Eric Douglas Taylor, Jerry Joseph, Silvince Metayer, and Chris Victor. ¶¶12-18. All of these were based on information learned in the initial 30 days of interception.

Agent Rosenfeld then detailed the probable cause that exited on Target Telephone 1. The entirety of this probable cause was based on the dirty conversations heard on the original interception. ¶23-67. There was not one reference to a CSs'or CDs' involvement in order to establish probable cause for this interception. Toll records were then analyzed for text messages. ¶¶68-73.[5]

Agent Rosenfeld then detailed why there was probable cause to intercept Target Telephone 2. He explained how, while on the wire, agents heard Sylvin speaking to his wireless carrier on Target Telephone 1, and asking the provider to transfer his number associated with Target Telephone 2 to another handset device. Agent Rosenfeld then detailed a specific instance on the wire, coupled with surveillance which resulted in a drug seizure from Sylvin's vehicle, and then stated that the toll analysis patterns from Target Telephone 1 matched those to Target Telephone 2. ¶¶77-78.

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[5]This second application for both Target Telephone 1 and 2 included a request to intercept text messages, which was not a part of the original application.

Agent Rosenfeld then went on to detail the telephonic contact between Target Telephone 2 and the newly discovered targets, thus indicating that this phone was dirty as well. ¶¶79-99.

Agent Rosenfeld then detailed the reasons why alternative methods had been tried and were not successful, or were too dangerous to employ. ¶¶100-102. Agent Rosenfeld then went on to go through the list of possible investigative methods that could not be utilized to uncover the full breadth of the investigation. ¶¶103-109. Agent Rosenfeld specifically detailed another instance where law enforcement was spotted by the targets on November 24, 2008, where Sylvin and Othello recognized a car to be law enforcement's, and then began speaking to each other, exchanging information such as vehicle description, tag information, and location, much like a regular law enforcement officer would do. Further, Agent Rosenfeld indicated that Sylvin and co-conspirators would often conduct counter-surveillance, making sharp turns or u-turns in the middle of the street in an effort to identify if they were being followed. Thus, surveillance opportunities were limited. Moreover, even if successful, the information gleaned from that alone would be insufficient to gather the necessary evidence for prosecution. ¶104.

Agent Rosenfeld completed the affidavit by assuring that the proper minimization procedures would occur, and then requesting the necessary technicalities to be ordered so as to permit the interception. ¶¶110-116.

On December 22, 2008, at approximately 1:05 p.m., the Honorable Cecilia M. Altonaga, signed an order reauthorizing the interception of Target Telephone 1, to include text massages, and authorized the interception of Target Telephone 2 for both oral and text messages. Interception began on December 26, 2008, and continued through January 9, 2009. Interception ceased before the 30 day authorization windows because the phones had gone dead.

ARGUMENT:

A. The Government Met Its Burden To Demonstrate Necessity

The district court's authority to authorize the electronic surveillance involved in this case is found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. §§ 2510-2520. Title III sets forth numerous requirements the government must meet before surveillance may be authorized, 18 U.S.C. § 2518(1), the findings the district court must make, 18 U.S.C. § 2518(3), and requirements for the district court's authorization order. 18 U.S.C. § 2518(4). Title III contains its own exclusionary rule under which the defendant has standing to challenge the surveillance. 18 U.S.C. § 2518(10). United States v. Van Horn, 789 F 2d. 1492 (11th Cir. 1986).

An application for interception must contain 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). The "necessity" requirement is designed to ensure that electronic surveillance is neither routinely employed nor used when less intrusive techniques will succeed. United States v. Giordano, 416 U.S. 505, 515 (1974); United States v. Kahn, 415 U.S. 143, 153 n. 12 (1974). The affidavit need not, however, show a comprehensive exhaustion of all possible techniques, but must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves. United States v. Alonso, 740 F.2d 862, 868 (11th Cir.1984). United States v. Hyde, 574 F.2d 856, 867 (5th Cir.1978).[6] "The affidavits must be read in a 'practical and common sense fashion' and the district court is clothed with broad discretion in its consideration of the application." Id. (quoting United

[6] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

States v. Brick, 502 F.2d 219, 224 n.14 (8th Cir. 1974)). Reviewing courts are sensitive to the reality that the quantum of evidence "sufficient to obtain a conviction is an imprecise concept." United States v. Nixon, 918 F.2d 895, 901 (11th Cir. 1990). As a result, "[c]ourts will not invalidate a wiretap order simply because defense lawyers are able to suggest post factum some investigative technique that might have been used and was not." Hyde, 574 F.2d at 867. Judged by these standards, the affidavits in this case are legally sufficient.

Sylvin contends that the Special Agent Rainwater's affidavit supporting the government's November 17, 2008, application for a wiretap order merely recites boilerplate conclusory statements which are inadequate for compliance with the statute. Sylvin essentially contends that the need for the wire interception is obviated because the government had used and employed confidential sources and cooperating defendants. However, this argument fails. First, the Eleventh Circuit has stated on several occasions that the cooperation of an informant does not negate the need for electronic surveillance. United States v. Messersmith, 692 F.2d 1315, 1317 (11th Cir. 1982). In Messersmith, the F.B.I. was able to utilize an informant, but the main target "was very wary of the traditional investigative techniques which could have substituted for the challenged electronic surveillance." Id. at 1318. As a result, a wiretap was necessary.

Further, the confidential informants were only able to provide background information, and were only able to conduct small drug transactions with Sylvin and Sterlin. This did not expose the entire breadth of the DTO, nor the kilograms of cocaine and crack cocaine that the DTO was trafficking. This circuit has repeatedly held that, where conventional techniques will not show the entire scope of the conspiracy, a wiretap is permissible, even in those situations where conventional techniques will allow for the arrest and conviction of some members. In Hyde, the former Fifth

Circuit considered a similar situation. The Hyde wiretap affidavit revealed that the government had a web of informants that would have enabled the government to prosecute lower level conspirators. However, because the government could not make a case against the "top-level conspirators," the court held that "the wiretap was necessary to ascertain the full scope of the conspiracy under investigation and to gather evidence against the leaders of the organization." Id. at 869. Notwithstanding the partial success in gathering evidence against some of the conspirators, the court held that a wiretap was necessary to determine the identities and roles of all of the members of the conspiracy. The court stated:

> Although the government has actual knowledge of a conspiracy and evidence sufficient to prosecute one of the conspirators, it is unrealistic to require the termination of an investigation before the entire scope of the narcotics distribution network is uncovered and the identity if the participants is learned.

Id. at 869 (quoting United States v. Armocida, 515 F.2d 29, 38 (3d Cir. 1975). As a result, the court upheld the legality of the wiretap.

Furthermore, simply by virtue of the fact that the confidential sources were able to make small drug purchases from certain targets does not invalidate the need for necessity. In United States v. Nixon, 918 F.2d 895, 900 (11th Cir. 1990), this circuit upheld a wiretap against a necessity challenge in which the application stated that at least two of the targets had agreed to sell narcotics to undercover agents. Moreover, in Nixon the agents had actually been able to purchase narcotics from the defendants, through the use of an informant.

Likewise, in United States v. Van Horn, 789 F.2d 1492, 1497 (11th Cir.), the court was faced with a wiretap of a marijuana importation ring. The defendants argued that surveillance could have been used to detect the marijuana offloading operation, and the wiretap was unnecessary. The court rejected the defendants' argument, and held that surveillance which was likely to detect only one

or two off-loads was insufficient when the goal was to expose the entire conspiracy: "[I]t is obvious that the government was not seeking to catch one or two small vessels with marijuana, but to expose the entire conspiracy." Van Horn, 789 F.2d at 1497.

Contrary to defendant's assertion, the entire scope of the organization was not known to law enforcement prior to the wire intercept. The potential targets named in the original application were Junior Sylvin, Frantz Sterlin, Kenyon Rumph, Tarvus Daniels, and Ansley Victor. ¶6.[7] Only two of three of those targets ended up being a part of the indictment. Not fully flushed out as to their roles, or even known to law enforcement were Emmanuel Othello, Eric Taylor, Niko Thompson, Ziv Bythol, and Chris Victor. Furthermore, based on the investigation, and information gathered on the wire, multiple search warrants were executed on the day of the takedown. One was at a residence known to be associated with Niko Thompson. In that residence, in Gordon Louis' bedroom, was over a kilogram of cocaine, two firearms, including an AK-47, and numerous drug paraphernalia. Louis confessed to awareness of the drugs, and that he had received them the night before from Niko Thompson to safeguard. Niko Thompson was identified as one of Sylvin's source of supply, only by virtue of the wire. Drugs were confirmed to be stashed at Chris Victor's house, only by virtue of the wire. Eric Taylor was confirmed to be the one associated with his residence, and in being one of Sylvin's employees, only by virtue of the wire. And the understanding of Othello's role in the DTO, that he was essentially Sylvin's right-hand man in the organization, was only realized by virtue of the wire intercept.

[7]Defendant posits a far reaching conspiracy theory that because Rumph was not indicted, the government offered him some type of immunity, and thus is hiding information. Defendant fails to consider the more obvious alternative – there was no evidence gathered on Rumph during the course of the wire, thus he was not indicted.

Defendant makes mention that surveillance was already employed. While this may have been the case, the agents were spotted on many occasions. Moreover, arguably the most successful surveillance occurred on December 8, 2008, where the wire intercepts indicated that Sylvin was delivering drugs to Ziv Bythol. Defendant ironically points this episode out (¶21) as the reason why there was not a necessity for the wiretap. However, this is the perfect demonstration of the usefulness and necessity for the wiretap. While monitoring the wire, Sylvin engaged in numerous conversations with Bythol where it was clear that he had dropped off 16 ounces of cocaine to Bythol earlier that evening, and Bythol now wanted another 20 ounces. Sylvin contacted Othello to prepare the drugs, and then, after picking up the drugs, confirmed with Bythol that he was on his way to drop off the new order.[8] At this point, based on the whole story unfolding on the wire, and the corresponding surveillance, Sylvin was traffic stopped. Approximately 21 ounces of cocaine and a firearm were discovered in a secret compartment in his vehicle. This would never have happened if not for the information gleaned from the wire. There would have been no probable cause to stop or search the car. All law enforcement would have seen is Sylvin driving from one location to another, without a clue as to what he was actually doing. As indicated in United States v. Van Horn, 789 F.2d 1492, 1497 (11th Cir. 1986), even if surveillance was successful, "it could only lead to evidence that members of the conspiracy were meeting, and not to direct evidence of criminal activity." Even undetected surveillance is of limited utility against concerted, organized drug activity. Courts have looked at the difficulties in conducting surveillance in determining the necessity of a wiretap. See, e.g., Id. at 1496; Hyde, 574 F.2d at 868; United States v. Messersmith,

[8]This entire event is the subject of defendant's Motion to Suppress Evidence, and is set forth in greater detail in the government's response.

692 F.2d 1315, at 1318 (11th Cir. 1982).

Thus, far from setting forth mere boilerplate language, as defendant suggests, and far from having the entire investigation wrapped up prior to the wiretap, the necessity and the explanation for the necessity was fully set forth in the application, and more than sufficed to justify the authorization of the intercept.

B. Franks Violation/CI Disclosure:

Though the argument is set forth in two separate motions, defendant's argument is basically the same: A Franks hearing should be held because the agents knew that CS1 was working both sides of the fence, or alternatively, they should have known. Based on this assertion, defendant posits that a Franks hearing should be held on the matter, and, defendant asserts that given CS1 and CS2 participated in the investigation, and provided information to law enforcement, they should be disclosed to defendant. Defendant's arguments are without merit, and a hearing on the matter is not necessary.

1. No Substantial Preliminary Showing Has Been Made:

Claims to entitlement to the hearing made available pursuant to Franks v. Delaware, 438 U.S. 154 (1978), which itself recognized the "presumption of validity" regarding affidavits, and arguments opposing, must, of necessity begin with the rule itself:

> [W]here the defendant makes a *substantial preliminary showing* that a false statement *knowingly and intentionally, or with reckless disregard* for the truth, was included by the affiant in the warrant affidavit, *and* if the allegedly false statement is *necessary* to a finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Although Franks arose in the context of false statements in a search warrant for physical evidence, the rule announced therein has since been held applicable to affidavits submitted in support of court-

ordered electronic surveillance, United States v. Bascaro, 742 F. 2d 1335 (11th Cir. 1984); United States v. Harvey, 560 F. Supp. 1040 (S.D. Fla. 1982); to material omissions from affidavits, United States v. Martin, 615 F. 2d 318 (5th Cir. 1982); and to an affidavit's averments pertaining to the necessity for court-ordered electronic surveillance. 18 U.S.C. §§ 2518(1)(c) and (3)(c); United States v. Ippolito, 774 F. 2d 1482 (9th Cir. 1985); and United States v. Cantu, 625 F. Supp. 656 (N.D. Fla. 1985).

The first reason why Sylvin's request for a Franks hearing should be denied is because he has failed to make a substantial preliminary showing both that: 1) any of the information provided by the confidential informants was false and 2) Agents Rainwater knew or should have known that CS1 was both cooperating as a confidential informant, and yet engaging in independent criminal activity when he wrote the affidavit.

The Eleventh Circuit has held that the "substantiality" requirement is not lightly met, and that:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

United States v. Arbolaez, 450 F.3d 1283, 1294 (11th Cir. 2006) (internal citations omitted).

A defendant's "bare allegations" unsupported by offers of proof do not warrant a Franks hearing. United States v. Shurn, 849 F.2d 1090, 1096 (8th Cir. 1988). Given that the requisite showing has not been made, there is no need for a Franks hearing.

The United States concedes that CS1, the individual who made the controlled call on June 18, 2008 is the same individual referred to as "Red Boy" during the wire intercept with Sylvin on January 3, 2009. However, this is of no moment. Defendant points out the lengthy criminal history of the confidential informant, but acknowledges that such information was explicitly included in the affidavit. Defendant then points to pen register analysis indicating from December 30, 2008 through January 7, 2009, there were 66 calls between the CS1 and Sylvin. (p. 26) What defendant does not make explicitly clear however is that these dates are *during* the second wire intercept, not beforehand.[9] The plain facts of the matter were that CS1, as referenced in paragraph 23 of the original wire affidavit, was working not only on this matter, but another matter as well. This dated back to March, 2008. His handlers had constant contact with him, and had no reason to suspect that he was working both sides, and had no information to suggest that he was. Obviously the CS was a prior criminal, this is by definition what a CS is. Again, this was disclosed in the affidavit. Defendant makes no other assertion as to why Agents should have known the CS was playing both sides other than the CS's criminal history. That the CS was discovered to be working both sides of the fence during the course of the wire has no bearing on the application to get up on the wire, as such discovery was not made before the original wire application. Moreover, the reauthorization for the wire application on December 22, 2008, along with the request for authorization for Target

[9]Defendant, without any substantiation other than 'information and belief' (thus a presumable conversation with his client), indicates on BS # 449 that two other phone numbers were also associated with CS1 under the name MJ Johnson. Aside from the fact that the first entry of (786) 362-9702 is also during the course of the wire intercept, not before, it is a quantum leap to presume that of the thousands of phone calls occurring during the wire, and the hundreds of phone numbers associated with those calls, that the agents spotted, or should have spotted calls from "MJ Johnson," and realized that this was CS1, and failed to disclose this fact. The undersigned has confirmed that the CS's last name is not Johnson, thus this is, once again, another phone with a fake name associated with it.

Telephone 2 did not even reference any CS. **[Ex. 2].**

2. Materiality Requirement Has Not Been Met:

Even if Sylvin could satisfy the "substantiality" requirement under Franks, he would still not be entitled to relief because he cannot satisfy the "materiality" requirement. In order to be entitled to relief under Franks, a defendant must show not only that misrepresentations or omissions were intentionally or recklessly made, but also that, absent those misrepresentations or omissions, probable cause would have been lacking to issue the warrant or order. Franks, 438 U.S. at 156; United States v. Novaton, 271 F.3d 968, 987 (11th Cir. 2001). If there is still probable cause to support the warrant or order after the misrepresentation or omission has been excised, then the defendant is not entitled to relief. See Franks, 438 U.S. at 156.

The sum total of CS1's non-monitored contact with Sylvin referenced in the affidavit was a conversation CS1 had with Sylvin approximately 2 weeks prior to being debriefed by agents on October 16, 2008, regarding Sylvin wanting to acquire cocaine, and a text message forwarded to law enforcement by CS1 which he received from Sylvin on October 24, 2008, indicating that Sylvin had a supply to sell. [Ex. 1 ¶¶33, 56.]. However, both of these tidbits provided by CS1 were then corroborated by a monitored call placed October 17, 2008 and October 25, 2008 respectively, which followed up the themes of the conversation that CS1 presented. ¶¶55, 57. CS1 provided information on a residence, 8000 NW 10th Avenue being a drug stash house. ¶31. This information was in-fact later corroborated by various surveillances, a drug purchase that occurred at the residence, and by a search warrant that was executed at this residence on April 6, 2009, which led to the discovery of drug paraphernalia, and the arrest of Eric Taylor, who is named in this Indictment in a conspiracy with Sylvin and others in Count 1. All other contact by CS1 with Sylvin or other targets set forth

in the affidavit to establish probable cause was monitored and recorded, ¶¶50, 51,52,53,54, which included the purchase of two ounces of cocaine from Sylvin on June 18, 2008.

The entire remainder of the affidavit concerns information given and controlled calls placed by CS2 and CS3 in reference to Sterlin. Under the principles necessary to obtain a TIII authorization, probable cause would have existed simply by virtue of the fact that Sterlin was a drug dealer and utilized his phones, and was in contact with Sylvin for those deals, which law enforcement was not privy to. CS2 and CS3 more than established probable cause that Sterlin used his phone to conduct drug deals, ¶¶35-49, and the toll analysis strongly corroborated this.¶¶63-65. Sylvin's phone was established to be dirty by the monitored call placed by CS1, thus, probable cause to complete the triangle and hear what Sterlin and Sylvin were speaking about was established with minimal involvement from CS1. And again, in the reauthorization for Target Telephone 1, and authorization for Target Telephone 2, there is not one reference to CS1. Hence, under the second prong of materiality, defendant's Franks argument fails.

3. No Grounds Have Been Established for CS Disclosure:

In Roviaro v United States, 353 U.S. 53 (1957) the Supreme Court recognized that the government has a limited privilege to withhold from disclosure the identity of its informants. Roviaro, 353 U.S. at 59-60, 77 S. Ct. at 627. The Roviaro Court established a balancing test, whereby a court must examine "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Roviaro, 353 U.S. at 62. If disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro, 353 U.S. at 60-61.

In this Circuit, Roviaro's progeny has focused the balancing test on three factors: (1) the extent of the informant's participation in the criminal activity; (2) the directness of the relationship between the defendant's asserted defense and the probable testimony of the informant; and (3) the government's interest in nondisclosure. See United States v. Gutierrez, 931 F.2d 1482, 1490 (11th Cir. 1991) (citing United States v. Tenorio-Angel, 756 F.2d 1505, 1509 (11th Cir. 1985)). In cases falling between these two extremes, that is, where the informant is more than a mere tipster but less than a crucial player, the law favors nondisclosure. Id.

As mentioned above, CS1, CS2 and CS3 provided some background information on Sylvin and the other targets, placed monitored phonecalls to the targets, and conducted small drug transactions with them. Notably, there was only one actual drug transaction with Sylvin set forth in the affidavit from June 18, 2008, which is one count, Count 13, of the Indictment. Even as to this count, the government has no intention on calling the CS to testify. Moreover, Counts 1, 2, 3, 4, 5, 6, 7, and 8 are all counts that Sylvin is charged in, and are all counts based on conversations and events that occurred during the wire intercepts which have nothing to do with any confidential source. See United States v. Varella, 692 F.2d 1352, 1356 (11th Cir. 1983); see also United States v. Kerris, 748 F.2d 610, 614 (11th Cir. 1984) (disclosure not warranted where informant's level of participation is minimal). Thus, defendant's argument fails as to prong one.

Second, though defendant makes the assertion that there is a relationship between the informant's participation in the criminal activity and the directness of the relationship between the defendant's asserted defense, he offers no basis or explanation for this assertion. If defense counsel intends to attack the veracity of the agents testifying at trial or the authenticity of the investigation by virtue of the CS working both sides of the fence, the agents can be asked such questions.

Impeachment of a CS, while certainly tempting and tantalizing to a defendant, is not an asserted defense, particularly when there is no anticipated testimony by any CS from the government. Thus, there is no directness of any relationship. Finally, given the overarching policy concerns of needing to protect the identity of CSs for future investigations, and not wanting to deter future CSs from cooperating, there is no need for disclosure.

Defendant has not made any type of assertion that disclosure of the CSs would assist him in his defense. Thus, in sum, the complete failure to demonstrate that the informant's testimony would have "significantly aid[ed] in establishing an asserted defense," and that the informant's participation in the charged criminal activity is minimal, defendant's request for disclosure should be denied. See United States v. McDonald, 935 F.2d 1212, 1217 (11th Cir. 1991); Gutierrez, 931 F.2d at 1491.

CONCLUSION:

Based on the foregoing, defendant's Motion to Suppress Intercepted Wire Communications, request for Franks hearing, and Disclosure of Confidential Informants should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ *Russell Koonin*
Russell Koonin
Assistant United States Attorney