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IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND JOHN MARTINEZ and
JUANITA MARIE QUITUGUA MOSER,

Defendants.

CRIMINAL CASE NO. 15-00031

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO SUPPRESS SEARCH OF DEFENDANTS' CELL PHONES AND EVIDENCE DERIVED FROM THE SEARCH (ECF No. 25)

COMES NOW THE United States of America, in opposition to Defendants' Motion to Suppress Evidence – defendants' cell phones and states:

INTRODUCTION

Defendants have filed a Motion to Suppress Evidence (ECF No. 25) obtained from cell phones agents searched on July 25, 2014.

As a result of defendants' unlawful activities they have been charged in a Superseding Indictment with the offenses of Conspiracy to Distribute Methamphetamine, and Conspiracy to Commit Money Laundering. The Superseding Indictment also contains two Forfeiture Allegations.

According to United Airlines (UA) records (Government's Exhibit #1) on July 9, 2014, defendants and their party departed Guam on UA flight #196 to Narita, Japan and continued on UA flight #33 to Los Angeles (L.A.), California. On July 24, 2014 the defendants and their party departed L.A. on UA flight #32P and flew to Narita, Japan. On July 25, 2014, the defendants departed Narita, Japan on UA flight #197 and arrived in Guam.

ARGUMENT

1. The Search of Defendants' Cell Phones is a Legal Border Search

The guaranteed right of an individual to be free from unreasonable searches and seizures is provided by the Fourth Amendment of the United States Constitution. However, case law has established at least ten judicially recognized exceptions to the warrant requirement which include search incident to a lawful arrest; plain view; consent; stop and frisk; inventory searches; emergencies; search incident to a lawful arrest; hot pursuit; probable cause plus exigent circumstances searches; and border searches.

The basis for a border search exception is the Government's interest in preventing the entry of unwanted persons and effects. *United States v. Flores-Montano*, 541 U.S. 149 (2004). (1977). In reversing the Ninth Circuit, the Supreme Court held that border searches do not require reasonable suspicion. The Supreme Court further stated the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *Flores-Montano*, *id.* 152. The Supreme Court went on to state, "Congress has always granted the Executive plenary authority to conduct searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Id.* 1583.

Defendants rely on *Riley v. California*, 134 S. Ct 2473 (2014) in support of the Motion. In

Riley, the Supreme Court addressed the question of whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Supreme Court expressly held that digital data is not subject to the warrant exception for searches incident to an arrest and that as a general matter, law enforcement authorities must obtain a search warrant before searching an arrestee's electronic device. *Riley*, *id.* 2484. The Supreme Court in deciding *Riley,* declined to address case-specific Fourth Amendment exceptions, but explained, as an example, how the exigent circumstances exception still might apply. *Riley*, *id.* 2494. The Supreme Court made no specific references to border searches or any of the other case-specific exceptions to the warrant requirement such as; plain view; consent; stop and frisk; inventory searches; emergencies; or hot pursuit. The Supreme Court stated, "even though the search incident to arrest exception does not apply to cell phones, other case specific exceptions may still justify a warrantless search of a particular cell phone." *Riley*, 2494.

The Ninth Circuit has held that when agents conduct a border search wherein they image an international traveler's computer, the agents must have reasonable suspicion to conduct such a search. Reasonable suspicion is a particularized and objective basis for suspecting the particular person stopped of criminal activity. Even if the factors considered in isolation from each other are susceptible to an innocent explanation, they may collectively amount to a reasonable suspicion. *United States v. Cotterman*, 709 F.3d. 952 (9th Cir. 2013).

On July 9, 2014, defendants and two other individuals were scheduled to fly to Narita, Japan, with L.A. as their final destination. Defendants went through the Transportation Security Administration (TSA) screening at Guam International Airport. The TSA screener noted an anomaly in RAYMOND JOHN MARTINEZ's (MARTINEZ) hand carry bag. A TSA officer conducted a search of the bag and retrieved a money pouch. When the TSA officer opened the

pouch, he saw a thick stack of $100 dollar bills. MARTINEZ told the officer that it was $50,000 and that he had documents for the money. MARTINEZ said he would present the documents when he arrived at his final destination. When defendants arrived in California, MARTINEZ declared $100,000 and filed a FINCEN 105 report.

After July 9, 2014, but prior to defendants return to Guam from Narita, Japan, on July 25, 2014, U.S. Department of Homeland Security Investigations (HSI) agents conducted further investigation into the defendants. The investigation yielded the following results. The defendants were unemployed but lived a lavish lifestyle. MARTINEZ was alleged to have been involved in an indoor marijuana grow operation and he was associated with a group that distributed methamphetamine in the southern part of Guam.

On July 9, 2014, MARTINEZ told a U.S. Customs and Border Patrol Officer that he sold a 2006 Hummer he previously purchased for $130,000, for $100,000 because the buyer was paying cash. HSI agents determined that the "Blue Book"[1] value of the Hummer at that time was approximately $60,000. Agents learned that MARTINEZ had sold the Hummer to Eric Sanabia (Sanabia) and subsequently did a search of Sanabia in their system. They learned that Sanabia was involved in trafficking illegal drugs and his organization used luxury vehicles to transport drugs.

HSI Special Agent (S/A) Matthew Hernandez reported that the defendants became agitated when they were subjected to an outbound examination when they were leaving L.A. S/A Hernandez viewed several shipping documents the defendants had in their possession. The documents indicated that the defendants had two motorcycles and one Mercedes G55 bound for Guam in MARTINEZ's name.

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[1] A publication stating the value of vehicles based on a number of factors such as age, condition and mileage. The Kelley Blue Book is used by consumers and people in the automotive industry.

Based on all of the foregoing circumstances, Guam Customs Officers had reasonable suspicion to search defendants' cell phones at the border.

Defendants' Cases

Defendants cited a number of cases in support of the Motion in addition to *Riley*, *id.* However the defendants' analysis is flawed. In *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) the defendants were charged with illegal importation of methamphetamine in violation of 21 U.S.C. § 952(a). The defendants transported methamphetamine from California to Guam. The issue in *Cabaccang* was whether or not the transportation of drugs on a *nonstop* flight from one location within the United States to another constitute importation within the meaning of § 952 even though the flight traveled through international airspace. The Ninth Circuit held that when drugs pass through international airspace on a nonstop flight en route from one U.S. location to another, without touching down on either land or water, such travel does not constitute importation. *Cabaccang*, *id.*

The issue in this case is not the same as in *Cabaccang*. However, the language in *Cabaccang* is relevant to the analysis of this case. The defendants in this case did not fly nonstop from a United States jurisdiction to Guam. Defendants flew from L.A. to Narita, Japan, on UA flight # 32P. *See Govt.'s Ex.* 1. UA Flight # 32P from L.A. landed in Narita, Japan, which incidentally is not a location within the United States. According to UA records, flight # 197 left Narita, Japan (a location not in the United States) and flew directly to Guam. The search in Guam was a border search. Defendants' reliance on *Cabaccang* is misplaced.

Cabaccang was distinguished by *United States v. Rowland*, 464 F.3d 899, 905-6 (9th Cir. 2006). The Ninth Circuit held that a Guam Customs officer has authority to stop and question a defendant about violations of Guam drug laws in spite of the fact that defendant flew from Hawaii

to Guam. The Ninth Circuit held that Guam is not part of the U.S. Customs territory and has its own customs zone. *Rowland*, *id.* at 905. The Ninth Circuit reasoned that although Guam is geopolitically a part of the United States, an item passing from the United States into Guam leaves one customs territory and its administration, and enters another. Therefore it makes sense that for purposes of Guam Customs law, any item arriving in Guam, from outside of Guam – even if coming from the United States – is subject to customs inspection. *Rowland*, *id.* If the Court accepts defendants' suggestion that a flight from Narita, Japan, to Guam is not an international flight, subjecting defendants' items to a border search, the Court can look to *Rowland, id.* to uphold the search by Guam Customs Officer Ungacta on July 29, 2014.

Defendants' reliance in *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014) is inapposite. The Ninth Circuit did not analyze *Camou* in terms of a border search. Rather the Court's analysis was in terms of a cell phone search, incident to an arrest, based on the facts of the case. Border Patrol agents stopped defendant at a checkpoint in Westmoreland, California. The agents found an undocumented alien on the floor of the backseat of defendant's vehicle. Everybody in the truck was arrested. The vehicle, the defendant's cell phone, and the arrestees' cell phone were seized and taken to a checkpoint security office. The cell phones were inventoried as seized property and evidence. Agents then interviewed two of the arrestees. One of the arrestees told agents the defendant received calls on his cell phone from smugglers concerning the smuggling of undocumented aliens. Approximately one hour and twenty minutes after the defendant's arrest, one of the agents searched defendant's cell phone to include the phone's internal memory. The Ninth Circuit suppressed the search of the cell phone in Camou, id. because the search of the cell phone was too far removed in time from the defendant's arrest.

Unlike the defendant in *Camou*, *id.* the defendants in this case were neither arrested nor

delayed for a long period of time on July 25, 2014. Here, the defendants had just entered the United States into the Guam Customs territory by way of Narita, Japan. The Ninth Circuit did not analyze *Camou*, *id.* as a border search, therefore defendants' reliance on that case is misplaced.

The case of *United States v. Eisenhour*, 44 F. Supp. 3d 1028 (D.Nev. 2014) involved the suppression of the data search of a cell phone incident to an arrest. The present case does not involve the search of a cell phone incident to an arrest. Further, the police officers in *Eisenhour*, *id.* searched defendant's cell phone days after defendant was arrested and after it had been stored in the police evidence room. Defendant's reliance on *Eisenhour*, is misplaced.

United States v. Alonso-Castaneda, 2015 WL 1711989 (D. Az. 2015), an unreported case, also involved a search incident to an arrest. The Court held that when the defendant was arrested, his cell phone was fifty feet away, on the visor in his vehicle and therefore not in his immediate control.

Defendants also cited *United States v. Kim*, 2015 WL 2148070 (D.C. 2015). In *Kim* the defendant's bag was searched prior to him leaving the United States. The defendant was the target in an investigation involving procurement and exportation of defense articles without the required licenses, to Iran, in violation of the trade embargo. Ultimately, it was determined the defendant had no contraband in his baggage. As the defendant was about to board the plane the agent asked him if he had any electronic devices. The defendant said he had a laptop and the agent responded to the defendant that he was detaining the laptop and would return the laptop when the search was completed. The District Court noted the agent did not have a translator present. The agent testified he did not turn on Kim's computer or search it at the time, because he did not want to turn the computer on without an individual being present who knew how to preserve the contents of the laptop. The following day, December 6, 2012, the agent turned the computer over to an agent

assigned to the Department of Homeland Security Computer Forensics group and requested a 'border search' of the computer. The laptop's hard drive was imaged and the hard drive was placed back inside of the laptop. On December 7, 2012 the laptop was returned to the seizing agent. The agents conducted a limited search of the imaged files which included exporting image files which also included documents; they used keywords to filter out files. Those activities took place between December 7, 2012 and December 10, 2012. Between December 10, 2012 and December 19, 2012 the agent reviewed the files that were downloaded off the imaged hard drive from defendant's laptop. It was during that search that agents found emails that formed the basis of the charges against the defendant.

On January 13, 2013 agents applied for and obtained a search warrant to conduct a forensic examination of the laptop's hard drive. In granting the defendant's suppression motion, the D.C. District Court found it significant that the agent testified he did not need any suspicion to conduct a border search of defendant's laptop. The Court believed that the agent was gathering evidence of a completed crime as the motivation of seizing the laptop. Further, the District Court questioned whether the search was in fact a border search. The Court noted that although the defendant's laptop was seized at the border, it was not opened or searched at the border. The laptop was transported 150 miles from the border. Those facts, combined with the fact that the search of the laptop was not predicated on any observation of defendant's activities within the United States, is why the search of the laptop in *Kim*, *id.* was suppressed. In the present case, Guam Customs officers had reasonable suspicion as discussed previously to search the defendants' cell phones at the border. Further, Guam Customs Officers returned the cell phones to the defendants, in spite of not searching all of the cell phones. The defendants' reliance on *Kim*, *id.* is misplaced.

Relying on *United States v. Kyle*, 2011 WL 176038 (N.D.Cal.), an unpublished opinion, defendants state "On international flight from Germany, warrantless searches of cell phones and laptop upon arrival at San Francisco airport were proper border searches." (Def. Br. p. 8). The Government agrees with defendants. The search of defendants' cell phones upon defendants' arrival at the Guam airport after an international flight from Narita, Japan was a proper border search.

Inevitable Discovery

Should the Court be inclined to grant defendants' Motion to Suppress, the Government reserves the right to put on evidence to demonstrate that the C/I's cooperation took place without the use of the information seized from defendants' cellphones on July 25, 2014, or in the alternative, the agents would have inevitably 'discovered' the C/I subsequent to the July 25, 2014 search of defendants' cell phones.

The inevitable discovery doctrine is an exception to the exclusionary rule that permits the Court to admit unconstitutionally obtained evidence if an independent, lawful police investigation inevitably would have discovered it. Regardless of whether or not the investigation was ongoing at the time of alleged illegal police conduct, it is possible for an investigation that begins after the violation to be independent of the illegal investigation. *United States v. Ruckes*, 586 F.3d 713 (9th Cir. 2009); *United States v. Reilly*, 224 F.3d 986 (9th Cir. 2000). The Government's burden is to demonstrate by a preponderance of the evidence that there was a lawful alternative justification for discovering the evidence.

The investigation involving the C/I[2] commenced sometime in 2005 and continued until 2014. The defendants in this case are not mentioned in the C/I's case nor were the defendants the targets of that investigation. The C/I came forward in 2015 for the same reason most defendants

[2] The Government is describing the C/I's case in vague terms because of prior court orders.

cooperate with the Government, which is to help reduce his/her prison sentence. The C/I would have been charged with criminal offenses regardless of the existence or nonexistence of the defendants or the search of their cell phones.

The C/I's cooperation against the defendants commenced nearly ten months after their respective cellphones were searched.

Conclusion

The United States moves this Court to deny defendants' Motion to Suppress Evidence seized in this case without a hearing.

RESPECTFULLY SUBMITTED this 11th day of September, 2015.

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By: /s/ Clyde Lemons, Jr.
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