ADDENDUM

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NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM PAUL COX, JR., Defendant-Appellant.	No. 18-30104 D.C. No. 6:17-cr-00004-CCL-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Submitted March 4, 2019**
Portland, Oregon

Before: GRABER and BERZON, Circuit Judges, and TUNHEIM,*** Chief District Judge.

William Cox, Jr. contends that the district court should have suppressed the recording of a phone call he placed from jail, information from which was used to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

secure a search warrant for his car. He argues the conversation was "a protected communication under the [Secured Communications Act (SCA)] or the Fourth Amendment," so "a warrant was required for law enforcement to lawfully access those recorded calls." We disagree and affirm.

1. Although the SCA prohibits "intentionally access[ing] without authorization a facility through which an electronic communication service is provided," or exceeding authorized access to that facility, to obtain access to electronic communication stored therein, 18 U.S.C. § 2701(a), suppression is not a remedy available for violations of those provisions. The statute provides that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." *Id.* § 2708. Suppression is not among the remedies and sanctions described. *Id.* § 2701. For that reason, this circuit has long recognized that "the [SCA] does *not* provide an exclusion remedy. It allows for civil damages and criminal punishment but nothing more." *United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998) (citations omitted).

2. The Fourth Amendment is no more help than the SCA to Cox. *United States v. Van Poyck* is clear that "any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls." 77 F.3d 285, 291 (9th Cir. 1996).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM PAUL COX, Jr., Defendant.	CR-17-4-H-CCL-JTJ **FINDINGS AND RECOMMENDATION**

I. INTRODUCTION

Defendant William Paul Cox, Jr. (Mr. Cox) filed motion to suppress recorded telephone calls he made while incarcerated at Lewis and Clark County Detention Center, which were later used in a search warrant application. (Doc. 13). Mr. Cox claims it was unlawful for law enforcement officers to listen to his telephone calls without first having obtained a warrant. Mr. Cox argues that such an intrusion into his private conversation was unlawful, and as a result, Mr. Cox seeks to suppress the telephone calls as an unconstitutional search.

II. BACKGROUND

On April 3, 2016, Mr. Cox was arrested for burglary and theft and transported to the Lewis and Clark County Detention Center. Mr. Cox was given a jail handbook,

which stated that "All phone calls are recorded and may be monitored except calls made to an attorney."[1] (Doc. 21-1 at 1). There is a sign by the phones on the booking floor, as well as a "placard" on each individual phone with the warning that all calls are subject to recording and monitoring. (Hrg. Tr. 34:18-35:9) (July 25, 2017)). Additionally, whenever a person makes an outgoing call from the Detention Center, he or she is warned that the call may be recorded and monitored. (*Id*. at 14:13-17).

While incarcerated, Mr. Cox made several telephone calls from the Detention Center. During the calls, Mr. Cox sought aid in removing certain items still inside his vehicle, which was seized by police when he was arrested. Mr. Cox referenced a green bag, said to contain his cash and medication, and a red bag, which contained a "boom-boom"–a slang term for a firearm. On April 4, 2017, the police sought and obtained a second search warrant for controlled substances, paraphernalia, cash proceeds, and firearms based on the information gained from monitoring Mr. Cox's telephone calls. Mr. Cox claims that it was unlawful for law enforcement to listen to the recorded telephone calls.

[1]The analysis does not include calls made to an attorney, which are neither recorded or monitored, as is undisputed that Mr. Cox's calls were not made to an attorney. It is understood that this analysis excludes properly made calls to one's attorney.

III. ANALYSIS

A. Fourth Amendment

The Fourth Amendment of the Constitution protects citizens from unlawful searches and seizures. The Fourth Amendment is only triggered, however, when the state "intrudes into an area in which there is a constitutionally protected reasonable expectation of privacy." *United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir. 1996) (quoting *New York v. Cass*, 475 U.S. 106, 112 (1986)) (internal quotations omitted). Under the test set out in *Katz v. United States*, that right of privacy only exists where the defendant has an "actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.' " 389 U.S. 347, 516 (1967) (Harlan, J. concurring).

As a general rule, individuals have an expectation of privacy in their telephone conversations. However, a prisoner's right to privacy is "seriously curtailed" once he is incarcerated. *Van Poyck*, 77 F.3d at 291.

The gravamen of Mr. Cox claims is that his right to privacy under the Fourth Amendment was violated when the officer listened to a recording of the subject telephone conversations without a warrant. The question therefore, under the test set forth in *Katz*, is whether Mr. Cox had an actual subjective expectation of privacy in his telephone calls made while incarcerated and whether that expectation is one

society is willing to recognize as reasonable.

1. Actual subjective expectation of privacy

The Court finds that Mr. Cox did not have an actual subjective expectation of privacy in his outgoing telephone calls made while incarcerated at the Lewis and Clark Detention Center. This case closely resembles the facts in *Van Poyck*, which this Court finds instructive. In 1993, Mr. Van Poyck was arrested and transferred to the Metropolitan Detention Center ("MDC") in Los Angeles, California. While detained at MDC, Mr. Van Poyck made several incriminating phone calls, which were recorded and selectively monitored by MDC. Mr. Van Poyck signed a form acknowledging that outgoing calls would be recorded, and there were signs posted above the phones warning that MDC was recording and monitoring outgoing calls. *Van Poyck*, 77 F.3d at 287. The Ninth Circuit affirmed the district court's finding that Mr. Van Poyck knew the policy before he made the calls. "If he knew MDC was listening, it is hard to believe he though his calls were private." *Id.* at 290.

Much of Mr. Cox's argument regarding his right to privacy is based on Montana state law, as set forth in *State v. Allen*, 241 P.3d 1045 (Mont. 2010). Mr. Cox argues that *Allen* "persuasively bears on the issue herein." (Doc. 14 at 5). In *Allen*, the Montana Supreme Court overturned a lower court's denial of a motion to suppress, holding that a defendant had a reasonable expectation of privacy in a

telephone conversation with a confidential informant. *Allen*, 241 P.3d at 1061.

The facts and analysis of *Allen* are inapposite in this case. Not only did the Montana Supreme Court analyze Mr. Allen's expectation of privacy under Article II, Sections 10 and 11 of the Montana Constitution,[2] but much of Mr. Allen's subjective expectation of privacy is based on the fact that he did not know he was speaking to a confidential informant, and therefore had no reason to believe his call would be recorded. *Id.* at 1057-58. As such, the analysis in *Allen* is not controlling or persuasive.

Mr. Cox's argument that he did have an expectation of privacy is not compelling. Mr. Cox argues that he was not "even made aware that his telephone calls were recorded." (Doc. 14 at 2). Mr. Cox states that there "no evidence that he was advised of his rights, including the right to remain silent. . . . Nor does evidence exist that signs advising [that his calls may be monitored or recorded] were posted above the telephones." (*Id.* at 6).

The record in this case clearly establishes that Mr. Cox knew his call would be recorded. First, Mr. Cox was advised of his right to remain silent; the arresting officer stated in his report that he read Mr. Cox his *Miranda* rights. (Doc. 21-6). Later, when

[2]Sections 10 and 11 of Article II of the Montana Constitution provide greater protection against government intrusion than does the Fourth Amendment. *State v. Goetz*, 191 P.3d 489, 494 (Mont. 2008).

Mr. Cox arrived at the Detention Center, he was given a jail handbook, which warned that "[a]ll phone calls are recorded and may be monitored." (Doc. 21-1 at 1). Finally, there were written signs on the wall and placards on each phone indicating that all calls would be recorded. (Hrg. Tr. 34:18-35:9). It is clear that Mr. Cox was aware that his calls would be recorded and not kept private.

Moreover, Mr. Cox referenced a "boom-boom" in his conversation; a coded term for a firearm. (Doc. 21 at 3; Exhibit 3, USAO 65-68, filed under seal). That Mr. Cox needed to disguise the fact that he was talking about a firearm is evidence that he was aware his telephone conversation was being recorded. *See United States v. Feekes*, 879 F.2d 1562, 1565 (7th Cir. 1989) (speaking in code is a manifestation of an awareness of the risk that one's conversation is not private). As with the Court in *Van Poyck*, this Court too finds that Mr. Cox did not have a subjective expectation of privacy.

2. Objectively reasonable expectation of privacy

Assuming Mr. Cox can meet the first prong of the *Katz* test, such an expectation is not one society is willing to recognize as reasonable. A prisoner does not forfeit all of his rights on the jailhouse steps, but also cannot expect to be fully free from government surveillance while incarcerated. *Van Poyck*, 77 F.3d at 290-91 (citing *Franklin v. Oregon*, 662 F.2d 1337, 1347 (9th Cir. 1981). Institutional security

concerns justify the recording and monitoring of outgoing telephone calls, which renders them reasonable under the Fourth Amendment. *Van Poyck*, 77 F.3d at 291 (*see also United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977); *United States v. Amen*, 831 F.2d 373, 379 (2d Cir. 1987); *United States v. Willoughby*, 860 F.2d 15 (2d Cir. 1988); *Abbamonte v. United States*, 485 U.S. 1021 (1988)). The Ninth Circuit has made it clear: "We hold that any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls." *Van Poyck*, 77 F.3d at 291. Accordingly, Mr. Cox did not have an objectively reasonable expectation of privacy precluding government intrusion under the Fourth Amendment.

3. The validity of the *Katz* test

Mr. Cox argues that the Court should forego the *Katz* test for the "plain language" of the Constitution. (Doc. 13 at 2). He contends that the plain language of the Fourth Amendment (a "search" analysis) has been supplanted by a new "privacy" analysis, and the Court should focus on whether the government was "searching" for evidence rather than whether Mr. Cox divulged "private" information in a setting where law enforcement could find it. (Doc. 14 at 7-8). He argues that "the plain language of the Fourth Amendment mandates that whenever the government is searching, a defendant has the right to be secure regardless of the risks he assumed or

how serious the particular intrusion into his privacy may be." (*Id*. at 7 (citing *Allen*, 241 P.3d at 1069 (Nelson, J., concurring))).

The plain language of the Fourth Amendment states that citizens are free from "unreasonable" searches and seizures. Therefore, a citizen does not have, as Mr. Cox argues, "the right to be secure regardless of the risks he assumed or how serious the intrusion into his privacy may be" when the intrusion is not unreasonable. "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. In this case, what a person knowingly exposes over during a telephone conversation he knows is being recorded is not protected by the Fourth Amendment. Under the plain language of the Fourth Amendment, Mr. Cox was not subjected to an unreasonable search.

4. Consent

Even assuming that the Fourth Amendment is implicated, the Court finds that Mr. Cox consented to having his communications recorded. "[C]onsent vitiates a Fourth Amendment claim." *Van Poyck*, 77 F.3d at 291. "Consent may be express or may be implied in fact from 'surrounding circumstances indicating that the defendant knowingly agreed to the surveillance.'" *Id.* at 292 (quoting *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987)); *see also United States v. Faulkner*, 439 F.3d 1221, 1224 (10th Cir. 2006) ("It is generally accepted that a prisoner who places a call from

an institutional phone with the knowledge that the call is subject to being recorded has impliedly consented to the recording").

In *Van Poyck*, the district court found that Mr. Van Poyck "consented to the recordings because he (1) signed a form warning him of monitoring and taping; (2) read signs above the phones warning of taping; and (3) read a prisoner's manual warning of the recordings." *Id*. Mr. Cox argues that his case is distinct from *Van Poyck* in that he did not sign any form consenting to the monitoring of his telephone calls, and that even though he was told his calls *may* be monitored, there is no evidence that he expressly consented. (Doc. 25 at 2).

Though Mr. Cox did not expressly consent to the recording, the Court finds that he impliedly consented in that he made the calls knowing they would be recorded. The warnings were redundant: Mr. Cox received the jail handbook when he arrived at the facility, the wall of phones had a sign warning the prisoners that the calls would be recorded and monitored, and each individual phone displayed a similar warning. Additionally, Mr. Cox states in his brief that he made "several telephone calls from the jail." (Doc. 14 at 2). Before each call, Mr. Cox would have heard a verbal admonition warning him of the recording. (Hr'g Tr. 55:19-22). Knowing full-well that his conversations would be monitored, Mr. Cox proceeded to make several calls from the Detention Center and in doing so, impliedly consented to having his

conversations recorded and monitored.

For the foregoing reasons, the Court finds that there was no unlawful government intrusion into a constitutionally protected area, nor did the government violate Mr. Cox's Fourth Amendment rights.

B. Wiretap Act

Mr. Cox contends that the Lewis and Clark Detention Center violated 18 U.S.C. § 2510 *et seq.* (the "Wiretap Act") by illegally intercepting and recording his wire communication (i.e. telephone call). Importantly, the Wiretap Act forbids the use of intercepted communications as evidence: "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial[.]" 18 U.S.C. § 2515. The government argues that its recording of his conversations falls under either of two exceptions: the consent exception and the investigative or law enforcement exception. 18 U.S.C. §§ 2511(2)(c), (5)(a)(ii).

1. Consent exception

Title 18 of the United States Code, section 2511(2)(c) provides that "it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to

such interception."

Mr. Cox argues that he did not consent, but rather took the risk that his call would not be monitored, which evidences his lack of consent. "To take a risk is not the same thing as to consent." *United States v. Feekes*, 879 F.2d 1562, 1565 (7th Cir. 1989). In *Feekes*, the Seventh Circuit discussed in dicta its apprehension about applying the consent exception in a similar situation, suggesting the exception might swallow the rule. "The implication of the argument is that since wiretapping is known to be a widely employed investigative tool, anyone suspected of criminal (particularly drug) activity who uses a phone consents to have his phone tapped." *Id*. Based on the juxtaposition of "all calls will be recorded" and "may be monitored," Mr. Cox argues that instead of an explicit warning, this is a "take-your-chances kind of warning," which is not enough to imply consent.[3] (Doc. 25 at 3).

However, the government is arguing that he consented to his telephone calls from the jail being recorded and subject to monitoring simply because wiretapping is "widely known" to be used by law enforcement. Rather, the government is arguing that Mr. Cox consented to his telephone calls from the jail being recorded and subject to monitoring as a result of him being expressly informed and warned on numerous

[3] Interestingly, Mr. Cox acknowledges there was a chance his call would not be monitored, took that chance, and now complains about the result.

occasions that his telephone calls from the jail would be recorded and may be subject monitoring and proceeding the make the telephone calls. Therefore, the dicta from *Feekes* that Mr. Cox relies upon is not persuasive.

Rather, the Court is persuaded by cases from the First, Second, Fourth, Eighth, Ninth, and Tenth Circuits that readily apply the consent exception by holding "we have no hesitation in concluding that a prisoner's knowing choice to use a monitored phone is a legitimate 'consent' under the Wiretap Act." *See United States v. Faulkner*, 439 F.3d 1221, 1224 (10th Cir. 2006) (listing cases). It is true, as Mr. Cox argues, that merely being incarcerated is not itself a grant of consent to have one's telephone calls from the jail to be recorded and monitored. However, Mr. Cox was repeatedly informed and warned that his outgoing telephone calls from the jail would be recorded and subject to monitoring, yet he chose to proceed with the telephone calls in spite of the warnings. The surrounding circumstances therefore indicate that Mr. Cox knowingly consented to his telephone calls from the jail being recorded and subject to monitoring. *Van Poyck*, 77 F.3d at 292.

2. Investigative law enforcement exception

Under the investigative or law enforcement exception, all means of electronic recording are prohibited except those "being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative

or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a)(ii).

Mr. Cox argues that the investigative law enforcement exception does not apply because the officers at the Detention Center are unsworn detention officers, meaning that there could be no showing that the phone calls were intercepted at the insistence of an "investigative or law enforcement officer" in the ordinary course of his duties. (Doc. 37 at 5).

Various courts have found the contrary. Cases from a variety of jurisdictions have affirmed the exception applies to more than just sworn police officers, including Assistant United States attorneys (*United States v. All Right, Title & Interest in Five Parcels of Real Prop. & Appurtances Thereto Known as 64 Lovers Lane,* 830 F. Supp. 750 (S.D.N.Y. 1993)), prison officials (*United States v. Cheely*, 814 F. Supp. 1430, 1441 (D. Alaska 1992)), prison employees (*United States v. Clark*, 651 F. Supp. 76, 79 (M.D. Pa. 1986)), private contractors (*United States v. Rivera*, 292 F. Supp. 2d 838, 842 (E.D. Va. 2003)), and even "Personnel of the Michigan Attorney Grievance Commission" (*In re Elec. Surveillance*, 49 F.3d 1188, 1192 (6th Cir. 1995)). The analysis in these cases hinges on whether the person recording did so as part of the ordinary course of his duties, and not whether the person recording was a sworn member of law enforcement.

The Lewis and Clark Detention Center records all outgoing telephone calls in its ordinary course of business. This case is again similar to *Van Poyck*:

> [The Metopolitan Detention Center] is a law enforcement agency whose employees tape all outbound inmate telephone calls; interception of these calls would appear to be in the ordinary course of their duties. . . . We agree with [the Sixth and Seventh Circuits] and therefore conclude that the law enforcement exception applies in this Circuit to MDC's routine taping policy.

Van Poyck, 77 F.3d at 292 (*see also United States v. Paul*, 614 F.2d 115, 117 (6th Cir. 1980), *cert. denied*, 446 U.S. 941 (1980); *Feekes*, 879 F.2d at 1565-66).

The record in this case indicates that all of the telephone calls from every phone, including the phones in the booking area, are recorded as a matter of policy. (Hr'g. Tr. 24:18-21). Moreover, the jail handbook states that it is the policy of the Lewis and Clark Detention Center to record all telephone calls. (Doc. 21-1 at 1). Because the Detention Center records all outgoing telephone calls as part of its ordinary course of business, it falls squarely within the investigative or law enforcement exception.

C. Stored Communications Act

Finally, Mr. Cox argues that the government violated 18 U.S.C. § 2703(a) (the "Stored Communications Act"), by failing to obtain a warrant to search the recorded telephone conversations. "A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic

communication . . . only pursuant to a warrant." 18 U.S.C. § 2703(a). An "electronic communication service" is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). A "user" is "any person or entity who (A) uses an electronic communication service; and (B) is duly authorized by the provider of such service to engage in such use." 18 U.S.C. § 2510(13).

Section 2703(a) does not apply in this case because the Lewis and Clark Detention Center is the user of the electronic communication service. The Detention Center has a contract with Securus Technologies ("Securus"), a private, contract-based provider that serves correctional facilities in both the United States and Canada. (Doc. 39 at 6). Robert Kinyon, a detective with the Lewis and Clark County Sheriff's office, testified that the criminal investigations bureau has a specific "log-in" which allows them to listen to any telephone call from the Detention Center. (Hr'g Tr. at 15:12-21). The Detention Center and the Lewis and Clark County Sheriff's Office are authorized by Securus to engage in use of the electronic communication service. As such, § 2703(a), which prevents unlawful government intrusion into a provider's stored communications, does not apply in this case. Put another way, the government need not "require" Securus to disclose its stored communications if it has access to them as the user of Securus' services.

Moreover, even if the government did violate § 2703(a), suppression is not an available remedy for violations of the Stored Communications Act. Section 2708 of the Stored Communications Act reads in full: "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." The Ninth Circuit has stated, "unlike the Wiretap Act, the Stored Communications Act does *not* provide an exclusion remedy. It allows for civil damages . . . and criminal punishment . . . but nothing more." *United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998) (emphasis in original) (internal citations omitted).

Mr. Cox argues that the exclusive remedy for the Stored Communications Act does not apply in this case, as a warrantless search in this case violates his constitutional rights. Mr. Cox contends that "constitutional errors are not subject to § 2708 and suppression is a proper remedy when § 2703 is not followed." (Doc. 37 at 10).

As stated above, however, Mr. Cox did not suffer a constitutional violation because the search, if one occurred, was reasonable under the Fourth Amendment. "The Fourth Amendment prohibits unreasonable searches, not warrantless searches. As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' " *United States v.*

Davis, 785 F.3d 498, 516-17 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 479, (2015) (citing *Fernandez v. California*, 571 U.S. ___, 134 S. Ct. 1126, 1132 (2014)). Either by Mr. Cox's lack of a reasonable expectation of privacy, or by his consent, as explained above, the government did not unreasonably search Mr. Cox's telephone conversations so as to run afoul of the Fourth Amendment.

IV. FINDINGS AND RECOMMENDATION

Based upon the foregoing, the Court **FINDS:**

1. The government did not intrude into a constitutionally protected area when it monitored the recorded telephone calls Mr. Cox made while incarcerated at the Lewis and Clark Detention Center.

2. Mr. Cox did not have a subjective expectation of privacy in his telephone conversations because he was adequately and repeatedly warned that such conversations would be recorded and were subject to monitoring by law enforcement.

3. As a prisoner, Mr. Cox does not have an objectively reasonable privacy right in his outgoing telephone calls.

4. There is no violation of the Wiretap Act because: (1) Mr. Cox consented to his telephone calls being recorded by knowingly proceeding with a conversation he knew would be recorded and subject to monitoring, or

(2) the calls were recorded in the ordinary course of the detention facility's business.

5. The government did not violate the Stored Communications Act because it is a user of the electronic communication service, and was therefore allowed to monitor the recorded conversations. Even if it did, suppression of evidence is not a remedy for such a violation under the plain language of the Stored Communications Act.

Therefore, the Court **RECOMMENDS:**

1. That Mr. Cox's motion to suppress be denied.

DATED this 3rd day of October 2017.

John Johnston
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM PAUL COX, Defendant.	CR 17–4–H–CCL ORDER ADOPTING FINDINGS & RECOMMENDATION

Before the Court is Defendant William Paul Cox's Motion to Suppress recorded telephone calls (ECF No. 13). Magistrate Judge John Johnston held an evidentiary hearing on July 25, 2017, and the parties followed with post-hearing briefing completed on September 6, 2017. Judge Johnston filed Findings and Recommendations ("F&R") (ECF No. 41) on October 3, 2017, and on October 17,

2017, the Defendant filed an "Objection to Findings and Recommendations." (ECF No. 44.)

Pursuant to 28 U.S.C. § 636(b)(1), this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." The district judge must review the magistrate judge's findings and recommendations de novo if objection is made. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). If an objection is made, the court reviews de novo only the portion to which the objection was made, and the remainder is reviewed for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). An objection having been made, this Court reviews the Findings and Recommendation accordingly.

BACKGROUND

Defendant Cox is charged with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was previously convicted of being a felon-in-possession of a firearm in this federal district court in 2005. Cox has also been

detained on state charges. While on federal supervision, Cox has been revoked four times while on supervised release, and so he has been incarcerated at the local detention facility (the "Lewis and Clark County Detention Center" or "LCCDC") on numerous occasions for various reasons. He is very familiar with this detention facility, a fact which bears upon a relevant issue to be considered.

On April 3, 2016, Cox was arrested for burglary and theft by a Lewis and Clark County Sheriff's Deputy. After booking at LCCDC, Cox was given a jail handbook stating that "All phone calls are recorded and may be monitored except calls made to an attorney." (ECF No. 41 at 2.) Inmates are provided personal identification numbers to use when placing calls. A sign on the wall next to the LCCDC phone in the booking area and a placard on the phone itself warned that all calls were recorded and monitored. (ECF No. 41 at 2.) When an inmate places a call on an LCCDC phone, a recorded message plays for both the inmate and the recipient of the call that notifies both parties that the call may be recorded and monitored. (ECF No. 41 at 2.) One witness, Detective Hayes, testified that this telephone system had existed at the LCCDC for at least the past 12 years (at least

as long as a co-worker had worked there). (ECF No. 36, TR 38:3-12.)

While incarcerated, Cox made calls seeking assistance in removing items from his vehicle: cash, "medication," and a "boom-boom," which is alleged to be slang for a firearm. (F&R at 2.)

The day after his arrest, a search warrant was sought for Cox's vehicle based on LCCDC's monitoring of Cox's phone calls. The search warrant sought controlled substances, paraphernalia, cash proceeds, and firearms. (F&R at 2.)

Defendant Cox now asserts in his Motion to Suppress telephone recordings that the monitoring of his phone calls by the LCCDC violated the Fourth Amendment of the U.S. Constitution.

DISCUSSION

The Magistrate Judge properly outlined the Fourth Amendment standards that are applicable to the motion to suppress. *See* ECF No. 41 at 3. As the Magistrate Judge found, "Cox did not have a subjective expectation of privacy in his telephone conversations because he was adequately and repeatedly warned that

such conversations would be recorded and were subject to monitoring by law enforcement." (ECF No. 41 at 17.) Indeed, an expectation of privacy in outgoing telephone calls in a prisoner would not be objectively reasonable. *United States v. Van Poyck*, 77 F.3d 285, 290-91 (9th Cir. 1996). The Magistrate Judge found further that "Cox consented to his telephone calls being recorded by knowingly proceeding with a conversation he knew would be recorded and subject to monitoring...." (ECF No. 41 at 17.) Certainly given the number of times that Cox has been in custody in the LCCDC, he understood that all inmate calls were recorded. The Magistrate Judge properly concludes that Cox did not have an "actual (subjective) expectation of privacy . . . that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 516 (1967 (Harlan, J. concurring). (ECF No. 41 at 3, 17.)

Defendant Cox objects to the Magistrate Judge's Findings and Recommendation by asserting that the Stored Communications Act, 18 U.S.C. §§ 2701-2712, applies to an inmate's use of a detention center's telephone that is recorded by a third-party company and subsequently monitored by a law

enforcement officer. Defendant's argument is unpersuasive. Cox impliedly consented to recording and monitoring of his calls. The officer who monitored the recorded call did so with the authority of the Lewis and Clark County Detention Center, with the assistance of its contractual provider of electronic communication services.

The Stored Communications Act, which makes it a civil offense to unlawfully access stored electronic communications, provides an exception for the entity providing the electronic communication service, which in this case would be the Lewis and Clark County Detention Center (owner of the telephone and telephone equipment on the premises) and its contractual agent, Securus Technologies ("Securus"). The exception provides that there can be no SCA violation by "obtain[ing] . . . access to a wire or electronic communication while it is in electronic storage in such system. . .," 18 U.S.C. 2701(a), by "the person or entity providing a wire or electronic communications service. . . ." 18 U.S.C. 2701(c)(2).

Section 2703 of the SCA provides rules for a governmental demand for

disclosure of records from a provider of electronic communication services. However, here, the communications facilities are owned by the detention center, the communication services (recording and storage) are provided by the detention center's agent, and there can be no demand for disclosure by a governmental entity because the content is already in the legal possession of the governmental entity. The Stored Communications Act simply does not apply to these circumstances, and even if it did, as Judge Johnston points out, the SCA does not provide suppression as an available remedy. *(*ECF No. 41 at 16, citing *United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998).)

Because Cox impliedly consented to the recording and monitoring of the telephone calls he made in custody and because he had no reasonable expectation of privacy, the LCCDC was entitled to use the information obtained from the calls to apply for a search warrant to search his vehicle. Defendant's motion to suppress the recorded telephone calls should therefore be denied.

Accordingly, Defendant's objection is overruled, and Judge Johnston's Findings and Recommendation (ECF No. 41) is accepted.

IT IS HEREBY ORDERED that the Motion to Suppress recorded telephone calls (Doc. 13) is DENIED.

Dated this 2nd day of November, 2017.

CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE

COPY

MONTANA FIRST JUDICAL DISTRICT COURT/ JUSTICE COURT/ LEWIS AND CLARK COUNTY, HELENA, MONTANA

IN RE THE SEARCH OF: **Gray 1999 K1500 Chevrolet Suburban VIN 3GNFK16R9XG136785 no license plates with red pin stripes which was in William Cox's possession currently at the Helena Police Department Impound on Custer Avenue**	Cause No. ASW 2016-60 **APPLICATION FOR SEARCH WARRANT**

STATE OF MONTANA)
:
County of Lewis and Clark)

On the 4th day of April, 2016, Missouri River Drug Task Force Detective Patrick McDuffie, a duly appointed and acting officer for the Lewis and Clark County Sheriff's Office, being first duly sworn upon his oath, deposes and says:

That he has reason to believe that in and upon the vehicle located within Lewis and Clark County, State of Montana, particularly described as:

Gray 1999 K1500 Chevrolet Suburban VIN 3GNFK16R9XG136785 no license plates with red pin stripes which was in William Cox's possession currently at the Helena Police Department Impound on Custer Avenue

there are located certain items of property which are evidence of the crimes of Criminal Distribution of Dangerous Drugs, a felony, in violation Mont. Code Ann. § 45-9-101, Criminal Possession of Dangerous Drugs, a felony, in violation Mont. Code Ann. § 45-9-102(1), Unlawful possession of a firearm by a convicted person, a felony, in violation of Mont. Code Ann. § 45-8-313 and Criminal Possession of Drug Paraphernalia, a misdemeanor, in violation of Mont. Code Ann. § 45-10-103 and are particularly described as:

> Controlled substances, drug paraphernalia including but not limited to plastic baggies, pipes, and scales; ledgers and/or other papers documenting the sale of dangerous drugs and receipt of payments for dangerous drugs; cell phones; firearms; and cash proceeds. Including these items from bags, back packs, briefcases, or other items used to conceal said items.

The facts which are the grounds of this application and upon which applicant relies to the establish probable cause for the issuance of a search warrant are as follows:

- Sunday, April 3, 2016, William Cox, Jr. was arrested for Burglary and Theft, both felonies. After Cox was arrested a search warrant was executed on the Chevrolet Suburban reference above that was located at Cox's residence. $1921 and about 7 grams of suspected methamphetamine were seized from the vehicle from a blue bag. Once the items were located the search was stopped so the vehicle could be seized and a more thorough search could be conducted.

- The money consisted of 6-$100 bills, 9-$50 bills, 41-$20 bills, 2-$10 bills, 4-$5 bills, and 11-$1 bills. The suspected methamphetamine was field tested and was presumptive positive for methamphetamine. The suspected methamphetamine was packaged as 1-3 gram baggy and 2-2 gram baggies. The increments of currency and the weight of each baggy is consistent with distribution of dangerous drugs. It is common for individuals who distribute methamphetamine to have a large number of $20 bills and the 3 grams bag would most likely be sold as an "8 ball" which is 3.5 grams or 1/8 of an ounce. The 2 gram bags are commonly referred to as "Teeners" which is approximately 1.75 grams or 1/16 of an ounce.

- The Missouri River Drug Task Force has received information over the last three months regarding William Cox, Jr. using and selling methamphetamine in Lewis and Clark County. MRDTF recently was advised Cox was in the possession of a Taurus .45 pistol. Cox has multiple felony convictions, including a conviction for

Criminal Possession of Dangerous Drugs in 2013 and was previously convicted of being a felon in possession of a firearm under federal law. Due to these convictions he is also in violation of Montana statutes if he is in possession of a firearm. The information regarding the drugs and the firearm has been provided from concerned citizens and from reliable confidential informants.

- April 3, 2016 Cox used the recorded phone from the Lewis and Clark County Detention Center. Cox called several unknown people from the Detention Center. Detective Michael Hayes listened to several calls and advised Cox spoke about needing the cash and "his medication" from the green bag and also requested the unknown people take a red bag out of a speaker box in the back of the suburban. Cox referred to the red bag and referred to a "boom-boom" in the bag. "Boom-boom" would be a common slang term used to refer to a gun.

Affiant has been Deputy Sheriff with the Lewis and Clark County Sheriff's Office for seven years. Affiant has been assigned to the Missouri River Drug Task Force (MRDTF), specifically with the duties to investigate violations of Title 45, Sections 9 and 10, concerning dangerous drugs and drug paraphernalia. Affiant has also assisted on and or conducted controlled purchases and undercover agent purchases of illegal drugs as well as participated in other illegal drug investigations. Based upon Affiant's training and experience, he knows that the criminal distribution of dangerous drugs usually occurs in private, in a place of seclusion, away from possible public scrutiny. That persons who distribute dangerous drugs commonly use cellphones to arrange the meetings with individuals who are purchasing the drugs. It is also very common for people who sell dangerous drugs to use guns to protect themselves. Affiant has successfully completed the Montana Law Enforcement Academy and holds an Intermediate Certificate from P.O.S.T. Affiant is an SFST Instructor, has completed a 40 hour DEA Basic Drug Investigations Course and completed Rocky Mountain HIDTA Clandestine Laboratory Safety Course.

Information in this Affidavit is confidential criminal justice information and access to it is restricted according to Mont. Code Ann. § 44-5-101 through -405. Because the investigation

of this matter is ongoing and there will be a period of time, potentially lengthy, between the service of the requested search warrant and the filing of criminal charges, there is good cause to restrict dissemination of the information. Knowledge of the investigation and the details thereof could result in suspects and witnesses fleeing the jurisdiction, intimidating witnesses, or destroying evidence. Therefore, dissemination could be detrimental to the law enforcement efforts of the state. Request is hereby made that this Affidavit be sealed by order of this Court. Any modification of that order should be allowed only after notice is given to both parties.

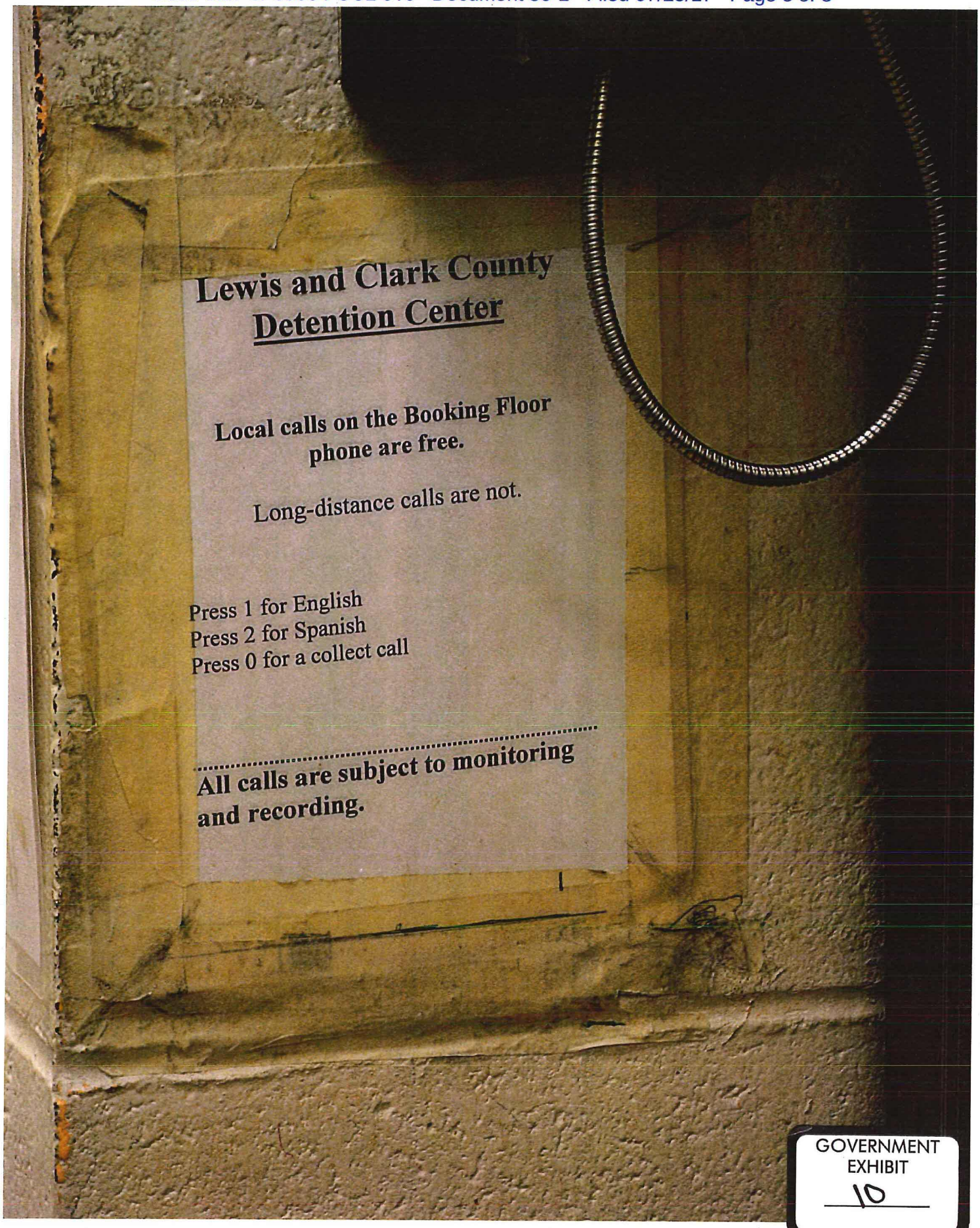
THEREFORE, the Affiant requests that a search warrant be issued for the purpose of searching the above-described location and seizing any evidence or other instrumentalities and articles used in the commission of the crime of, as provided by law. The undersigned may require the assistance of fellow officers at the above-described location in execution of this warrant.

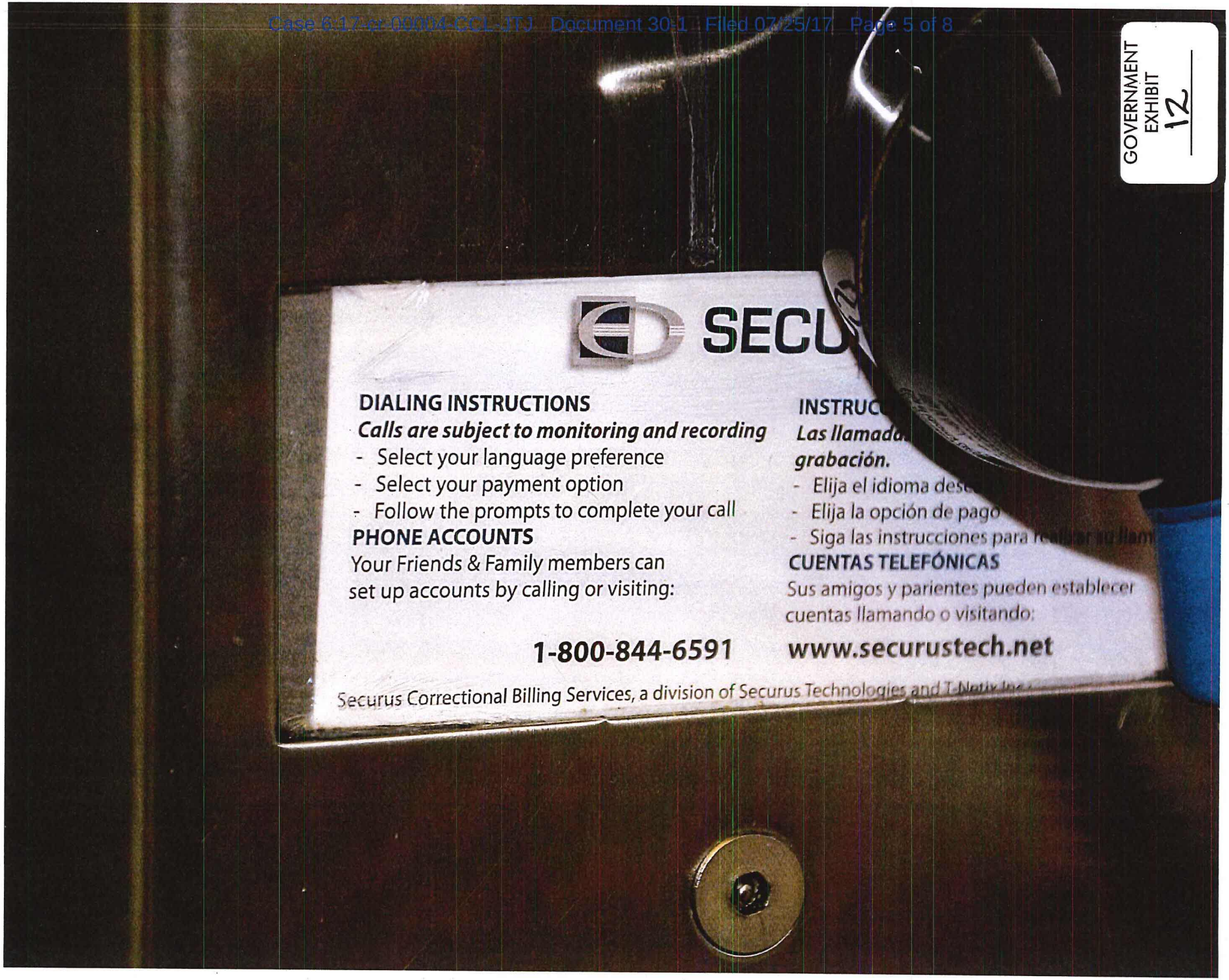
Dated this 4th day of April, 2016.

MRDTF Detective Patrick McDuffie
Lewis and Clark County Sheriff's Office

Sworn to and subscribed before me on the 4th day of April, 2016.

JUDGE


Lewis and Clark County
Detention Center
Local calls on the Booking Floor phone are free.
Long-distance calls are not.
Press 1 for English
Press 2 for Spanish
Press 0 for a collect call
All calls are subject to monitoring and recording.
GOVERNMENT EXHIBIT
10



Federal Rules of Criminal Procedure

USCS Court Rules. Federal Rules of Criminal Procedure. Title VIII. Supplementary and Special Proceedings

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) *Scope.* This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) *Definitions.* The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities

related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises — no matter who owns them — of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) *In General.* After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) *Requesting a Warrant in the Presence of a Judge.*

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) *Requesting a Warrant by Telephonic or Other Means.* In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(e) Issuing the Warrant.

(1) *In General.* The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) *Contents of the Warrant.*

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 14 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(C) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) *Warrant by Telephonic or Other Means*. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the

applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) *Warrant to Search for and Seize a Person or Property.*

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

(D) Return. The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the

person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(C) Service. Within 10 days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) *Delayed Notice.* Upon the government's request, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

(4) *Return.* The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.