Appendix

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MARCOS ALEJANDRO GONZALEZ FLORES and PAIGE IRENE ALLEN, Defendants.	CASE NO. CR-16-146-R ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS AND SUPPLEMENTAL MOTION TO SUPPRESS

Before the Court are Defendants' Motion to Suppress, which was filed on January 24, 2017 (Dkt. No. 72), and Supplemental Motion to Suppress, which was filed on February 10, 2017 (Dkt. No. 76). Having been thoroughly briefed by all parties, this Court took the matter under submission on February 22, 2017.

Defendants seek to suppress all evidence and observations derived from the execution of the search warrant. First, Defendants argue that the search warrant was not sufficiently particular to meet the requirements of the Fourth Amendment. Second, Defendants argue that even if the search did not exceed the scope of the warrant, the search was conducted in an unreasonable manner. Lastly, in a Supplemental Motion to Suppress, Defendants argue that the search warrant was not supported by probable cause. For the reasons discussed below, the Court denies both Motions to Suppress.

Based on a confidential informant and an anonymous tip, between February and March 2016, law enforcement officers conducted an investigation of Auto Shop Solutions in Riverside believed to be a front for a narcotics operation. Riverside police officers surveilled the premises, people, and vehicles both in person and via a conspicuous, stationary camera. The investigation, led by Detective Scott Levesque, revealed customers coming and going from Auto Shop Solutions at odd hours, leaving without having work done to their cars, carrying bags or suitcases, and customers driving their car into the shop and leaving with cardboard boxes loaded in their trunks. Based on nighttime aerial surveillance which revealed lights turned on uniformly from the front of Auto Shop Solutions in a continuous path to the back of the building, Detective Levesque believed that the auto shop extended from the front of the building to the back. On the basis of Detective Levesque's declaration detailing these observations among others, law enforcement officers obtained a search warrant for Auto Shop Solutions.

The search warrant permitted a search of "THE PREMISES at 9000 Arlington Ave., Suite # 114, Riverside, California, 92503 . . . including all rooms, attics, basements, and other parts therein, all safes, locked cabinets, containers, and boxes, the surrounding grounds and any garages attached or detached, storage rooms, trash containers, and outbuildings of any kind located thereon." Law enforcement officers executed the search warrant. In the initial search of the auto shop, Detective Levesque was surprised to find the auto shop to be smaller than he expected based on his investigation. Around the same time, another officer located a noisy fan which was covering three-foot-by-three-foot hole in an interior wall. The officer pushed the fan and it rolled away from the hole. Through the hole, on the other side of the wall, the officer observed a large room filled with several cars. Without expanding the hole, the officers crawled through to the adjoining room and in their initial sweep found firearms, marijuana, equipment for packaging marijuana, and a television with surveillance footage of the auto shop. After this initial search of the adjoining room, a sergeant authorized the officers to cut a larger, door-sized hole where the fan was first discovered. At the completion of the search, officers had uncovered a large quantity of marijuana, multiple firearms, and drug paraphernalia. Additionally, the officers discovered multiple hidden walls and rooms within the building both during the search and after its

conclusion. Defendant contends, and the Government does not dispute, that the adjoining room was actually Suite 106, the suite next to Suite 114.

Prior to the search of the auto shop, law enforcement conducted a search of two pieces of mail, one addressed to Auto Shop Solutions and one addressed to Paige Allen. Postal Inspection Service Inspector Anthony Jacobs obtained a warrant to search both parcels. The search warrant was supported by Inspector Jacobs's affidavit detailing in relevant part, a narcotics detection dog's external examination of the packages and subsequent positive alert for controlled substances. The affidavit stated that the detection dog known as "Link" gave a positive alert on both parcels for "the presence of controlled substances or other items, such as the proceeds of controlled substances, which have been recently contaminated with, or associated with, the odor of one or more controlled substances. . . ." The affidavit also included "Link's" narcotic detection certification. The search of the parcels uncovered $13,000 in United States currency in each.

Defendants first argue that the search warrant's description of the place to be searched was not sufficiently particular to enable law enforcement officers to locate Suite 106. Analogizing to *United States v. Collins*, 830 F.2d 145 (9th Cir. 1987), the Defendants argue that "although the warrant in this cased sufficiently described Suite #114, it did not 'describe[] [Suite #106] with sufficient particularity to enable the executing officer to locate' Suite #106 (i.e. the location to be searched)." (alterations in original). Defendants' argument misses the mark. First, this case is not analogous to *Collins*. In *Collins*, the search warrant was issued for 300 Springdale Street which was described as "the last house on the west side" of the street. *Id*. at 145. Officers searched 300 Springdale Street, determined that was not the last house on the west side, and proceeded to locate and then search the last house on the west side of the street. *Id.* In contrast, here, the search warrant described 9000 Arlington Avenue, Suite 114, law enforcement officers searched that address, and during the search of that address found an adjoining room containing contraband. The search warrant did not describe Suite 106 with particularity because Detective Levesque did not intend to search Suite 106. For the reasons discussed below, the search of the adjoining room was within the scope of the search warrant.

The search warrant permitted the search of 9000 Arlington Ave, Suite 114 as well as the

rooms therein, the surrounding grounds, attached or detached garages, and storage rooms. The government contends that this language permitted the search of the concealed room discovered during the search. "Whether a search exceeds the scope of a search warrant is an issue we determine through an objective assessment of the circumstances surrounding the issuance of the warrant, the contents of the search warrant, and the circumstances of the search." *United States v. Hitchcock*, 286 F.3d 1064, 1071 (9th Cir. 2002). To determine whether to exclude evidence discovered outside the scope of a search warrant, courts "use an objective test: would a reasonable officer have interpreted the warrant to permit the search at issue." *United States v. Gorman*, 104 F.3d 272, 274 (9th Cir. 1996). Here, the circumstances rendered the adjoining room within the scope of the search warrant and a reasonable officer would have interpreted the warrant to permit the search of an adjoining room storing cars.

Both the contents of the search warrant and the circumstances of the search indicate that the adjoining room was within the scope of the warrant. The explicit language of the search warrant included "storage rooms" and "garages attached or detached." The adjoining room was being used to store cars. As such, it fits squarely within the terms of the search warrant. Additionally, the circumstances of the search indicate that Detective Levesque believed that Suite 114 contained hidden rooms and expected the auto shop to occupy space from the front of the building to the back. Detective Levesque stated in the search warrant application that he anticipated Auto Shop Solutions may contain "hidden walls and compartments." When Detective Levesque entered the auto shop and was surprised to see that it did not reach the back of the building as he expected, he would have been particularly alert for hidden rooms attached to the smaller space in which he found himself. These circumstances indicate that a hidden attached room was within the scope of the search warrant. On this record, it is clear that a reasonable officer would have interpreted the search warrant to include a hidden adjoining room used to store cars in the back of the auto shop. Accordingly, the search was within the scope of the search warrant, and even if it was not, the evidence should not be excluded.

Defendants next argue that even if the search did not exceed the scope of the warrant, by cutting a door-sized hole in the wall between the auto shop and the adjoining room, the search was

conducted in a manner that violated the Fourth Amendment. The Government argues that the search was conducted in a reasonable manner, and, even if it was unreasonable, cutting a hole in the wall did not lead to the discovery of evidence and therefore the evidence discovered should not be suppressed. The manner in which a search warrant is executed is subject to judicial review for reasonableness. *Dalia v. United States*, 441 U.S. 238 (1979). "[D]estruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment." *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991) (quoting *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982)). "Claims that otherwise reasonable searches have been conducted in an unconstitutionally unreasonable manner must be judged under the facts and circumstances of each case." *Id.*

Expanding the size of the existing hole in the wall between Suite 114 and the adjoining room did not lead to the discovery of evidence. Detective Levesque stated that the decision to expand the hole was made in order to facilitate the search by allowing several officers on site to remove contraband discovered in the adjoining room. However, prior to that decision, officers had already crawled through the three-foot-by-three-foot hole and discovered firearms, marijuana, and equipment for packaging marijuana. "[T]he exclusionary rule applies only when discovery of evidence results from a Fourth Amendment violation. . . ." *United States v. Ankeny*, 502 F.3d 829, 837 (9th Cir. 2007). Thus, even if it was unreasonable to expand the hole in the wall, there is no causal connection between the unreasonable conduct and the discovery of evidence. Accordingly, the Court need not determine whether the search was conducted in a constitutionally reasonable manner.

Finally, in the Supplemental Motion to Suppress, Defendants argue that because police detection dog "Link" did not have training to detect United States currency, the search warrant was not supported by probable cause. However, nowhere did the government claim that "Link" detected currency in the parcels. The affidavit explicitly stated that "Link" alerted for the presence of controlled substances or materials recently contaminated with the scent of controlled substances. "If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's

alert provides probable cause to search." *Florida v. Harris*, -- U.S. --, 133 S. Ct. 1050, 1057 (2013). Here, Defendants have offered no conflicting evidence. Instead, they have relied on an argument unsupported by the underlying facts. Neither Riverside Police nor the Postal Inspection Service claimed that "Link" detected currency. Rather, they stated that "Link" positively alerted indicating the presence of controlled substances or items contaminated with their scent. "Link" had the training and certification to render such an alert reliable. Therefore, the search warrant was supported by probable cause.

IT IS HEREBY ORDERED that Defendants' Motion to Suppress is DENIED. (Dkt. No. 72).

IT IS HEREBY FURTHER ORDERED that Defendants' Supplemental Motion to Suppress is DENIED. (Dkt. No. 76).

Dated: February 28, 2017.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

FILED

JAN 9 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. MARCOS ALEJANDRO GONZALEZ FLORES, Defendant-Appellee.	No. 17-50269 D.C. No. 5:16-cr-00146-R-1 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCOS ALEJANDRO GONZALEZ FLORES, Defendant-Appellant.	No. 17-50270 D.C. No. 5:16-cr-00146-R-1

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted December 10, 2019
Pasadena, California

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

Before: O'SCANNLAIN, PAEZ, and OWENS, Circuit Judges.

The government appeals the district court's imposition of a sentence below the mandatory minimum. Marcos Alejandro Gonzalez Flores ("Gonzalez") cross-appeals the district court's denial of his suppression motion. We have jurisdiction under 28 U.S.C. § 1291. "We review de novo the legality of a criminal sentence . . . ." *United States v. Moreno-Hernandez*, 48 F.3d 1112, 1114 (9th Cir. 1995). We also review de novo the denial of a suppression motion and review for clear error the factual findings underlying such a denial. *United States v. Brobst*, 558 F.3d 982, 991 (9th Cir. 2009). We vacate the sentence, affirm the denial of the motion to suppress, and remand to the district court for resentencing.

1. As an initial matter, we reject Gonzalez's challenge to the propriety of the government's appeal. First, the appellate waiver provision in the parties' plea agreement does not bar the appeal of an unlawful sentence. *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) ("An appeal waiver will not apply if . . . the sentence violates the law."). Second, we are satisfied the appeal was properly authorized under 18 U.S.C. § 3742(b) by the Acting Solicitor General Jeffrey Wall. *See* 5 U.S.C. §§ 3345(a)(1), 3346(a)(1); 28 C.F.R. § 0.137(b). Finally, the government timely filed its notice of appeal on July 26, 2017; the government's filing of a second, identical notice of appeal on August 1, 2017, after the district court's clerk's office requested the first notice be refiled under the correct "event"

code, does not render the appeal untimely. *Cf. United States v. Arevalo*, 408 F.3d 1233, 1237–39 (9th Cir. 2005) (concluding an appeal was untimely where seven months had elapsed between appellant's *voluntary dismissal* of the appeal and his attempt to reinstate it); *Williams v. United States*, 553 F.2d 420, 422 (5th Cir. 1977) (where ten months elapsed between the same).

2. As to the merits of the government's appeal, the district court erred in imposing a sentence that disregarded the mandatory consecutive penalty. Gonzalez pleaded guilty to offenses that carry mandatory minimum sentences of five years each, which must run consecutively. *See* 21 U.S.C. § 841(b)(1)(B)(vii); 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D)(ii). The district court sentenced Gonzalez to 72- and 60-month terms to run *concurrently*. That was error. *See United States v. Sykes*, 658 F.3d 1140, 1146 (9th Cir. 2011) ("It is axiomatic that a statutory minimum sentence is mandatory."). We vacate the unlawful sentence and remand to the district court for resentencing.

3. Finally, we determine that the district court did not err in denying Gonzalez's motion to suppress evidence obtained during the search of his business. Police obtained a warrant to search "Suite 114" of a multi-unit commercial complex. While executing the warrant, they discovered a hidden three-by-three-foot hole leading from Suite 114 into a second unit (not within the scope of the warrant), which they erroneously believed was part of Suite 114. We conclude

that, under the circumstances, it was "objectively understandable and reasonable" for the officers to believe this second space was part of Suite 114 and thus to search it. *Maryland v. Garrison*, 480 U.S. 79, 88 (1987). Accordingly, we affirm the denial of the motion to suppress.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

FILED

JUN 30 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. MARCOS ALEJANDRO GONZALEZ FLORES, Defendant-Appellee.	No. 17-50269 D.C. No. 5:16-cr-00146-R-1 Central District of California, Riverside ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCOS ALEJANDRO GONZALEZ FLORES, Defendant-Appellant.	No. 17-50270 D.C. No. 5:16-cr-00146-R-1

Before: O'SCANNLAIN, PAEZ, and OWENS, Circuit Judges.

The memorandum disposition filed on January 9, 2020 is amended as follows:

On page 4, delete:

> Accordingly, we affirm the denial of the motion to suppress.

On page 4, add:

4. We reject Gonzalez's argument that the district court abused its discretion by ruling on Gonzalez's motion to suppress without holding an evidentiary hearing. "An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000). Gonzalez's motion did not meet that standard.

The amended memorandum is filed concurrently with this order.

The petition for rehearing (Dkt. 72) is denied. No further petitions for rehearing may be filed.

NOT FOR PUBLICATION

FILED

JUN 30 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. MARCOS ALEJANDRO GONZALEZ FLORES, Defendant-Appellee.	No. 17-50269 D.C. No. 5:16-cr-00146-R-1 AMENDED MEMORANDUM*

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for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted December 10, 2019
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