UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 13-Cr-234

DAMIAN PATRICK,

Defendant.

RESPONSE BY THE UNITED STATES TO DEFENDANT'S "OBJECTION TO MAGISTRATE JUDGE'S RECOMMENDATION TO DENY DEFENDANT'S MOTION TO SUPPRESS EVIDENCE."

The United States of America, by and through its attorneys, James L. Santelle, United States Attorney for the Eastern District of Wisconsin, and Bridget J. Domaszek, Assistant United States Attorney, hereby responds to defendant Damian Patrick's "Objection to Magistrate Judge's Recommendation to Deny Defendant's Motion to Suppress Evidence." For the reasons stated herein, this Court should adopt the magistrate's recommendation and deny defendant Patrick's motion to suppress evidence.

A federal grand jury has charged the defendant with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The charge is based on an October 28, 2013, traffic stop during which a firearm was recovered from the vehicle in which the defendant was a passenger. On September 30, 2014, United States

Magistrate Judge William E. Callahan, Jr., recommended that the defendant's motion to suppress evidence be denied. The defendant filed an objection to this recommendation on November 7, 2014.

Inasmuch as the defendant's objection largely reiterates his previous argument that the search warrant for his cellular telephone location data lacked probable cause, the government will rely on and incorporate its response filed on August 14, 2014. Specifically, the government has asserted that the location data warrant was reasonable under the Fourth Amendment because: (1) there was probable cause to believe that evidence of the defendant's whereabouts would likely be found by obtaining his telephone location data; and (2) even if the warrant was not supported by probable cause, the *Leon* good faith exception applies.

Notably, the defendant raises a new argument: that the magistrate erred because there is no connection between the items to be seized (location data for the defendant) and the criminal behavior. (Def. Obj. at 3). In support of his claim, the defendant relies on *In the Matter of an Application of the United States of America for an Order Authorizing the Disclosure of Location Information of a Specified Wireless Telephone*, 849 F. Supp. 2d 526, 561 (D. Maryland 2011)(*Wireless Telephone*). Not only does his argument have no merit, but it appears that *Wireless Telephone* is contrary to Supreme Court and Seventh Circuit precedent.

As explained in the recommendation, the location data warrant was supported by probable cause because there was a substantial basis for the issuing judge to believe

that such data would aid in the apprehension of the defendant, who was a fugitive. (Mag. Recom. at 11, 13). The defendant now asserts that, under *Wireless Telephone*, there has to be a connection between the telephone location data and his criminal behavior. However, *Wireless Telephone* is not binding precedent in this circuit. Moreover, the magistrate recommendation relies on *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129 (E.D.N.Y. 2013)(*Smartphone*), which declined to follow *Wireless Telephone* because it "rejects a long line of Supreme Court Cases advising that 'it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would *aid in apprehending* and convicting criminals.'" (emphasis added). Indeed, the Seventh Circuit has relied on this "aid in apprehension language" to define probable cause. *See, e.g., United States v. Lisk*, 522 F.2d 228, 230-31 (7th Cir. 1975). As the magistrate explained, "according to Patrick's definition of probable cause, the government cannot obtain a search warrant to obtain data that would assist in locating the same defendant. Such a distinction would defy common sense." (Obj. Recom. At 13). Thus, the magistrate recommendation is not deficient for failing to conclude that *Smartphone* mandates suppression of the location data.

Similarly unavailing are the defendant's attempts to distinguish *Warden v. Hayden*, 387 U.S. 294 (1967), *Payton v. New York*, 445 U.S. 573 (1980), and *Stegald v. United States*, 415 U.S. 204 (1981) on various grounds. None of these arguments weigh against

a finding that there was a substantial basis for the issuing judge to believe that cellular telephone location data would aid in the defendant's apprehension.

Therefore, for the reasons set forth herein, the government respectfully requests that this Court adopt the thorough and well-reasoned recommendation of the magistrate judge and deny the defendant's motion in its entirety.

Respectfully submitted at Milwaukee, Wisconsin, this 9th day of December, 2014.

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