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ENDORSED FILED
SAN MATEO COUNTY

FEB 10 2010

Clerk of the Superior Court
By Heien Luton
DEPUTY CLERK

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SAN MATEO

10 THE PEOPLE OF THE STATE OF CALIFORNIA

11 Plaintiff,

12 v.

13 [REDACTED]
14 Defendant.

[REDACTED]
PEOPLE'S OPPOSITION TO
DEFENDANT'S MOTION TO
SUPPRESS, AND MOTION TO
TRAVERSE AND QUASH SEARCH
WARANT

Date: February 18, 2010
Time: 9:00 AM
Dept: 2A

17
18 STATEMENT OF THE LAW

19 On November 3, 2009, [REDACTED] (Defendant) entered the Sprint PCS store located at
20 320 Gellert Blvd., Daly City, and attempted to purchase 30 Blackberry cellular telephones and
21 activate their service. Sprint PCS employee Clarence Alcala spoke with the Defendant that day. The
22 Defendant told Mr. Alcala that he wanted to open a business account to purchase the phones, and that
23 he was the owner of a company called "[REDACTED]" Mr. Alcala searched the business "[REDACTED]"
24 using the internet and asked the Defendant to confirm the business address of [REDACTED]

1 [REDACTED] The Defendant confirmed that this was the business address for his company and
2 said that it was his main office.

3 Mr. Alcalá told the Defendant that he did not have 30 phones but could order what was not in
4 stock. He also told the Defendant that he needed additional documentation in order to open a
5 business account. The Defendant said he had to leave but would return the next day. After the
6 Defendant left the store, Mr. Alcalá contacted the store's Assistant Manager, Jason Santos. Mr.
7 Santos thought the sale was unusual, and contacted the District Manager, Hans Randall. Mr. Randall
8 told Mr. Santos that the Defendant had purchased 30 cell phones at the Sprint PCS store on Castro
9 Street in San Francisco the day before. Mr. [REDACTED] recent
10 increase in fraudulent business accounts through the purchase of cell
11 phones before defaulting on the accounts.

12 Using the address provided by the Defendant, Mr. Randall
13 conducted an internet address search and contacted [REDACTED] Mr.
14 Randall spoke with the owner of [REDACTED] and [REDACTED] now the
15 Defendant and had not authorized him to contact [REDACTED], she said
16 that the address the Defendant used was out of [REDACTED]

17 The following day (November 4, 2009), the Defendant returned to the store and provided Mr.
18 Alcalá with Articles of Incorporation and tax ID for "[REDACTED]" Mr. Randall notified Daly
19 City police, and they responded to the store. Officer Green placed the Defendant under arrest for
20 Pen. Code section 530.5(a), Unauthorized use of personal identifying information.

21 The Defendant identified himself with an Arizona Driver's License in the name [REDACTED]
22 [REDACTED] Officer Green asked the Defendant where his vehicle was parked and the Defendant said that
23 it was in the store parking lot. Officer Green asked for permission to search the vehicle and the
24 Defendant refused consent, but stated that he had approximately \$5,000 cash in the front seat that he
25

1 wanted to retrieve. Officer Palaby took the Defendant's keys and retrieved the money from the front
2 seat of the vehicle.

3 The lot in which the Defendant's car was parked is a private lot for use by customers only.
4 Vehicles belonging to non-customers are commonly cited and towed. Officer Green informed the
5 Defendant that he would impound the vehicle. Prior to towing, Officer Green conducted an inventory
6 search of the vehicle. A plastic bag on the back seat contained receipts from the Sprint PCS store in
7 San Francisco for the purchase of Blackberry cell phones valued at \$2,434.90. Pursuant to
8 department policy, Officer Palaby completed a CHP 180 form. A DMV check listed the registered
9 owner as [REDACTED] Officer Palaby transported the Defendant
10 to the Daly City Police Department.

11 Officer Green contacted Kate Bright, the owner of [REDACTED] She stated that she did
12 not know the Defendant and had not authorized anyone to use her previous business address or
13 business name. She stated that approximately six months prior in May, 2009, someone had opened a
14 fraudulent account for her business at the Sprint AT&T store in Omaha, Nebraska, and used the
15 account to purchase 36 cell phones, although she does not have a business in Nebraska and had not
16 authorized anyone to do so. She stated that she filed a report with the Omaha Police Department.

17 Officer Green read the Defendant his Miranda rights from a department issues card, and the
18 Defendant said he understood. Detective Bocci spoke with the Defendant, who said that his birth
19 name was [REDACTED], and that he had been born and raised in Nebraska. Detective Bocci
20 looked at the receipts from the San Francisco store recovered from the Defendant's car, noting that
21 the name used to open the account was [REDACTED] Next, he looked at the Apple iPhone which was on
22 the Defendant's person at the time of his arrest. The Defendant told Detective Bocci and Officer
23 Green that he had opened the business account in San Francisco, and that he split time between San
24 Francisco and Omaha, Nebraska. He also indicated that he had a felony conviction for fraud in
25 Arizona.

1 On November 5, 2009, the Defendant's fingerprints were matched via the FBI database with
2 those of [REDACTED]

3 On November 6, 2009, Detective Bocci obtained the Defendant's criminal record from
4 Arizona and saw that it contained convictions for forgery, fraud, and identity theft. He also obtained
5 the Omaha Police Department report made by Kate Bright following the May 2009 incident. He
6 contacted the Omaha Sprint AT&T store and spoke with the manager, Brendan Barry, who told him
7 that a fraudulent business account had been opened for [REDACTED] and the purchaser was [REDACTED]
8 [REDACTED]

9 Next, Detective Bocci spoke with Michelle Bennett, manager of the San Francisco Sprint
10 store, and she emailed him the account information for the Defendant's purchases on November 2,
11 2009. The documents showed that "[REDACTED]" opened the account using the business name
12 [REDACTED] with an address of [REDACTED]. The
13 business contact name provided was [REDACTED] with a phone number [REDACTED]. Detective
14 Bocci found that a business by that name and phone number had a listed owner named Cynthia
15 Deack. He spoke with Ms. Deack, and she said that someone had opened cell phone accounts in her
16 company's name, without her authorization, and that she had received bills for these accounts. She
17 recognized the name [REDACTED] from the fraudulent accounts but did not know a real person by this
18 name, nor did she know [REDACTED] or [REDACTED]

19 Based on his training and experience investigating fraud, Detective Bocci believed that the
20 Defendant was involved in a fraud ring, unlawfully using information to open business accounts with
21 cell phone providers in order to purchase bulk quantities of cell phones. He applied for a search
22 warrant based on the information stated above, and specified that he believed evidence of criminal
23 activity that would be relevant to the investigation would be found on the Defendant's cell phone in
24 the form of electronically stored data and voice mail messages.
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LAW AND ARGUMENT

I. OFFICER GREEN HAD PROBABLE CAUSE TO ARREST THE DEFENDANT

A warrantless arrest is justified where the officer has probable cause to believe that an individual has committed a crime, based on facts and reasonable inferences, looking at the totality of the circumstances. *United States v. Sokolow* (1989) 490 U.S. 1, 8-10. Probable cause exists where the arresting officer has sufficient reliable information to lead an officer of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime. *Beck v. Ohio* (1964) 379 U.S. 89, 91. Probable cause does not require an actual showing of criminal activity. *Illinois v. Gates* (1983) 462 U.S. 213, 235. Evidence indicating a substantial chance of criminal activity, even behavior with an innocent explanation, can support a warrantless arrest. *Id.* at 245, fn. 13.

Cal. Penal Code section 530.5(a), unauthorized use of personal identifying information, states:

Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

Additionally, Cal Pen. Code section 460(b) criminalizes commercial burglary, where the suspect enters a building with the intent to commit theft. 1-1700 CALCRIM 1700.

Officer Green had probable cause to arrest the Defendant for a violation of Cal. Pen. Code section 530.5(a) and Cal. Pen. Code section 460(b) based on what he learned upon arriving at the Sprint store. Mr. Alcalá and Mr. Santos told him that the Defendant had attempted to purchase 30 phones and open accounts for them under the name '██████' with a business address of ████████████████████ ████████████████████. Mr. Santos said that the Sprint District Manager contacted the owner of that business, Kate Bright, who told him that she had not authorized the purchases and did not know the Defendant. Additionally, Mr. Santos said that the Defendant had purchased 30 cell phones from the

1 San Francisco store the day before, and that the stores had been experiencing an increase in
2 fraudulent business accounts of this type. The fact that the Defendant was attempting to complete the
3 sale using Articles of Incorporation and tax ID number for a different business with a similar name
4 ([REDACTED]) does not negate the fact that he gave fraudulent information in an attempt to
5 purchase cell phones and open accounts in another's name. Given these circumstances, an officer of
6 ordinary care and prudence would entertain a strong and honest suspicion that the Defendant was
7 engaged in criminal activity.

8 **II. IMPOUNDING THE DEFENDANT'S VEHICLE WAS REASONABLY NECESSARY**
9 **AND THE SUBSEQUENT INVENTORY SEARCH WAS PURSUANT TO**
10 **DEPARTMENT POLICY.**

11 Police officers may impound the car of a driver who has been taken into custody, pursuant to Cal.
12 Veh. Code section 22651(h), when it is reasonably necessary as part of their community care taking
13 function. *South Dakota v. Opperman* (1976) 428 U.S. 364, 368; *People v. Williams* (2006) 145 Cal.
14 App. 4th 756, 761. "The Vehicle Code is not the only source of authority to impound a vehicle.
15 Indeed, the police have a duty to protect a vehicle, like any other personal property, which is in the
16 possession of an arrestee." *People v. Scigliano* (1987) 196 Cal.App.3d 26, 29. An inventory search
17 conducted pursuant to standardized procedures is an exception to the warrant requirement, and serves
18 to protect "the owner's property while it is in the custody of the police, to insure against claims of
19 lost, stolen or damaged property, and to guard the police from danger." *Colorado v. Bertine* (1987)
20 479 U.S. 367, 372.

21 **a. Reasonably necessary**

22 It was reasonably necessary for Officer Green to impound the Defendant's car following his
23 arrest as part of his community care taking duties. The vehicle was parked in a lot adjacent to the
24 Sprint PCS store. The lot is for customer parking only and vehicles in violation of the policy are
25 subject to tow. The Defendant had been taken into custody by Daly City police and was not a
customer of the shopping center. As a result, the Defendant's vehicle was in violation of the parking

1 policy and subject to tow. The Defendant had no companions to take possession of the car.
2 Impounding his car and conducting an inventory search prior to the tow protected the police
3 department from claims of loss or damage that might have arisen had the car been towed
4 independently or left unattended.

5 The defense cites *People v. Williams* for the proposition that there was no reasonable basis to
6 impound the Defendant's car, although this reliance is misplaced. In *Williams*, the appellant's car
7 was legally parked in front of his own residence at the time of his arrest. *People v. Williams, supra* at
8 762. The court noted that there was no community care taking purpose served by towing the car from
9 in front of the appellant's house, given that it was not parked in violation of any laws. *Id.* By
10 contrast, the Defendant's vehicle was parked in violation of a private parking policy. The Defendant
11 stated that he resides in San Francisco, and was alone at the time of his arrest. There was a
12 reasonable community care taking purpose for impounding the Defendant's vehicle under these facts.

13 **b. Standard procedure**

14 Officers Green and Palaby conformed to department procedure for conducting an inventory of a
15 vehicle prior to impound by completing a CHP 180 form documenting the condition of the vehicle.
16 This form is provided to law enforcement agencies by the CHP for standardized record keeping and
17 has been acknowledged by the court. *People v. Williams* (1999) 20 Cal. 4th 119, 124.

18 **II. SEARCH OF THE CELL PHONE WAS PROPER..**

19 The search of the defendant's cell phone (hereinafter referred to as "iPhone," was proper as a
20 lawful search incident to arrest. An officer may always thoroughly search a person incident to arrest
21 when the person is taken into lawful custody, regardless of the offense for which the arrest is made.
22 (*United States v. Robinson* (1973) 414 U.S. 218; *Gustafson v. Florida* (1973) 414 U.S. 260; *People v.*
23 *Monroe* (1993) 12 Cal.App.4th 1174, 1195; *People v. Boren* (1987) 188 Cal.App.3d 1171, 1175-
24 1176.) Even a minor criminal offense punishable only by a fine can support a custodial arrest and,
25 thus, a search incident to arrest. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 340, 353;

1 *People v. McKay* (2002) 27 Cal.4th 601, 605, 618.) The right to search attaches once the person is
2 taken into custody – it does not matter that he or she will be released without booking. (*People v.*
3 *Castaneda* (1995) 35 Cal.App.4th 1222, 1228; see also, *People v. Humberto O.* (2000) 80
4 Cal.App.4th 237, 242-243 [juvenile transported to school after truancy arrest]; *In re Charles C.*
5 (1999) 76 Cal.App.4th 420, 424-425 [juvenile taken to station after curfew arrest]; *In re Demetrius A.*
6 (1989) 208 Cal.App.3d 1245, 1247-1248 [minor in custody for transportation home]; accord, *In re*
7 *Ian C.* (2001) 87 Cal.App.4th 856, 860)

8 Incident to the arrest officers may conduct a limited search “(1) for instrumentalities used to
9 commit the crime, the fruits of that crime, and other evidence thereof which will aid in the
10 apprehension or conviction of the criminal; (2) for articles the possession of which is itself unlawful,
11 such as contraband or goods known to be stolen; and (3) for weapons which can be used to assault the
12 arresting officer or to effect an escape.” (*People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 312-
13 313.) But the right to search does not depend on the probability that any of these items will be found.
14 The fact of a lawful custodial arrest alone establishes the authority to search – no additional
15 justification or suspicion is required. (*United States v. Robinson, supra*, 414 U.S. at pp. 234-235;
16 *Gustafson v. Florida, supra*; *People v. Superior Court (Kiefer), supra*, 3 Cal.3d at p. 813.)

17 The right to search extends to the area within the immediate control of the person arrested
18 “from within which he might gain possession of a weapon or destructible evidence.” (*Chimel v.*
19 *California* (1969) 395 U.S. 752, 763 [*Chimel*].) Alternatively expressed, the scope of the search
20 extends to areas the person could have reached or grabbed at the time of arrest. (*People v. Rege*
21 (2005) 130 Cal.App.4th 1584, 1590.) Moreover, “it is clear that a valid search incident to arrest may
22 take place even after the suspect has been arrested or immobilized.” (*Id.* at p. 1589.) It is only
23 necessary that “[t]he search [be] reasonably contemporaneous with the arrest, and no subsequent
24 events . . . rendered such a search unreasonable.” (*Id.* at p. 1590.)

1 The key phrase which justifies the initial search of the iPhone is "limited search for
2 instrumentalities used to commit the offence." When Det. Bocci conducted his limited search of the
3 iPhone, he already knew that the defendant has attempted to purchase numerous additional cell
4 phones using personal identifying information (hereinafter "PII) that did not belong to him, that
5 Defendant was using said information without the consent of the owners, that defendant was
6 attempting to purchase, not once, but twice, large quantities of cell phones, that defendant has
7 actually completed one such purchase using fraudulently obtained PII, and that fraudulent cell phone
8 accounts has previously been opened in the victim's business name with addresses in Omaha,
9 Nebraska, which is where Defendant hails from. All this, coupled with Det. Bocci's countless hours
10 of investigation in identity theft and fraud cases, provided Det. Bocci with reasonable facts necessary
11 to justify the limited search of the iPhone as an instrumentality used to commit the offence charged in
12 this case.

13 It should be noted that once the limited search was conducted, the search was halted and a
14 search warrant obtained. See argument, *infra*.

15 The defendant's reliance on the Stored Communication Act is misplaced. Nowhere is there
16 any information that the iPhone was locked or otherwise password protected. Similarly, there is no
17 evidence that Det. Bocci or anyone else "hacked" into the cell phone using some illegal means. The
18 Stored Communication Act is a federal criminal statute which, in essence, punishes wire tapping
19 where there is subversion of "secure" or otherwise password protected areas. There is no case law
20 citing 18 UCSC 2701 which is remotely similar to this case, nor is there any case law to support
21 defendant's position. It is inapplicable to this case and any discussion about it should be deemed
22 irrelevant.

23 **III. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT CONTAINS**
24 **SUFFICIENT EVIDENCE TO SUPPORT PROBABLE CAUSE.**

1 Even assuming the search of the cell phone was not a legal search incident to arrest, the later
2 search of the cell phone is lawful as pursuant to a legally obtained warrant.

3 Search and seizure conducted pursuant to a search warrant are presumed lawful. The burden of
4 establishing the invalidity of the search or seizure rests upon the defendant. *Theodor v. Superior*
5 *Court* (1972) 8 Cal.3d 77, 101. Both the magistrate and the reviewing court are to interpret an
6 affidavit for a search warrant with common sense and in a realistic fashion. *Illinois v. Gates* (1983)
7 462 U.S. 213, 238. The magistrate's task is to make a practical and common sense decision
8 whether, given all the information in the affidavit, "there is a fair probability that contraband or
9 evidence of a crime will be found in a particular place." *Id.*

10 In the event that the affidavit contains information that was obtained in violation of the Fourth
11 Amendment, the warrant will be upheld so long as the remaining, lawfully obtained information
12 supports probable cause. *People v. Angulo* (1988) 199 Cal.App.3d 370, 374; *United States v.*
13 *Giordano* (1974) 416 U.S. 505, 555 ["The ultimate inquiry on a motion to suppress evidence seized
14 pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally
15 obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful
16 information stated in the affidavit suffices to show probable cause."]

17 The defense has not challenged the sufficiency of the affidavit as it is written, but makes the
18 argument that evidence found in the car and cell phone should be suppressed and excised from the
19 affidavit in support of the warrant. Even assuming that the evidence found in the car and cell phone
20 was obtained in violation of the Fourth Amendment and should therefore be excised, the affidavit
21 contains ample probable cause to support the issuance of a warrant.

22 The Defendant attempted to purchase 30 Blackberry cell phones and open accounts for them
23 using the name [REDACTED], saying that his business was called [REDACTED] with a main office
24 located at [REDACTED]. [REDACTED] belongs to Kate Bright.
25 Kate Bright has never met the Defendant, but was the victim of a similar fraud in May, 2009, when

1 a person named [REDACTED] in the Defendant's hometown of Omaha, Nebraska, successfully
2 opened a business account for [REDACTED] and purchased a large amount of cell phones using the
3 same Santa Monica address.

4 The day before he attempted to purchase the phones in Daly City, the Defendant opened a
5 business account at the Sprint PCS San Francisco store using a different name, [REDACTED]. He
6 purchased approximately 30 phones under the business name [REDACTED] with an
7 address of [REDACTED]. The contact name he gave was [REDACTED]
8 [REDACTED]. The owner of [REDACTED] located at [REDACTED] is
9 Cynthia Deack. Ms. Deack said that she had been victimized by someone opening accounts in her
10 company's name, that she did not know [REDACTED] or the Defendant.

11 The Defendant gave his birth name ([REDACTED]) while he was being booked, and admitted
12 to purchasing the phones at the San Francisco store. The District Manager of Sprint PCS said that
13 the company had recently experienced an increase in fraudulent business accounts where a suspect
14 opens an account using unlawfully obtained information, purchased a large quantity of phones at a
15 bulk discount, and then defaulted on the accounts.

16 The affidavit contained those facts recited above, as well as five paragraphs providing a nexus
17 between the suspected crime and the contents of the Defendant's phone. Those paragraphs (page 8,
18 line 9 through page 9, line 8) establish that Detective Bocci expected to find electronically stored
19 data and voice mail messages related to the crime on the Defendant's phone. Based on his
20 extensive training and experience investigating fraud (page 1, lines 10-22) and the facts contained in
21 the affidavit, Detective Bocci demonstrated probable cause that the Defendant was involved in a
22 criminal fraud ring, and that evidence of this criminal activity would be found on the Defendant's
23 phone in the form of stored data and voice mails (page 8, line 21 through page 9, line 3).

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CONCLUSION

Based on the foregoing, the People respectfully request that the court deny the Defendant's Motion to Suppress Evidence and Motion to Quash and Traverse the search warrant.

Dated: February 10, 2010

Respectfully Submitted,
JAMES P. FOX, DISTRICT ATTORNEY

By 
Chris J. Feasel, Deputy

PROOF OF SERVICE BY FAX



My name is Venita Smith. My main business address is:

- | | |
|---|--|
| <input checked="" type="checkbox"/> Office of the District Attorney
400 County Center, 3 rd Floor
Redwood City, CA 94063 | <input type="checkbox"/> Office of the District Attorney
400 County Center, 4 th Floor
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| <input type="checkbox"/> Office of the District Attorney
1050 Mission Road
South San Francisco, CA 94080 | <input type="checkbox"/> Office of the District Attorney
21 Tower Road
San Mateo, CA 94402 |

I am over the age of eighteen (18) years and not a party to the cause. On February 10, 2010, I served the attached:

PEOPLE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS, AND MOTION TO TRAVERSE AND QUASH SEARCH WARRANT

on the hereinafter named, by placing a true copy thereof in a fax machine and ordering it delivered to fax machine telephone number (415) 568-0560 , the fax number for the Law Offices of Randall Garteiser.

Executed at Redwood City, California.

I declare under penalty of perjury that the foregoing is true and correct.

Venita Smith