

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
MICHAEL MARR, JAVIER SANCHEZ,
GREGORY CASORSO, and VICTOR
MARR,
Defendants.

Case No. 14-cr-00580-PJH

PRETRIAL ORDER NO. 3

Before the court is defendants' motion to suppress warrantless audio recordings (doc. no. 68). The parties have filed supplemental post-hearing briefs, declarations and exhibits, and the matter is submitted. Having reviewed the relevant legal authority, the parties' papers, argument of counsel, and evidence in the record, the court DENIES the motion to suppress for the reasons set forth below.

I. BACKGROUND

Defendants challenge the warrantless use of audio recording devices to capture private conversations at the public entrance to the Alameda and Contra Costa County courthouses, on the ground that they had a reasonable expectation of privacy in their communications. Doc. no. 68. As conceded by defense counsel, defendants do not assert a reasonable expectation of privacy as to the video recordings. Defendants also seek suppression of evidence tainted by the unlawful recordings. Accordingly, the government's concession that it will not use the courthouse recordings in its case-in-chief does not moot the motion to suppress the recordings.

1 **II. LEGAL STANDARD**

2 The United States Constitution protects “the right of the people to be secure in
3 their persons, houses, papers, and effects, against unreasonable searches and
4 seizures.” U.S. Const. amend. IV. “The Fourth Amendment protects people rather than
5 places, but ‘the extent to which the Fourth Amendment protects people may depend upon
6 where those people are.’” *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000)
7 (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). To invoke the protections of the
8 Fourth Amendment, a person must show he had a “legitimate expectation of privacy.”
9 *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the Supreme Court held that as long
10 as the target has a legitimate expectation of privacy, a warrant is required for the
11 government to conduct electronic surveillance. To establish a “legitimate” expectation of
12 privacy, he must demonstrate a subjective expectation that his activities would be private,
13 and he must show that his expectation was “one that society is prepared to recognize as
14 reasonable.” *Nerber*, 222 F.3d 597, 599 (quoting *Bond v. United States*, 529 U.S. 334,
15 338 (2000)).

16 Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.
17 §§ 2510-2522, prescribes the procedure for securing judicial authority to intercept wire
18 communications in the investigation of specified serious offenses, and provides for
19 suppression of unlawfully intercepted communications.

20 Whenever any wire or oral communication has been
21 intercepted, no part of the contents of such communication
22 and no evidence derived therefrom may be received in
23 evidence in any trial, hearing, or other proceeding in or before
 any court . . . if the disclosure of that information would be in
 violation of this chapter.

24 18 U.S.C. § 2515. Section 2510(2) defines “oral communication” as “any oral
25 communication uttered by a person exhibiting an expectation that such communication is
26 not subject to interception under circumstances justifying such expectation.” The Ninth
27 Circuit has recognized that “the legislative history behind § 2510(2) reflects Congress’s
28 intent that [the *Katz* inquiry] serve as a guide to define communications that are uttered

1 under circumstances justifying an expectation of privacy,” that is, whether the
2 communications were made by a person (1) who has a subjective expectation of privacy,
3 and (2) whose expectation was objectively reasonable. *United States v. McIntyre*, 582
4 F.2d 1221, 1223 (9th Cir. 1978) (citations omitted). See *United States v. Chavez*, 416
5 U.S. 562, 575 (1974) (“suppression is not mandated for every violation of Title III, but only
6 if ‘disclosure’ of the contents of intercepted communications, or derivative evidence,
7 would be in violation of Title III”); *United States v. Duran*, 189 F.3d 1071, 1084 (9th Cir.
8 1999) (“Suppression is required: (i) if the communication was unlawfully intercepted;
9 (ii) the order of authorization or approval under which it was intercepted is insufficient on
10 its face; or (iii) the interception was not made in conformity with the order of authorization
11 or approval.”) (citing 18 U.S.C. § 2518(10)(a)).

12 The district court in the exercise of its discretion may choose to hear live testimony
13 at a suppression hearing rather than rely on the written materials submitted by the
14 parties. See *United States v. Batiste*, 868 F.2d 1089, 1091 (9th Cir. 1989) (district court
15 properly exercised discretion to hold an evidentiary hearing on probable cause to arrest
16 even though evidentiary hearing was not required where the defendant failed to dispute
17 any material fact in the government’s proffer). If affidavits show as a matter of law that
18 defendant is or is not entitled to relief, no evidentiary hearing is required. *United States v.*
19 *Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

20 **III. DISCUSSION**

21 **A. Standing**

22 As an initial matter, the government contends that defendants lack standing to
23 challenge all the stationary recordings under either the Fourth Amendment or under Title
24 III, which only allows an “aggrieved person” to move to suppress wiretap evidence. Opp.
25 Mot. Suppr. Recordings (doc. no. 86) at 5 (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)
26 and 18 U.S.C. § 2518(10)(a)). See 18 U.S.C. § 2510(11) (an “aggrieved person” means a
27 person “who was a party to any intercepted wire, oral, or electronic communication or a
28 person against whom the interception was directed.”). Defendants have submitted

1 declarations by Casorso and Sanchez, in which they assert that they recognize their
2 voices on specific recordings. The government has also identified 16 recordings of Victor
3 Marr, Sanchez and/or Casorso. Wynar Decl. (doc. no. 86-1) ¶ 19; Sambat Decl. (doc.
4 no. 128-1) ¶ 2 and Ex. A. Having identified specific recordings of their conversations in
5 the record, defendants Victor Marr, Casorso and Sanchez have demonstrated standing
6 under the Fourth Amendment and the wiretap statute to challenge those recordings.

7 However, with respect to Michael Marr, defendants do not dispute the
8 government’s representation that Michael Marr was never recorded, but argue that he
9 was identified as a subject of the investigation. Defendants cite *United States v. Oliva*,
10 705 F.3d 390, 395 (9th Cir. 2012), where the court held that the defendant was one of the
11 individuals “against whom the interception was directed,” even though his voice was not
12 verified to be on any of the recordings, where the affidavits in support of the surveillance
13 orders included investigators’ statements certifying their beliefs that he was using the
14 individual cellular phones at issue, showing that the defendant’s conversations were the
15 target of the surveillance. Defendants rely on *Oliva* to support their argument that an
16 “aggrieved person” with standing under the wiretap statute is one whose conversations
17 were the target of the surveillance. Reply Mot. Suppr. Recordings (doc. no. 104) at 2.
18 Although the government did not address Michael Marr’s standing argument in its
19 surreply, the court determines that *Oliva* does not expressly recognize a defendant’s
20 standing to bring a motion to suppress where he was not actually recorded or was not
21 named in a wiretap application. Unlike *Oliva*, Michael Marr was not named in a wiretap
22 application, since the government did not seek a wiretap order.

23 Defendants also cite an unpublished opinion, *United States v. Luis*, 537 Fed.
24 Appx. 752, 753 (9th Cir. 2013), which does not support their standing argument for
25 Michael Marr. There, the defendant moved to suppress recorded conversations with an
26 informant that were recorded with the informant’s consent without judicial authorization
27 and by the government’s use of wiretaps. The court held that all of the defendant’s
28 conversations were properly intercepted without judicial authorization pursuant to the

1 informant's consent. With respect to the wiretaps, the court in *Luis* held that the
2 defendant lacked standing to challenge the interceptions because he was not named in
3 any of the applications and none of his phone calls were intercepted pursuant to a Title III
4 authorization. The court in *Luis* cited *United States v. Gonzalez, Inc.*, 412 F.3d 1102,
5 1116 (2005), *amended by* 437 F.3d 854 (9th Cir. 2006), where the court recognized that
6 "[t]he Supreme Court has interpreted these provisions as limiting standing to challenge
7 wiretaps to persons whose Fourth Amendment rights were violated by the interception,"
8 and held that the defendants had standing to challenge all conversations intercepted by a
9 wiretap on their business premises, not only their own intercepted conversations, where
10 the defendants owned and leased the building to their family-run business. In *Alderman*
11 *v. United States*, 394 U.S. 165, 171-72 (1969), the Supreme Court rejected an expansive
12 view of Fourth Amendment standing urged by the defendants there who argued that "if
13 evidence is inadmissible against one defendant or conspirator, because tainted by
14 electronic surveillance illegal as to him, it is also inadmissible against his codefendant or
15 coconspirator." The Supreme Court recognized that "[t]he established principle is that
16 suppression of the product of a Fourth Amendment violation can be successfully urged
17 only by those whose rights were violated by the search itself, not by those who are
18 aggrieved solely by the introduction of damaging evidence. Coconspirators and
19 codefendants have been accorded no special standing." *Id.*

20 Notwithstanding the court's statement at the hearing, now that the court has had
21 the opportunity to read the cases cited by defendant, in the absence of authority broadly
22 recognizing that a defendant who was under investigation, but was neither intercepted
23 nor named in a wiretap application, qualifies as an "aggrieved person" under the wiretap
24 statute, the court finds that Michael Marr has not demonstrated that he has standing to
25 challenge the warrantless recordings. Defendants cite no authority broadly construing "a
26 person against whom the interception was directed" to include someone who was under
27 surveillance but had no communications intercepted, was not an owner of the premises
28 where the warrantless interceptions were made, and was not named in a wiretap

1 application. The court further notes that the record indicates that the government agents
2 were informed that Michael Marr never personally attended the rounds but had people
3 representing him; thus he was not even an intended target of the interception. Wynar
4 Decl., Ex. C at 4-5 (under seal). The Ninth Circuit has held that standing under the
5 wiretap statute is not broader than Fourth Amendment standing. “Both the language of
6 the statute and its legislative history make it clear that it does not broaden the rule of
7 standing provided for in [former] Rule 41(e), F.R.Crim.P., relating to Fourth Amendment
8 motions to suppress.” *United States v. King*, 478 F.2d 494, 506 (9th Cir. 1973) (citing 18
9 U.S.C. § 2510(11); S. Rep. No. 1097, 90th Cong. 2d Sess., quoted in 1968 U.S. Code
10 Cong. & Admin. News at 2179). The court in *King* concluded that “a defendant may
11 move to suppress the fruits of a wire-tap only if his privacy was actually invaded; that is, if
12 he was a participant in an intercepted conversation, or if such conversation occurred on
13 his premises.” *Id.*

14 Under the weight of authority discussed here, the Fourth Amendment standing of
15 defendants Victor Marr, Casorso and Sanchez is limited to challenging the interception of
16 conversations in which they participated, and not all the warrantless recordings made in
17 the course of the investigation. Michael Marr has not demonstrated standing to move for
18 suppression of any of the warrantless recordings.

19 **B. Expectation of Privacy**

20 Defendants contend that they had a reasonable expectation of privacy in their
21 communications outside the courthouses, citing cases recognizing a privacy right in
22 communications made in a public place. None of the cases are directly on point, to hold
23 that one has a reasonable expectation of privacy in communications at or near a
24 courthouse entrance.

25 The government concedes that in the course of the bid-rigging investigation,
26 based on information provided by cooperators, the FBI installed stationery microphones
27 in public spaces in the vicinity of the public auctions outside the Alameda County
28 courthouse in Oakland from March 2010 to December 2010, and near the Contra Costa

1 County courthouse in Martinez from June 2010 to December 2010, for the purpose of
2 making recordings around the time of the public foreclosure auctions. Wynar Decl. (doc.
3 no. 86-1) ¶¶ 8, 14. The warrantless recordings at issue were recorded on microphones
4 located at the following locations:

- 5 • Outside the Alameda County Courthouse (1) inside the lower light
6 box along the courthouse steps of the Alameda County Courthouse
7 on 1225 Fallon Street, Oakland, (2) on vehicles parked in front of
8 the courthouse; and (3) at the bus stop near the courthouse on the
9 corner of Fallon Street and 12th Street, Oakland.
- 10 • Outside the Contra Costa County Courthouse (1) on vehicles
11 parked in front of the Contra Costa County Courthouse on 725
12 Court Street, Martinez, (2) on vehicles parked in front of the
13 staircase near the southwestern corner of the Contra Costa
14 Finance Building on 625 Court Street, Martinez, and (3) along this
15 staircase at 625 Court Street, Martinez.

16 Sambat Decl. (doc. no. 128-1), Ex. A. The court takes judicial notice that the Contra
17 Costa Finance Building is directly across the street from the Contra Costa County
18 Courthouse, and that the staircase where two of the recording devices were installed
19 leads from the entrance of the Finance Building to the sidewalk near the corner of the
20 block facing the courthouse. Sambat Decl., Ex. N.

21 The government contends that defendants did not have a reasonable expectation
22 of privacy in their public oral communications outside the county courthouses,
23 challenging both their subjective expectation of privacy and the reasonableness of that
24 expectation. The parties agree that the applicable factors to consider in determining
25 whether an individual can demonstrate a reasonable expectation of privacy are set forth
26 in *Kee v. City of Rowlett*, 247 F.3d 206, 213-15 (5th Cir. 2001)):

- 27 (1) the volume of the communication or conversation;

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(2) the proximity or potential of other individuals to overhear the conversation;

(3) the potential for communications to be reported;

(4) the affirmative actions taken by the speakers to shield their privacy;

(5) the need for technological enhancements to hear the communications; and

(6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

See Reynolds v. City and County of San Francisco, 2012 WL 1143830 at *5 (N.D. Cal. Mar. 30, 2012) (citing *Kee*).

1. Subjective Expectation of Privacy

Defendants contend that their subjective expectation that their conversations would remain private is demonstrated by the secretive and confidential nature of the secondary auctions, citing cases recognizing the subjective expectation of privacy by people attempting to conceal unlawful activity. *See U.S. v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000) (affirming finding of subjective expectation of privacy in the defendants’ hotel room where, “[i]n addition to closing the door, drawing the blinds, and exercising dominion over the room after the informants left at 10:00 a.m., defendants ingested cocaine and brandished weapons in a way they clearly would not have done had they thought outsiders might see them.”). The evidence in the record does not support an inference that defendants attempted to keep their conversations secret in order to conceal unlawful activity, in light of the evidence that they conducted their rounds in open, public areas and evidence suggesting that defendants did not expect that they could be prosecuted for bid-rigging. *See Patchen Decl.* (doc. no. 109-1), Ex. C at 15 (under seal) (indicating that Casorso did not believe his involvement in rounds amounted to bid-rigging). The government provided evidence that Casorso told the FBI, “If there are 30 bidders present at auction there are usually 12 bidders who are willing to work a deal.” *Patchen Decl.*, Ex. C at 3 (under seal). The government also offered hearsay in the form of press articles quoting Casorso flagrantly admitting how the secondary rounds

1 were conducted. While this evidence may not be admissible at trial on the issue of guilt,
2 the court finds that these statements are consistent with Casorso’s statements to the FBI
3 regarding his state of mind.

4 Defendants Sanchez and Casorso submitted self-serving declarations stating that
5 they believed their conversations were private, but offer no facts to demonstrate their
6 subjective beliefs. Defendants argue that they took steps to protect their conversations
7 by moving away from other people, standing close together, covering their mouths and
8 speaking in low volumes. See Defs’ Resp. to Surreply re Mot. Suppr. Recordings (doc.
9 no. 112) at 3. Defendants offer no declaration attesting to these attempts to maintain
10 privacy, but defense counsel argued at the hearing that defendants cannot be expected
11 to remember what steps they took to protect the privacy of each conversation that was
12 recorded without their knowledge six years ago.

13 The evidence in the record, including audio recordings of the intercepted
14 communications, suggests that defendants communicated near the courthouse entrance
15 openly with up to 12 people at a time to work out the secondary auction. These
16 circumstances do not demonstrate a subjective expectation of privacy, even in light of
17 defendants’ conclusory statements that they believed their conversations were private. In
18 having these conversations, the “rounders” did not leave the vicinity of the public
19 auctions, which were held outside the courthouse just prior to the secondary auction.
20 The auctioneer would typically position himself at the top of the steps or midway on the
21 landing of the steps of the courthouses to conduct the public auctions, which were held
22 weekdays from 12 noon to 12:30 pm at the Alameda County courthouse, and at 10:00
23 am and 1:30 pm at the Contra Costa County courthouse. Wynar Decl. ¶¶ 8, 12.
24 Defendants took part in the recorded conversations at or near the courthouse entrance or
25 at the corner bus stop bearing a “County Court House” sign. Sambat Decl., Exs. G, H, I.
26 Other than defendants’ own conclusory statements, there are no reliable facts in the
27 record to support a finding that any defendants had a subjective expectation of privacy in
28 the conversations at issue.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Reasonableness

Even if defendants' conclusory assertions of their subjective expectations were supported by facts, the *Kee* factors render those expectations objectively unreasonable, particularly the factors: proximity or potential of other individuals to overhear the conversation, potential for communications to be reported, and location of the communications, as it relates to their subjective expectations. Having listened to the recordings at issue, the court finds that defendants did not take steps to protect the privacy of the conversations that were audibly recorded.

a. The volume of the communication or conversation

The recordings at issue intercepted defendants' communications that were made at a normal conversational volume level, not in hushed or whispering tones. Many conversations were conducted by participants in loud voices, sometimes laughing out loud. In particular, the audio recording of a conversation among a group of about eight to ten men on August 17, 2010, at the Fallon Street bus stop, which was played for the grand jury during the indictment presentation in *United States v. Florida, et al.*, CR 14-582 PJH, reflects that the participants had to project their voices and yell to be heard over the sound of a nearby jackhammer. Sambat Decl., ¶ 8 and Ex. B, 1D484.002.wav (under seal). All of the recordings picked up background noise, such as automotive traffic, construction noise, and other conversations from people nearby, which often drowned out the defendants' conversations on the recording. In the video footage accompanying many of the audio recordings, including the video clip that was played for Witness 1 and the grand jury, the participants are not seen appearing to whisper or covering their mouths when having audible conversations that can be heard on the recording. Wynar Decl. ¶ 19; Sambat Decl., ¶ 8 and Ex. B, 1D106.003.avi (under seal). In listening to the audio recordings, the court observed that when a person was speaking at a lowered volume, the recorded communications were not audible or intelligible. The audible conversations that were recorded were loud enough to be heard by anyone passing by,

1 whether at the courthouse entrance or at the bus stop, undermining the reasonableness
2 of any subjective expectation of privacy.

3 **b. The proximity or potential of other individuals to overhear**
4 **the conversation**

5 The fact that the rounds were conducted in open, public areas close to the
6 courthouse entrance, where the public auctions had just been held, and where various
7 members of the public, including law enforcement officers and attorneys, come and go,
8 does not support a reasonable expectation of privacy under the second *Kee* factor.
9 Defendants suggest that private affairs are routinely discussed outside courthouses,
10 including attorney-client communications. Mot. Suppr. Recordings (doc. no. 68) at 7. It is
11 unlikely, and certainly unreasonable, for attorneys to risk breaching their confidential
12 communications with clients by discussing sensitive matters out in the open, in
13 conversational tones, in front of a public forum such as a courthouse, where they could
14 easily be overheard by other attorneys, prosecutors, law enforcement officers, security
15 personnel, court staff, judges, and other bystanders. As an aside, it has been the court's
16 observation that conversations near the courthouse entrance are frequently overheard by
17 unintended and unseen listeners, even from inside the courthouse. Defendants cite no
18 authority recognizing an objectively reasonable expectation of privacy in the space
19 immediately outside a courthouse entrance.

20 **c. The potential for communications to be reported**

21 As noted above, defendants conducted the intercepted conversations at or near a
22 courthouse entrance, where the public foreclosure auction was daily held and where
23 members of the bar and law enforcement officers routinely traversed, exposing them to a
24 high likelihood of being observed and reported. Furthermore, many of defendants'
25 conversations were conducted with multiple participants, any of whom could have
26 reported the bid-rigging activity. See *Hoffa v. United States*, 385 U.S. 293, 303 (1966)
27 ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived
28

1 as to the identity of one with whom one deals is probably inherent in the conditions of
2 human society.”) (citation and internal marks omitted).

3 **d. Affirmative actions taken by the speakers to shield their**
4 **privacy**

5 Defendants have not offered evidence to show affirmative actions taken to protect
6 their privacy, other than suggesting in their brief that they tried moving away from other
7 people, standing close together, covering their mouths and speaking in low volumes.
8 Having listened to the recordings at issue, many of which were accompanied by video
9 images, the court determines that when a speaker spoke in a quiet voice or leaned in to
10 whisper to the listener, the communication was not audibly intercepted by the recording
11 device. Based on the recorded communications that are audible or intelligible, it is clear
12 that defendants did not take measures to keep their conversations private. Unlike *Katz*,
13 where the defendant went into a phone booth and closed a glass door to protect his
14 privacy, defendants did not enter an enclosed space but stayed in an open, public area.
15 The photos of the Fallon Street bus stop show that the bus shelter was not closed, but
16 opened to the street, and was located at a busy corner with pedestrian traffic and street
17 traffic. Sambat Decl., Exs. G, H, I.

18 **e. The need for technological enhancements to hear the**
19 **communications**

20 To address the fifth *Kee* factor, the government offers evidence that the FBI used
21 recording devices that picked up only what could be heard by a human ear and did not
22 amplify the conversations. Wynar Decl. (doc. no. 86-1) ¶ 15(b). FBI Special Agent
23 Wynar states that the microphones used to make the recordings have the following
24 characteristics: (1) they are omnidirectional, i.e., there is no additional gain in a particular
25 direction; (2) the microphones lack equalization or noise cancellation; (3) the minimum
26 sound pressure level detectable by the microphone is limited by its own electrical noise,
27 which is specified by the manufacturer as 33.0dB (A-weighted), maximum, and (4) they
28 are less sensitive than a healthy human ear. Wynar Decl. (doc. no. 86-1) ¶ 15(b). The

1 evidence shows that the intercepted conversations could be overheard by a human ear.
2 See *U.S. v. Fisch*, 474 F.2d 1071, 1077 (9th Cir. 1973) (per curiam) (finding no
3 reasonable expectation that conversations in hotel room would not be heard in the next
4 room, noting that the “officers were in a room open to anyone who might care to rent
5 [and] were under no duty to warn the appellants to speak softly, to put them on notice
6 that the officers were both watching and listening.”). As noted earlier, the sound quality
7 of the audio recordings reflect that the recording devices only picked up voices in
8 conversational or loud tones, and not hushed or whispered voices.

9 **f. The place or location of the oral communications in**
10 **relation to the subjective expectations of the individuals**
11 **who are communicating**

12 Given the proximity of defendants to the courthouse entrance, which was the site
13 of the public auction, when they conducted communications about the secondary
14 auctions, the context of the conversations does not support a legitimate expectation of
15 privacy.

16 While the court agrees with defendants that it is at the very least unsettling that the
17 government would plant listening devices on the courthouse steps given the personal
18 nature of many of the conversations in which people exiting the courthouse might be
19 engaged, it is equally unrealistic for anyone to believe that open public behavior including
20 conversations can be private given that there are video cameras on many street corners,
21 storefronts and front porches, and in the hand of nearly every person who owns a smart
22 phone. There are no cases which establish a bright line rule one way or the other.
23 Instead, the court is required to apply the *Kee* factors to the evidence of record. Based
24 upon a review of that evidence, the court cannot find that any subjective expectation of
25 privacy held by defendants was objectively reasonable. Accordingly, the court finds that
26 the warrantless recording of defendants’ conversations did not violate their rights under
27 the Fourth Amendment or under the wiretap statute. The court need not reach the taint
28

1 issue and defendants are not entitled to an evidentiary hearing. The motion to suppress
2 is therefore DENIED.

3 **C. Record on Taint**

4 Although defendants' Fourth Amendment rights are not implicated by the
5 recordings at issue due to the lack of a reasonable expectation of privacy in the recorded
6 conversations, the court makes the following observations about the evidence that has
7 been developed in the record addressing defendants' arguments about possible taint,
8 which may provide guidance to the parties and inform their trial strategy.

9 The government has identified the uses made of the recordings at issue during the
10 course of the investigation and presentation of the indictment. The government has
11 provided declarations addressing defendants' concerns whether any confidential sources
12 may have been persuaded to cooperate based on the illegal recordings, or whether any
13 witnesses or lawyers were informed of the recordings as part of a reverse proffer by the
14 government lawyers to induce cooperation.

15 **1. Cooperating Witnesses**

16 The FBI played five stationary courthouse recordings to four witnesses, three of
17 whom heard recordings that may have captured the voices of Gregory Casorso, Javier
18 Sanchez and Victor Marr. Wynar Decl. (doc. no. 86-1) ¶¶ 19, 22. Each of those three
19 witnesses had been interviewed several times prior to being shown audio/video
20 recordings in October 2014, and each of them had already entered a guilty plea pursuant
21 to a cooperation agreement. Wynar Decl. (doc. no. 86-1) ¶¶ 23-25. The information
22 about defendants' recorded conversations that were played for witnesses, and
23 information about each witness's plea entry on the public docket, is summarized as
24 follows:

25

26 Witness	FBI Interview Date	Plea Entry Date for Witness	Possible Recorded Defendants	Excerpt of witness interview summary filed under seal with Wynar Decl. (doc. no. 86-1)
27 (1) Jorge Wong	28 10/8/14 (previously	10/12/11 in case	Victor Marr,	Ex. J: Prior to the commencement of the interview, Wang [sic] and

1	(represented by Gail Shifman)	interviewed 6 times)	number CR11-428	Javier Sanchez	Shifman reviewed an audio/video recording (1D106.003) privately. The video showed Wong participating in a secondary auction, also known as a “round” with Vic Marr, Sanchez, and others. . . . Wong identified Vic Marr and Sanchez in the video.
2					
3					
4					
5	(2) Joseph Vesce	10/17/14	8/7/13	Javier Sanchez	Ex. K: During the interview Vesce was shown documents and audio and video recordings. . . 1D619.001 part1,wav (audio), 1D611 (video). . .Vesce identified the conduct in this audio/video recording as Wong, Sanchez, Heisner, Renquist, Vesce and Nick Diaz participating in a round.
6	(represented by James Lassart)	(previously interviewed 4 times)	in case number CR13-415		
7					
8					
9					
10	(3) Brian McKinzie	10/24/14	11/23/11	Victor Marr, Gregory Casorso	Ex. L: McKinzie was shown documents and audio and video recordings . . . 1D402.002.wav. After reviewing this audio recording McKinzie identified the conduct as a secondary auction, also known as a “round” being conducted for the Lobelia Way property. McKinzie did not hear the voice of Vic Marr but Vic Marr had a position, also known as a “seat” in the round.
11	(represented by William DuBois)	(previously interviewed 7 times)	in case number CR11-424		
12					
13					
14					
15					
16					

17
18 See Wynar Decl., Exs. J, K, L. Under these circumstances, the court finds no material
19 issue whether the recordings would have influenced the witnesses’ decision to cooperate,
20 given that each of them had already pled guilty and agreed to cooperate with the
21 government before being shown the courthouse recordings.

22 **2. Grand Jury**

23 The government represents that on November 19, 2014, the grand jury was shown
24 a stationary audio/video recording capturing Sanchez and Victor Marr’s voices on March
25 19, 2010, identified as 1D106.003, during the indictment for this case. Sambat Decl. ¶ 8.
26 Another stationary recording that captured Casorso’s voice on August 16, 2010, identified
27 as 1D484.002, was provided to the grand jury during the indictment for *United States v.*
28 *Florida* on November 18, 2014. *Id.* The court notes that both here and in *Florida*, the

1 grand jury returned the indictment on the same day that the recording was played. The
2 government represents that no additional subpoenas or testimony were sought by the
3 grand jury after reviewing the recordings. Sambat Decl. ¶ 10.

4 It is well-settled that unlawfully seized evidence is admissible before a grand jury.
5 *United States v. Calandra*, 414 U.S. 338, 344-45, 348-52 (1974) (“The grand jury’s
6 sources of information are widely drawn, and the validity of an indictment is not affected
7 by the character of the evidence considered.”). *See also U.S. v. Williams*, 504 U.S. 36,
8 50 (1992) (noting that in *Calandra*, challenging physical evidence the government had
9 obtained through a violation of the Fourth Amendment, “we rejected the proposal that the
10 exclusionary rule be extended to grand jury proceedings, because of “the potential injury
11 to the historic role and functions of the grand jury.”); *U.S. v. Zielesinski*, 740 F.2d 727,
12 732 (9th Cir. 1984) (citing *Calandra* as authority that “challenges to indictments will not be
13 heard where they rest on objections to the evidence-gathering process,” as distinct from
14 challenges based on improprieties within the grand jury process itself). Defendants’
15 Fourth Amendment concerns are therefore not implicated by the grand jury’s exposure to
16 the warrantless recordings.

17 3. Lawyers

18 The government represents that on March 21, 2013, the government played a
19 stationary audio recording capturing Casorso’s voice at the Fallon Street bus stop,
20 identified as 1D430.001, to an attorney representing then-target John Shiells, in an effort
21 to reach a pre-indictment resolution with Shiells. Sambat Decl. (doc. no. 128-1) ¶ 6.
22 Shiells was subsequently indicted on November 19, 2014, and pleaded guilty to bid
23 rigging and mail fraud on July 8, 2015, pursuant to a cooperation deal with the
24 government. *See United States v. John Shiells, et al.*, CR 14-00581 PJH. The court
25 notes that this particular use of a stationary recording is the only one presenting a
26 potential issue of taint, but there is no evidence in the record on the question whether
27 playing this audio recording for Shiells’ attorney influenced Shiells’ decision to cooperate,
28 or whether any evidence was obtained as a direct result of his cooperation. *See U.S. v.*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Huberts, 637 F.2d 630, 638 (9th Cir. 1980) (discussing exclusionary rule and exceptions to the rule) (citing *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963)). Because the court has found that defendants did not have a legitimate expectation of privacy in the recorded conversations, it does not reach the issue of taint with respect to any evidence derived from Shiells.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to suppress the warrantless audio recordings is DENIED.

IT IS SO ORDERED.

Dated: July 22, 2016



PHYLLIS J. HAMILTON
United States District Judge

General Information

Court	United States District Court for the Northern District of California; United States District Court for the Northern District of California
Federal Nature of Suit	Criminal
Docket Number	4:14-cr-00580