IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH J. GIRAUDO, RAYMOND A. GRINSELL, KEVIN B. CULLINANE, JAMES F. APPENRODT, and ABRAHAM S. FARAG,

Defendants.
/

No. 14-CR-534 CRB

ORDER DENYING MOTION TO SUPPRESS FURTHER EVIDENCE AS FRUIT OF THE POISONOUS TREE

In this criminal case, the sprawl of litigation about the alleged taint from unlawful stationary audio recordings has approached that of the investigation itself. But unlike the latter, the former has come up empty.

I.

In October 2009, two brothers reported extensive bid-rigging at public foreclosure auctions in San Francisco and San Mateo counties. The men—known as "CHS-AG" and "CHS-RG"—told authorities that they had been asked to make cash payoffs to keep bidding down. See Gov't Exs. 87, 162. They identified Mo Rezaian, Dan Rosenbledt, and Defendants Joseph Giraudo, Raymond Grinsell, and Kevin Cullinane as members of the alleged conspiracy.[1] Id.

[1] Hereafter, the term "Defendants" refers collectively to Giraudo, Grinsell, and Cullinane, along with their co-defendants James Appenrodt and Abraham Farag.

The FBI investigated. Agents reviewed documents obtained from the brothers and began conducting surveillance of the San Francisco and San Mateo auctions. See Jan. 17, 2017 Tr. at 20; Jan. 19, 2017 Tr. at 265–66, 350. CHS-RG and an undercover agent ("UCE") continued participating in the allegedly collusive conduct—wearing hidden microphones. Jan. 19, 2017 Tr. at 265–66. Other agents photographed and videotaped the goings-on from discrete locations. Id. This new, lawfully obtained evidence "rapidly corroborated" the brothers' reports of rampant bid-rigging and pointed to a host of additional suspects. Feb. 11, 2016 Tr. at 183; Jan. 19, 2017 Tr. at 269–70.

Two of these additional suspects were Gajan Thia and Juan Diaz. On December 6, 2009, CHS-RG overheard Thia agree not to bid against Cullinane in exchange for a $15,000 payoff from Rezaian and Rosenbledt. Gov't Ex. 101; Def. Ex. 2–81. Though the conversation was not captured on his microphone, CHS-RG reported the agreement the next day. Id. He also told the government that Thia was working with Diaz, and that together they ran a company called Equity Chase Inc. Id.

By late December 2009, the government feared that the brothers' relationship with Defendants had soured. Feb. 11, 2016 Tr. at 56, 72–73. In an attempt to capture out-of-earshot conversations, agents planted stationary recording devices on an unmarked police car, backpack, sprinkler, and (fittingly) a planter. Id. at 36, 115. Despite its concerns, and despite deploying these stationary devices, the government did not give up on its original investigative methods. Jan. 19, 2017 Tr. at 274. CHS-RG, for example, reported that Thia had made a pay off to Rezaian and that a man named Bob Williams appeared to have done the same for Defendant Abraham Farag. Gov't Exs. 76, 112. He also identified Defendant James Appenrodt as a participant in the apparent bid-rigging. Jan. 19, 2017 Tr. at 270–71. FBI agents, for their part, continued surveilling the auctions.

Special Agent Roahn Wynar was doing just that on January 28, 2010, when he saw a conversation between Rezaian, Rosenbledt, and Thia erupt into an argument. Jan. 17, 2017 Tr. at 107. Fearing a fight to follow, Agent Wynar intervened and escorted Thia away from the confrontation. Id. at 109. He then identified himself as a law enforcement officer and

asked Thia to meet later that day. Id. at 110–11. When they met again, Thia explained that Rezaian and Rosenbledt had accused him of trying to "piggy back" off of certain bids. Gov't Ex. 74 at 2. Thia also implicated Cullinane, Rosenbledt, Grinsell, and others in bid-rigging.[2] Id. at 1. Agent Wynar told him that the government was investigating collusive activity at the auctions and recommended that Thia retain an attorney. Jan. 17, 2017 Tr. at 89, 106. He also asked Thia not to tell anyone else about the investigation. Id. at 106.

Thia took Agent Wynar's advice about getting a lawyer but broke his promise about keeping the investigation a secret. See Jan. 19, 2017 Tr. at 309–10; Feb. 27, 2017 Tr. at 528; Jan. 17, 2017 Tr. at 114. He tipped off Diaz about the investigation, spurring the latter to lawyer-up himself. Jan. 17, 2017 Tr. at 114; Def. Ex. 2–122. Diaz's attorney then contacted the government and offered to cooperate. Id. The government interviewed Thia and Diaz several times, and both men admitted to bid-rigging in San Mateo as well as in the East Bay. Gov't Exs. 196–200; Def. Exs. 2–112, 2–122. Their cooperation was formalized soon after. Feb. 27, 2017 Tr. at 391, 439. Neither was charged with a crime.

In March 2010, the government used information supplied by Thia to apply for pen registers on phones belonging to Rezaian and Giraudo. Gov't Exs. 98–100. Those applications did not refer to stationary audio recordings, Jan. 19, 2017 Tr. at 32, though they contained information about a property discussed on them, Park Pacifica, see, e.g., Feb. 27, 2017 Tr. at 422.

The investigation continued apace. CHS-RG, CHS-AG, and UCE recorded further incriminating conversations on their hidden microphones, while agents conducted more physical surveillance. See Opp'n at 8–9 (providing relevant citations to the record). In November and December of 2010, agents searched Rezaian's and Giraudo's trash, where they found spreadsheets chronicling purchases of various properties and, for some purchases, memorializing an accompanying bid-rigging agreement. See Gov't Exs. 120–22, 168, 193. The government used that information, along with further evidence supplied by cooperators and FBI agents, to apply for search warrants of Giraudo's and Rezaian's houses, Giraudo's

[2] A stationary audio recording corroborated Thia's account. Def. Ex. 2–84.

car, and Grinsell's office, among other locations.[3] Gov't Exs. 83–87; Jan. 19, 2017 Tr. at 274–75; Feb. 28, 2017 Tr. at 615. Like the pen register applications, these contained information about Park Pacifica but did not refer to stationary audio recordings. See Jan 17, 2017 Tr. at 86–88; Jan. 19, 2017 Tr. at 277.

Agents executed the searches in January 2011. They recovered a heap of incriminating evidence, including detailed records of hundreds of payoff agreements from Rezaian's computer, cell phone, and paper notes. Gov't Exs. 119, 147. With this new evidence in hand, the government convinced ten alleged conspirators to plead guilty over the next 18 months: Craig Lipton, Laith Salma, James Doherty, Patrick Campion, Henri Pessah, Keith Goodman, Troy Kent, Gary Anderson, Lydia Fong, and Matthew Worthing. Several of them implicated Rezaian, Rosenbledt, and Defendants in collusive activity. See, e.g., Def. Exs. 2–95, 2–103.

On November 19, 2012, the government met with Rezaian's attorneys, who had "expressed an interest in seeing if [they] could work out a plea." Feb. 28, 2017 Tr. at 643. The 45-minute presentation included an overview of the three parallel investigations happening in San Joaquin County, Contra Costa and Alameda County, and San Francisco and San Mateo Counties. Gov. Ex. 123. It made clear that several members of the alleged conspiracy were cooperating and detailed numerous inculpatory documents, including those obtained from Rezaian. Id. It also contained surveillance photographs and some 19-plus minutes of lawfully obtained video and audio recordings. Gov't Ex. 72. And, notably for present purposes, the presentation included a 25-second audio clip from a stationary audio recording of an incriminating conversation, albeit one for which both CHS-RG and UCE were present and mic'd up. Feb. 28, 2017 Tr. at 652–54. Two months later, the government met with Rosenbledt's attorneys and showed them a tweaked version of the same presentation.[4] See id.; Def Exs. 2–76, 2–77; Gov't Ex. 73.

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[3] A grand jury also issued subpoenas. See, e.g., Feb. 27, 2017 Tr. at 530–40.

[4] It appears that Rosenbledt's meeting occurred on January 15, 2013, but it might have occurred on January 25, see Opp'n at 16 n.14. Any discrepancy makes no difference here.

On January 23, 2013, Rezaian's business partner, Norman Montalvo, pleaded guilty. Feb. 28, 2017 Tr. at 648; United States v. Montalvo, case no. 12-cr-0785-CRB (dkts. 10, 11). He, like others before him, proceeded to implicate Rezaian and Rosenbledt, along with several Defendants in the alleged scheme. See Gov't Exs. 184, 230. On February 20, another alleged co-conspirator, Gilbert Chung, pleaded guilty. See United States v. Chung, no. 13-CR-0069-CRB (dkt. 6). On May 2—some six months after his attorneys sat down with the government—Rezaian pleaded guilty. Gov't Ex. 80.

Three months later, Bob Williams pleaded guilty to bid-rigging charges of his own. See United States v. Williams, no. 13-CR-0388-CRB (dkt. 8). On November 4, Kuo Hsuan Chang did the same. See United States v. Chang, no. 13-CR-0670-CRB (dkt. 11). The next day—some eight months after his attorneys sat down with the government—Rosenbledt pleaded guilty.[5] Gov't Ex. 81.

Defendants were indicted in October 2014 and, about a year later, moved to suppress the stationary audio recordings and any evidence tainted thereby under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See Mot. to Suppress (dkt. 58). After conducting an evidentiary hearing, the Court granted the motion to suppress all stationary audio recordings.[6] See Order on Mot. to Suppress (dkt. 149) at 18–19. It then conducted another evidentiary hearing to determine what evidence, if any, was tainted by the now-suppressed stationary audio recordings. The parties submitted (yes) 154 pages of further briefing. Based on that sprawling record, the Court makes the foregoing findings of fact and the following conclusions of law.

[5] The government showed Rezaian and Rosenbledt further clips from stationary audio recordings long after they pleaded guilty. See Gov't Exs. 70, 71. It also showed CHS-RG a couple such clips, again long after he agreed to cooperate. See Def. Ex. 2–201.

[6] Furthermore, while litigating the motion to suppress, the government twice represented that it "will not use any of the challenged stationary audio recordings at trial." Opp'n to Mot. to Suppress (dkt. 62) at 1; see also Surreply to Mot. to Suppress (dkt. 72) at 1. So to reiterate, no stationary audio recording will be admitted at trial, period. Even if a lawful recording picked up the same conversation as a stationary audio recording, the government must use the former.

II.

Although Fourth Amendment and Title III protections have their differences, see, e.g., Clarifying Order (dkt. 191) at 7, the scope of their fruit-of-the-poisonous-tree doctrines is not one of them. See United States v. Smith, 155 F.3d 1051, 1059 (9th Cir. 1998) (citing United States v. Spagnuolo, 549 F.2d 705, 711 (9th Cir. 1977)). So to decide whether evidence is "derived" from an unlawfully intercepted communication under 18 U.S.C. § 2515, the Court looks to Fourth Amendment case law. See id. (citing Chandler v. United States, 125 F.3d 1296, 1304 (9th Cir. 1997)).

The Fourth Amendment's exclusionary rule, and thus Title III's, extends to both direct and indirect use of unlawfully obtained evidence. See Wong Sun v. United States, 371 U.S. 471, 484 (1963). Direct use, for example, might be introducing into evidence drugs discovered during an unlawful search incident to arrest. See, e.g., United States v. Nora, 765 F.3d 1049, 1055–56 (9th Cir. 2014). Indirect use, in turn, would be introducing evidence seized pursuant to a warrant, the probable cause for which relied heavily on the unlawfully seized drugs. See, e.g., id. at 1057–59. Either way, suppression requires a "direct and unbroken causal chain" between the violation and the challenged evidence—and then some. See Smith, 155 F.3d at 1060.

That an underlying violation contributed in some way to the discovery of challenged evidence is not enough. To the contrary, it must be that, but for the violation, the government would not have obtained the evidence at all. Hudson v. Michigan, 547 U.S. 586, 592 (2006). So if the government had an independent source for the challenged evidence, or would have inevitably discovered it anyway, the exclusionary rule does not apply. Smith, 155 F.3d at 1060. But-for causation, then, is a necessary condition for suppression. Hudson, 547 U.S. at 592.

It is not, however, a sufficient one. Id. The taint inquiry ultimately hinges on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488

(citation omitted). In more colloquial terms (by lawyerly standards at least), that question is something "akin to a proximate causation analysis." Smith, 155 F.3d at 1060. So where the causal connection between the underlying violation and the challenged evidence is attenuated, the exclusionary rule likewise does not apply. See id. And given the special costs imposed by suppressing live-witness testimony, doing that requires an even "closer, more direct link" to the violation.[7] United States v. Ceccolini, 435 U.S. 268, 278 (1978).

Finally, it bears mention that suppression is a "last resort," not a "first impulse." Hudson, 547 U.S. at 591. The exclusionary rule thus applies only were "its deterrence benefits outweigh its substantial social costs." Utah v. Streiff, 136 S. Ct. 2056, 2061 (2016) (citation omitted); see also Herring v. United States, 555 U.S. 135, 144 (2009).

III.

Despite the foregoing headwinds, Defendants set out under full sail. They ask the Court to exclude all evidence gathered after the day the government began using stationary recording devices. See Post-Hr'g Br. at 26. But before, during, and after doing so, the government deployed a formidable array of lawful investigative tools, including confidential informants, undercover agents, wearable microphones, and physical surveillance. It even rummaged through the trash. So gutsy as their initial tack may be, it gets Defendants nowhere. Even assuming that they have met their "initial burden of establishing a factual nexus between" the stationary audio recordings and each and every other piece of evidence discovered after December 22, 2009, United States v. Kandik, 633 F.3d 1334, 1335 (9th Cir. 1980), nothing suggests that those recordings were an across-the-board but-for cause of those discoveries, let alone something akin to their proximate cause, Smith, 155 F.3d at 1060.[8]

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[7] To decide whether live-witness testimony meets this heightened bar for suppression, courts consider (1) whether the testimony is an act of "free will," (2) whether unlawfully seized evidence was used in questioning the witness, (3) how much time passed between the violation and the initial questioning of the witness, (4) whether the government knew the identity of the witness beforehand, and (5) whether a desire to find a willing and knowledgeable witness motivated the government's unlawful conduct. See Ceccolini, 435 U.S. at 279–80; United States v. Ramirez–Sandoval, 872 F.2d 1392, 1397 (9th Cir. 1989). By extension, these same factors appear to apply to the fruits of cooperation more generally. See Ramirez–Sandoval, 872 F.2d at 1398 n.6.

[8] There is thus no reason to dismiss the charges against Farag.

With that, Defendants are left to shorten sail, at least a little. They argue in the alternative that (A) the stationary audio recordings tainted Thia's and Diaz's cooperation, which in turn (B) tainted the government's warrant and pen register applications, and that (C) clips from stationary audio recordings shown to Rezaian's and Rosenbledt's attorneys tainted their clients' guilty pleas and impending trial testimony. See Post-Hr'g Br. at 26–40. Defendants then go on to argue that (D) the Court should exercise its "supervisory authority" to exclude all testimony from three FBI agents and certain refreshed testimony from CHS-RG, as well as all evidence gathered regarding eleven properties (on whatever dates) and all evidence collected on seven dates (regarding whatever properties). See id. at 40–47. But for reasons wholly apart from supposedly shoddy record-keeping, the headwinds are simply too strong.

A.

First, Thia and Diaz. Their cooperation is not tainted. To recap: CHS-RG reported overhearing Thia accept a $15,000 payoff and identified Diaz as a possible suspect—before any stationary recording devices were in place. Six weeks later, Agent Wynar disclosed his identity to Thia and informed him about the ongoing investigation—before Agent Wynar could have listened to what Defendants maintain were particularly "critical" stationary audio recordings made that day, Post-Hr'g Br. at 29. Thia was concerned enough to meet Agent Wynar a second time,[9] retain counsel, and tell his partner about their predicament. Diaz then retained his own counsel and, with nary another nudge, offered to cooperate. Need the Court say more?

Probably not, but just in case, compare the above facts with those of United States v. Rubalcava-Montoya, 597 F.2d 140 (9th Cir. 1978). There, border patrol agents illegally searched a car, finding five undocumented immigrants hidden in the trunk. Id. at 142. The Ninth Circuit held that both the agents' and immigrants' testimony should have been suppressed because "the search uncovered the crime itself," making the challenged testimony

[9] Agent Wynar also testified that he did not reveal the existence of, or information obtained from stationary audio recordings during these conversations. See Jan. 19, 2017 Tr. at 310; Feb. 28, 2017 Tr. at 528.

"closely, almost inextricably, linked" to the violation. Id. at 144. And with "no indication that the connection between the crime and the witnesses would have been discovered from" an independent source, the defendants were in luck. Id. at 143–44; see also United States v. Ienco, 182 F.3d 517, 529–31 & n.13 (7th Cir. 1999) (holding that testimony should have been suppressed because the witness and the defendant were stopped and identified for no reason other than being "two men together," and because the witness was told explicitly about unlawfully obtained evidence).

No such luck here. Both Thia and Diaz were (and would have been) suspects even if the government had never deployed stationary recording devices, while both men had (and would have had) ample reason to cooperate absent that underlying violation.

B.

Because Thia's and Diaz's cooperation is not tainted, Defendants' attempt to suppress evidence obtained pursuant to the pen registers and search warrants crumbles on its own terms. See Post-Hr'g Br. at 31 ("Thia and Diaz . . . are foundational to the Government's case. The pen registers, the search warrants, and all other evidence obtained as a result of their cooperation should be excluded as tainted."); Reply at 15 ("Tainted Evidence from Thia and Diaz was Central to the Search Warrants and Pen Registers"). But even if Thia's and Diaz's cooperation were tainted, the government had more than enough to establish probable cause for the search warrants.[10] See United States v. Nora, 765 F.3d 1049, 1058 (9th Cir. 2014) (noting that, if a search warrant application contains tainted evidence, courts should excise that evidence and determine whether the remaining untainted evidence was enough for probable cause). The affidavit contained a wealth of information from other sources, including CHS-RG, CHS-AG, UCE, and the trash searches. See Gov't Ex. 83 ¶¶ 51–52, 55–56, 60, 71, 75, 88, 98, 111, 117.

[10] As for the pen registers, the government need only have "certified to the court that the information likely to be obtained" from them was "relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a). It did not need probable cause. See, e.g., Brown v. Waddell, 50 F.3d 285, 290 (4th Cir. 1995). But to whatever extent the government needed to provide anything more than its own sworn statement, information from Thia was not its only option. CHS-AG and CHS-RG, for example, had gathered incriminating information on both Rezaian and Giraudo. Just the same, the Court need not (and does not) reach the issue.

Armed with the foregoing evidentiary howitzer, the government decided to leave out the existence of, and information obtained from, the stationary audio recordings in an (unsuccessful) attempt to avert allegations of taint and the accompanying litigation. There was nothing nefarious about that decision. The government "need not include all of the information in its possession to obtain a search warrant," so long as it includes enough to support a finding of probable cause. United States v. Johns, 948 F.2d 599, 606 (9th Cir. 1991) (emphasis omitted). Omitting evidence can be a problem, but only when it "cast[s] doubt on the existence of probable cause." Id. at 606–07 (internal quotation marks and citation omitted); accord United States v. Perkins, 850 F.3d 1109, 1119 (9th Cir. 2017). Here, precisely the opposite is true. The stationary audio recordings would have strengthened an already strong case for probable cause. After all, Defendants sought to suppress those recordings (at least in part) because many of them were incriminating.

Neither United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988), nor United States v. Bah, 794 F.3d 617 (6th Cir. 2015), counsels otherwise. In both cases, the government failed to disclose a prior warrantless search of the very place it sought to search again with a warrant. See Whitworth, 856 F.2d at 1281 (same mobile home), Bah, 794 F.3d at 634 (same cell phone). That matters. If agents have already conducted a search and seized incriminating evidence, they are less likely to find more the second time around. Cf. Whitworth, 856 F.2d at 1281–82 ("The government has argued persuasively that the consent search in this case was not performed as thoroughly as a warrant-based search would have been, so that there still was probable cause for the subsequent [warrant-based] search."). And if they have already searched and found nothing, that too casts doubt on probable cause should the government nevertheless apply for a search warrant. For these reasons, Whitworth and Bah had good reason to admonish the government for failing to disclose prior unlawful searches. See Whitworth, 856 F.2d at 1281; Bah, 794 F.3d at 634. But here the existence of the stationary audio recordings, along with the government's worry about their

legality, in no way suggested that the contemplated searches were less likely to bear fruit than the magistrate was led to believe.[11]

C.

Defendants next maintain that short clips from stationary audio recordings shown to Rezaian's and Rosenbledt's counsel during proffer sessions convinced their clients to plead guilty. See Post-Hr'g Br. at 17–21; Reply at 18–21. Not so. For one thing, Rezaian's attorneys expressed an interest in cooperating before being shown the offending clip. And for good reason. The government had powerful evidence against their client from the pen registers and search warrants alone, to say nothing of the trash searches, photographs, videos, and anticipated testimony from informants, case agents, and alleged co-conspirators who had since struck a deal. Granted, the record is unclear just how much Rezaian and his attorneys knew going into the meeting. But the more they knew, the stronger their initial interest in cooperating; the less they knew, the more powerful the presentation. Either way, no dice.

If that were not enough, the government has represented that it "could have shown the audio of the same event" through lawful recordings obtained by CHS-RG and UCE, both of whom were present for the incriminating conversation. See Opp'n at 14. Defendants' conclusory rejoinder that this independent source was somehow less persuasive and/or should not matter "[a]s a matter of deterrence," Reply at 20 & n.18, is unpersuasive.[12] And even if all that were not enough, Rezaian's business partner, Montalvo, pleaded guilty during the six-month gap between the presentation and Rezaian's eventual guilty plea. Rosenbledt's position is basically the same, save that several more people, including Rezaian, had already pleaded guilty by the time he followed suit.

In short, for both Rezaian and Rosenbledt, there was straw enough to break the camel's back several times over.

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[11] The record also makes clear that the government had ample reason apart from the stationary audio recordings to pursue both pen registers and search warrants. Cf. Bah, 794 F.3d at 633 n.11 (noting that defendants never argued that evidence discovered during the first search prompted, and thus tainted, the decision to pursue a warrant for the second search).

[12] Clips shown after pleading guilty could not have influenced that decision.

D.

Finally, Defendants urge the Court to suppress, under its "supervisory authority," all testimony from three FBI agents, certain refreshed testimony from CHS-RG, and all evidence obtained regarding certain properties and on certain dates.[13] Post-Hr'g Br. at 40–48. But as the Supreme Court made clear in United States v. Payner, 447 U.S. 727 (1980), that authority is no license to "disregard the considered limitations of the law [the Court] is charged with enforcing."[14] Id. at 737. So just as suppressing evidence unlawfully seized from a third party in Payner would have been a "substitution of individual judgment for the controlling decisions" of the Supreme Court, id., so too would suppressing the foregoing evidence absent the requisite causal links to the underlying violation here. And by asking the Court to act under its supervisory authority, rather than the Fourth Amendment or Title III, Defendants effectively concede what by now should be clear: no such links exist.

That Agent X unlawfully obtained evidence on Date Y regarding Property Z does not put all evidence lawfully obtained by Agent X, on Date Y, or regarding Property Z off-limits for all time. It puts the offending evidence off-limits, along with other evidence discovered as a proximate result of the violation, but that's it.[15] See Smith, 155 F.3d at 1060. So other than the stationary audio recordings themselves, nothing else need (or may) be suppressed on this record.[16] That reality is due not to records shoddily kept, but to abundant evidence lawfully obtained.

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[13] They also request—without citation—an instruction informing the jury that agents "illegally recorded conversations, thereby violating Defendant[s'] . . . rights, and that the agent's memory may be tainted by those illegal recordings." Post-H'rg Br. at 41 n.21. The Court DENIES the request.

[14] Indeed, absent "a fraud upon the court in addition to a violation of the defendant's rights," the doctrine does not apply. United States v. Cortina, 630 F.2d 1207, 1216 (7th Cir. 1980). Nothing of the sort happened here. See Part III.B; Reply at 30 (noting that some recordings were "mislabeled").

[15] So without more, it is of no moment that the Park Pacifica deal "was discussed on not one but three illegal recordings," Post-H'rg Br. at 32 (emphasis in original).

[16] Defendants' quite rightly abandon their initial request to suppress testimony from CHS-RG regarding recollections refreshed with a stationary audio recording. See Reply at 25–33; Surreply at 18 n.10. A lawful recording captures the very same interaction, while the government has represented that it will not use stationary recordings to refresh the recollection of any witness at trial. Opp'n at 47.

* * *

For the foregoing reasons, the Court DENIES Defendants' motion to suppress further evidence as fruit of the poisonous tree and DIRECTS the parties to appear on August 2, 2017 at 2:00pm for trial setting.[17]

IT IS SO ORDERED.

Dated: July 18, 2017

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

[17] Assuming Farag still wishes to waive his right to be present on this date, see Waiver (dkt. 247), his request is GRANTED.