UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No.08-10071-RGS**
	)	
BRIMA WURIE	)	

OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

The defendant moves the Court to suppress any and all evidence seized by the police as the result of a drug investigation commenced on September 5, 2007. His motion should be denied in its entirety because each step the police took during their investigation, from arresting the defendant to executing a search warrant at his residence, was constitutionally permissible.

On that date, trained and experienced members of the Boston Police Department Drug Control Unit observed the defendant selling drugs in South Boston, and placed him under arrest only after confirming with the drug buyer that their observations were correct. By conducting a thorough investigation with information obtained during a lawful search of the defendant incident to arrest, the police ultimately recovered over 215 grams of cocaine and a stolen firearm from the defendant's apartment.

The defendant's motion fails to state any legitimate reason for the suppression of the drugs and gun (and other items) recovered as a result of the defendant's arrest. He alleges in conclusory fashion that the police had no probable cause to arrest him following the drug deal, but fails to present any explanation for this position.

Further, there is no support for his empty assertion that the police violated his constitutional rights when they seized his cell phone and keys following his arrest. Where the defendant has submitted only a perfunctory affidavit (several paragraphs of which are not even based on his personal knowledge) and has failed to contest any of the material facts of this case, his motion should be summarily denied; there is no basis for the Court to hold an evidentiary hearing.

FACTS

On September 5, 2007, shortly before 6:45 p.m., Sergeant Detective Paul Murphy, a twenty-two year veteran of the Boston Police Department and the supervisor of the Area C-6 Drug Control Unit (assigned to cover South Boston and parts of Dorchester), was driving past the L'il Peach convenience store on Dorchester Avenue. See Affidavit of Paul W. Murphy, Jr. ¶1-2, attached hereto as Exhibit 1 ("Murphy Aff."). He saw a man, later identified as Fred Wade, age 51, talking on a cell phone and watching cars as they drove by the store's parking lot. Id. ¶2. After approximately five minutes, Sgt. Det. Murphy observed a white 2007 Nissan Altima sedan pull into the parking lot and stop next to Wade. Id. The only occupant of the car was the driver, later identified as the defendant, Brima Wurie. Id. Wade got into the front passenger seat and the defendant drove from the lot, turning left onto Dorchester Avenue toward D Street. Id.

While Sgt. Det. Murphy waited for additional drug unit officers to arrive, he followed directly behind the Altima on Dorchester Avenue. Id. ¶3. The defendant drove slowly for approximately one hundred and fifty yards up Dorchester Avenue, made a u-turn, and stopped in the middle of Dorchester Avenue across from the L'il Peach

store. Id. Both the defendant and Wade appeared to be moving within the car. Id. Sgt. Det. Murphy watched Wade exit the car, cross the street and enter the store. The Altima then drove away. Id.

Sgt. Det. Murphy, based on his years of training and experience, believed that a drug transaction had taken place. Id. ¶4. The activities he witnessed were significant because a popular method of selling drugs in South Boston is by car delivery: the parties negotiate a price for the drugs over the phone, the buyer proceeds to an agreed-upon location, the drug dealer arrives in a car, and the parties quickly complete the sale in the car. Id. While completing the sale, the parties often drive a short distance -- around the block or up a section of street and back -- in order to try to blend in and avoid police surveillance. Id. Sgt. Det. Murphy has arrested several dozens of drug dealers that have employed this method of delivery service. Id.

After making these observations, Sgt. Det. Murphy broadcast the make, model and license plate number of the defendant's vehicle to the other members of his squad. Id. ¶5 One member of the squad, Officer Boyle, arrived and went into the L'il Peach store with Sgt. Det. Murphy. Id. Sgt. Det. Murphy and Officer Boyle stopped Wade as he was leaving the store and found two plastic bags of crack cocaine in Wade's left front pocket. Id. Sgt. Det. Murphy believed that each bag held an "8-ball," a slang term describing 3.5 grams of crack cocaine. Id. After Wade was read his Miranda warnings, he said that he bought the drugs from "B," the male driving the Altima. Id. He also said that "B" lives in South Boston and sells large amounts of crack cocaine in amounts no smaller than an "8-Ball." Id. Wade said

he had purchased cocaine several times from "B," usually in South Boston, but sometimes at "B's" father's house off of Topliff Street in Dorchester. Id. On those occasions, Wade would go to the house and wait for "B" to drive there and sell him cocaine. Id.

Sgt. Det. Murphy contacted Officer Smigliani who had been following the defendant in the Altima, and told him that Wade admitted buying crack cocaine from the defendant. Id. ¶7. The defendant parked his car near the intersection of Dorchester Avenue and Silver Street in South Boston. Id. After exiting the Altima, Officer Smigliani arrested the defendant for distribution of cocaine and read him his Miranda warnings. Id. The car the defendant was driving was a rental car. Id.

The defendant was taken immediately to the Area C-6 police station, located approximately one-half mile from where he was arrested. Id. ¶8. At the station, as is standard procedure, the defendant was searched incident to arrest and his personal property was inventoried. Id. Two cell phones and $1,275.00 were recovered from the defendant. Id.

Approximately 5-10 minutes after the defendant arrived at the station (and prior to being booked), Officers Kevin Jones and Robert England, members of the C-6 Drug Control Unit, noticed that one of the cell phones recovered from the defendant was repeatedly receiving calls from a number identified as "my house" on the external caller ID screen on the front of the phone. See Affidavit of Robert England ¶5, attached hereto as Exhibit 2 ("England Aff."). About 5 minutes after it began ringing, officers opened the phone to look at the phone's call log. Id. ¶6. They found a photo of a young black female holding

a baby as the phone's "wallpaper." Id. By pressing one button they were able to access the phone's call log. Id. From there, by pressing one button, they were able to determine that the calls appearing as the "my house" caller ID reference were from the phone number "617-315-7384." Id. When Officer Jones typed that phone number into the Internet website "AnyWho" (www.anywho.com), the number came back listed to "Manny Cristal" of 315 Silver Street in Boston. Id. ¶7. Officers did not search the "contacts" or access any other information contained within the defendant's phone. Id. ¶8.

Sgt. Det. Murphy read the defendant his Miranda warnings a second time. Murphy Aff. ¶10. The defendant stated that he lived at 51 Speedwell Street in Dorchester and that he was in South Boston "cruising around." Id. He denied stopping in the L'il Peach parking lot, denied giving anyone a ride, denied speaking with anyone in South Boston that day, and denied selling cocaine. Id.

Sgt. Det. Murphy suspected, based on the large amount of cash, the two cell phones[1], the defendant driving a rented car[2], the amount of drugs found on Wade, and what Wade told him about the quantities of drugs the defendant typically sold, that the defendant may have a large quantity of drugs stored somewhere. Id. ¶11. As Sgt. Det. Murphy knows from his training and experience, when a drug dealer sells relatively large amounts of drugs, he typically keeps the drugs at his residence or a "stash house." Id. When meeting with a drug buyer to make a sale, the drug dealer may only carry with him the

[1] Often times a drug dealer uses more than one cell phone – one for arranging drug deals and another for personal use. Murphy Aff. ¶11

[2] Drug dealers with a more lucrative business often use rental cars to prevent their personal cars from being seized should they get caught selling drugs. Murphy Aff. ¶11

amount of drugs he has agreed to sell to the drug buyer to (1) avoid being robbed of additional drugs or (2) being caught by the police with a significant amount of drugs. Id.

Sgt. Det. Murphy also believed that the defendant was lying about living in Dorchester, as drug dealers usually take steps to cover-up where they live because, as described above, they often store their drugs and drug packaging materials there. Id. ¶12. Wade told Sgt. Det. Murphy that the defendant lived in South Boston, the defendant was parking his car at the corner of Silver Street and Dorchester Avenue in South Boston when he was arrested, and the phone number he labeled as "my house" was associated with 315 Silver Street in South Boston. Id.

As a result, Sgt. Det. Murphy and other members of the Drug Control Unit went to investigate that address, taking with them the key ring seized from the defendant at the time of his arrest. Id. ¶13. There, they found three mailboxes outside the building's front door. Id. One mailbox had the names "Cristal" and "Wurie" written on it in handwritten ink. Id. The lights in the first floor apartment were on. Id. Sgt. Det. Murphy was able to see a young black woman talking on the phone from the sidewalk. Id. The woman appeared to be the same woman whose picture served as the "wallpaper" on the defendant's cell phone. Id.

Sgt. Det. Murphy took the defendant's keys and unlocked the door to the front entrance of 315 Silver Street and entered the common hallway area. Id. ¶14. There was only one apartment on the first floor to the right, and a locked door which led to the second floor. Id. Sgt. Det. Murphy tried all of the keys on the defendant's key

ring to open the door to the second floor, but none worked. Id. Sgt. Det. Murphy then tried the keys in the first floor apartment lock and found that one key unlocked the door. Id. He removed the key from the lock without opening the door, knocked on the door, and the black female, identified as Yolanda Walker, answered. Id.

Sgt. Det. Murphy identified himself as a Boston Police officer and asked Walker to step into the hallway. Id. ¶15. He and other members of the unit could smell the distinct odor of burnt marijuana coming from the first floor apartment. Id. Walker told Sgt. Det. Murphy that she knew the defendant and that he occasionally stayed at the apartment; she admitted he had been there the night before and earlier that day. Id. Based on the smell of burnt marijuana, officers suspected criminal activity within the apartment. Id. They conducted a protective sweep of the apartment in anticipation of "freezing" it and obtaining a search warrant. Id. Inside, officers encountered a sleeping child on a bed in the apartment who appeared to be the same child depicted on the defendant's cell phone. Id.

Sgt. Det. Murphy returned to the police station and asked the defendant why his keys opened the door to the first floor apartment of 315 Silver Street. Id. ¶16. The defendant stated "I don't know." Id.

Pursuant to the execution of a search warrant that night, among other things, officers recovered from the master bedroom:

- over 215 grams of crack cocaine;
- a Smith & Wesson .9 millimeter firearm containing five rounds of nine-millimeter ammunition;
- six rounds of .40 caliber hollow point ammunition;
- two large plastic bags, one medium-sized plastic bag, and one small plastic bag of marijuana;

- photographs and personal papers of the defendant and Walker;
- two cell phones;
- plastic bags, scissors, a scale, razor blades; and
- $250 in cash.

Id. ¶17

The Bureau of Alcohol, Tobacco, Firearms and Explosives found that the .9 millimeter firearm was stolen on April 5, 2005 from a home during a breaking and entering in Columbus, Georgia. Id. ¶18.

ARGUMENT

There is simply no merit to the defendant's bare assertions that the evidence in this case must be suppressed. The police had ample facts upon which to conclude that the defendant sold drugs to Wade, including Wade's own admission. Furthermore, the defendant's keys and cell phone were properly recovered and examined incident to his arrest. The information obtained from the defendant's cell phone call log was used to track down his residence, and the keys were used only to determine the whether the defendant resided at 315 Silver Street, not to gain entrance. Only after the police smelled burnt marijuana and obtained a search warrant did they seize additional contraband. From start to finish, the members of the Drug Control Unit conducted a lawful, thorough investigation.

A. The Defendant's Arrest Was Based on Probable Cause.

Probable cause to arrest the defendant arose when Sgt. Det. Murphy observed the numerous textbook signs of a drug transaction. Out of an abundance of caution, however, he and Officer Boyle spoke with the drug buyer, Wade, to confirm his well-grounded belief that the defendant had sold him drugs before making an arrest.

Probable cause to arrest arises where the "facts and circumstances known to the arresting officers [is] sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." United States v. Cleveland, 106 F.3d 1056, 1060 (1st Cir. 1997). "The probable cause standard does not require the officers' conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable." United States v. Winchenbach, 197 F.3d 548, 555-56 (1st Cir. 1999). Probable cause is determined by looking to the totality of the circumstances. See Illinois v. Gates, 462 U.S. 213, 230 (1983). Individual circumstances "are not to be dissected and viewed singly; rather they must be considered as a whole." United States v. Trullo, 809 F.2d 108, 111 (1st Cir. 1987).

Sgt. Det. Murphy, a highly trained and experienced officer in the Drug Control Unit, saw Wade making phone calls while waiting in an area known for high drug activity, looking intently as cars drove by. When Wade finally got into a car, he did so only to get dropped off barely minutes later in nearly the exact same location, while the driver departed. While in the car, both he and the defendant moved about a bit. While any of these acts independent of one another may appear insignificant on the surface, together, in that particular location, they are tell-tale signs of a drug transaction. United States v. Lamela, 942 F.2d 100, 102 (1st Cir. 1991) (the circumstances under which the officers acted "are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training"); United States v. Stanley, 915 F.2d 54, 56 (1st cir. 1990) ("[c]onduct innocent in the eyes of the untrained may

carry entirely different 'messages" to the experienced or trained observer").

Indeed, Wade had in his left front pocket 6.4 grams of crack cocaine.[3] After receiving his Miranda warnings, Wade explained, among other things, that he had just bought the drugs from "B," the male driving the Altima. He also told police that "B" lived in South Boston, sells large amounts of crack cocaine in amounts no smaller than an "8-Ball," and that he had purchased cocaine several times from "B," usually in South Boston.

Together with Sgt. Det. Murphy's observations, Wade's statement allowed the police to more than reasonably conclude that the defendant had committed a crime. The defendant's arrest was supported by ample probable cause.

B. The Search Of The Defendant's Cell Phone Was Incident To His Valid Arrest.

The de minimus search of the defendant's cell phone was lawful because it was incident to his valid arrest. "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of U.S. Const. amend. IV." United States v. Robinson, 414 U.S. 218, 224 (1978). A search incident to a lawful arrest allows an arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment

[3] In any event, the defendant has no standing to challenge the stop of Wade or suppress the drugs found as a result of that stop. Rakas v. Illinois, 439 U.S. 128, 134 (1979) ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."); Alderman v. U.S., 394 U.S. 165, 174 (1969) ("There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party."); see also United States v. Gambale, 610 F.Supp. 1515, 1522-23 (D. Mass. 1985).

or destruction, including closed containers. Id. at 226, 236 (holding crumpled package of cigarettes may be searched); United States v. Edwards, 415 U.S. 800, 803 (1974) ("both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence.").

The issue of warrantless searches of electronic devices, such as cell phones and pagers, has not been addressed directly by the First Circuit Court of Appeals. However, the existing caselaw on warrantless searches of analogous personal items may be logically and rationally applied to the search in this case. Such an extension of the law would be consistent with the developing caselaw in other jurisdictions, the vast majority of which have held that warrantless searches of cell phones (and pagers) are permissible when conducted incident to arrest (or pursuant to the automobile exception).[4]

[4] See United States v. Young, 278 Fed. Appx. 242, 245-46 (4th Cir. May 15, 2008) (upholding the warrantless search of a cell phone's text messages incident to arrest) (unpublished); United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007), cert. denied, 127 S. Ct. 2065 (2007) (upholding the search of a cell phone's call log and text messages incident to arrest); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1994) (finding reasonable the search of a pager found on the defendant at the time of his arrest because it was akin to searching a closed container, but particularly noting the possible destruction of information should the device receive additional incoming pages); United States v. Curry, 2008 U.S. Dist. LEXIS 5438, Criminal No. 01-100-P-H (D. Me., Jan. 23, 2008) (holding that a search of a cell phone's call log incident to arrest was lawful); United States v. Santillan, __F.Supp. 2d__, 2008 WL 3190032 (D. Ariz. July 14, 2008) (upholding search of cell phone's call log incident to arrest, as well as based on exigency); United States v. James et al., No. 1:06CR134-CDP, 2008 U.S. Dist. LEXIS 34864, (E.D.Mo. Apr. 29, 2008) (upholding search of a cell phone found in the defendant's car several days after the defendant's arrest pursuant to the automobile exception; court also held that the defendant had no privacy in his phone's call log, as information regarding incoming and outgoing calls is transmitted to the phone company); United States v. Fierros-Alavarez, 547 F.Supp. 2d 1206, 1209-10 (D. Kan. Apr. 23, 2008) (holding that a cell phone recovered from a car was searched pursuant to the automobile exception, as well as finding that the defendant had no reasonable expectation of privacy in the phone's call log, as this information is the same as that which may be obtained with a pen register – which is not a search under the Fourth Amendment); United States v. Valdez, Case No. 06-CR-336, 2008 U.S. Dist. LEXIS 9995, at *5-6 (E.D. Wis. Feb 8, 2008) (upholding warrantless search of cell phone's call log and address book pursuant to search incident to arrest exception); United States v. Lynch, 908 F. Supp. 284, 287-88 (D.V.I. 1995) (holding

The reasoning used in cases decided by the First Circuit regarding constitutionally permissible warrantless searches of personal belongings incident to arrest, such as wallets[5] and lists of names and phone numbers, should be extended to cell phones. Cell phones are akin to such items because they too are possessions individuals carry on themselves to have access to things such as phone numbers, addresses, and calendars.

One such case which highlights the existing First Circuit caselaw on searches of personal belongings containing individuals' names and phone numbers is United States v. Sheehan. In that case, the defendant was pulled over by police when the last four digits of his license plate were broadcast as possibly being involved in a bank robbery. United States v. Sheehan, 583 F.2d 30, 31 (1st Cir. 1978). Due to an outstanding motor vehicle warrant, the police placed the defendant under arrest and took him to the station. Id. While there, the police searched his wallet incident to arrest and found a paper with names and phone numbers on it, one of which turned out to be the name of someone involved in the robbery. Id. at 31. A police officer photocopied that paper, even though he admitted it had nothing to do with the reason the defendant was arrested, and returned the original to the defendant's wallet. Id.

---

that a pager found on the defendant at time of arrest could be searched incident to arrest, even though the defendant no longer had access to it once in police custody, noting analogous case where courts have allowed searches of address books and wallets); United States v. Chan, 830 F. Supp. 531, 535 (N.D. Cal. 1993) (holding that a pager found on the defendant at the time of his arrest could be searched incident to arrest without a warrant, explaining that the numbers in the phone's memory were similar to contents in a closed container).

[5] In United States v. Uricoechea-Casallas, 946 F.2d 162, 165-66 (1st Cir. 1991), the court allowed a search of the defendant's wallet incident to arrest.

The defendant conceded that the search of his wallet was legal, but argued that copying the paper with names and phone numbers constituted an unlawful seizure. Id. The Court dismissed this argument, and explained that the police are not prevented from using information obtained during a search incident to arrest for one crime to investigate another crime. Id. at 32. "[T]he Supreme Court [in Edwards] has made it increasingly clear that a lawful arrest justifies a special latitude of both search and seizure of things found on the arrestee's person." Id. In fact, the Court found that copying the names and phone numbers on a piece of paper taken from a robbery suspect's wallet was the type of "lead . . . that any careful investigator would follow up." Id.

Here, conducting a very narrow search of the defendant's call log to determine that the "my house" phone number was "617-315-7384" is almost exactly like copying a piece of paper containing names and phone numbers. Although technology has evolved since Sheehan to allow people to convert their pieces of paper to electronic data, this is a distinction without a difference. Both this case and Sheehan involve limited searches of personal belongings incident to arrest, resulting in the police obtaining a phone number pertinent to an ongoing investigation.

The caselaw developing in other jurisdictions is also applicable here. In particular, the Fifth Circuit Court of Appeals' holding in United States v. Finley provides guidance on warrantless searches of cell phones. United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007), cert. denied, 127 S. Ct. 2065 (2007). That Court found the post-arrest search of a cell phone's call log and text messages lawful

as a search incident to arrest. Id. at 259-60. There, the defendant drove an individual to sell drugs to a cooperating witness. Id. at 253. After the exchange of drugs and money, both the defendant and his passenger were arrested. Id. at 254. A cell phone was taken from the defendant's pocket; thereafter, both the defendant and his passenger were taken to the passenger's home where a search warrant was being executed. Id. While there, a special agent with the Drug Enforcement Agency ("DEA") searched the defendant's cell phone call log and text messages. Id.

The defendant filed a motion to suppress, arguing that while the phone was permissibly seized, the warrantless search of its contents was unlawful. Id. at 259-60. The Court dismissed this argument swiftly, and held without hesitation that the warrantless search was permissible incident to arrest. Id. at 260. The Court's holding was not affected by the fact that the defendant had been moved from the scene of his arrest to the passenger's home, as it found that the administrative processes incident to the arrest and custody had not been completed and the search was still substantially contemporaneous with the defendant's arrest. Id. n.7.

The United States District Court for the District of Maine recently addressed the warrantless search of a cell phone incident to arrest, and followed the Finley Court's lead. In United States v. Curry, the defendant was targeted in a sting operation set-up by the Scarborough, Maine police and DEA. United States v. Curry, Criminal No. 01-100-P-H, 2008 U.S. Dist. LEXIS 5438, at *2 (D. Me., Jan. 23, 2008). A confidential informant arranged, via cell phone, to buy crack cocaine from two men, one of whom was the defendant. Id. at *2-

3. Immediately following the drug sale, the defendant was tackled and placed in cuffs. Id. at *5. A cell phone was found half-way out of one of his pockets, while another was found beneath him. Id. Back at the police station, an officer began searching the cell phone's contents for evidence of drug trafficking. Id. at *8. The Court held that the search of the phone, like that in Finley, was substantially contemporaneous with the arrest because it took place within a half-hour of the arrest and in close proximity (at the police station) to the scene of the drug bust. Id. at *29-30.[6]

The search of the defendant's cell phone in this case is similar to those conducted in Curry and Finley (and other cases cited in note 4). It was substantially contemporaneous with and in close proximity to the scene of the defendant's arrest, and limited to discovering information pertinent to the ongoing drug investigation.[7]

Drug Control Unit officers immediately transported the defendant to the police station following his arrest; the police station is located about one-half mile from where he was arrested. There they recovered two cell phones from him. Only 5-10 minutes later, Officers Jones and England noticed that one phone was repeatedly receiving calls from a number identified on the external caller ID screen as "my

[6] The Court rejected the defendant's argument that it should adopt the holding in an unpublished decision, United States v. Park, No. CR 05-375 SI, 2007 U.S. Dist. LEXIS 40596, 2007 WL 1521573, at *6, *8-*9 (N.D. Cal. May 23, 2007). In that case, the Court found that cell phones are analogous not to personal possessions but to possessions within an arrestee's control such as luggage or closed containers. It consequently held that once seized, the police needed a warrant to conduct a search. Id. at *21-22. Also distinguishable in Park, as noted by the Curry Court, was the fact that the search took place *over one and a half hours after* the defendant's arrest. The Park case appears to stand alone.

[7] In addition, this Court could also hold, like the court in Fierros-Alavarez, supra note 4, that the search was permissible because the defendant had no expectation of privacy in the phone's call log since that same information could be obtained via pen register. See 547 F.Supp. at 1209-10.

house." This caller ID could be seen in plain view on the front of the phone. Within 5 minutes, they opened the phone and found a photo of a young black female holding a baby as the phone's "wallpaper." They looked at the phone's call log by pressing a single button, and from there, by pressing another button, determined that "617-315-7384" was the phone number linked to the "my house" caller ID reference.

As described above in detail, Sgt. Det. Murphy suspected that the defendant was storing large quantities of drugs at his home, and that he lied to the police when he told them he lived on Speedwell Street in Dorchester. While officers could arguably have searched the defendant's entire phone, they limited it to gathering information specific to the ongoing drug investigation, i.e., the location of his residence.

C. The Use Of Keys To Access The Common Hallway Did Not Constitute A Search.

Sgt. Det. Murphy's use of the defendant's keys to gain access to the common area of 315 Silver Street did not constitute a search because the defendant did not have a reasonable expectation of privacy in the common hallway. "It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building." United States v. Hawkins, 139 F.3d 29, 31 (1st Cir. 1998) (a basement containing storage spaces assigned to different apartments in the building was a common area of the apartment building, and that the appellant therefore had no reasonable expectation of privacy); United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977) ("the locks on the doors to the entrances of the

apartment complex were to provide security to the occupants, not privacy in common hallways").

Without a privacy interest, the defendant lacks standing to challenge the entry. See United States v. Garner, 338 F.3d 78, 80 (1st Cir. 2003) ("without a privacy interest in the common areas of the apartment building the defendant has no standing to challenge the search and seizure of the drugs and firearm found in a hole in the basement wall").

D. Insertion Of Keys Into The Lock Of Apartment Number One Did Not Constitute A Search.

The defendant cannot challenge Sgt. Det. Murphy's insertion of his key in the lock of Apartment 1 because mere insertion of a key does not constitute a search. See Hawkins, 139 F.3d at 32, n. 1. This long-standing proposition was explained in United States v. Lyons, 898 F.2d 210, 213 (1st Cir. 1990). In that case, the police used keys seized from the defendant incident to a lawful arrest. Id. These keys were then inserted into the padlock of storage unit to determine whether or not the defendant had access to and control of that unit. Id. at 212. Once they confirmed that the defendant's key could open the padlock, the police removed the key from the padlock without entering the storage unit. Id. A search warrant was obtained and the unit was lawfully searched. Id. The court upheld the steps taken by the police, reasoning that no search occurred prior to the issuance of the warrant because the use of the keys was merely a means of identifying an area to which the defendant had access. Id. at 213.

Here, too, Sgt. Det. Murphy inserted the defendant's key into the door lock and turned it to see if the defendant resided in Apartment 1. He did not use the key to enter the apartment; rather, he knocked on the door, which was opened by Ms. Walker. It was not until the police decided to "freeze" the apartment upon smelling burnt marijuana that they entered to conduct a protective sweep. Thereafter, they obtained a search warrant and seized the contraband described above.

E. The Protective Sweep and Freezing Of Apartment Were Permissible.

After Ms. Walker voluntarily opened the door upon Sgt Det. Murphy's knock, the officers could smell burnt marijuana. The smell of burnt marijuana provided probable cause to believe illegal activity was taking place within the apartment.[8] See United States v. Staula, 80 F.3d 596, 602 (1st Cir. 1996) (smell of burnt marijuana furnished law enforcement with probable cause to search vehicle).

At that time Sgt. Det. Murphy applied for and received a search warrant for the apartment. Only after obtaining a search warrant did officers seize over 215 grams of crack cocaine; a Smith & Wesson .9 millimeter firearm containing five rounds of nine-millimeter ammunition; six rounds of .40 caliber hollow point ammunition; two large plastic bags, one medium-sized plastic bag, and one small plastic bag of marijuana; photographs and personal papers of the defendant and Walker; two cell phones; plastic bags, scissors, a scale, razor blades; and $250 in cash.

[8] The defendant does not allege an expectation of privacy in the apartment and therefore cannot challenge the protective sweep, freezing, issuance of the search warrant for and subsequent search of the apartment.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny the defendant's Motion to Suppress in its entirety.

Respectfully submitted

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY

By: /s/ GRETCHEN LUNDGREN
GRETCHEN LUNDGREN
Special Asst. U.S. Attorney
One Courthouse Way
Boston, MA
(617) 748-3100

October 16, 2008