UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. CASE NO: 2:16-cr-68-FtM-38CM

JORGE GUERRERO-TORRES

OPINION AND ORDER[1]

This matter comes before the Court on Defendant Jorge Guerrero-Torres' Motion to Suppress. (Doc. 56). The Government filed a Response in Opposition. (Doc. 67). In addition to the parties' briefs, the undersigned held a two-day evidentiary hearing at which Defendant was present and represented by counsel. At the conclusion of the hearing, the Court denied Defendant's motion for lack of standing with a written order to follow. This is that order.

INTRODUCTION

Defendant has been indicted for possessing and producing child pornography that law enforcement allegedly recovered from his cellular phone. (Doc. 1). Although Defendant concedes that the cell phone at issue is exclusively his device, he moves to suppress the phone's contents and any post-*Miranda* statements as "fruit of the poisonous tree" of an illegal search. (Doc. 56). The Government asserts that Defendant

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lacks standing to bring the motion because he abandoned the phone and thus lost any reasonable expectation of privacy in it. The Court agrees that Defendant lacks standing.

BACKGROUND

Defendant called one witness at the hearing – himself. He also introduced one exhibit. (Doc. 74). The Government, in turn, called the following nine witnesses:

- Fortunato Mazzotta, a detective with the Lee County Sheriff's Office ("LCSO");
- Aurelio Almazan, a sergeant with the Okeechobee Police Department;
- Jose Garduno, a road patrol officer with the Okeechobee County Sheriff's Office;
- Tina Marsian, an agent with the Florida Department of Law Enforcement ("FDLE");
- Amanda Stephens, an FDLE senior crime intelligence analyst;
- Jeffrey Duncan, a special agent to the electronic surveillance support team for the FDLE;
- Michael Lacombe, an LCSO digital forensic specialist;
- Antonia Aguirre-Torres, a private individual who helped law enforcement apprehend Defendant; and
- Steven Morehouse, a private individual who found Defendant's cell phone.

(Doc. 70). The Government also introduced twelve exhibits. (Doc. 73). Based on this evidence, the Court makes the following findings of fact material to the motion to suppress.

This case originates from a missing child investigation. Although the child's disappearance is unrelated to Defendant's child pornography charges, it is relevant to explain law enforcement's interaction with him between May 29, 2016 and June 4, 2016.[2]

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[2] All dates relevant to this case occurred in 2016 unless otherwise stated.

On the morning of May 29, LCSO received a report that a child went missing from her home during the night. A statewide search for the child ensued that involved multiple law enforcement agencies. The child's mother mentioned Defendant's name to police because, among other things, he had moved out of her home a few weeks earlier. This information prompted Tina Marsian, an FDLE agent, to speak with Defendant at his new home in Orlando. Defendant denied any knowledge of the child's whereabouts and said that he was in a car accident on May 28 while driving to Okeechobee, Florida.

On May 31, LCSO obtained a search warrant to recover records and historical cell cite location for three cell phones, including Defendant's white Samsung Galaxy 5 with the number 305-785-0205. Contrary to what Defendant told Agent Marsian, his cell tower records placed his phone near the child's home between 12:00 a.m. and 3:00 a.m. on the night of her disappearance. The phone then travelled back to Orlando but stopped for periods at several locations along the way. Later that afternoon, the United States Marshal's Florida Regional Fugitive Task Force got a second warrant to track Defendant's cell phone.

Also on May 31, Detective Mazzotta met with the child's mother in hopes of recovering any new information. During that conversation, Detective Mazzotta learned that Defendant might have had an inappropriate relationship with the child prior to her disappearance. As such, Agent Marsian arranged a second in person meeting with Defendant. This time Detective Mazzotta and his partner, Detective John Lathrop, planned to attend.

Around 4:30 p.m. that day, Detectives Mazzotta and Lathrop landed at the Orlando airport, which was approximately ten to fifteen minutes from Defendant's home. While en

route, Defendant called Agent Marsian, who told Defendant that they were almost at his home. When the officers arrived, Defendant was not there and nowhere to be found. Agent Marsian called his cell phone at least ten times and left him voicemail messages – he never answered or returned her calls. One of Defendant's roommates called him too, but again he did not answer.

Defendant offers a slightly different narrative. He concurs that he had a meeting with officers on May 31, and that he talked to Agent Marsian that afternoon. But he puts the scheduled meeting around an hour or so earlier. According to Defendant, the officers did not show up at his home when they said they would. He then went for a walk and got lost. And while lost, Defendant testified that it rained.

The rain is important to this case because Defendant stated that his cell phone got soaked in his pants' pocket. He removed the phone's battery twice to shake out excess water. That did not work, because the phone did not power on after he reinserted the battery. Defendant testified that he knew the phone was unfixable and that he needed a new one because of his previous experience with water-damaged cell phones. Consequently, he explained that he threw the phone in a ditch that ran parallel to a public street and in front of an apartment complex. The ditch was about one mile from his home.

The next day, Steven Morehouse found Defendant's phone in the ditch while cutting the grass. Morehouse testified that he found the phone powered on, albeit with low battery, with around twenty-seven (27) missed phone calls. He showed the phone to his supervisor, who told Morehouse that he could keep the phone if nobody claimed it. At some point that day or the next, the cell phone rang and Morehouse answered it. He spoke to an unknown female caller and told her that he would meet her or the phone's

owner to return it. According to Morehouse, the female said that he could keep the phone and that she did not have any use for it. On June 3, FDLE agents traced Defendant's cell phone to Morehouse in Daytona Beach, Florida. FDLE agent Jeffrey Duncan retrieved it from Morehouse and gave it to Detective Mazzotta.

Also on June 3, Defendant attempted to enlist help to reach Texas or the Mexican border. Defendant and his friend met the friend's sister, Antonia Aguirre, at her beauty salon in Okeechobee in hopes that she could facilitate his travel. Aguirre initially advised Defendant that she would think about helping him. But Aguirre contacted the police later that day when she learned that Defendant was a possible suspect in a child's disappearance. From there, Aguirre, in coordination with law enforcement, told Defendant that she would help him and arranged a meeting. Around 8:00 p.m. that evening, Aguirre picked up Defendant who was hiding in the woods. The police thereafter stopped Aguirre's car. They detained Defendant for questioning and transported him to the Okeechobee County Sheriff's Office.

The next day, Detective Mazzotta gave Defendant's phone to the LCSO Digital Forensics Unit to conduct a forensic examination in hopes of finding information on the still-missing child. Although no such information was found, the Digital Forensics Unit recovered deleted images of child pornography.

Against this factual backdrop, a federal grand jury returned a two-count indictment against Defendant for possession and production of child pornography in violation of 18 U.S.C. §§ 2251, 2252. This motion to suppress followed.

DISCUSSION

The Fourth Amendment protects people from "unreasonable searches and seizures" by the government. U.S. Const. amend. IV. To have standing to assert a Fourth Amendment violation, a defendant must establish that he has a legitimate expectation of privacy in the item searched. *See Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978); *United States v. Brazel*, 102 F.3d 1120, 1147-48 (11th Cir. 1997). A defendant's legitimate expectation of privacy exists when he can show (1) a subjective expectation of privacy in the item searched that (2) society is prepared to recognize as objectively reasonable. *See United States v. Ford*, 34 F.3d 992, 995 (11th Cir. 1994) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Determining whether an individual has a legitimate expectation of privacy requires a careful analysis of the facts of the particular case, and the individual's expectation must be justifiable under the circumstances. *See Rakas*, 439 U.S. at 142-48; *United States v. Cooper*, 133 F.3d 1394, 1398 (11th Cir. 1998). The defendant bears the burden of showing a legitimate expectation of privacy. *See United States v. Ramos*, 12 F.3d 1019, 1023 (11th Cir. 1994).

Pertinent here, "Fourth Amendment claims do not lie when the defendant has abandoned the searched property." *United States v. Sparks*, 806 F.3d 1323, 1341-42 (11th Cir. 2015) (citations and footnote omitted). "It is settled law that one has no standing to complain of a search or seizure of property he has voluntarily abandoned." *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973) (en banc).[3] "In determining whether there has been an abandonment, the critical inquiry is whether the person prejudiced by

[3] Pursuant to *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), opinions of the Fifth Circuit issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit.

the search . . . voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Ramos*, 12 F.3d at 1023 (emphasis, internal quotations, and citation omitted). "[T]he issue of abandonment for Fourth Amendment standing purposes is not abandonment in the 'strict property-right sense.' Rather, courts use a 'common sen[s]e approach' in evaluating abandonment." *Sparks*, 806 F.3d at 1342 (quoting *United States v. Edwards*, 441 F.2d 749, 753 (5th Cir. 1971)). While the defendant must prove a legitimate expectation of privacy in the areas searched, the government must prove abandonment. *See Ramos*, 12 F.3d at 1023.

The abandonment doctrine hinges on the individual's intent to abandon. Courts "assess objectively whether abandonment has occurred, based primarily on the prior possessor's intent, as discerned from statements, acts, and other facts. All relevant circumstances existing at the time of the alleged abandonment should be considered." *Sparks*, 806 F.3d at 1342. Intent is inferred from the defendant's words, actions, and other circumstances that indicate a lack of privacy expectation over the discarded item. *Id.* at 1353; *see also Colbert*, 474 F.2d at 176 (stating that intent to voluntarily abandon may be inferred from "words spoken, acts done, and other objective facts"). For instance, abandonment is common in criminal cases when a suspect throws, drops, or discards an incriminating item or contraband like drugs or weapons in anticipation of police interaction. *See, e.g.*, *California v. Hodari*, 499 U.S. 621, 629 (1991); *United States v. Tinoco*, 304 F.3d 1088, 1117 (11th Cir. 2002). Trash left outside of a home or dropped in the garbage can of another person or business is another common situation involving abandoned evidence. *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 40 (1988). The idea in both

scenarios is the individual discarded an item with the intent of not maintaining ownership over it. Along these lines, the abandonment doctrine has been extended to opening and searching discarded containers, because once abandoned, the loss of any privacy expectation applies to both the container and anything inside. *See, e.g.*, *United States v. McKennon,* 814 F.2d 1539, 1546 (11th Cir. 1987) (per curiam) ("This Court has specifically held that when a claimant relinquishes possession and disclaims ownership of an article of luggage, any expectations of privacy become illegitimate." (citation omitted)); *United States v. O'Bryant*, 775 F.2d 1528, 1534 (11th Cir. 1985) (concluding that the defendant "did not have a reasonable expectation of privacy in a briefcase that was discarded next to an overflowing trash bin on a busy city street").

Although the abandonment doctrine has long been in place, Defendant argues that this case does not align with current precedent. This is because, according to him, the item discarded was a passcode-locked cell phone. To be clear, Defendant concedes that he ditched the *physical* cell phone on May 31. But he argues that he still had a reasonable expectation of privacy in the phone's *contents* because the phone was password-protected and because he would not have discarded it but for his belief that the phone was broken. (Doc. 56 at 13). In other words, he asserts that even if the phone worked when he discarded it, the contents were not accessible without his passcode, and thus he maintains standing to challenge the search of his phone's contents. (*Id.* at 12). Defendant's argument is novel and extrapolates from the Supreme Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2016).

In *Riley*, the Court examined how the search incident to arrest exception to the warrant requirement applied to modern cell phones. The Court reiterated that concerns

for officer safety and evidence preservation justify the search incident to arrest exception, and that any such search is limited to the arrestee's person or area of immediate control. During a search incident to arrest, an officer may examine containers like cigarette packs discovered on the arrestee or in an area that he might gain possession without a warrant. *Id.* at 2483 (citing *United States v. Robinson*, 414 U.S. 218 (1974)).

The Court, however, found that searches of data on cell phones are untethered to the justifications for a search incident to arrest. It reasoned that cell phones do not pose a safety risk to police because "[d]igital data stored a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate an arrestee's escape. . . . Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." *Id.* at 2485. The Court also elaborated that destruction of evidence does not justify a warrantless search because once officers separate the phone from the arrestee "there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* at 2486.

From there, the Court discussed an arrestee's privacy interest when taken into police custody. *Id.* at 2488. "The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Id.* The Court acknowledged that lower courts have applied the search incident to arrest exception to a variety of personal items carried by the arrestee. But the Court noted, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 2488-89.

The Court also outlined the quantitative and qualitative differences between cell phones and other items that could be found on an arrestee's person. *Id.* at 2489. Likening

cell phones to "minicomputers," the Court discussed the vast storage capacity of cell phones, the privacy implications that data storage causes, and the pervasiveness of the devices in today's society. *Id.* at 2489-90. The Court expressed concern that today nearly every adult stopped by the police will have a cell phone filled with revealing and sensitive information about its owner and "[a]llowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case." *Id.* at 2490. The Court further asserted that cell phones are qualitatively different from non-digital objects in the detailed personal information they contain such as internet search history, historical location information, and geographic tracking. *Id.* "Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home[.]" *Id.* at 2491 (emphasis in original).

Finally, the Court recognized that "even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Id.* at 2494. The Court recognized an exigent circumstance as one such exception:

> In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: . . . *a child abductor who may have information about the child's location on his cell phone*. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.

Id. (internal citations and footnote omitted) (emphasis added). To conclude its decision, the Court wrote, "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant." *Id.* at 2495.

Because of *Riley*, Defendant argues that the Supreme Court has placed cell phones on a pedestal above other property when it comes to warrantless searches. But Defendant reads *Riley* too broadly. *Riley* is limited to searches incident to arrest and explicitly left the door open for the fate of cell phones in other types of warrantless searches.

Abandonment is at issue here – not search incident to arrest. And that distinction makes a difference. The abandonment doctrine is conceptually different from a search incident to arrest, and thus the application to cell phones is different. Searching abandoned property is justified because an individual intended to relinquish ownership interest in the item, and thus he lost his privacy interest therein. Without a reasonable expectation of privacy, there can be no Fourth Amendment violation. In contrast, a suspect subject to a search incident to arrest has not relinquished ownership of any item. But police are nevertheless justified to search the arrestee's person and immediate area to ensure officer safety and prevent destruction of evidence.

Much of the Supreme Court's reasoning in *Riley* was devoted to why searching data on a cell phone did not fit the traditional justifications for a search incident to an arrest. That line of reasoning, as noted, is not applicable to the abandonment doctrine. The remaining reasoning in *Riley* was dedicated to an arrestee's privacy interests during a search incident to arrest. The undersigned is mindful of the privacy concerns with cell phones given their storage capacity and the myriad of data (*e.g.*, pictures, bank records,

medical records, text messages, internet history, etc.) stored on them. But there are no privacy interests with abandoned property, so the privacy concerns the Supreme Court expressed in *Riley* are not relevant to abandoned cell phones. Also, the prevalence of most adults having cell phones on their person or within their immediate control is a far cry from an individual who intentionally abandons a cell phone in a public place with no intent to reclaim it. Because of these differences, the Supreme Court's reasons for categorically excluding cell phones from searches incident to arrest do not extend to abandonment. Until the Supreme Court or Eleventh Circuit states otherwise, the long-standing precedent on abandonment binds this Court in this case.

Before the Court turns to applying the facts of this case to the settled abandonment doctrine, it has one more hurdle – *KC v. State*, 207 So. 3d 951 (4th DCA 2016). Defendant relies on this case because the Florida appellate court found exactly as he asks this Court to find, namely, accessing the contents of a password-protected cell phone without a warrant violates the Fourth Amendment. *Id.* at 982.

In *K.C.*, a fleeing suspect left a password-protected cell phone in a stolen car. The pursuing officer confiscated the phone, which sat at the police station for several months unclaimed. Because the police considered the phone to have been abandoned, the forensic unit unlocked the device, without a warrant, to determine its owner. Enter the defendant who was charged with burglary. The defendant successfully moved to suppress his cell phone's contents. He argued that the police could not search property that was passcode-protected without a warrant. According to the defendant, even though he abandoned the physical cell phone, he retained an expectation of privacy in its contents by virtue of the passcode protecting the phone. *Id.* at 953.

The Florida appellate court agreed with the defendant. It held that warrantless searches of abandoned cell phones, the contents of which are password protected, are *per se* unconstitutional. *Id.* at 956. It stated,

> [w]hile we acknowledge that the physical cell phone in this case was left in the stolen vehicle by the individual, and it was not claimed by anyone at the police station, its contents were still protected by a password, clearly indicating an intention to protect the privacy of all the digital material on the cell phone or able to be accessed by it.

Id. at 955. In reaching its holding, the court relied on and extended *Riley*. It was persuaded by *Riley*'s reasoning of how cell phones are quantitatively and qualitatively different from other objects that might be subject to a search. *Id.* at 953-54.

But it was not lost on the court that its decision was the minority view. Indeed, it noted that it agreed with the *dissenting* opinions in two state court cases addressing the same issue. *Id.* at 956-57 (citing *State v. Brown*, 414 S.C. 14 (S.C. Ct. App. 2015) and *State v. Samalia*, 186 Wash. 2d 262 (2016)). In *Brown*, the majority found that the police properly searched the defendant's passcode-locked cell phone without a warrant because the objective facts showed that he abandoned the device at the scene of the crime. *Id.* at 28-29 ("[I]n the case of a smartphone, the mere use of a passcode does not always lead law enforcement to conclude the owner of the phone retained an expectation of privacy in the phone and its contents when other objective facts to the contrary are available."). Although the dissent reached the opposite conclusion, it noted that "[t]he officers' delay in accessing the cell phones belies the presence of any exigent circumstances justifying the warrantless intrusion." *Id.* at 30-31 (citation omitted). Similarly, in *Samalia*, the majority found that "although [the defendant] initially had a constitutionally protected privacy interest in the cell phone and its data, he abandoned

that interest when he voluntarily left the cell phone in a stolen vehicle while fleeing from a lawful traffic stop." 186 Wash. 2d at 266, 272-73. The dissent, however, concluded that "[i]f government officials discover a cell phone and want to search its digital data for evidence of criminal activity, they may seize and secure the cell phone to preserve any evidence it may contain, but they must obtain a warrant before searching its digital data." *Id.* at 290-91.

Defendant urges this Court to adopt the logic of *K.C.* and the dissenting opinions in *Brown* and *Samalia*. The Court respectfully declines to do so. To start, *K.C.* is not binding on this Court. And for the reasons previously stated, the Court does not agree that the reasoning in *Riley* for why cell phones should not be subjected to a warrantless search incident to arrest applies to abandoned cell phones with or without a passcode. Recall that the Supreme Court was concerned about the capacity to store private information on a cell phone that far exceeds that of other physical objects. But abandonment is about intent, and when a person abandons a physical object, he maintains no right of privacy in the contents. This is fundamentally different from a search incident to arrest, and the decision in *K.C.* does nothing to persuade this Court otherwise. Also telling, the Supreme Court in *Riley* did not require law enforcement officers to obtain a warrant to search every phone that falls into their possession. *Riley*, 134 S. Ct. at 2494 ("[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone."). In fact, it recognized an exigent circumstance like the one here – a child abductor who may have information about the child's location on his cell phone. The law enforcement witnesses consistently testified that they were entrenched in a statewide

search for a missing nine-year old child who still has not been found to date. Time is of the essence in missing children cases, and from May 31 to June 5 when they searched his cell phone, Defendant was a lead suspect in the child's disappearance. This is a distinguishing fact from *K.C.* and the other dissenting opinions that Defendant cannot circumvent.

At bottom, the passcode on Defendant's cell phone does not save the day for him under the facts of this case. The Court sees no reasons to separate the contents of the cell phone from the physical device for purposes of abandonment. And, contrary to Defendant's argument, there is no rational basis from *Riley* or *KC* for the Court to do so.

Against the above law and analysis, the Court turns to the abandonment doctrine under the facts of this case. Considering all the relevant facts and circumstances on May 31 and the days before, Defendant's actions show that he intended to voluntarily and knowingly abandon his cell phone. Defendant testified that he knew the police were coming to Orlando to speak with him for a second time about the missing child. In fact, Defendant called Agent Marsian while she, Detective Mazzotta, and Detective Lathrop were en route to his home. And Agent Marsian told Defendant that they would be arriving within fifteen minutes. But Defendant was not there when the officers arrived – he was supposedly lost on a walk in a rainstorm. And while supposedly lost, Defendant discarded his cell phone in a ditch that ran parallel to a public road next to an apartment complex. That apartment complex is mowed weekly, which is how Steven Morehouse came to find the phone the next day. And Defendant knew that an individual named "Esteban"[4] found

[4] Esteban is the Spanish version of Steven.

his phone, but he did nothing to retrieve it. In fact, Defendant testified that he bought another cell phone after he discarded the phone at issue.

Regarding Defendant's claim that he only discarded his cell phone because it was waterlogged, the Court rejects his testimony as not credible. *See United States v. Castro*, 723 F.2d 1527, 1533 (11th Cir. 1984) (stating it is the district court's function to evaluate the credibility of witnesses when ruling on a motion to suppress evidence). Instead, the Court credits Morehouse's testimony on the phone's condition when he found it. Although the parties agree that it rained on May 31, Agent Marsian testified that she called Defendant several times before it rained and that he never answered or returned her calls. This is consistent with Morehouse's testimony that he found the cell phone powered on with low battery and twenty-seven missed calls. Morehouse stated that the phone looked brand new and undamaged when he found it in the ditch despite the weather's elements. Morehouse also testified that he answered a call on the phone, which indicates that the phone was not broken. Morehouse said that he was able to charge the phone and that he intended to keep it for his own use after his acquaintance bypassed the passcode. In testifying, Morehouse exhibited all the signs of credibility. His recitation of the events followed a logical pattern, he had no discernable interest in the outcome of the case, and he had no prior knowledge of or contact with Defendant. In the face of Morehouse's testimony, Defendant, who has an obvious interest in suppressing the phone's contents, was incredulous in stating that his phone was broken when he discarded it.

Defendant's actions after May 31 further show an intent not to reclaim his cell phone. Soon after discarding the phone, he withdrew thousands of dollars from a bank, paid a $250 taxi fare to travel from Orlando to Okeechobee, and arranged passage to

Texas or the Mexican border. Defendant also never attempted to contact the police after the May 31 scheduled meeting. In fact, the next time police had contact with Defendant was three days later when they stopped him in Okeechobee mid-pursuit for Texas or the Mexican border. Objectively speaking, Defendant made a voluntary and calculated decision to cease all efforts to reclaim his phone.

Turning to Defendant's passcode-protected position, his argument contravenes his testimony that he deleted the alleged child pornographic images on his cell phone prior to discarding the device. And to the extent that he relies on a smartphone application called Vault for a two-layer of password protection argument, that position falters given that the child pornography images recovered from his phone were not stored in that application.

It may be that Defendant did not expect the contents of his phone to become known to the police or other members of the public. But "[a]n expectation of privacy does not give rise to a Fourth Amendment protection . . . unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 U.S. at 40. Society would not accept as reasonable Defendant's claim to an expectation of privacy in a discarded cell phone – passcode or not – left on the side of a public road in an area accessible to pedestrians or other members of the public.

Taking the above facts and circumstances together, Defendant abandoned his cell phone and its contents and made no intent to reclaim possession or ownership over the device. The Court, therefore, finds that Defendant lacks standing to bring the motion to suppress.

Accordingly, it is now

ORDERED:

Defendant Jorge Guerrero-Torres's Motion to Suppress (Doc. 56) is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 17th day of May, 2017.[5]

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: Counsel of Record

[5] The Court enters this Order post-trial because of the extensive pretrial publicity surrounding Defendant's case. In this Order, the Court found Defendant not credible in his testimony on the so-called damaged condition of his cell phone when he discarded it. Consequently, the Court withheld issuing this written Order to avoid any potential prejudice to Defendant because the Court's finding on his credibility could have tainted potential jurors had they been selected for the jury and had Defendant elected to testify at trial.