IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 09-276 (JR)**
	)	
STEWART DAVID NOZETTE,	)	
	)	
Defendant.	)	
	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION TO SUPPRESS THE FRUITS OF THE SEARCH OF DEFENDANT'S FAMILY HOME, PERSON AND CAR

The United States of America, by and through its undersigned attorneys, respectfully opposes defendant's "Motion to Suppress the Fruits of the Search of Defendant's Family Home, Person and Car" (hereinafter "Motion"). In support of its opposition, the United States relies on the following points and authorities and such other points and authorities as may be cited at any hearing on this matter.

FACTUAL BACKGROUND

On the morning of October 19, 2009, law enforcement officers went to defendant's residence at [redacted], Chevy Chase, Maryland to execute a search warrant for the premises. United States Magistrate Judge William Connelly from the District of Maryland had signed the search warrant on October 16, 2009. In the affidavit in support of the search warrant, FBI Special Agent Paul Michael Maric set out in detail the probable cause to believe that defendant was involved in espionage related activities. Agent Maric first described his seven years of experience with the FBI, which included his assignment to the Counterintelligence Squad and his training in handling classified information. He also noted that prior to joining the FBI, he worked as a prosecuting attorney in Ohio. See Affidavit in Support of Application for

Search Warrant for [redacted] Chevy Chase, Maryland, attached as Exhibit A.

As probable cause for the location to be searched, Agent Maric stated, *inter alia*, the following regarding the undercover false flag operation (reproduced in relevant part by paragraph number):

> 42. On September 3, 2009, NOZETTE was contacted via telephone by an individual purporting to be an Israeli intelligence officer of the Mossad, but who was, in fact, an FBI undercover employee ("UCE"). During that call, NOZETTE agreed to meet with the UCE . . .
>
> 43. Later that day, NOZETTE met with the UCE and had lunch in the restaurant of the hotel. During the lunch, NOZETTE demonstrated his willingness to work for the Israeli Intelligence Service:
>
> "UCE: ….I'll just say it real quick and then we'll just move on. Quick, I wanna clarify something from the start.
>
> And I don't say it very often, but umm, I work for Israeli Intelligence…
>
> NOZETTE: Mm-hmm
>
> UCE:…Agency known here as Mossad.
>
> NOZETTE: Mm-hmm
>
> UCE: So from now on I'm not gonna say this. But if I say service…
>
> NOZETTE: Mm-hmm
>
> UCE: ….so you know what that, what it is. But I just wanna be sure, I'll let it out so we don't have any ambiguity later on. But….
>
> NOZETTE:….Mm-hmm
>
> UCE: How you doin'?
>
> NOZETTE: Good. Happy to be of assistance."

46. The UCE then asked NOZETTE if he would be willing to provide answers to Israeli questions about United States satellite information:

"UCE: [A]nswers to those questions. And, uh, so if you were to give me those answers. I mean what is it that, you know, what would you like in return? Is there anything?

NOZETTE: Oh, you could pay me."

47. The UCE then explained to NOZETTE that the Mossad had arranged for a "dead drop" communication system so that NOZETTE could pass information to the Mossad in a Post Office Box. The UCE also provided NOZETTE with a "clean phone" so that NOZETTE could send text messages or leave voicemail messages for the UCE.

48. NOZETTE then made the following statements:

"NOZETTE: Well okay. So let me get to the bottom line.

UCE: Yes.

NOZETTE: So actually there are two things that . . .

UCE: Yes please….

NOZETTE: A couple things I want.

. . .

NOZETTE: But you want me to be a regular, continuing asset?

UCE: Right.

NOZETTE: Which I'm willing to do.

. . .

NOZETTE: I don't get recruited by Mossad every day. I knew this day would come by the way.

UCE: How's that?

NOZETTE: (Laughs) I just had a feeling one of these days.

UCE: Really?

NOZETTE: I knew you guys would show up.

UCE: How you, um . . .

NOZETTE: (Laughs) And I was amazed it didn't happen longer with IAI.

UCE: Hm. I'm s-, I'm sure my, back at home, one of the few people had actually said it, but I, people did say I'm surprised you guys didn't come sooner than this but, um, um, but you . . .

NOZETTE: I thought it was working for you already. I mean that's what I always thought IAI was just a front."

. . .

55. On or about September 10, 2009 undercover FBI agents left a letter in the "dead drop" facility for NOZETTE. In the letter, the FBI asked NOZETTE to answer a list of questions concerning United States satellite information. . . .

56. On or about September 16, 2009, NOZETTE was captured on videotape leaving a manila envelope in the "dead drop" Post Office Box in the District of Columbia.

57. On or about September 17, 2009, the FBI agents retrieved the sealed manila envelope that NOZETTE had dropped off. A white label that appeared to have typewritten information made by a typewriter identifying the pre-arranged post office box number was affixed to the outside of the envelope. During a search of NOZETTE's residence on February 16, 2008, investigators took a photograph of Nozette's home office.[1] The photograph depicted a typewriter on one of Nozette's desks. Inside the envelope retrieved on September 17, 2009 were the following items:

a. The signed passport signature cards (in true name and in an alias);

[1] There was a typographical error in the warrant affidavit. It should read "February 16, 2007."

b. Four passport-sized photographs of NOZETTE;
c. One Sharpie pen;
d. One page document containing "Answers" to the questions left by the FBI undercover agents on September 10, 2009, which employed a prearranged code;
e. The document containing the questions left by the FBI undercover agents on September 10, 2009;
f. A computer "thumb drive" or "memory stick."

58. FBI agents immediately took the document containing NOZETTE's "Answers" to a United States Government agency for a classification review. An original classification authority for the United States determined that the information NOZETTE had provided in his "Answers" was national defense information classified at the SECRET/SCI level, the unauthorized release of which could reasonably be expected to cause serious damage to the national security of the United States.

60. On or about October 1, 2009, undercover FBI agents left a letter in the "dead drop" facility for NOZETTE. In the letter, the FBI asked NOZETTE to provide answers to questions about his access and knowledge of classified programs. The agents also included a $9,000 cash payment for NOZETTE. The serial numbers of the bills were recorded. Those serial numbers are included on the attached Exhibit C. NOZETTE retrieved the questions and the money from the "dead drop" Post Office Box the same day. NOZETTE placed an envelope at the location containing the thumb drive provided to him (NOZETTE) by the FBI on September 17, 2009. The thumb drive is currently being forensically reviewed by several Subject Matter Experts ("SMEs"), though the SME has already identified several photographs on the thumb drive which he believed were classified. Forensic examiners determined that these photographs were made by an Olympus camera, model C765UZ."

Agent Maric concluded that probable cause exists to believe that defendant had retained classified information, in violation of 18 U.S.C. § 793 and that "contraband, evidence, instrumentalities and fruits of a violation" exist in Nozette's residence. Affidavit at ¶ 65. Attachments B and C to the Affidavit stated with specificity the items to be seized.

In searching the residence, agents seized a number of items listed in the attachment to the warrant. Of particular importance to this case, those items included, among others: any and all electronic devices, including computers, printers and removable disks which the defendant used to type, create, and store the classified information that the defendant supplied to the undercover agent; the underlying classified information that the defendant produced for the undercover agent; records relating to the safe deposit box where defendant stored classified information; money given to the defendant during the false flag operation; and a typewriter.

ARGUMENT

I. There was Sufficient Probable Cause

Defendant argues that "the searched lacked probable cause." Motion at 8. Defendant's argument is without merit.

The Fourth Amendment protects "the people" from "unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. In reviewing a warrant application,

> "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Illinois v. Gates, 462 U.S. 213, 238 (1983). In turn, "the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." Id. at 238-9, citing Jones v. United States, 362 U.S. 257, 271 (1960). The

magistrate's determination of probable cause should be accorded "great deference." Id. at 236 (citation omitted).

The required nexus between the place to be searched and the evidence sought "need not rest on direct observation." United States v. Jenkins, 901 F.2d 1075, 1080 (11th Cir.), cert. denied, 498 U.S. 901 (1990) (citation omitted). See also, United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993); United States v. Lamon, 930 F.2d 1183, 1188 (7th Cir. 1991); United States v. Jackson, 756 F.2d 703, 705 (9th Cir. 1985). Instead, "a magistrate may infer a nexus between a suspect and his residence, depending upon the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places." United States v. Williams, 544 F.3d 683, 687 (6th Cir. 2008) (citation and internal quotations omitted). See also, id. at 688 (collecting cases). The magistrate also may afford "considerable weight to the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found...." Id. at 686 (citation omitted).

In the instant case, the affidavit clearly establishes that defendant occupied [redacted], Chevy Chase, Maryland. The only question is whether it is reasonable to conclude, as did Agent Maric and Magistrate Judge Connelly, that evidence of a crime or property used in committing a crime would be located at defendant's residence. That conclusion is reasonable. Beginning in September of 2009, defendant became involved in the FBI false flag undercover operation. As discussed by Agent Maric, on September 16 and October 1st, defendant passed classified information. The latter information was contained on a thumb drive. It was eminently reasonable to infer that the computer used to download and transfer that information was within

defendant's residence. This is particularly true as in 2007, as detailed in the affidavit, that law enforcement agents had recovered computer data which contained classified information. Affidavit at ¶ 34. Courts in analogous circumstances have taken similar positions. See United States v. Abbout, 438 F.3d 554, 572 (6th Cir. 2006) ("One does not need Supreme Court precedent to support the simple fact that records of illegal business activity are usually kept at either a business location or at the defendant's home"); United States v. Laury, 985 F.2d 1293, 13-14 (5th Cir. 1993) (finding that search warrant affidavit established an adequate nexus between a bank robbery suspect's home and instrumentalities and evidence of robbery because one normally would expect a defendant to hide stolen material at his residence, and that inference was supported by the agent's training, experience, and participation in numerous bank robbery investigations).

Defendant's predominant attack on the warrant appears to be a staleness argument, that is, that the evidence seized during the previous search of his house in 2007 is too far removed in time to be relied upon as probable cause in this instance. Motion at 2-3. This argument is inapt. In making such an argument, defendant seems to misunderstand the significance of the evidence retrieved in 2007. The centerpiece of the government's probable cause is the undercover operation. The government submits that even if there had been no prior search, on the undercover information alone, law enforcement agents would have sufficient probable cause to search defendant's house. Defendant lived and worked at his residence. It is certainly reasonable to conclude that he stored his computer equipment, typewriter, cash, and documents on the premises. The fact that law enforcement agents discovered classified material on

defendant's computers on those same premises in 2007 merely underscores this common sense proposition.

In sum, evidence of the type sought to be seized were of the nature and type normally kept at one's residence and/or place business. Agent Maric's affidavit for the warrant is more than sufficient to establish probable cause. This Court should find, as did Magistrate Judge Connelly, that the affidavit passes constitutional muster.[2]

II. Good Faith Exception

Even were the court to conclude that the search warrant in this case lacked probable cause to believe that instrumentalities and fruits of the crime would be found in defendant's residence, the evidence obtained from that warrant nonetheless is admissible because the agents who executed the warrant relied in objective good faith on the magistrate's determination of probable cause. Recognizing that "the exclusionary rule is designed to deter police misconduct

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[2] Defendant also seeks to suppress the fruits of the search of his car and his person which took place on October 19, 2009. The government had obtained a warrant to search defendant's car on October 16, 2009 from Magistrate Judge Deborah A. Robinson of the District Court for the District of Columbia. That supporting affidavit was substantially similar to the one supporting the search of defendant's house. In paragraph 63 of the former affidavit, Agent Maric stated that surveillance revealed that Nozette drove his Mercedes to the dead drop site on at least two occasions in September of 2009. On September 10th, defendant drove his Mercedes and picked up from the dead drop, among other things, a list of questions. Defendant dropped off his answers to those questions on September 16, 2009, which contained classified information forming the basis for Count One in the Indictment. On September 17, 2009, defendant drove his Mercedes to the dead drop and picked up a thumb drive provided by the FBI. Defendant returned that thumb drive to the dead drop on October 1, 2009. Classified information on that thumb drive forms the basis for Count Two in the Indictment. Defendant thus used his car to transport himself to and from the crime scene, and to transport instrumentalities of the crime. There thus can be no doubt that probable cause existed to search defendant's Mercedes on October 19th, when defendant drove to the planned meeting with the undercover FBI agent. As for the items seized from defendant after he was placed in custody on October 19, 2009, the government did not obtain a search warrant in the District of Columbia relating to defendant's person; those items were seized incident to his arrest.

rather than to punish the errors of judges and magistrates," the Supreme Court has determined that the rule should not be applied "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." United States v. Leon, 468 U.S. 897, 916, 920 (1984).[3] In other words, "the police, having turned the probable cause decision over to another person, ... are generally entitled to presume that the magistrate knows what he is doing." United States v. Spencer, 530 F.3d 1003, 1007 (D.C. Cir.), cert. denied, 129 S.Ct. 582 (2008) (citation omitted). Such is the case here.

For the foregoing reasons, the government respectfully requests that the court deny the defendant's motion.

Respectfully submitted,

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[3] The Court in Leon set forth four examples of circumstances under which an officer's reliance on the warrant would not be objectively reasonable, none of which the defense argues applies to the officers who executed this warrant. See 468 U.S. at 923.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was electronically served upon John C. Kiyonaga, Esq., counsel for defendant, on this day 4th of January, 2010.

/s/
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Assistant United States Attorney