

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES,

V.

Crim. No. 1:09-CR-00276

STEWART DAVID NOZETTE,

Defendant.

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

Comes now Defendant Dr. Stewart Nozette, by counsel, and moves this Court to suppress the fruits of the searches of his person, car and family home. Because the affidavit supporting the warrant for these searches did not demonstrate probable cause to predict the presence of the items it ostensibly seeks, the warrant for these searches is invalid. In accordance with the Fourth Amendment, the fruits of these impermissible searches should be excluded.

AFFIANT'S REPRESENTATIONS

On October 16, 2009, FBI Special Agent, Paul Michael Maric sought a search warrant for the person and automobile of Dr. Stewart Nozette and for the home he shares with his wife, Wendy McColough. Search Aff. at ¶ 1.¹ The purported purpose of the

¹ That same day, FBI Special Agent Leslie G. Martell, filed another affidavit for the arrest of Dr. Nozette for alleged attempts to pass national defense information to foreign entities in violation of 18 USC 794(a). The Martell affidavit expressly confined itself to the "limited purpose of establishing probable cause in support of a complaint and arrest warrant" on those charges. Martell aff. ¶ 3. In support of those charges, the Martell affidavit mentions neither Dr. Nozette's vehicle nor his home. Unless otherwise

search was to recover classified documents that might be found on Dr. Nozette's person, in his car, or in the home that he owned with his wife. Search Aff. at ¶ 2. The Government maintained that the maintenance of such documents in Dr. Nozette's home or car or on his person might be a violation of 18 USC § 793. *Id.* at ¶¶ 2-3.

To establish probable cause that classified documents might be found in Dr. Nozette's car and family home, the affiant primarily relied upon information that there may have been restricted documents in Dr. Nozette's home almost three years before. The affiant attempted to supplement this stale information with allegations that augur not for, but against the presence of the items sought; 1.) claiming that Dr. Nozette had traveled to India and Israel (without any allegation that such travel involved classified documents), 2.) describing a series of interactions between Dr. Nozette and undercover agents in which Dr. Nozette denied possessing classified documents in his home or anywhere else, and 3) describing a statement from a co-worker that he believed Dr. Nozette took his laptop computer, which was personal and different from the computer which the Government had purchased for Dr. Nozette, when he went home.

Severely Dated Information-

Loss of Information Access Three Years Before-

The affiant relied primarily upon information that was almost three years old. Dr. Nozette, for many years, had worked at various laboratories on the development of high level "Advanced Concept Technology" for space research. Search Aff. at ¶ 11. In late 2002, Dr. Nozette had an altercation with a co-worker in which Dr. Nozette demanded, and attempted to obtain, project information. *Id.* at ¶¶ 26-29. Although Dr. Nozette was

specified, all citations to "Search Affidavit" or "Affidavit" in this motion refer to the Maric affidavit.

reprimanded and demoted as a result of the incident, an investigation confirmed that he had not tried to obtain information to which he was not entitled. Aff. at ¶ 29. This incident involved neither the illegal possession nor the removal of any documents; nor did it involve Dr. Nozette's home. *Id.* The Affidavit admitted that, after March 21, 2005, Dr. Nozette had not had access to classified Advanced Concept Technology. *Id.* at ¶ 31.²

Search of Home Three Years Before-

On February 16, 2007, almost three years prior to the date of the Affidavit, in the course of a different investigation, the FBI searched Dr. Nozette's home, and seized his home computers. Search Aff. at ¶¶ 32-36, 39. The Affidavit claimed that the computers seized almost three years ago may have had restricted technology.³ *Id.* The Affidavit, however, does not provide any information about what had become of the seized computers,⁴ especially whether they were ever returned to Dr. Nozette, nor did it advance any reason to believe that Dr. Nozette would have continued to retain any such prohibited information in subsequent years. The Affidavit offers no explanation as to why, in the intervening three years, the Government has not been able to confirm that the information in question was, in fact, classified. Finally, the Affidavit, ostensibly to strengthen this meager showing, recurs to other allegations which actually diminish its persuasiveness.

² The Martel affidavit claims that Dr. Nozette's Top Secret security clearance lasted until 2006, i.e. three years prior to the Search Affidavit. Martell Aff. at ¶¶ 21, 23.

³ The Search Affidavit's only mention of any computer currently in Dr. Nozette's home was a Coworker's statement that "I'm sure [Nozette] takes [his laptop computer] home from work." However, this computer is a personal computer and different from a work computer that NASA purchased for Nozette. Search Aff. at ¶ 62. There is no indication that Dr. Nozette owned this laptop three years ago or that it was searched at that time, nor anything to indicate that that the laptop has any prohibited documents.

⁴ The Search Affidavit's only information about the resolution of the legal matters related to the prior search is that a plea agreement resolved all charges. Search Aff. at Fn. 2.

Foreign Travel-

The affiant recounted Dr. Nozette's trips to Israel and India even though there was no indication that these trips involved restricted documents or Dr. Nozette's home.⁵

India Trips-

The affiant alleged that Dr. Nozette, in January and July 2009, i.e. nine months and three months prior to the affidavit, respectively, made two trips to India.⁶ Search Aff. at ¶¶ 37-38, 41.

The Affidavit alleges that a search of Dr. Nozette's outbound luggage on his January trip revealed that he had his silver Macintosh laptop computer and associated "chords and charges" as well as two thumb drives. Search Aff. at ¶ 37. The Customs search upon Dr. Nozette's return to the United States did not find any thumb drives. *Id.* at ¶ 38. The only mention of documents in the FBI's discussion of the January 2009 India trip was the allegation that the Customs search of Dr. Nozette's laptop found computer icons "bearing the name associated with" a technical program associated with

⁵ The only statement that the Affidavit alleges that Dr. Nozette made with regard to Israel or India, or any foreign power was a drunken statement that he would "tell them everything." Search Aff. at ¶ 40. The Affidavit, however, does not allege that Dr. Nozette made any statements with regard to documents.

⁶ The affiant labels the destination of Dr. Nozette's January 2009 trip as "Country B" and the country of the "Foreign Company" with which he worked for many years as "Country A". Search Aff. at ¶¶ 18, 37. However, further on, the Affidavit's quotation of the transcript reveals that the "Foreign Company" was Israeli. *Id.* at ¶ 48; see also Martell aff. at ¶¶ 24, 34. The Search Affidavit reveals that the trip in question was to India. Search Aff. at ¶ 62, The Martell affidavit labels the destination of the January 6, 2009, India trip as "Country A."

NASA, for which Dr. Nozette worked. *Id.* The Affidavit admits that aspects of that same technical program “that NASA is working on are not classified.” *Id.* Having made this admission, the Affidavit merely concludes that Dr. “Nozette previously worked on classified components of” that technical program. *Id.* The Affidavit does not tell how many years ago such work occurred nor does it give any information to indicate that Dr. Nozette’s computer contained restricted information. After this search, in fact, Dr. Nozette was not detained and his computer was not seized.⁷

Israel Trips-

The Affidavit also alleges that Dr. Nozette has made several trips to Israel. Search Aff. at ¶ 18. However, the Affidavit does not allege that Dr. Nozette gave any documents to Israel. In fact, the SA Martell’s affidavit admits that it “does not allege” that “the Government of the State of Israel or anyone acting on its behalf committed any offense under the laws of the United States.” Martell aff. at Fn. 1.

Interaction with FBI Agents-

The Affidavit finally relies upon two meetings with FBI agents at which Dr. Nozette denied possessing any classified information and information exchanges that did not implicate Dr. Nozette’s home.

Meetings with FBI Agents-

Dr. Nozette, at all of his meetings with undercover agents, repeatedly denied possessing classified documents. The Affidavit admitted that, at the first meeting, Dr. Nozette flatly stated that he had not “been involved in classified work for the last couple of years.” Search Aff. at ¶ 44. Dr. Nozette denied providing any classified documents to

⁷ The Search Affidavit, apart from stating Dr. Nozette’s itinerary, makes no allegations with regard to his July 2009 trip to India. *Id.* at ¶ 41.

Israel. *Id.* at ¶ 45.⁸ At the second meeting, Dr. Nozette indicated that any information he had would be entirely “in [his head].” *Id.* at ¶ 49. Dr. Nozette was so insistent that he had no documents that he claimed that information could be reconstructed only from memory and through extensive discussion. *Id.* at ¶ 50. Dr. Nozette never deviated from this insistence that he had no documents and that any information he had would “have to be recreated from memory over some time.” *Id.* at ¶ 59.

Post Office Box Mailings-

Dr. Nozette’s Post Office box mailings did not indicate that any documents would be in his home. The Affidavit alleges that, on September 16, 2009, Dr. Nozette left an envelope⁹ with 1.) signed cards that the FBI had left for Dr. Nozette in the box, 2.) passport photographs of Dr. Nozette, 3.) a Sharpie pen that the FBI had left for Dr. Nozette, 3.) a page of questions that the FBI previously had left along with a single page of written answers, and 4.) a computer “thumb drive” or “memory stick.” Search Aff. at ¶ 57.¹⁰

⁸ As discussed above at Fn. 5, this country, referred to as “Country A,” is revealed in the Affidavit as Israel. The FBI’s other affiant also admitted that Israel and its representatives have not been alleged to be involved in any wrongdoing. Martell Aff. at Fn. 1.

⁹ The Affidavit alleges that an envelope label was typewritten and that a photograph taken almost three years previously had shown a typewriter in Dr. Nozette’s home. Search Aff. at ¶ 57. However, the Affidavit does not provide any information about the model of typewriter or the typeface on the envelope label that might prove a connection with a typewriter in Dr. Nozette’s home almost three years previously. Other than mentioning the nondescript typewriter years before, the Post Office box portion of the Affidavit does not mention Dr. Nozette’s home at all.

¹⁰ The Search Affidavit alleges that Dr. Nozette, on October 1, 2009, returned a “thumb drive” that the FBI had provided on September 17, 2009. Search Aff. at ¶ 60. However, the Affidavit fails to specify when Dr. Nozette would have retrieved the September 17, 2009, request and thumb drive.

The only items from either mailing that the Affidavit indicates might possibly be classified were photographs, made by a Nikon E5700 and Olympus C765UZ model cameras, of a “specialized satellite antenna” and unspecified material. *Id.* at ¶¶ 58, 60. The Affidavit offers no explanation as to why the Government could not confirm whether these images were, in fact, classified. Nor does the Affidavit give any information concerning how many years ago the pictures were taken, or any reason to believe that the Nikon or Olympus cameras in question would have been in Dr. Nozette’s home. In fact, during all of these mailings, Dr. Nozette’s only statement concerning documents was his comment that information he might give would “have to be recreated from memory over some time.” Search Aff. at 59. The Affidavit does not indicate that Dr. Nozette made any response to the FBI’s October 1, 2009, information request.

Observation of Dr. Nozette’s Car-

The Affidavit’s only mention of Dr. Nozette’s car and person is confined to a single paragraph at the end.¹¹ The Affidavit alleges that, almost three months prior to the Affidavit, an FBI agent observed a copy of the “Civilian Space Newsletter” (the very title of which suggests the contents are not classified) from the Johns Hopkins University Applied Physics Laboratory along with “several [unidentified] papers including a thick stack of papers bound together by a large, black paperclip” in Dr. Nozette’s car. Search Aff. at ¶ 63. The Affidavit makes no further representations about that laboratory or its

¹¹ In that same paragraph, the Affidavit mentioned that Dr. Nozette carried a blackberry on his belt. There was no other indication of documents on Dr. Nozette’s person. Nor was there any indication that the blackberry was capable of producing documents nor that it could have played any role in the alleged activity at issue in this matter.

“Civilian Space Newsletter”.¹² *Id.* The Affidavit further attests that, one month prior to the Affidavit, Dr. Nozette had traveled to the FBI-acquired Post Office box. *Id.* Neither happenstance remotely approaches, singly or jointly, probable cause for a car search.

ARGUMENT

I. The Search Lacked Probable Cause

The Fourth Amendment guarantees that American citizens shall be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and [that] no warrants shall issue but upon probable cause.” Search warrant affidavits must provide the magistrate with a substantial basis for determining the existence of probable cause.” *Illinois v. Gates*, 462 U.S. 213, 239 (1983). The Government may not use the fruits of searches not based upon probable cause. *See, e.g., Schoeneman v. United States*, 317 F. 2d 173 (D.C. Cir. 1963). Even when a warrant has been issued, if the warrant was “based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,’” the fruits of a search will be excluded. *United States v. Leon*, 468 U.S. 897, 923 (1984) (*quoting Brown v. Illinois*, 422 U.S. 590, 610-611 (1975)); *see also United States v. Lindsey*, 596 F. Supp. 2d 55, 60 (D.D.C. 2009).

A. Probable Cause May Not Rest on Dated Information.

The Supreme Court has long held that a search warrant affidavit must allege “facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time*.” *Sgro v. United States*, 287 U.S. 206, 210 (1932).

Information that, even if taken as true, is out of date for the circumstances of the case, is

¹² In fact, an internet search reveals that this laboratory has a publicly accessible website at the URL www.jhuapl.edu with a wide range of publications.

stale and fails to provide probable cause. *See Schoeneman*, 317 F. 2d at 177-178 (invalidating a search warrant because affidavit allegations that classified documents had been observed at the location less than four months before were stale and could not support probable cause); *see also Lindsey*, 596 F. Supp. 2d at 58-59 (invalidating a warrant based upon two-year old information) (*citing Schoeneman* and *United States v. Webb*, 255 F. 3d 890 (D.C. Cir. 2001)). The Government may not search based upon information that is three years out of date.

The affiant could not even state definitively that the home ever contained classified information. Rather he relied upon the fact that restricted information **may** have been in Dr. Nozette's home almost three years before. The D.C. Circuit invalidated a search warrant based upon the alleged sighting of restricted Government documents in a defendant's home a mere few months prior to an affidavit. *Schoeneman*, 317 F. 2d at 176.¹³ In the *Lindsey* case, the D.C. District Court has invalidated warrants based upon information that was only 18 months old. 596 F. Supp. 2d at 57-58. The alleged sighting of restricted documents in Dr. Nozette's home almost three years ago is too stale to support probable cause.

¹³ Although the search for restricted documents is the broadest aspect of the search in this case and the focus of the Search affidavit, Dr. Nozette challenges the search for all items listed in the search warrant request. For the same reasons that there is no probable cause for a document search, there is no probable cause to support the search for other items. For example, the staleness of the information related to documents in the home is equally true of the search for a nondescript typewriter apparently seen in Dr. Nozette's home almost three years ago. There is no cause to believe that Dr. Nozette possesses the listed cameras in his home, nor is there cause to believe that his cell phone has any information. There is no reason to believe that he would possess the currency that the FBI left in the Post Office box several weeks earlier. Nor is there probable cause to believe that Dr. Nozette's travel records or the indicia of his possession of his property will provide evidence. For the same reasons that document and computer evidence should be suppressed, the fruits of the entire search of Dr. Nozette's home, person and car should be suppressed.

The FBI's claim that there was "no indication that Nozette has destroyed or removed the classified documents" that may or may not have been present three years previously, Search Aff. at ¶ 62, ignores the fact that it is the Government's burden to demonstrate probable cause for the search. *See, e.g., Gates*, 462 U.S. at 239. Moreover, this ignores the fact that Dr. Nozette actually repeatedly stated that he had no restricted documents. This further ignores the fact that information about potentially inculpatory evidence more readily becomes stale than innocuous evidence. *See, e.g., United States v. Pelham*, 749 F. Supp. 304, 309 (D.D.C. 1990) (distinguishing between information about innocuous evidence which is likely to remain longer than "*per se* inculpatory items [such as] contraband- that probably would remain in a suspect's home for only a short period of time"). If Dr. Nozette had ever possessed prohibited documents, the FBI provides no reason why he would have retained potentially inculpatory evidence after having his home searched. The Search Affidavit required a belief, without any explanation or justification, that Dr. Nozette, having the information that he considered valuable in his head, and having faced legal exposure related to restricted documents, would have kept such incriminating and superfluous documents for years afterward. The Affidavit demonstrates no probable cause for such an illogical conclusion.

B. Dr. Nozette's Unimpeded Foreign Travel Belies his Possession of Contraband Documents.

The Affidavit's description of trips to India and Israel that law enforcement allowed to occur years after Dr. Nozette's access to classified information was restricted does not provide any basis for believing that Dr. Nozette's home, car, or person harbored any restricted information. In fact, the FBI's most specific allegation with regard to India or Israel is the explicit clarification that Israel and its agents are not accused of any

wrongdoing. This foreign travel, made with the knowledge of the Government and subject to Government searches during arrival and departure, can not support probable cause to search Dr. Nozette's home, person or car.

C. Dr. Nozette's Interaction with the FBI Belies his Possession of Contraband Documents.

The FBI's description of Dr. Nozette's two meetings and subsequent mailings with FBI agents admits that Dr. Nozette repeatedly denied possessing documents.¹⁴ The only item from any interactions with the FBI that the Affidavit indicated might even have been classified were photographs, of a "specialized satellite antenna" and unspecified material. Search Aff. at ¶¶ 58, 60. The "specialized satellite antenna" would not have been at Dr. Nozette's home¹⁵ and the Affidavit does not give any information concerning how many years ago the pictures were taken, nor does the Affidavit give any reason to believe that the pictures in question would have been in Dr. Nozette's home. During his later mail exchanges, Dr. Nozette's only statement concerning records was his comment that information he might give would "have to be recreated from memory over some time." Search Aff. at 59. Given that the Government professes to believe that Dr. Nozette was attempting in these meetings to seal a potentially lucrative deal to provide information, his denials that he possessed information and proposals to provide information through protracted and arduous reconstructions from memory could only indicate that he did not possess any relevant documents. In the absence of any FBI

¹⁴ Dr. Nozette's denials have added credibility if he actually believed that he was talking with a Mossad agent with the means to confirm his denials.

¹⁵ The search warrant request did not mention the antenna, as it certainly would have if the Government seriously believed the supposedly classified piece of hardware were in Dr. Nozette's home.

allegations to negate his denials, Dr. Nozette's meetings with agents cannot support probable cause for a document search of his home, person or car.

B. The Affiant Could Not Reasonably Have Believed That The Affidavit Gave Probable Cause For A Search.

The affiant could not reasonably have believed that the stale allegations of that affidavit bestowed probable cause for a search. Law enforcement may not introduce evidence from a search warrant that they could not reasonably have believed was based upon probable cause. *See, e.g., Leon*, 468 U.S. at 923; *see also Lindsey*, 596 F. Supp. 2d at 60-63 (refusing to allow law enforcement reliance in "good faith" upon a search warrant issued from an experienced officer's affidavit giving incomplete information 18 months out of date); *United States v. Huggins*, 733 F. Supp. 445, 449-450 (D.D.C. 1990) (excluding evidence from a warrant based on an affidavit that failed to give information establishing probable cause). In this matter, an FBI affiant, himself an attorney of several years experience, Search Aff. at para. 1, filed an affidavit based upon information almost three years out of date without any attempt to explain why the contraband sought would still be in the home years later. He supplemented that information with discussion of foreign travel that the Government had not sought to prevent and which indicated nothing about the presence of any documents. The affiant finally relied upon a series of meetings between Dr. Nozette and FBI agents at which Dr. Nozette denied possessing any documents. The attorney affiant could not reasonably have been unaware that such stale and inadequate information did not support probable cause for a search. Accordingly, the evidence from that search should be suppressed.

CONCLUSION

