UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 12 CR 723
	)	
v.	)	Hon. Sharon Johnson Coleman
	)	
ADEL DAOUD	)	

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTIONS FOR DISCOVERY AND FOR A HEARING PURSUANT TO *FRANKS v. DELAWARE*

The UNITED STATES OF AMERICA, by ZACHARY T. FARDON, United States Attorney for the Northern District of Illinois, respectfully submits its consolidated response to defendant Adel Daoud's motions for discovery and for a hearing pursuant to *Franks v. Delaware* (R.124, 126).

Introduction

The defendant has renewed motions for discovery and for an evidentiary hearing regarding the legality of the FISA collection. R.124, 126. Though the defendant claims both motions arise from "new evidence," they in fact seek to rehash issues that have been resolved unequivocally by this Court and the Court of Appeals. The only new information offered by the defendant comes from counsel's speculation that is not borne out by the record and from "public disclosures" that have nothing to do with this case. Because the litigation history is informative, a brief summary is needed.

First, the defendant submitted no less than four filings for discovery related to the FISA Amendments Act, insisting that such evidence is at issue in this case, R.43, 47, 65, 70. Ultimately, this Court denied those motions. R.87.

Second, the defendant filed a lengthy motion for discovery "Regarding the Surveillance and Investigation of Defendant." R.54, 69. That motion included a broad request for all evidence generated from government monitoring. Based on the government's representations regarding its discovery protocol, this Court denied the motion. R.87.

Third, the defendant submitted over a hundred pages of briefing in an effort to suppress the FISA collection, disclose the FISA applications, and hold an evidentiary hearing pursuant to *Franks v. Delaware*. R. 51, 52, 74. That motion became the subject of additional briefing before the Seventh Circuit, and the defendant presented even more factual and legal theories to the Court of Appeals. 14-1284, R.34. Yet the defendant's efforts were squarely rejected by the Court of Appeals, which held:

> Not only do we agree with the district judge that it is possible to determine the legality of the government's investigation of Daoud without disclosure of classified materials to his lawyers; our study of the materials convinces us that the investigation did not violate FISA.

United States v. Adel Daoud, 755 F.3d 479, 485 (7th Cir. 2014). In a subsequent classified opinion, the Seventh Circuit rejected the defendant's

suggestion that the applications may contain intentional or reckless material falsehoods, necessitating an evidentiary hearing under *Franks v. Delaware*. *United States v. Adel Daoud*, 761 F.3d 678, 681-82 (7th Cir. 2014). Following these rulings, the defendant sought rehearing *en banc*, challenging the Seventh Circuit's decision to reach the merits of the FISA collection and rule it lawful. 14-1284, R.72. Not one member of the Court of Appeals requested a vote on the defendant's petition for rehearing *en banc*. 14-1284, R.76.

Fourth, the defendant challenged the government's motion to withhold certain evidence under the Classified Information Procedures Act. R.93. The Court granted the government's motion, holding that the material the government has withheld is not "exculpatory, impeaching, or otherwise relevant and helpful to the defense" and that "disclosure of this material at this time is likely to harm the national security of the United States." R.136.

In sum, the defendant has previously filed a host of motions related to electronic surveillance, discovery, and for an evidentiary hearing, all of which has been denied by this Court and the Court of Appeals. These two "new" motions should meet the same fate.

Argument

I. The Court Should Deny the Defendant's Demand For Discovery Regarding Alleged Surveillance Under Executive Order 12333.

Citing "recent public disclosures" that purport to describe intelligence collection pursuant to Executive Order 12333, the defendant requests discovery regarding the use of this Executive Order and demands that the government "affirm or deny" the existence of this intelligence collection. R.126, ¶17.

In response to this request, the government reiterates that it is aware of its discovery obligations and has been complying with them throughout the pendency of this case, and will continue to do so. Discoverable material in the possession of the government has either been tendered to the defense or addressed to this Court through the Classified Information Procedures Act. The government has or will address any discoverable material or legal obligations regarding Executive Order 12333 in the same manner.

II. The Court Should Decline the Defendant's Invitation to Reconsider the Ruling of the Court of Appeals.

A. The Court of Appeals Found the FISA Collection Lawful And Denied the Request For An Evidentiary Hearing.

The Court of Appeals denied the defendant's motion to suppress the FISA collection, concluding that the FISA applications were so plainly lawful that disclosure and an evidentiary hearing were unnecessary. *United States*

v. Adel Daoud, 755 F.3d 479, 485 (7th Cir. 2014). The Court arrived at that conclusion following a careful review of the FISA applications and orders *ex parte* and *in camera*, coupled with its analysis of the defendant's many legal and factual challenges. Not only was the Court thoroughly convinced that the FISA collection was lawful and supported by "ample" probable cause, it stressed that the "[i]t would have been irresponsible of the FBI *not* to have launched its investigation of the defendant." *United States v. Adel Daoud*, 761 F.3d 678, 681 (2014) (emphasis in original). And the Court rejected the defendant's suggestion that the applications may contain intentional or reckless material falsehoods, necessitating an evidentiary hearing under *Franks v. Delaware*. *Adel Daoud*, 761 F.3d at 681-82.

The defendant now attempts to minimize the reach of the Court of Appeals ruling, claiming it left open the possibility of an evidentiary hearing, (*see* R.124 at ¶8, suggesting the Court "did not reach the *Franks* issue"), but that notion cannot be squared with the Court's holding. It ruled the FISA collection lawful without the need for disclosure to the defense or an evidentiary hearing—*i.e.*, it denied the defendant's suppression motion outright. Indeed, the breadth of the Court's ruling is what the defendant protested when seeking rehearing *en banc*. The defendant complained:

> [T]he panel then took an even more remarkable step: It concluded that "the investigation did not violate FISA"—thus denying defendant's suppression motion . . .

14-1284, R.72 at 7. Though the government finds nothing "remarkable" about the Court's careful ruling, it agrees with the defendant's conclusion—the Court of Appeals denied the defendant's suppression motion, including his request for an evidentiary hearing.

B. Defendant's Motion Should Be Treated as a Motion to Reconsider.

The defendant seeks to upset a Court of Appeals decision—one that was the culmination of hundreds of pages of briefing—so he faces an uphill battle, and appropriately so. Motions to reconsider are not expressly authorized by the Federal Rules of Criminal Procedure, but are treated like similar motions in civil suits. *United States v. Rollins*, 607 F.3d 500, 502 (7th Cir. 2010). Thus, as in a civil suit, "[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp.2d 704, 707 (N.D. Ill. 2006) (quoting *Caisse Nationale de Credit Agricole v. CBI Indus.*, Inc., 90 F.3d 1264, 1269 (7th Cir. 1996)).

The defendant appears to invoke the "newly discovery evidence" prong, but he may only do so following a "significant change in the law or facts since the submission of the issue to the Court." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (internal citations omitted). A motion to reconsider is not an opportunity for the losing party to

present evidence that it could have presented the first time around. *Bordelon v. Chicago School Reform Bd. of Trustees*, 233 F.3d 524, 529 (7th Cir. 2000).

C. The "New Evidence" Presented By the Defendant Is Not a Basis to Reconsider the Ruling of the Court of Appeals

When scrutinizing the defendant's motion to reconsider, one will notice that very little of the proffered information is in fact new. The defendant cites the complaint affidavit (R.124, ¶¶19-20), a report regarding the opening of the investigation (¶14), and a report regarding the arrest of an individual in Poland on terrorism charges ("Individual A") (¶16). All of those items have been available to the defense for years now.

The only "new" information arises out of defense counsel's recent trip to Poland to meet with attorneys for Individual A. According to the defendant, these attorneys in Poland purportedly have "documents from the Polish intelligence agency that show Polish authorities knew as early as May 18, 2012, and most certainly by May 24, 2012, that [Individual A] had a lengthy and documented history of psychiatric treatment." R.124, ¶ 17. Assuming those documents exist and in fact are authentic (the defendant does not attach them to his motion), they by no means give grounds to reconsider the ruling of the Court of Appeals, as explained in the government's classified addendum. In other words, these newfound allegations may be considered, and rejected, based on an examination of the classified record. None gives

grounds to reopen the Seventh Circuit's ruling and hold an evidentiary hearing.

Even if the defendant were to identify "new evidence" that establishes a "concrete and substantial preliminary showing" that the affiant deliberately or recklessly included false statements or failed to include material information in the FISA applications, *Franks*, 438 U.S. at 155-56 (which he has not), that still would not give grounds for an evidentiary hearing. The next question would be whether the affidavit would still provide probable cause if the allegedly false material were eliminated or if the allegedly omitted information were included. *Id.* at 171; *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990); *United States v. Ketzeback*, 358 F.3d 987, 990 (8th Cir. 2004); *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980).[1]

In sum, the defendant presents no reason to set aside the decision of the Court of Appeals that the FISA applications were lawful and supported by "ample" probable cause.

[1] Moreover, even if the FISA collection were not lawfully authorized, the "good faith" rule of *United States v. Leon*, 468 U.S. 897, 914-15 (1984) would prevent exclusion of the evidence unless the affidavit supporting the warrant was false or misleading, or probable cause was so transparently missing that "no reasonably well trained officer [would] rely on the warrant." *See United States v. Ning Wen*, 477 F.3d 896, 897 (7th Cir. 2007) (applying Leon to FISA warrant). There is no basis to find that any of the applications at issue contained false or misleading statements or that probable cause was lacking.

Conclusion

For these reasons, the United States respectfully requests that this Court deny the defendant's motions.

Respectfully submitted,

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