IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 12-cr-00033-JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. BAKHTIYOR JUMAEV,

Defendant.

DEFENDANT JUMAEV'S COMBINED FISA-RELATED MOTIONS: (1) TO ADOPT DEFENDANT MUHTOROV'S "MOTION TO SUPPRESS FISA ACQUIRED EVIDENCE (SUPPLEMENT TO DOC. 14)" (DOC. 125); (2) FOR DISCLOSURE OF FISA MATERIALS; (3) FOR A PRELIMINARY CHALLENGE TO SUPPRESS FISA ACQUIRED EVIDENCE; AND (4) FOR LEAVE TO FILE A *FRANKS* MOTION AFTER RECEIPT OF ALL THE GOVERNMENT'S DISCOVERY

Defendant Bakhtiyor Jumaev, by and through his counsel, submits the following combined FISA-related motions: (1) to Adopt Defendant Muhtorov's "Motion to Suppress FISA Acquired Evidence (Supplement to Doc. 14)" (Doc. 125) filed on May 25, 2012; (2) for Disclosure of FISA Materials; (3) for a Preliminary Challenge to Suppress FISA Acquired Evidence; and (4) for Leave to File a *Franks* Motion After Receipt of All the Government's Discovery; and for reasons informs the Court as follows:

TABLE OF CONTENTS

DEFENDANT JUMAEV'S COMBINED FISA-RELATED MOTIONS: (1) TO ADOPT DEFENDANT MUHTOROV'S "MOTION TO SUPPRESS FISA ACQUIRED EVIDENCE (SUPPLEMENT TO DOC. 14)" (DOC. 125); (2) FOR DISCLOSURE OF FISA MATERIALS; (3) FOR A PRELIMINARY CHALLENGE TO SUPPRESS FISA ACQUIRED EVIDENCE; AND (4) FOR LEAVE TO FILE A *FRANKS* MOTION AFTER RECEIPT OF ALL THE GOVERNMENT'S DISCOVERY

I. INTRODUCTION

Josef K., the tragic protagonist in Franz Kafka's *The Trial*, was arrested by two agents "one fine morning" and spent a nightmarish year waiting to stand trial. He had no idea of the charges against him or what secret court authorized the process that led to his arrest. One year later, two agents again came for the unknowing Josef K. and took him to a quarry outside of town. There, he was executed.

Surely, Josef K. would empathize with the not too dissimilar circumstances confronting Defendant Bakhtiyor Jumaev. Although Mr. Jumaev knows he has been charged with providing material support to a designated terrorist organization, he is unaware of what government agents told a secret court about him and why that court decided to initiate process against him.

Mr. Jumaev has learned that the agents who arrested him are members of the Federal Bureau of Investigation, who were permitted to conceal surveillance of his phone conversations and allowed to rummage through his home and personal possessions. However, Mr. Jumaev doesn't know why the FBI was allowed to do any of those things and for how long they had been doing them. Mr. Jumaev is now facing a future trial in a United States federal district court where United States law – the Federal Intelligence Surveillance Act ("FISA") -- is designed to prevent him from discovering why these covert techniques were ordered and whether his rights as an aggrieved party were protected in the

process. Here, Mr. Jumaev will explain to this Honorable Court how he can be afforded rights which are rightfully his.

II. ADOPTION OF MR. MUHTOROV'S MOTION

In accordance with D.C. Colo. LCrR 12.1, Mr. Jumaev hereby adopts and incorporates herein by reference the arguments, reasons, requests for relief, and authorities advanced and cited by the defendant Jamshid Muthtorov in his *Motion to Suppress FISA Acquired Evidence* (*Supplement to Doc. 14*) (Doc. 125) (hereinafter "Muhtorov Motion"), filed on May 25, 2012. Mr. Jumaev then provides the following discussion of facts and emphasis of legal authority specific to him.

III. PERTINENT FACTS

A. Bakhtiyor Jumaev's Immigration to the United States

Mr. Jumaev is a 45-year-old citizen of Uzbekistan, who, due to the persecution of Muslims (including Mr. Jumaev) by the Uzbekistan government, fled his native land and lawfully entered the United States during April of 2000. *See Respondent's Application for Asylum and Related Relief* (hereinafter "Asylum Application"); Form I-589, Exhibit A.[1] Mr. Jumaev has resided in Philadelphia, Pennsylvania and worked there and in nearby communities for over a decade. *Id.*

---

[1]A number of Exhibits in these combined motions may implicate the current Protective Order. Accordingly, all of the Exhibits are filed as Restricted Level 1, document viewable only by the court and parties. Exhibits considered in the public domain, such as the reports by the Office of Inspector General ("OIG"), can be easily accessed via the Internet.

He has not left United States soil since he arrived in 2000 and fears he would be imprisoned and/or tortured if he returned to Uzbekistan. *Id.*

On February 2, 2010, Mr. Jumaev was arrested in Philadelphia by immigration authorities on the basis that his non-immigrant residency privileges had expired. *See Warrant for Arrest of Alien* (hereinafter "Arrest Warrant"), Exhibit B. Mr. Jumaev was released from immigration custody on April 20, 2010, having posted a bond of $3,500 with the conditions that he comply with the Intensive Supervision Appearance Program ("ISAP"). *Immigration Bond ICE ForM I-352,* Exhibit C. ISAP required, among other things, that Mr. Jumaev wear an ankle bracelet/GPS monitoring device to track his whereabouts *Intensive Supervision Appearance Program*, Exhibit D. Mr. Jumaev awaits a hearing before the immigration court on his Asylum Application, but the proceedings in that court have been postponed until the instant matter is resolved. *See* DHS Motion to Administratively Close Case and Order, Exhibits E and F.

Mr. Jumaev's release on bond from immigration custody was effectuated with the financial help of family and friends, including Mr. Muhtorov. Evidently, Mr. Muhtorov decided to reciprocate a previous kindness that Mr. Jumaev had displayed toward the end of 2009 when he, Mr. Jumaev, extended the hospitality of his apartment in Philadelphia where Mr. Muhtorov stayed while studying and training for a commercial driver's license. *See* FBI 302 dated February 22, 2012, at 1, Exhibit G. Shortly after Mr. Muhtorov left Philadelphia, immigration

authorities commenced their removal proceedings against Mr. Jumaev in January 2010. *See Notice to Appear, Form I-862*, Exhibit H. One of the officers who assisted in the immigration arrest of Mr. Jumaev on February 2, 2010, was FBI Special Agent JTA. *See* Exhibit I.[2] Mr. Jumaev was released from immigration custody on April 20, 2010 after posting his immigration bond as described above.

For the next approximately eleven (11) months, Mr. Muhtorov and Mr. Jumaev fostered a friendship and communicated frequently over the phone. During this time, Mr. Muhtorov resided in Denver with his wife and young children, while Mr. Jumaev, resided in Philadelphia but without the presence of his wife and three children who had been denied visas by the Uzbek government to join Mr. Jumaev in America. *See* FBI 302 report of February 2, 2010 interview of Mr. Jumaev, Exhibit J.

In early March 2011, at Mr. Jumaev's request and in exchange for $300 cash, a friend of his gave Mr. Jumaev a check dated March 10, 2011 in the amount of $300; the check was made payable to Mr. Muhtorov. *See* FBI 302 of interview on February 14, 2012, Exhibit K. Mr. Jumaev sent Mr. Muhtorov the check for $300 for repayment of the former's debt. *Id.* After receipt of the check, the two men continued their long-distance communications.

---

[2]SA JTA continued to play an integral role in the government's investigation of Mr. Jumaev during the next more than two years, culminating in the agent's arrest of Mr. Jumaev on March 15, 2012 in the case-at-bar.

B. The Arrests of Mr. Muhtorov and Mr. Jumaev

On January 21, 2012, Mr. Muhtorov was arrested in this case at O'Hare Airport in Chicago while waiting to board a flight to Turkey. The criminal Complaint against him had been filed in this district on January 19, 2012. *See* Doc. No. 1 in Case No. 12-mj-01011-CBS. Government agents throughout the country then proceeded to interview any number of people who had come in contact with Mr. Muhtorov.

On February 14, 2012 and February 24, 2012, FBI agents, including Special Agent JTA, who had two years earlier assisted in the February 2, 2010 immigration arrest and interview of Mr. Jumaev, interviewed him for the second and third time. The agents questioned Mr. Jumaev regarding, among other things, his relationship with Mr. Muhtorov, the purpose underlying the $300 check, and the meaning of alleged "code" words which the government contended were used during telephonic communications and e-mails between Messrs. Jumaev and Muhtorov.

On March 14, 2012, the government filed a Complaint in this district against Mr. Jumaev. *See* Doc. No. 1 in Case No. 12-mj-01039-KLM (hereinafter, "Jumaev Complaint"). Mr. Jumaev was arrested the following morning, March 15th, in Philadelphia, after returning home from work, and underwent a custodial interrogation concerning many of the same issues covered during the two prior

interviews of him in February. During the three separate post-Muhtorov-arrest interrogations, Mr. Jumaev repeatedly maintained that the purpose of the $300 check sent in March 2011 was to repay money that Mr. Muhtorov had lent to Mr. Jumaev for the latter's immigration case. A Superseding Indictment was returned against both Mr. Jumaev and Mr. Muhtorov on March 19, 2012 (Doc. No. 50), which was superseded a second time on March 22, 2012 (Doc. No. 59).

C. The Government's FISA Investigation

The government has notified Mr. Jumaev that it intends to use evidence acquired through FISA surveillance. *See Notice of Intent to Use Foreign Intelligence Surveillance Information* (Doc. 68). However, the government has not disclosed and will likely resist disclosure of any FISA materials – such as applications, affidavits and FISA orders – which purportedly support the covert electronic surveillance and physical searches conducted in this matter. This governmental resistance will occur notwithstanding that in typical Title III wiretap cases arising under the Ominous Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, covert electronic interceptions can be authorized for the exact crimes for which Mr. Jumaev has been indicted here.[3] Such materials are

---

[3]18 U.S.C. § 2516(1) enumerates an exhaustive list of predicate crimes for which Title III authorization of electronic interceptions can be obtained, including at subsection (q) any criminal violation of 229 (relating to chemical weapons): or sections 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h, 2339, **2339A, 2339B**, 2339C, or 2339D of this title (relating to terrorism) (emphasis supplied). In the

customarily a part of the government's Rule 16 disclosures in cases arising from Title III investigations. *See* 18 U.S.C. § 2518(8)(b) and (d) and (9).

In the absence of disclosure of the FISA materials, Mr. Jumaev is unaware of, *inter alia*: the facts surrounding issuance of the FISA surveillance orders; when the applications were submitted and when the orders were entered; whether there were extension requests and orders; the nature, scope, and duration of the surveillance; whether there was compliance with minimization procedures; and whether the FISA applications and affidavits contain intentional false material statements and/or omissions of material facts, and/or whether they were made with reckless disregard for the truth.

D. The Government's Investigation of Mr. Jumaev

The Jumaev Complaint reveals that the FBI has been investigating Mr. Jumaev since as early as his arrest for immigration charges in February 2010, at which time Mr. Jumaev provided authorities with his mobile telephone number. *See Jumaev Complaint*, ¶ 13. Thereafter, the FBI obtained information against Mr. Jumaev on the basis of having obtained "appropriate authority" to engage in various investigative techniques directed against him. *Id.* Mr. Jumaev assumes that "appropriate authority" includes the FISC.

---

case-at-bar, Mr. Jumaev is charged with two counts of allegedly violating 18 U.S.C. §2339B.

The Jumaev Complaint contains a gap of information related to Mr. Jumaev of approximately eleven (11) months after his release from immigration custody on April 20, 2010. The Complaint then describes interception of communications that occurred for at least 10 months (March of 2011 through January of 2012) from both Mr. Muhtorov's phone and Mr. Jumaev's phone. Mr. Jumaev is alleged to have been speaking to Mr. Muhtorov during the period when Mr. Muhtorov's phone calls were intercepted. Mr. Jumaev's phone was also subjected to FISA electronic surveillance, resulting in the interception of calls from his phone. As a result, Mr. Jumaev is an "aggrieved person" in accordance with 50 U.S.C. §1801(k).

The Jumaev Complaint, among other allegations, asserts that the government's investigation involved Mr. Muhtorov's "communications with Islamic Jihad Union ("IJU") website administrator and facilitator 'Muhammed'" known as "'Abu Muhammed.'" *See* Jumaev Complaint, ¶ 12. Review of the Affidavit filed in support of the Jumaev Complaint and the FBI "302" reports disclosed by the government, allow but a rudimentary glimpse of the FISA operation in this case. Those materials reveal the government's interception of e-mails and telephone calls between Messrs. Jumaev and Muhtorov in early March 2011.[4]

---

[4] Mr. Jumaev, of course, has no idea when the electronic monitoring actually began and when the FISA orders were issued.

FBI 302 reports reveal the FBI's physical surveillance of Mr. Jumaev from the beginning of 2011 to the end. Examples of the surveillance include: (a) a "trash cover" on January 7, 2011, *see* Exhibit L; (b) the FBI's January 11, 2011 observation of Mr. Jumaev walking from his apartment on the street carrying a plastic bag and wearing a black skull cap, *see* Exhibit M; (c) the FBI's January 12, 2011 following of a vehicle in which Mr. Jumaev was a passenger; the vehicle traveled from Mr. Jumaev's Philadelphia residence to his work place (the Super Fresh grocery store in Wilmington, Delaware), *see* Exhibit N; (d) another trash cover and seizure of items therefrom on April 28, 2011, *see* Exhibit); (e) the FBI's following Mr. Jumaev on May 3, 2011 as he traveled from his residence by foot and public transportation (a trolley and train) to and from his ISAP monitoring center, *see* Exhibit P; (f) the FBI's following Mr. Jumaev on May 17, 2011, as he traveled from his residence on foot and by trolley to the AL-Aqsa Islamic Center, *see* Exhibit Q; (g) the FBI's June 6, 2011 review of Mr. Jumaev's GPS tracking data for a week's period in May 2011, which included details and summaries relating to Mr. Jumaev's travels to his employment, laundromat, ISAP, and mosque, *see* Exhibit R;[5] and (h) the FBI's November 19, 2011 observation of Mr. Jumaev cleaning the floors at the Acme Grocery Store, his place of employment

---

[5]Similar details and summary reviews are contained in two additional FBI 302 reports for the month of May 2011.

in Holmes, Pennsylvania, *see* Exhibit S. Details of the above-described surveillance of Mr. Jumaev's innocuous activities are not included in the Jumaev Complaint. As a result, Mr. Jumaev does not know if any of those surveillance details are included in any FISA application that identifies him as a target.

Mr. Jumaev has not been informed whether there were multiple FISA surveillance applications and orders directed against both him and/or Mr. Muhtorov, or against each separately, how frequently the orders were extended pursuant to 50 U.S.C. § 1805(d)(2), or the particulars concerning the government's covert investigation of him.

IV. MOTION FOR DISCLOSURE OF FISA MATERIALS

A. Procedure for Issuance of FISA Surveillance

FISA authorizes issuance of "warrants"[6] for electronic surveillance and physical searches. There are two FISA courts: the FISC, consisting of 11 district court judges; and the FISC of Review, comprised of three district or circuit court judges. *See* 50 U.S.C. § 1803(a) & (b). Here, the FISC will be referred to from time to time as the "issuing court," while this Court will from time to time be referred to as the "reviewing" or "trial" court.

---

[6]Although FISA refers to orders authorizing physical and electronic surveillance as "warrants," Mr. Jumaev does not concede that such orders constitute "warrants" as contemplated by the Fourth Amendment.

In order to avoid unecessary repetition of the entire arguments, reasons, and authorities advanced and cited in the Muhtorov motion, which Mr. Jumaev has adopted, Mr. Jumaev will briefly highlight some authorities to better enable the Court to follow those arguments specific to Mr. Jumaev.

FISA was amended during October of 2011 in the wake of the events of September 11, 2011. The requirements under FISA for issuance of an order authorizing electronic surveillance or a search are summarized as follows:

- An application for a FISA order authorizing searches or surveillance must be made under oath by a federal officer with the approval of the Attorney General to the FISC. 50 U.S.C. §§ 1801(g), 1804, 1823;

- The application must identify or describe the target of the search or surveillance and establish that the target is either a "foreign power" or an "agent of a foreign power." 50 U.S.C. §§ 1804(a)(3), 1804(a)(4)(A), 1823(a)(3), 1823(a)(4)(A);

- The application must include a certification from a high-ranking Executive Branch official, such as the Director of the FBI, that the official "deems the information sought [by the search or surveillance] to be foreign intelligence information," and that "a significant purpose"[7] of the search or surveillance is to obtain "foreign intelligence information." 50 U.S.C. §§ 1804(a)(7)(A)-(B), 1823(a)(7)(A)-(B);

- A single FISC judge reviews each FISA application following its submission. 50 U.S.C. §§ 1805, 1824.

---

[7]Prior to enactment of the PATRIOT Act, FISA required that the "primary purpose" of searches and surveillance authorized by the statute was to obtain foreign surveillance was the reduction of this the most controversial of the Patriot Act amendments was to reduce this standard to a "significant purpose."

- Before approving a search or surveillance, the FISC judge must find that the application establishes "probable cause" to believe that the target of the search or surveillance is a "foreign power" or an "agent of a foreign power" and that each of the facilities or places at which the electronic surveillance is directed is being used by a foreign power or an agent of a foreign power. 50 U.S.C. §§ 1805(a)(2)(A) and (B).

- The initial duration of surveillance of an agent of a foreign power can be no more than ninety days. 50 U.S.C. §§ 1805(d)(1).

The statutory definitions of some of the words and phrases utilized in FISA are summarized below:

- "[A]gent of a foreign power" includes any person who "knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power," or any person who "knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power."

- "[F]oreign power" includes a "group engaged in international terrorism." 50 U.S.C. §§ 1801(a)(1),(4).

B. Disclosure of FISA Materials

FISA's disclosure procedures are shrouded by secrecy. U.S.C. § 1806(f) requires the trial court to:

> review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only ***where such disclosure is necessary to make an accurate determination of the legality of the surveillance***.

(emphasis supplied).

Section 1806(g) states that, if the trial court "pursuant to [Section 1806(f)]" determines that the surveillance was unlawful, it shall order suppression of evidence or information derived from the unlawful surveillance. Furthermore, if the reviewing court finds that FISA surveillance was "lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure." *Id.* By its very terms, FISA thus envisions a scenario where disclosure is authorized in order to accurately determine the legality of surveillance, even though a motion to suppress might subsequently be denied.

FISA's methodology concerning discovery and requiring motions to suppress FISA-acquired evidence to be prematurely-filed presents an archetypal chicken-and-egg conundrum. As a precondition for a reviewing court to order discovery, FISA requires the accused to first file a motion to suppress FISA-acquired evidence. The motion to suppress thus must be filed without defense counsel's having access to discovery needed to justify the suppression motion. The dilemma was recognized in *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1039 (D. Or. 2007), *rev'd on other grounds*, 599 F.3d 964 (9th Cir. 2010): "FISA also allows the government to retain information collected, and use the collected

information in criminal prosecutions without providing any meaningful opportunity for the target of the surveillance to challenge its legality."

The FISA discovery procedures also place the trial court in the non-traditional position of reviewing presumptively accurate assertions by the government but, in many instances, speculations and incomplete guess work by defense counsel. Once the motion to suppress is filed and discovery is requested, the court is required to engage in *ex parte* and *in camera* proceedings to determine whether disclosure of FISA materials is warranted in order to evaluate the legality of the FISA orders. Since the review is *ex parte* and unaided by the true adversarial process, the trial court's review is *de novo* and no deference is accorded the FISC's determinations. *United States v. Rosen,* 447 F. Supp. 2d 538, 545 (D. Va. 2006; *see also United States v. Squillacote,* 221 F.3d 542, 544 (4th Cir. 2000); *United States v. Warsame,* 547 F. Supp. 2d 982, 990 (D. Minn. 2008). Once the *in camera, ex parte* procedure is triggered, the trial court may disclose such materials "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f); *see also* 50 U.S.C. §1825(g). The legislative history explains that the question of legality may be complicated by factors such as:

> indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling

> into question compliance with the minimization standards contained in the order.

United States v. Belfield, 692 F.2d 141, 147 (D.C. Cir. 1982) (*quoting* S. Rep. No. 95-701, 95th Cong. 2d Sess. 64 (1978)).

C. Mr. Jumaev is Neither a Foreign Power nor an Agent Thereof

As previously noted, a FISA surveillance order must determine that the target is a "foreign power" or an "agent of a foreign power." FISA requires the court to accept the government's assertion that a target is a foreign power or an agent of a foreign power unless that assertion is deemed to be facially erroneous. *United States v Mayfield,* 504 F. Supp 2d at 1032-33. The Muhtorov Motion at 10-13 has addressed the issue of an assertion that a "target" is a foreign power or an agent of a foreign power, and that discussion will not be repeated here.

Compared to any other accused in this case, Mr. Jumaev is, based upon the evidence, exponentially less susceptible of being considered either a foreign power or an agent of a foreign power. He has resided in the United States for over 12 years, nearly all of that time in the same apartment in Philadelphia, Pennsylvania. There is no evidence that Mr. Jumaev had membership in or connection to the IJU or any foreign power, or that he engaged in any communications with any representative of the IJU or any terrorist organization during the entirety of his residence in this country, or at any time before he came to this country.

The government's surveillance of Mr. Jumaev, which included observing him traveling to his work place and cleaning the floors there, watching him walk in his neighborhood, segregating his trash, following him in a trolley and train to his ISAP facility, and furtively accompanying him in a trolley ride to the mosque where he prays, do not report Mr. Jumaev being in the presence of any terrorist organization, and do not conform to FISA's minimization requirements because of the totally innocuous nature of the activities observed. Here, the government evidently chose to go to the FISC despite the innocent nature of the above evidence and the lack of any indicia that Mr. Jumaev was in any way involved in the acquisition or dissemination of foreign intelligence information affecting our national security. Thus, the primary and sole purpose of the government's investigation of Mr. Jumaev evidently involved a belief that he was engaged in or was about to commit a criminal offense, including a violation of U.S. immigration laws. However, clearly, the government identified Mr. Jumaev as a target in its FISA investigation since conversations of his were intercepted from his phone. *See* Jumaev Complaint ¶ 28 (call on January 24, 2012 between Mr. Jumaev and a known associate, which occurred three days after Mr. Muhtorov's arrest).[8]

---

[8] Obviously, Mr. Jumaev is arguing in the blind here. It is not unreasonable to believe that Mr. Muhtorov may have been the government's sole target of a FISC order and that conversations between him and Mr. Jumaev were overheard during the time of and/or extension(s) of that initial order. The government could subsequently have also obtained a separate FISC order directed against Mr.

The gravaman of the offense alleged against Mr. Jumaev is his sending a $300 check to Mr. Muhtorov on or about March 10, 2011, which Mr. Jumaev repeatedly explained to the FBI was in repayment of his debt to Mr. Muhtorov. In its 49-paragraph, 19-page Complaint, the affiant devotes one short sentence at the end of paragraph 37 to Mr. Jumaev's repayment claim. The balance of the Complaint is a skewed recitation of allegations intending to effect a connection between Mr. Muhtorov and the Islamic Jihand Union ("IJU"), which the Muhtorov Motion challenges, and an even more attenuated, if not total absent, connection between Mr. Jumaev and the IJU.

The government seeks to support its belief that the $300 check was intended to be funneled to IJU by arguing that Mr. Jumaev engaged in telephone conversations and the exchange of e-mails with Muhtorov using "code" language and that the code language reflected Mr Jumaev's support of the IJU. However, expressions of support in of themselves are protected speech under FISA. *See* 50 U.S.C. §1805(a) (the FISC judge may not consider a United States person an agent of a foreign power "solely upon the basis of activities protected by the *First Amendment.*" (emphasis supplied)).

Jumaev while any order against Mr. Muhtorov was also extant. In either instant, Mr. Jumaev is an "aggrieved person" under the statute, but he is compelled to advance speculative challenges to the FISA materials without knowledge of the information contained in those materials.

D. The FBI's Questionable FISA Investigation of Mr. Jumaev was Preceded by the FBI's Historical Abuses of the PATRIOT Act

Here, there is an abundance of historical evidence and a significant amount of nonforeign surveillance information regarding Mr. Jumaev, which was never mentioned in the Jumaev Complaint. This raises the specter and likelihood of misrepresentations and/or material omissions of fact tainting the FISA materials. That taint calls into question the legality of the manner in which the government has preceded in its FISA investigation of Mr. Jumaev. FISA and Patriot Act abuses by the government, however, would not be novel to this case.

1. The Abuses Reported in 2000

Starting in September 2000, the government voluntarily disclosed and confessed error in some 75 FISA applications related to major terrorist attacks directed against the United States. *See In Re All Matters Submitted to the Foreign Intelligence Surveillance Court,* 218 F. Supp. 2d 611, 620 (2002). Those errors related to misstatements and omissions of material fact, including:

a. an erroneous statement in the FBI Director's FISA certification that the target of the FISA was not under criminal investigation;

b. erroneous statements in the FISA affidavits of FBI agents concerning the separation of the overlapping intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant U.S. attorneys;

c. omissions of material facts from FBI FISA affidavits relating to a prior relationship between the FBI and a FISA agent, and the interview of a FISA target by an assistant U.S. attorney.

Id.; *but see United States v. Warsame,* 547 F. Supp. 2d 982, 987-88 (D. Minn. 2008) (court paid short shrift to the above-quoted report, stating that misdeeds in prior FISA cases were not in issue; rather, the issue was whether errors could be shown in the investigation of Warsame so as to mandate disclosure). Regrettably, such a inviting challenge can only be successfully executed by clairvoyants, of which Mr. Jumaev's counsel is not one. Moreover, the errors of previous FISA and Patriot Act cases do not stop with the *mea culpas* admitted to by the government in 2000.

2. The Abuses Reported in 2001

In March of 2001, the government reported similar misstatements in another series of FISA applications in which there were supposedly a "wall" between separate intelligence and criminal squads in FBI field offices to screen FISA intercepts, when in fact all of the FBI agents were on the same squad and all of the screening was done by the one supervisor overseeing both investigations. *Foreign Intelligence Surveillance Court,* 218 F. Supp. 2d at 621.

3. The Abuses Reported in 2006

The March 8, 2006 Department of Justice, Office of the Inspector General (hereinafter "OIG") Report to Congress on Implementation of Section 1001 of the USA Patriot Act described certain failures of the FBI to adhere to FISA's requirements. *See United States v. Rosen,* 447 F. Supp 2d 538, 552 (E.D. Va.

2006). These failures are identified in the OIG's March 8, 2006 Report at 24-31, Sec. V, C. and concern the years 2004 and 2005, Exhibit T. They fall into three categories, namely, (1) improper utilization of authorities under FISA; (2) failure to adhere to Attorney General Guidelines or implementing FBI policy; and (3) improper utilization of authorities involving National Security Letters ("NSLs"). *Id.* at 24.

The failures encompassed a wide range of intelligence activities used by the FBI, including possible violations generally related to "over-collection" and "overruns." An "over-collection" refers to information gathered within the authorized period of a FISC order but outside the scope or intent of the order. An "overrun" refers to investigative activity conducted outside the time period of the FISC order or outside the authorized period of investigative activity. The Report revealed that the average duration of over-collections and overruns was approximately 24 days in 2004 and 16 days in 2005. *Id.* at 24-25. The duration of possible violations of the Attorney General Guidelines or FBI implementing policy governing national security investigations averaged 185 days in 2004 and 130 days in 2005. *Id.* at 25. Approximately, 54 percent of the reports examined by the OIG for 2004 and 47 percent of the reports examined for 2005 fell into the category of improper use of FISA authorities. *Id* at 27.

The nature of the information that may have been illegally collected in 2004 and 2005 included telephone calls, audio recordings, facsimile intercepts, e-mail communications, financial records, and credit reports. *Id.* Discovery received from the government to date by Mr. Jumaev includes, but is not limited to, telephone calls, audio recordings, e-mail communications, text messages, and financial records.

The court in *Rosen* characterized the failures enumerated in the foregoing 2006 OIG report as general assessments and "no more probative of a failure of minimization in this case than a general study of errors committed over a period of years in baseball would be probative of whether errors occurred in a specific game." *Rosen,* 447 F. Supp. 2d at 552. The difference, however, between *Rosen* and this case is that Mr. Jumaev has shown minimization and other failures as chronicled in Section III, *supra*, and in this Section IV. Moreover, unlike the limited history of 2004 and 2005 failures shown in *Rosen,* the FBI's abuses of the Patriot Act from 2000 through 2011 have been systemic and reflective of an ongoing and continual pattern of failures to adhere to the requirements of FISA.

4. The Abuses Reported in 2008

A report released on March 13, 2008 by the OIG on the FBI's use of National Security Letters ("NSLs") revealed a systemic widespread abuse of power according to the ACLU, which, among other organizations, has played a

role of "watchdog" regarding the government's abuse of Patriot Act Powers. *See* Exhibit U. The Jumaev Complaint at ¶ 13 states that "[u]pon obtaining appropriate authority, the FBI has lawfully searched and obtained information through various investigative techniques." Nowhere, however, does the Complaint enumerate the various investigative techniques utilized by the FBI. As the ACLU press release reveals, the FBI's power to collect private information against individuals by the issuance of NSLs without court approval was widely expanded by the PATRIOT Act. *Id.*

The OIG's March 13, 2008 report was a follow-up to its initial report of a year earlier wherein the OIG found "the serious misuse of NSL authorities." *See A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006.* Office of the Inspector General, March 2008, pp. 1-3, 6-9, Exhibit V. Although it noted that the FBI and the Department, i.e. Department of Justice ("DOJ") had made significant progress in implementing the recommendations from the March 2007 report, the OIG found, however, that the FBI's review of its own field files did not capture all NSL-related possible intelligence violations and therefore "did not provide a fully accurate baseline from which to measure future improvement in compliance with NSL authorities. *Id* at 8. The OIG concluded, "the results of the FBI's field review likely understated the rate of possible violations." *Id.*

5. The Abuses Reported in 2011

Finally, as recent as approximately one year ago, still other forms of PATRIOT Act abuses have come to the limelight in spite of the FBI's intent to shield potential abuses from the public eye. When FBI Director Robert Mueller testified before the Senate Judiciary Hearing on or about March 30, 2011, he reportedly denied that the three about-to-be-expiring provisions of the PATRIOT Act had been the subject of any negative reports of a finding of abuse. *See* Exhibit W. In at least one "John Doe" roving wiretap surveillance, the conversations of "young children" were purportedly monitored for approximately five days. *Id.* Both Mr. Jumaev and Mr. Muhtorov have children, but it is doubtful the government will produce in discovery any intercepted telephonic conversations that may involve either defendant's children. The adversarial process, however, is better designed to flush out such abuses, if they occurred.

E. Without Disclosure of the FISA Materials, the Government's Abuses will Continue with Impunity

Mr. Jumaev is mindful that apparently no trial court has found it necessary to disclose FISA materials to a criminal defendant to assist the court's determination of the lawfulness of either electronic surveillance or physical searches under FISA. *See United States v. Mubayyid,* 521 F. Supp. 2d 125, 130

(D. Mass. 2007) (collecting cases).[9] However, none of those cases collected in *Mubayyid* and decided since that decision have made the kind of compelling showing for disclosure as Mr. Jumaev has made here. Further, it is precisely why this unblemished record by the government demands even closer scrutiny by the reviewing court. A perpetual prophylactic shield of FISA materials provides a complacent and fertile environment for the government to do and say anything it wants in a FISA setting, especially where the government knows its actions will never see the light of day except for a future generic OIG report or ACLU outcry.

The ACLU and other private organizations can seek to be effective watchdogs over FBI abuses of the Patriot Act and the OIG can summarize those abuses for Congress, but only the trial court can ensure the Act's compliance in any particular case. "If one feature of the judiciary is essential above all others, it is that 'there is no liberty, if the power of judgment be not separated from the legislative and executive powers.'" *In the Matter of Local Rules of Practice District of Colorado,* J. Kane, dissenting from the amendments to the Local Rules of Practice, effective December 1, 2011.

Ample evidence has been presented to this Court of long-term significant abuses of FISA by the executive's unbridled and clandestine powers. Specific

---

[9]Mr. Jumaev's research has not uncovered any reported case since *Mubayyid, supra,* that has ordered such disclosure.

instances of overreaching and failure of minimization, a lack of any connection to or relationship with any alleged foreign power, and material omissions from the FBI's accusatory complaint call into question the government's conduct here. The time has now ripened for those abuses and powers to be aided by the adversarial process. The FISA materials must be disclosed. Otherwise, Kafka's Josef K. will become more truth than fiction.

F. Disclosure of the FISA Materials can Occur under Appropriate Security Measures and Protective Orders

As provided in 18 U.S.C. §1806(f), disclosure of FISA materials can occur under appropriate security procedures and protective orders. The Court has already conducted *ex parte* CIPA hearings for each side under appropriate precautions. A Protective Order is currently in place designed to protect disclosure and dissemination of the government's discovery. Government personnel, including principal officials in the Attorney General's office, Assistant United States Attorneys, DOJ counsel for its counterterrorism division, and Special Agents of the FBI and other law enforcement entities, have most likely assisted in the preparation, presentation, and dissemination of the FISA materials. Those materials have thus been scrutinized and reviewed by a number of individuals on the prosecution's side. Those individuals have presumably maintained the confidentiality and security of these materials. It is not presumptuous to contend that defense counsel for Mr. Muhtorov and Mr. Jumaev, as officers of the Court,

cannot likewise maintain the confidentiality and security of those materials and abide by any security precautions and/or protective orders implemented by the Court for review of the same.

G. Prayer for Disclosure of FISA Material

Based on the foregoing reasons, Mr. Jumaev seeks discovery of the following materials:

1. All FISA applications, certifications, and affidavits submitted to the FISC in connection with the government's investigation of Messrs. Muhtorov and Jumaev in this case;

2. Any and all transcripts of any *ex parte* proceeding that occurred before the FISC that issued any FISA orders in this case; and

3. All records concerning minimization procedures and the implementation of such procedures.

V. PRELIMINARY CHALLENGE TO FISA-ACQUIRED EVIDENCE: SUPPRESSION AND UNCONSTITUTIONALITY

As has been previously discussed, the requirement that a defendant must file a motion to suppress before obtaining FISA discovery requires defense counsel to file a suppression motion without being first provided the opportunity to discover the underlying facts that would support a suppression motion. Mr. Jumaev joins Mr. Muhtorov in asserting that suppression should be granted on grounds that include, but are not limited to:

1. The government failed to comply with statutory procedures leading to issuance of FISA orders authorizing searches and/or surveillance;

2. The government's application to FISC failed to establish probable cause that the target was either a "foreign power" or an "agent of a foreign power";

3. The application and supporting documents do not establish that either a "primary purpose" or a "significant purpose" of the FISA order is to obtain foreign intelligence information;

4. The FISA application and supporting materials are unconstitutionally overbroad and lacked particularity (*see* additional discussion that follows);

5. The PATRIOT act amendment to FISA that lowered the "foreign intelligence information" requirement from the "primary purpose" to a "significant purpose" is unconstitutional as applied to Mr. Jumaev; and

6. Mr. Jumaev reserves the right to assert suppression challenges based upon what might be revealed in future discovery.

On the issue of FISA's unconstitutionality, Mr. Jumaev urges the court to adopt the reasoning in *Mayfield v. United States*, which held that FISA, as amended by the PATRIOT Act, was unconstitutional on its face. (*Mayfield* was a civil *Bivens* action; the Ninth Circuit did not reach the merits of the constitutionality issue because the circuit court only reversed on the issue of standing). It is also important to note that two cases that addressed constitutional challenges to the post-PATRIOT Act FISA's reduction of "primary purpose" to "significant purpose" did not determine whether the amended FISA was unconstitutional because those cases held that their facts satisfied the "primary purpose test." *See United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *United States v. Hammoud*, 381 F.3d 316

(4th Cir. 2004). Moreover, *Stewart* found that *United States v. Duggan,* 743 F. 2d 59 (2d Cir. 1984) was controlling precedent in the circuit even though *Duggan* was decided before the PATRIOT Act was enacted.

VI. MOTION FOR LEAVE TO FILE A *FRANKS* MOTION AFTER RECEIPT OF ALL THE GOVERNMENT'S DISCOVERY

Disclosure of FISA materials is also necessary to permit defense counsel to evaluate and file a motion to suppress under *Franks v. Delaware*, 438 U.S. 154 (1978), which upheld the right of the defendant to challenge the validity of an affidavit in support of a search warrant. Under *Franks*, a defendant is entitled to an evidentiary hearing if the veracity challenge is supported by a specific offer of proof with affidavits that alleges a deliberate falsehood or a reckless disregard for the truth. If the allegations are proven, the warrant is to be examined for a finding of probable cause absent the false statements. *Id.* at 172.

Wiretap applications and affidavits are subject to the requirements of *Franks* and its progeny. *See United States v. Green*, 175 F.3d 822, 828 (10th Cir. 1999); *see also United States v. Ramirez-Encarnacion*, 291 F.3d 1219, 1223 (10th Cir. 2002). Thus, if "a wiretap affidavit omits material information that would vitiate either the necessity or the probable cause requirements had it been included, the resultant evidence must be suppressed." *Green*, 175 F.3d at 828.

A defendant is entitled to a hearing under *Franks* after making a substantial preliminary showing that the affiant included a false statement in the wiretap

affidavit, either knowingly and intentionally or with reckless disregard for the truth, and that such misstatement was necessary to the finding of probable cause or necessity. *See United States v. Small*, 229 F. Supp. 2d 1166, 1189 (D. Colo. 2002). A material omission in the wiretap affidavit also entitles a defendant to a *Franks* hearing if the same requisite showing is made. *Green*, 175 F.3d at 828.

Courts have explicitly held or assumed that *Franks* applies to FISA surveillance and searches. The court in *Duggan* reasoned that:

> FISA cannot, of course, give the government carte blanche to obtain a surveillance order in violation of a target's right to due process, and an application in which the requisite representations were fraudulently made would constitute such a violation. However, we would think that such a due process argument as to FISA orders should be governed by the principles set forth in *Franks v. Delaware*, 438 U.S. 154 with respect to Fourth Amendment requirements. Thus, the representations and certifications submitted in support of an application for FISA surveillance should be presumed valid. *See id.* at 171. To be entitled to a hearing as to the validity of those presentations, the person challenging the FISA surveillance would be required to make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included" in the application and that the allegedly false statement was "necessary" to the FISA Judge's approval of the application. *Id.* at 155-56.

743 F.2d 59 at 77; *see also United States v. Abu-Jihaad,* 630 F.3d 102, 130 (2d Cir. 2010) ("FISA warrant applications are subject to 'minimal scrutiny by the courts,' both upon initial presentation and subsequent challenge. Of course, even minimal scrutiny is not toothless.... In considering challenges to FISA Court orders, however, 'the representations and certifications submitted in support of an

application for FISA surveillance should be presumed valid' by a reviewing court absent a showing sufficient to trigger a *Franks* hearing." (internal citations omitted)); *United States v. Damrah*, 412 F.3d 618, 624-25 (6th Cir. 2005) (assuming *arguendo Franks* applies to FISA proceedings), *aff'd in part and rev'd in part on other ground*, 658 F.3d 35 (1st Cir. 2011); *United States v. Shnewer*, No. 07-459 (RBK), 2008 U.S. Dist. LEXIS 112001, at *36-37 (D.N.J. Aug. 14, 2008) ("There is no binding authority establishing that *Franks* applies in the context of FISA; however, several courts have conducted *Franks* analyses in FISA cases either affirmatively or *arguendo*").

An effective and meaningful *Franks* challenge cannot be made until Mr. Jumaev has received all of the government's discovery in this matter. It is only after a review of that material can Mr. Jumaev then properly make his preliminary showing of the entirety of the recklessly made false statements and/or material omissions from the FISA application in order to obtain a *Franks* hearing. If courts foreclose a *Franks* challenge on the basis that an accused has failed to make a sufficient preliminary showing, it is because such a showing is impossible to make without knowledge of the contents of the FISA application. Such a judicial position then renders vacuous a challenge under *Franks*.

Accordingly, Mr. Jumaev respectfully requests leave of the Court to file a *Franks* motion within a reasonable time after receipt of all the government's discovery in this matter and for such further relief as the Court may deem proper.

VII. CONCLUSIONS

A. Disclosure of FISA Materials

Mr. Jumaev is an aggrieved party because conversations in which he was a party with Mr. Muhtorov over the latter's phone were subject to FISA electronic surveillance. He is also an aggrieved party because his phone was also subject to FISA surveillance.

No evidence exists that Mr. Jumaev is a foreign power or an agent of a foreign power.

The physical surveillance of Mr. Jumaev did not reveal any activities of his that involved him acquiring or participating in the acquisition or dissemination of foreign intelligence information that affected our national security. The primary and sole purpose of the FISA surveillance of him was to obtain evidence that he was engaged or seeking to engage in criminal activity, including immigration law violations.

The government failed to adhere to FISA's minimization requirements. The government's failures in its investigation of Mr. Jumaev warrant disclosure of the FISA materials.

B. To Suppress and to Find Unconstitutional

For the reasons stated in both Muhtorov's Motion and Mr. Jumaev's arguments, the Court should grant the suppression of all FISA-acquired evidence and declare FISA unconstitutional as applied to Mr. Jumaev.

C. For Leave to File a Franks Motion

For the reasons and arguments advanced by Mr. Jumaev, the Court should allow Mr. Jumaev to file a *Franks* challenge after disclosure of the FISA materials and the government's discovery.

WHEREFORE, Mr. Jumaev prays as described above and for whatever further relief the Curt may deem proper.

DATED: July 30, 2012

s/David B. Savitz
David B. Savitz
999 18th St., #2500
Denver, CO 80202
303-825-3109
savmaster@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Gregory Allen Holloway
Email: Gregory.Holloway@usdoj.gov

Maureen Carle
Email: Maureen.Carle@usdoj.gov

Brian R. Leedy
Email: Brian_Leedy@fd.org

Warren R. Williamson
Email: Rick_Williamson@fd.org

s/ Pat Austin
Pat Austin, Paralegal to David B. Savitz