No. 16-50339

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEITH PRESTON GARTENLAUB,

Defendant-Appellant.

On Appeal From the United States District Court
For the Central District of California
Case No. SACR 14-173-CAS
The Honorable Christina A. Snyder

NOTICE OF INTENT TO FILE PUBLICLY APPELLANT'S REPLY IN SUPPORT OF MOTION FOR BAIL PENDING APPEAL (FILED UNDER SEAL)

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In accordance with Ninth Cir. Interim R. 27-13(f), appellant Keith Preston Gartenlaub hereby gives notice of his intent to file publicly his reply in support of his motion for bail pending appeal. Gartenlaub has filed the motion provisionally under seal because the motion discusses pleadings that are sealed in the district court.

DATED: November 13, 2016

Respectfully submitted,

/s/ John D. Cline
John D. Cline

Attorney for Defendant-Appellant
KEITH PRESTON GARTENLAUB

CERTIFICATE OF SERVICE

When All Case Participants Are Registered For The Appellate CM/ECF System

U.S. Court of Appeals Docket Number 16-50339

I hereby certify that on the 13th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, because the notice is at least temporarily sealed, I emailed a copy to counsel for the United States.

/s/ John D. Cline
John D. Cline

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INTRODUCTION

The government's opposition[1] tries to obscure the extraordinary nature of what happened here. Based on an FBI agent's unfounded belief that Gartenlaub was a spy for China, the government persuaded the Foreign Intelligence Surveillance Court to authorize a secret search of his home and computers. The searching agents imaged his computers--which both this Court and the Supreme Court have found worthy of special Fourth Amendment protection because of the huge amount of sensitive personal information they contain--and spent months poring through them. The agents found no evidence that Gartenlaub is a spy for China--not surprisingly, because not a shred of evidence supports that false theory. But in rummaging through Gartenlaub's computers, the agents stumbled upon some files containing child pornography. They then abandoned the baseless "Chinese spy" theory and prosecuted him on child pornography charges.

This case presents vitally important Fourth Amendment issues. Those issues will require this Court to decide how far the government can stretch Fourth Amendment protections to accommodate its purported national security concerns. Gartenlaub--whom the district court has found to be neither a flight risk nor a

[1] Government's Opposition to Appellant's Motion for Bail Pending Appeal Under Circuit Rule 9-1.2 ("G. Opp.") at 2. Gartenlaub's initial motion is cited as "Mot."

danger to the community--should remain on his current conditions of release while this Court considers those issues.

FACTUAL BACKGROUND

Although this motion does not require the Court to address the facts underlying Gartenlaub's conviction, some of the government's factual assertions require a brief response. The government notes, for example, that Gartenlaub had *adult* pornography on his computers--but that, of course, is no crime. It asserts that the child pornography files were "meticulously organized into subfolders"--but it does not mention that the organization of the child pornography subfolders did not change from the time they were first placed on Gartenlaub's computer in 2005 until the government seized them in 2014. In other words, regardless of who first organized the child pornography subfolders (and there is no evidence on that point), Gartenlaub merely copied them, along with all the other folders on the computer (hundreds of other folders containing thousands of files), when the entire hard drive was copied from computer to computer. There is no evidence Gartenlaub individually copied any folder containing child pornography.

The government points to evidence that in 2014 Gartenlaub opened one of the "folders" containing child pornography, G. Opp. 3, but it omits that neither he nor anyone else opened any of the actual child pornography *files* from the time they were placed on his computer in 2005 until the government seized them in

2014. If Gartenlaub were the pederast the government makes him out to be, largely through innuendo, one would expect him to at least have glanced at the child pornography files that the government claims he placed "meticulously" on his computers. He never did--not once in nine years. It is no exaggeration to say, as the district court did, that this is a "one-of-a-kind" child pornography case.[2]

ARGUMENT

On the merits of the bail motion, the government makes two arguments: that Gartenlaub has not shown that he is not a flight risk and that he has not identified a substantial question on appeal. It is wrong on both points.

I. FLIGHT RISK.

The government maintains that Gartenlaub has not shown that he is not a flight risk. G. Opp. 12-13. But the government overlooks that the district court has already found Gartenlaub not to be a flight risk--first after the verdict, T.12/10/15 at 58-60 (attached to motion as Exhibit D), and again implicitly after sentencing in permitting him to self-surrender. Before this Court, the government has the burden of showing that the district court clearly erred in finding Gartenlaub not to be a flight risk. *See, e.g., United States v. Lindsey*, 2016 U.S. App. LEXIS

[2] The government's opposition skews the facts in other respects, which we will address as necessary in our briefing. It bears noting here, though, that the government goes so far as to include purported hearsay information concerning Gartenlaub's visit to Thailand that it never proved at trial but succeeded in inserting into the PSR. G. Opp. 3-4 n.2. Gartenlaub objected to this aspect of the PSR (and certain other factual errors). Doc. 185 at 12-16.

11827, at *8 (9th Cir. June 28, 2016) (unpublished).[3] Appellate courts defer to the district court's flight risk determination "because of [the district court's] unique insights into the defendant as an individual and into his personal, professional, and financial circumstances." *United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004).

The government has not shown any error in the district court's flight determination, clear or otherwise. The government notes that Gartenlaub was "arrested on December 18, 2014 for having a router in his residence." G. Opp. 12. It omits, however, that the Magistrate Judge denied the government's motion to revoke bond and re-released Gartenlaub on his previous conditions, with the added condition that he could not have a router in his residence. Doc. 50.

The government also argues that Gartenlaub's compliance with his conditions of release "*predated* imposition of a 41-month term of imprisonment." G. Opp. 12-13 (emphasis in original). This is misleading in two respects. First, when the district court released Gartenlaub pending sentencing in December 2015, he was facing a mandatory minimum 60-month sentence on Count 1, which the district court dismissed months later. If Gartenlaub was not a flight risk when contemplating a mandatory minimum 60-month sentence, he is not a flight risk

[3] Oddly, the government acknowledges the "clearly erroneous" standard of review shortly before its "flight" argument, but then ignores that standard in the argument itself. G. Opp. 12.

when contemplating a 41-month sentence. Second, the government ignores the fact that the district court permitted Gartenlaub to self-surrender (thus implicitly finding that he was not a flight risk) *after* imposition of the 41-month sentence. T. 8/29/16 at 62-65 (attached to motion as Exhibit B).

The district court observed Gartenlaub's compliance with his release conditions for two years and found that he is not a flight risk. The government has not shown that determination to be clear error.

II. SUBSTANTIAL QUESTION LIKELY TO RESULT IN REVERSAL.

Because the government appears to misunderstand the substantial Fourth Amendment question Gartenlaub presents in this motion, we summarize it again (with the caveat, of course, that the appeal will present other questions as well) and then turn to the government's response.

A. The January 2014 FISC-Authorized Search, Which Found the Child Pornography That Justified the August 2014 Search, Violated Gartenlaub's Fourth Amendment Rights

In January 2014, the government persuaded the Foreign Intelligence Surveillance Court to authorize a covert search of Gartenlaub's home and computers.[4] In the course of the secret search, the government imaged Gartenlaub's computers. It then spent months reviewing the massive amount of

[4] Such FISC-authorized searches are sometimes called "sneak and peek" searches. But that trivializes the massive invasion of privacy that may result. Here, for example, the searching agents did not merely "peek" at Gartenlaub's computers. They imaged (i.e., copied) those computers, took the images offsite, and then spent months poring through the thousands of files they contained.

personal electronic data it had seized. That exhaustive review disclosed no evidence to support the theory on which the government had persuaded the FISC to authorize the search--that Gartenlaub was an "agent of a foreign power," and specifically that he had stolen Boeing information concerning the C-17 and provided the stolen information to China. But the secret search did turn up child pornography on Gartenlaub's computers.

The government abandoned the theory that Gartenlaub was a spy for China. In August 2014, explicitly using information found during the secret FISA search, it persuaded a Magistrate Judge to issue a warrant to search Gartenlaub's home, computers, and other locations for child pornography. In the course of the August search, the government found again the child pornography that it had stumbled upon during the secret January search. It then indicted Gartenlaub for receipt and possession of child pornography.

The lawfulness of the August 2014 search depends on the lawfulness of the January 2014 FISC-authorized search. If the FISC search violated the Fourth Amendment, then the August 2014 search, based on information uncovered during the FISC search, violated the Fourth Amendment as well. *See, e.g., United States v. Wanless*, 882 F.2d 1459, 1465 (9th Cir. 1989) ("It is now fundamental that evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search.").

The January 2014 FISA search of Gartenlaub's home and computers was valid only if the government's FISC application established probable cause to believe (among other things) that Gartenlaub was "an agent of a foreign power"--namely, China. If the application did not make that showing, or if it made that showing only through reckless and material falsehoods or omissions, then the FISC-authorized search violated Gartenlaub's Fourth Amendment rights, and the August 2014 search--which depended for its probable cause on the child pornography found during the January 2014 search--similarly violated the Fourth Amendment.

We cannot show directly that the government's application to the FISC failed to establish probable cause or contained reckless and material falsehoods or omissions, because the district court refused to give the defense access to the application. But we can surmise that the FISC application paralleled Agent Harris' June 2013 affidavit in support of the government's secret search warrant for Gartenlaub's emails. We showed in Gartenlaub's initial motion--and will show in more detail in our brief--that the Harris affidavit (1) does not establish probable cause to believe that Gartenlaub stole C-17 information from Boeing and gave it to the Chinese, and (2) contains reckless and material falsehoods and omissions. Mot. 12-20. It is fair to presume that the FISC application suffered from similar deficiencies.

B. The Government's Response.

The government barely mentions the FISA application and order. It merely recites the district court's legal conclusions (written entirely by the government lawyers, Doc. 114), without any factual elaboration. G. Opp. 6-7, 17-18. The government offers no showing that the FISA application established probable cause to believe that Gartenlaub was an "agent of a foreign power." And, because the government refuses to discuss the contents of the FISA application, it does not address the *Franks* issue substantively. The government notes that the district court refused to provide a *Franks* hearing, but it ignores the fact that the court could not possibly have known, without input from the defense, whether the application contained reckless and material falsehoods or omissions. As Judge Rovner has observed, the district court "cannot, for the most part, independently evaluate the accuracy of [the FISA] application on its own without the defendant's knowledge of the underlying facts." *United States v. Daoud*, 755 F.3d 479, 496 (7th Cir. 2014) (Rovner, J., concurring), *cert. denied*, 135 S. Ct. 1456 (2015).

Turning to the June 2013 Harris affidavit--which, at least for now, must serve as a proxy for the FISA application--the government makes little effort to argue that it established probable cause to believe that Gartenlaub was a spy for

China.[5] The government summarizes the allegations Agent Harris made in the affidavit, G. Opp. 7-8--but it is obvious that those allegations do not come close to establishing probable cause. The massive invasion of privacy that a computer search entails requires more than hunch and suspicion, and that is all Agent Harris had here. That is particularly clear in considering the exculpatory information in the affidavit (some of which is summarized at G. Opp. 15 n.4), and even more so when the affidavit's material falsehoods and omissions are taken into account. *See* Mot. 19-20; Doc. 73 at 18-34.

The lawfulness of the January 2014 FISA search presents a "substantial question"--that is, a question that is "fairly debatable" or "one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (quotations omitted). As the district court has found, Gartenlaub is neither a flight risk nor a danger to the community. He should remain on his current terms of release until this Court has decided the important Fourth Amendment and other issues his appeal will present.

[5] The government argues primarily that the emails obtained through the search warrant that Agent Harris secured in June 2013 did not contribute significantly to the August 2014 search warrant application. G. Opp. 14. Whatever the merit of this argument, it misses the point here. For purposes of this motion, the Harris affidavit serves primarily as a proxy for the FISA application.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the initial motion, the Court should permit Gartenlaub to remain on release pending appeal.

DATED: November 13, 2016

Respectfully submitted,

/s/ John D. Cline
John D. Cline

Attorney for Defendant-Appellant
KEITH PRESTON GARTENLAUB

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