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ERIC MCDAVID

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ERIC MCDAVID, Defendant.	Case No. CR.S-06-0035-MCE **MOTION TO SUPPRESS EVIDENCE** DEFENDANT'S NOTICE OF MOTION AND MOTION TO SUPPRESS ALL EVIDENCE OBTAINED AS PART OF A WARRANTLESS AND ILLEGAL ***VIDEO AND AUDIO SURVEILLANCE SEARCH OF MCDAVID'S HOME IN JANUARY OF 2006*** AS VIOLATIVE OF THE FOURTH AMENDMENT'S PROTECTION AGAINST SEARCHES OF THE HOME WITHOUT A WARRANT AND VIOLATIVE OF THE FEDERAL WIRETAP ACT, 18 U.S.C. §2510 ET SEQ.; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR EVIDENTIARY HEARING. Date: February 6, 2007 Time: 8:30 A.M. Judge: Hon. Morrison C. England

To: **McGregor W. Scott, R. Steven Lapham,** attorneys for plaintiff: PLEASE TAKE NOTICE that on the above date in the

above entitled action, defendant, through counsel MARK J. REICHEL, will move this Honorable Court to issue an order suppressing as evidence by the plaintiff in this trial the following evidence: Any and all evidence, derived directly or indirectly, and all fruits thereof, obtained pursuant to the unlawful search by use of hidden video and audio surveillance of defendant's residence in January of 2006 on the basis that the search of the premises was without a warrant, and therefore violative of the Fourth Amendment and the Federal Wiretap Act 18 U.S.C. §2510 et seq.

This motion is based on the United States Constitution, the Federal Rules of Criminal Procedure, the Points and Authorities submitted in support, and such argument and evidence of counsel at the hearing on the motion.

Respectfully submitted

DATED: December 19, 2006.

MARK J. REICHEL
ATTORNEY AT LAW
Attorney for defendant

/S/ Mark Reichel

MEMORANDUM OF POINTS AND AUTHORITIES

Supporting Facts[1]: Defendant was residing at the home he shared with codefendants Lauren Weiner and Zachary Jenson and the undercover officer named "Anna" in Dutch Flats, California on the dates of on or about January 2 through 13, 2006.

Defendant was not aware that the person he knew as "Anna" was an undercover law enforcement operative who carried a hidden audio taping device on her person in her purse, nor that the home he was residing in was equipped with several hidden video and audio recording devices, installed and maintained by the FBI. The audio and video taping took place constantly while defendant resided there, recording all of his conversations and every other intimate aspect of his life. The audio and video surveillance continued, even during the times that the undercover law enforcement operative "Anna" was not present.

The officers had not previously obtained a warrant from a judge for this search, as required by the Fourth Amendment and the Federal Wiretap Act 18 U.S.C. §2510 et seq.

Legal authority.

A. The Fourth Amendment "Exclusionary" Rule.

The Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

[1] Familiarity with the operative facts of this charge are assumed and reference is made to the Criminal Complaint and background facts therein. As with all of the defendant's pretrial motions, the factual background for this motion comes from the discovery provided by the government, defense investigation, and the anticipated testimony and evidence to be submitted at the hearing of the motion.

not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. Const., Amend. IV. Evidence obtained in violation of the Fourth Amendment must be excluded from a federal criminal prosecution. Weeks v. United States, 232 U.S. 383, 398 (1914). "The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" Segura v. United States, 468 U.S. 796, 804, 104 S. Ct. 3380 (1984) (citations omitted). "It 'extends as well to the indirect as the direct products' of unconstitutional conduct." Id., quoting Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407 (1963). The exclusionary rule fashioned in Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-392 (1920). Because the Amendment affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. Silverman v. United States, 365 U.S. 505 (1961); Katz v. United States, 389 U.S. 347 (1967).

B. Warrantless Search.

The United States must prove that the warrantless entry and search of defendant's residence was legal under the

Fourth Amendment. A search or seizure *not* accompanied by a warrant is presumed to be unreasonable. United States v. Carbajal, 956 F.2d 924, 930 (9th Cir. 1992), *citing* Katz v. United States, 389 U.S. 347 (1967). The burden is on the United States to justify the warrantless search of defendant's property as a recognized exception to the rule requiring the prior obtaining of a judicially authorized search warrant. Carbajal, 956 F.2d at 930.

C. Illegal search with video and audio surveillance.

This is not even a close call.

*The Fourth Amendment. This Circuit commands that the Fourth Amendment requires a warrant in such an instance.

"Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved." United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir.), cert. denied, 534 U.S. 866 (2001). If this case were before district court judge William D. Keller, Central District of California, Los Angeles, he would resonate exactly as he did in United States v. Andonian, 735 F. Supp. 1469, 1478 (1990) that "Video surveillance cannot under any circumstances be maintained without a warrant. Its continuing nature, while contributing to its invasiveness, subjects it to further oversight as well."

The Ninth Circuit[2] agrees. There are two closely similar

[2] As the Fifth Circuit has said, "hidden video surveillance invokes images of the 'Orwellian state' and is regarded by society as more egregious than other kinds of intrusions." Cuevas, 821 F.2d at 251. See also United States v. Mesa-Rincon, 911 F.2d 1433, 1442 (10th Cir. 1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use"); United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984) ("We think it . . . unarguable that television surveillance is exceedingly intrusive, especially in combination (as here) with audio surveillance, and

cases. The first, United States v. Koyomejian 970 F.2d 536 (9th Cir. 1992), involved the surreptitiously installed hidden audio and video recorders in the defendant's business, which was under investigation by law enforcement. The officers, however, had taken the time to get a warrant *prior* to the installation. The defendants moved to suppress the evidence at the district court level, arguing that the hidden video recording was prohibited by Title I of the Wire Tap Act, or, alternatively, that it is regulated by Title I; the government claimed such surveillance is neither prohibited nor regulated by the statute. The Ninth Circuit found (1) neither Title I nor the FISA prohibits domestic *silent* video surveillance; (2) Title I does not regulate such *silent* surveillance; (3) but, the Fourth Amendment *does* regulate such surveillance. (Italics added.)

> On the issue of the Fourth Amendment, it explained that
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> Although domestic silent video surveillance is not regulated by statute, it is of course subject to the Fourth Amendment. See Torres, 751 F.2d at 882. ...We proceed to describe the Constitutional requirements for silent video surveillance conducted for domestic purposes.
>
> As a preliminary matter, we conclude that Rule 41(b) of the Federal Rules of Criminal Procedure authorizes a district court to issue warrants for silent video surveillance. See United States v. Mesa-Rincon, 911 F.2d 1433, 1436 (10th Cir. 1990) ("Rule 41 'is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause." ...

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inherently indiscriminate, and that it could be grossly abused - to eliminate personal privacy as understood in modern Western nations"). And "Television surveillance is identical in its indiscriminate character to wiretapping and bugging. It is even more invasive of privacy, just as a strip search is more invasive than a pat-down search . . ." Torres, 751 F.2d at 885; Mesa-Rincon, 911 F.2d at 1437 (stating that "video surveillance can be vastly more intrusive" than audio surveillance).

> Second, following the other circuits which have ruled on this issue, we 'look to Title [I] for guidance in implementing the fourth amendment in an area that Title [I] does not specifically cover.'... While we do not adopt all of the special, technical requirements of Title I, see, e.g., 18 U.S.C. § 2516, we do adopt the following four requirements, in addition to the ordinary requirement of a finding of probable cause: (1) the judge issuing the warrant must find that 'normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous,' 18 U.S.C. § 2518(3)©; (2) the warrant must contain 'a particular description of the type of [activity] sought to be videotaped, and a statement of the particular offense to which it relates,' id. § 2518(4)©; (3) the warrant must not allow the period of [surveillance] to be 'longer than is necessary to achieve the objective of the authorization, []or in any event longer than thirty days' (though extensions are possible), id. § 2518(5); and (4) the warrant must require that the [surveillance] 'be conducted in such a way as to minimize the [videotaping] of [activity] not otherwise subject to [surveillance] . . .,' id. .... We are satisfied that these requirements comport with the demands of the Constitution, and guard against unreasonable video searches and seizures.

Id. 542.

The facts of the case at bar establish unequivocally that the Fourth Amendment was clearly violated by the *warrantless* secret videotaping of defendant's premises.

Very recently, with even closer facts, is United States v. Nerber, 222 F.3d 597 (9th Cir. 2000). There, the informant and law enforcement quickly rented a motel room, and installed hidden video surveillance without a warrant. The defendants were led to the motel room for a one time drug deal with the informant. They were to be there for a very brief period of time. They entered, did the deal, and then stayed while the informant left for a brief period of time. The informant did not come back for a few hours, and when the defendants left the motel room, they were arrested. They objected to the use at trial of the video and audio

surveillance of the motel room as violative of the Fourth Amendment's warrant protection. The motion was originally denied, but then later granted solely as to the *time when the informant was not present in the motel room*; that evidence was ordered suppressed. Id at 599. (Italics added for emphasis.)

The government appealed that suppression order– evidence taped while the informant was gone from the room -- to the Ninth Circuit. As such, the defendants did not appeal, and what was not presented to the Ninth Circuit was the issue of the illegality of the warrantless video/audio search *while the informant was present*.

The Ninth Circuit then ruled – our discussion requires the extended quotation that

> Despite the pause the government's use of video surveillance gives us, we agree with the district court that defendants had no reasonable expectation that they would be free from hidden video surveillance while the informants were in the room. Defendants' privacy expectation was substantially diminished because of where they were. They were not "residents" of the hotel, they were not overnight guests of the occupants, and they were there solely to conduct a business transaction at the invitation of the occupants, with whom they were only minimally acquainted.. ...These factors coalesce to support the district court's finding that the defendants may not invoke the Fourth Amendment to suppress the evidence gathered during this period.

The Court then instructed that

> We do not intend to imply that video surveillance is justifiable whenever an informant is present. For example, we suspect an informant's presence and consent is insufficient to justify the warrantless installation of a hidden video camera *in a suspect's home*. We hold only that when defendants' privacy expectations were already substantially diminished by their presence in another person's room to conduct a brief business transaction, the presence and consent of the informants was sufficient to justify the surveillance.

> We also agree with the district court, however, that once the informants left the room, defendants' expectation to be free from hidden video surveillance was objectively reasonable. When defendants were left alone, their expectation of privacy increased to the point that the intrusion of a hidden video camera became unacceptable. People feel comfortable saying and doing things alone that they would not say or do in the presence of others. *This is clearly true when people are alone in their own home or hotel room, but it is also true to a significant extent when they are in someone else's home or hotel room.* Even if one cannot expect total privacy while alone in another person's hotel room (i.e., a maid might enter, someone might peek through a window, or the host might reenter unannounced), this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden video cameras.

Id at 604.[3] (Emphasis added).

Dissecting the teachings: the Ninth Circuit first condemns the practice, then counsels that the practice of such warrantless police conduct gives the Circuit "pause." The Circuit then sets the parameters by advising that this warrantless search barely passes constitutional scrutiny because (i) the defendants' privacy expectation –a brief visit to a motel--was substantially diminished; (ii) unlike this defendant in the case at bar, they were not "residents"

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[3] The Ninth Circuit's instruction is a firm one. Prior to announcing the ruling, the court began by dictating that

> The governmental intrusion was severe. Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances. As we pointed out in Taketa, the defendant had a reasonable expectation to be free from hidden video surveillance because 'the video search was directed straight at him, rather than being a search of property he did not own or control . . . . [and] the silent, unblinking lens of the camera was intrusive in a way that no temporary search of the office could have been.' 923 F.2d at 677. As Judge Kozinski has stated, 'every court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy . . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need.' United States v. Koyomejian, 970 F.2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring).

Id at 603.

of the hotel nor *even overnight guests of the occupants*, and (iii) they were there solely to conduct a business transaction at the invitation of the occupants--unlike the defendant in the case at bar who was living full time at the premises, (iv) with whom they (the Nerber defendants) were only minimally acquainted–unlike the very long term and extremely close relationship between defendant and "Anna."

Finally, exactly on point for the court in this instance, the Ninth Circuit commanded that "We do not intend to imply that video surveillance is justifiable whenever an informant is present. For example, we suspect an informant's presence and consent is insufficient to justify the *warrantless installation of a hidden video camera in a suspect's home." (*Italics added.) Id at 604.

As well, once the informant was not in the house, the video and audio taping was illegal under the Fourth Amendment. "We also agree with the district court, however, that once the informants left the room, defendants' expectation to be free from hidden video surveillance was objectively reasonable. When defendants were left alone, their expectation of privacy increased to the point that the intrusion of a hidden video camera became unacceptable." Id.[4]

[4] The United States Attorneys Manual, Title 9, Criminal Resources, Chapter 32, was apparently not reviewed; the USAM itself explains the warrant requirement:

> Video surveillance, which is the use of closed-circuit television (CCTV) to conduct a visual surveillance of a person or a place, is not covered by Title III. Rather, its use is governed by the Fourth Amendment and, therefore, when a reasonable expectation of privacy exists, a search warrant should be sought pursuant to Fed. R. Crim. P. 41 and the All Writs Act, codified at 28 U.S.C. 1651. Six circuits, while recognizing that Title III does not govern video surveillance, require that search warrants for video surveillance meet certain higher, constitutional standards required under Title III. *See United States v. Falls*, 34 F.3d 674 (8th Cir. 1994); *United States v.*

*The Federal Wiretap Act 18 U.S.C. §2510 et seq.

The installation of the various audio recording devices–whether part of a video surveillance camera or separate of itself– inside the home of the defendant in January of 2006 was without a warrant and violated the Fourth Amendment. Without a wiretap warrant, it was completely illegal as well. "In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While 'the requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement,'...it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few

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Koyomejian, 970 F.2d 536 (9th Cir.), *cert. denied*, 113 S. Ct. 617 (1992); *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), *cert. denie d*, 479 U.S. 827 (1986); and *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

Accordingly, a search warrant requesting to use video surveillance must demonstrate not only probable cause to believe that evidence of a Federal crime will be obtained by the surveillance, but also should include: (1) a factual statement that alternative investigative methods have been tried and failed or reasonably appear to be unlikely to succeed if tried or would be too dangerous; (2) a statement of the steps to be taken to assure that the surveillance will be minimized to effectuate only the purposes for which the order is issued; (3) a particularized description of the premises to be surveilled; (4) a statement of the duration of the order, which shall not be longer than is necessary to achieve the objective of the authorization nor, in any event, longer than 30 days, measured from the date of the order (without any 10-day grace period to begin interception, but with 30-day extension periods possible); and (5) the names of the persons to be surveilled, if known.

The Department requires that the investigative agency seeking to use court-ordered video surveillance obtain prior approval from the appropriate Department official. That policy appears at USAM 9-7.200.

threats to liberty exist which are greater than that posed by the use of eavesdropping devices." Berger v. New York, 388 U.S. 41,63; 87 S. Ct 1873,1886.

As such, the installation of whatever audio devices–either independent of the video cameras or not–was an illegal trespass into this defendant's home, needed either a general warrant or a wiretap warrant. Neither was obtained. The evidence is inadmissible.

While the informant was not present in the room or house.

There can be no dispute from the government that it is clearly illegal to allow the taping to occur while the informant is not in the house or room. Prior to getting to the clear illegality of allowing the audio taping of the defendant to occur while the informant *was not present* in the home or room in January of 2006, the court must hold the government to their prior positions on this exact issue in the Nerber case, discussed above. There, the government conceded, without any real fight, that when the informant was not present in the motel room, the audio taping of the Nerber defendants violated the wiretap laws, 18 U.S.C. §2510. "The government conceded that audio surveillance conducted after the informants departed was inadmissible, because the federal wiretap statute permits warrantless audio surveillance only if one of the participants in the monitored conversation consents. Absent such consent, the government must obtain a warrant and satisfy the statute's stringent particularity requirements." Nerber at p. 605

The general rule is that statements made by U.S.

Attorneys during the course of criminal investigations or trials constitute party admissions admissible into evidence in subsequent trials under Rule 801(d)(2). United States v. Kattar, 840 F.2d 118, 127-131 (1st Cir. 1988); United States v. Salerno, 937 F.2d 797, 810-812 (2nd Cir. 1991); United States v. Morgan, 581 F.2d 933, 937 (D.C. Cir. 1978) (Federal Rules clearly contemplate that federal government is a party-opponent of criminal defendant); United States v. DeLoach, 34 F.3d 1001 (11th Cir. 1994).

The court rejected the government's argument that it should not be held to statements made by a different office: "The Justice Department's various offices ordinarily should be treated as an entity, the left hand of which is presumed to know what the right hand is doing." Kattar, supra, at 127.

Under the Federal Wiretap laws, if the informant were present, *wearing*[5] a recording wire, the "one party consent rule" of the Wiretap Act would apparently save the legality of the recording. However, once she left, the recording- without a warrant- had to stop. "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2). Further, The Federal Wiretap Act "generally forbids the intentional interception

[5]This is different than the installation in the house of hidden recorders which, as discussed herein above, is plainly illegal.

of wire communications, such as telephone calls, when done without court-ordered authorization." United States v. Workman, 80 F.3d 688, 692 (2d Cir. 1996). "It protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (internal quotation marks omitted). When information is obtained in violation of the Act, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." 18 U.S.C. § 2515.

Interestingly, our Supreme Court strongly urges the civil and criminal *prosecution* of all those involved in this illegal wiretap activity; having expressly done so in 1969, shortly after the final passage of the Act. In a wiretap case with similar facts, they argued that "The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed. In this respect we are mindful that there is now a comprehensive statute making unauthorized electronic surveillance a *serious crime*. The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Without experience showing the contrary, we should not assume that this new statute will be cavalierly disregarded or will not be enforced against transgressors....Not only does the Act impose criminal penalties upon those who violate its provisions governing eavesdropping and wiretapping, 82 Stat. 213 (18 U. S. C. §

2511 (1964 ed., Supp. IV)) (fine of not more than $ 10,000, or imprisonment for not more than five years, or both), but it also authorizes the recovery of civil damages by a person whose wire or oral communication is intercepted, disclosed, or used in violation of the Act, 82 Stat. 223 (18 U. S. C. § 2520 (1964 ed., Supp. IV)) (permitting recovery of actual and punitive damages, as well as a reasonable attorney's fee and other costs of litigation reasonably incurred). Alderman v. United States, 394 U.S. 165, 176, 89 S. Ct 961, 967 (1969).

The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, issued May 30, 2002 by then Attorney General John Ashcroft, mandated that the agents first obtain a warrant or a wiretap warrant in this instance-which they ***did not*** for some reason. These Guidelines are available on line at www.usdoj.gov/olp/generalcrimes2.pdf The Guidelines teach the agents that "Nonconsensual electronic surveillance must be conducted pursuant to the warrant procedures and requirements of chapter 119 of title 18, United States Code (18 U.S.C. 2510-2522);(At page 19 of the Guidelines, IV INVESTIGATIVE TECHNIQUES, B (4).) And that " 7. Consensual electronic monitoring must be authorized pursuant to Department policy. For consensual monitoring of conversations other than telephone conversations, advance authorization must be obtained in accordance with established guidelines. This applies both to devices carried by the cooperating participant and to devices installed on premises under the control of the participant. See U.S. Attorneys' Manual 9-

7.301 and 9-7.302. For consensual monitoring of telephone conversations, advance authorization must be obtained from the SAC or Assistant Special Agent in Charge and the appropriate U.S. Attorney, Assistant Attorney General, or Deputy Assistant Attorney General, except in exigent circumstances. An Assistant Attorney General or Deputy Assistant Attorney General who provides such authorization shall notify the appropriate U.S. Attorney;" (Guidelines at page 20.)

Not much more needs to be provided to the court in the case at bar.

Conclusion. Again, the Fourth Amendment forbids search and seizure of a person's property –including electronic searches of a person's home that they share with others – absent a warrant unless there is a judicially recognized basis to dispense with the warrant requirement *prior to the search*. The government bears the burden as to this issue. This they cannot do. As well, they concede themselves that such a practice is illegal under the Wiretap Laws, subjecting the agents to both civil and criminal penalty.

For the reasons stated above, defendant respectfully asks that the Court grant his motion to suppress all direct and derivatively obtained evidence.

Respectfully submitted

DATED: December 19, 2006.

MARK J. REICHEL
ATTORNEY AT LAW
Attorney for defendant

/S/ Mark Reichel