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 9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,  
 13 Plaintiff,  
 14 v.  
 15 KEITH PRESTON GARTENLAUB,  
 16 Defendant.

No. SA CR 14-173-CAS

[PROPOSED] ORDER DENYING MOTION

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 19 THIS MATTER is before the Court on defendant Keith Preston  
 20 Gartenlaub's Motion for Disclosure of FISA Material and Memorandum  
 21 of Point and Authorities to Suppress the Fruits or Derivatives of  
 22 Any Evidence Collected Pursuant to FISA or Other Foreign  
 23 Intelligence Gathering (CR 70,<sup>1</sup> the "Motion"). For the reasons set  
 24 forth below, it is ORDERED that the defendant's Motion is DENIED.

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 27 <sup>1</sup> "CR" refers to the Clerk's Record and is followed by the  
 applicable docket control number.

Background

On August 27, 2014, Gartenlaub ("defendant") was arrested upon a complaint charging him in the Central District of California with possession of child pornography, in violation of 18 U.S.C.

§ 2252(a)(5)(B). (CR 1.) On August 27, 2014, the government filed its Notice of Intent to Use Foreign Intelligence Surveillance Act ("FISA") Information. (CR 9.) On October 23, 2014, a grand jury in the Central District of California returned an indictment charging the defendant with one count of attempted receipt and receipt of child pornography, in violation of 18 U.S.C.

§§ 2252(a)(2)(A) and (b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(5)(B) and (b)(2). (CR 36.)

On February 2, 2015, the defendant filed his Motion, which seeks: (1) review by this Court of all FISA applications and warrants ("the FISA materials"); (2) disclosure of these documents to defense counsel; (3) that this Court conduct an evidentiary hearing pursuant to Franks v. Delaware; and (4) suppression of any evidence obtained or derived from FISA search or surveillance ("the FISA information"). On May 4, 2015, the government filed a response in opposition<sup>2</sup> to the defendant's Motion, (CR 80, 82), and the defendant filed a reply on June 8, 2015. (CR 90.)

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<sup>2</sup> The government filed both a classified and an unclassified Memorandum in Opposition to the defendant's Motion. All references herein to the government's response are to the unclassified memorandum.

Findings

1  
2 FISA contains specific and detailed procedures required for  
3 obtaining orders to authorize electronic surveillance and physical  
4 searches of a foreign power or an agent of a foreign power. To  
5 begin the FISA process, an application approved by the Attorney  
6 General that contains specific information is filed ex parte and  
7 under seal with the Foreign Intelligence Surveillance Court ("FISC")  
8 (50 U.S.C. §§ 1804(a), 1823(a)). The FISC must make necessary,  
9 specific findings after reviewing an application before entering an  
10 ex parte order (50 U.S.C. §§ 1805(a), 1823(a)), which specifically  
11 identifies the targeted facilities and directs how the electronic  
12 surveillance and physical searches are to be conducted. (50 U.S.C.  
13 §§ 1805(c)(1)-(2), 1824(c)(1)-(2)).

14 The Court has reviewed the defendant's Motion and the  
15 government's response and the Sealed Appendix thereto, including the  
16 FISA materials, as well as the defendant's reply to the government's  
17 response. After an in camera, ex parte review, and based on its  
18 analysis of all the materials submitted to the Court, and with the  
19 above in mind, the Court finds that:

20 (1) The President has authorized the United States Attorney  
21 General to approve applications to the FISC for electronic  
22 surveillance and for physical searches for foreign intelligence  
23 information and purposes;

24 (2) Each application was made by a federal officer and  
25 approved by the Attorney General (50 U.S.C. §§ 1805(a)(1),  
26 1824(a)(1));

27 (3) Each application contained facts establishing probable  
28 cause to believe that the target of the electronic surveillance,

1 physical searches, or both, was at the time an agent of a foreign  
2 power (50 U.S.C. §§ 1801(b)(2), 1805(a)(2)(A), 1824(a)(2)(A));

3 (4) No United States person was determined to be an agent of a  
4 foreign power solely upon the basis of activities protected by the  
5 First Amendment to the United States Constitution (50 U.S.C.  
6 §§ 1805(a)(2)(A), 1824(a)(2)(A));

7 (5) Each application made pursuant to 50 U.S.C. § 1804  
8 contained facts establishing probable cause to believe that each of  
9 the facilities or places at which the electronic surveillance was  
10 directed was being used, or was about to be used, by a foreign power  
11 or an agent of a foreign power (50 U.S.C. § 1805(a)(2)(B));

12 (6) Each application made pursuant to 50 U.S.C. § 1823  
13 contained facts establishing probable cause to believe that the  
14 premises or property to be searched was or was about to be owned,  
15 used, possessed by, or was in transit to or from, an agent of a  
16 foreign power or a foreign power (50 U.S.C. § 1824(a)(2)(B));

17 (7) Each application made pursuant to 50 U.S.C. § 1823  
18 contained facts establishing probable cause to believe that the  
19 premises or property to be searched contained foreign intelligence  
20 information (50 U.S.C. §§ 1823(a)(3)(B), 1824(a)(4));

21 (8) The minimization procedures incorporated into the  
22 applications and orders met the requirements of 50 U.S.C. §§ 1801(h)  
23 or 1821(4) (50 U.S.C. §§ 1805(a)(3), 1824(a)(3)), and the government  
24 implemented such minimization procedures in conformity with an order  
25 of authorization or approval;

26 (9) Each application contained all of the statements and  
27 certifications required by 50 U.S.C. §§ 1804 or 1823 (50 U.S.C.  
28 §§ 1805(a)(4), 1824(a)(4));

1 (10) No certification in an application for a target who was  
2 at the time a United States person was clearly erroneous on the  
3 basis of the statement made pursuant to 50 U.S.C. §§ 1804(a)(6)(E)  
4 or 1823(a)(6)(E) or any other information furnished under 50 U.S.C.  
5 §§ 1804(c) or 1823(c) (50 U.S.C. §§ 1805(a)(4), 1824(a)(4));

6 (11) A "significant purpose" of the government's collection  
7 pursuant to FISA was to collect foreign intelligence information (50  
8 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B));

9 (12) Each order issued by the FISC satisfied the requirements  
10 of 50 U.S.C. §§ 1805(c) or 1824(c);

11 (13) Each order issued by the FISC satisfied the requirements  
12 of 50 U.S.C. §§ 1805(d) or 1824(d);

13 (14) The defendant made no preliminary or substantial showing  
14 of a false statement, nor of a false statement that was material,  
15 nor a statement that was made knowing or intending it was false or  
16 with reckless disregard for its truth, in the FISA applications that  
17 would entitle him to a hearing pursuant to Franks v. Delaware, 438  
18 U.S. 154 (1978). As there is no indication of any such false  
19 statements in the FISA applications, a Franks hearing is not  
20 warranted in this matter;

21 (15) Disclosure to the defense of the FISA materials is not  
22 required because the Court was able to make an accurate  
23 determination of the legality of the electronic surveillance and  
24 physical searches without disclosing the FISA materials or any  
25 portions thereof; and

26 (16) Due process does not otherwise require disclosure of the  
27 FISA materials.

28

1 Discussion

2 The defendant seeks materials that were presented to the FISC,  
3 including the resulting FISC orders, that provided the legal basis  
4 for the electronic surveillance and physical searches from which  
5 some of the evidence that will be used against him was obtained or  
6 derived. By requesting the disclosure of the FISA materials, the  
7 defendant is seeking discovery of material that FISA specifically  
8 protects from such disclosure, except as provided in 50 U.S.C.  
9 §§ 1806(f), (g) and 1825(g), (h) (i.e., if disclosure is necessary  
10 for the Court to make a determination of the legality of the  
11 surveillance, or if due process requires discovery or disclosure).<sup>3</sup>

12 The Attorney General has filed a sworn declaration in this case  
13 stating that disclosure of the FISA materials or an adversary  
14 hearing would harm the national security of the United States.  
15 Therefore, as mandated by FISA, this Court conducted an in camera,  
16 ex parte review of the FISA materials to determine whether the  
17 information was lawfully acquired and whether the electronic  
18 surveillance and physical searches were made in conformity with an  
19 order of authorization or approval (i.e., were lawfully conducted).  
20 This in camera, ex parte review process under FISA satisfies due  
21 process under the United States Constitution. See, e.g., United  
22 States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987) (ruling FISA's  
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25 <sup>3</sup> Two distinct due process considerations governed this Court's  
26 consideration. First, this Court considered whether the in camera,  
27 ex parte review process mandated by FISA Sections 1806(f) and  
28 1825(g) accorded with due process. It does, as set forth in the  
cases cited below. Second, this Court considered whether the FISA  
materials contain any information that due process requires be  
disclosed to the defendant (e.g., Brady material) under FISA  
Sections 1806(g) and 1825(h). They do not.

1 in camera, ex parte procedures do not deprive a defendant of due  
2 process); United States v. Daoud, 755 F.3d 479, 481-83 (7th Cir.  
3 2014) (upholding FISA's in camera, ex parte procedures); United  
4 States v. El-Mezain, 664 F.3d 467, 567 (5th Cir. 2011); United  
5 States v. Abu-Jihaad, 630 F.3d 102, 117 (2d Cir. 2010); United  
6 States v. Damrah, 412 F.3d 618, 624 (6th Cir. 2005); United States  
7 v. Butenko, 494 F.2d 593, 607 (3d Cir. 1974); United States v.  
8 Warsame, 547 F. Supp. 2d 982, 988-89 (D. Minn. 2008); United States  
9 v. Spanjol, 720 F. Supp. 55, 58-59 (E.D. Pa. 1989). In conducting  
10 that review, the Court may disclose the FISA materials "only where  
11 such disclosure is necessary to make an accurate determination of  
12 the legality of the surveillance [or search]." 50 U.S.C.  
13 §§ 1806(f), 1825(g).

14 After conducting its own review of the FISA materials, the  
15 Court finds that it does not require the assistance of the defense  
16 to make an accurate determination of the legality of the electronic  
17 surveillance and physical searches. Thus, there is no valid, legal  
18 reason for disclosure of any of the FISA materials to the defendant.  
19 See United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984) (holding  
20 that disclosure should occur only if the court determines that such  
21 disclosure is necessary to make an accurate determination of the  
22 legality of the surveillance); Daoud, 755 F.3d at 485 (holding that  
23 because legality of surveillance was apparent from in camera, ex  
24 parte review, disclosure to defense was not necessary).

25 As a result of the Court's thorough in camera, ex parte  
26 examination of the materials in the Sealed Appendix, the Court finds  
27 that the FISA materials provide all of the information needed to  
28 address the defendant's Motion. The Court finds that the government

1 satisfied FISA's requirements to obtain orders for electronic  
2 surveillance and physical searches; that the information obtained  
3 pursuant to FISA was lawfully acquired; and that the electronic  
4 surveillance and physical searches were made in conformity with an  
5 order of authorization or approval.

6 Additionally, there is no basis for disclosure of the FISA  
7 materials pursuant to 50 U.S.C. §§ 1806(g) and 1825(h). Such  
8 disclosure is only permitted if this Court's in camera, ex parte  
9 review disclosed that due process requires discovery or disclosure.  
10 The Court finds that due process does not require disclosure of the  
11 FISA materials to the defendant.

12 Although federal courts are not in agreement whether the FISC's  
13 probable cause determinations should be reviewed de novo or accorded  
14 deference, the Court finds that the materials that it has reviewed  
15 in camera, ex parte satisfy either standard. The Court also finds  
16 that the probable cause requirement of FISA comports with the  
17 requirements of the Fourth Amendment to the United States  
18 Constitution. See, e.g., United States v. Cavanagh, 807 F.2d 787,  
19 790-91 (9th Cir. 1987) (ruling that Fourth Amendment's probable  
20 cause and particularity requirements are satisfied for an order  
21 targeting a facility used by a foreign power); El-Mezain, 664 F.3d  
22 at 568-70; Abu-Jihaad, 630 F.3d at 117-19; United States v. Isa, 923  
23 F.2d 1300, 1304 (8th Cir. 1991). FISA's "significant purpose"  
24 standard is also constitutional under the Fourth Amendment. See  
25 United States v. Duka, 671 F.3d 329, 343-45 (3d Cir. 2011).

26 Furthermore, the certifications submitted in support of a FISA  
27 application should be "subjected only to minimal scrutiny by the  
28 courts," United States v. Badia, 827 F.2d 1458, 1463 (11th Cir.



1 1987), and are to be "presumed valid." Duggan, 743 F.2d at 77 & n.6  
2 (citing Franks v. Delaware, 438 U.S. 154, 171 (1978)); United States  
3 v. Campa, 529 F.3d 980, 993 (11th Cir. 2008); United States v.  
4 Sherifi, 793 F. Supp. 2d 751, 760 (E.D.N.C. 2011) ("a presumption of  
5 validity [is] accorded to the certifications"); United States v.  
6 Nicholson, 2010 WL 1641167 at \*5 (D. Or., Apr. 21, 2010) (quoting  
7 United States v. Rosen, 447 F. Supp. 2d 538, 545 (E.D. Va. 2006));  
8 Warsame, 547 F. Supp. 2d at 990 ("a presumption of validity [is]  
9 accorded to the certifications"). If the target is a United States  
10 person, then the district court should also ensure that each  
11 certification is not "clearly erroneous." Campa, 529 F.3d at 994;  
12 Duggan, 743 F.2d at 77; United States v. Kashmiri, No. 09 CR 830-4,  
13 2010 WL 4705159 at \*2 (N.D. Ill. Nov. 10, 2010). A certification is  
14 clearly erroneous only when "the reviewing court on the [basis of  
15 the] entire evidence is left with the definite and firm conviction  
16 that a mistake has been committed." United States v. U.S. Gypsum  
17 Co., 333 U.S. 364, 395 (1948); see United States v. Garcia, 413 F.3d  
18 201, 222 (2d Cir. 2005); United States v. Islamic American Relief  
19 Agency ("IARA"), No. 07-00087-CR-W-NKL, 2009 WL 5169536, at \*4 (W.D.  
20 Mo. Dec. 21, 2009). Applying these standards, this Court finds that  
21 the certifications at issue here were made in accordance with FISA's  
22 requirements.

23 The defendant also seeks an adversarial hearing pursuant to  
24 Franks v. Delaware, 438 U.S. 154 (1978). A defendant is entitled to  
25 such a Franks hearing only where he has made "a substantial  
26 preliminary showing that a false statement knowingly and  
27 intentionally, or with reckless disregard for the truth, was  
28 included" in the FISA materials and that the allegedly false

1 statement was necessary to the FISC's approval of the application.  
2 See id. at 155-56. The defendant has made no such substantial  
3 preliminary showing here as to any false statements, whether any  
4 such false statements were material, and whether any such false  
5 statements were made knowingly, intentionally, or with reckless  
6 disregard for their truth, and therefore, is not entitled to a  
7 Franks hearing. The Court is aware that the defendant has not  
8 reviewed the FISA materials. Therefore, the Court has made an  
9 independent review of all the materials and has determined that  
10 there is no indication of any false statements having been included  
11 in the FISA materials. Daoud, 755 F.3d at 484-85 (holding that  
12 district judge should determine viability of Franks challenge based  
13 on ex parte, in camera review).

14 Lastly, the Sixth Amendment's right to confrontation is not a  
15 basis for granting access to the FISA materials at issue. The right  
16 to confrontation is "not absolute" and may bow to accommodate  
17 legitimate interests in the criminal trial process without violating  
18 the defendant's Sixth Amendment rights. Isa, 923 F.2d at 1306-07;  
19 see Ott, 827 F.2d at 475, 477 (affirming district court's denial of  
20 motion to suppress FISA information where defendant challenged in  
21 camera, ex parte procedures based on Fifth and Sixth Amendment, and  
22 affirming denial of request to provide cleared counsel with FISA  
23 materials).

#### 24 Conclusion

25 For all of the foregoing reasons, IT IS HEREBY ORDERED that the  
26 defendant's Motion is DENIED; and

27 IT IS HEREBY FURTHER ORDERED that the government's FISA  
28 applications, orders, and other related materials and its classified

1 submissions for this matter are SEALED and shall be retained in  
2 accordance with established security procedures by the Classified  
3 Information Security Officer or his/her designee.

4 IT IS SO ORDERED.

5 This 6th day of August, 2015

6  
7 *Christina A. Snyder*  
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9 \_\_\_\_\_  
10 HONORABLE CHRISTINA A. SNYDER  
11 United States District Judge

12 Presented by:

13 \_\_\_\_\_  
14 /s/

15 ANTHONY J. LEWIS  
16 Assistant United States Attorney  
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