NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEITH PRESTON GARTENLAUB, AKA Keith Preson Gartenlaub, Defendant-Appellant.	No. 16-50339 D.C. No. 8:14-cr-00173-CAS-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted December 4, 2017
Pasadena, California

Before: WARDLAW and GOULD, Circuit Judges, and PIERSOL,** District Judge.

Keith Gartenlaub appeals his conviction for knowingly possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

under 28 U.S.C. § 1291, and we affirm.[1]

1. There was sufficient evidence to sustain Gartenlaub's conviction for knowing possession of child pornography. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime—including knowledge—beyond a reasonable doubt. The government presented sufficient evidence that Gartenlaub knew the child pornography was present on his computers. *See* 18 U.S.C. § 2252A(a)(5)(B) (requiring that the defendant must "knowingly possess[] . . . any . . . computer disk, or any other material that contains an image of child pornography that has been . . . transported using any means or facility of interstate or foreign commerce . . . including by computer").

The government demonstrated that an individual intentionally downloaded child pornography, copied it onto Gartenlaub's hard drives, and organized and reorganized the child pornography into folders reflecting the content of the videos. *See* 18 U.S.C. § 2252A(a)(5)(B). A rational jury could have concluded beyond a reasonable doubt that the user of the password-protected "Keith" account opened a folder containing obviously child-pornographic filenames and then copied those files onto a new computer, that "Keith" knowingly downloaded and organized the child pornography collection in the first place, and that "Keith" was Keith

[1] The government's motion to file an oversized brief, Dkt 51, is GRANTED.

Gartenlaub himself. *See United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc); *United States v. Willard*, 230 F.3d 1093, 1095 (9th Cir. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

2. The district court did not commit plain error by failing to suppress the evidence from Gartenlaub's computer as inadmissible for violating the Fourth Amendment.[2]

No controlling authority dictates the conclusion that the government's Foreign Intelligence Surveillance Act ("FISA") search and subsequent use of FISA-derived materials in a non-national security prosecution violates the Fourth Amendment, such that the district court's failure to follow it was plain error. *See United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011), *as amended* (Nov. 16, 2011). Our decision in *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc), *abrogation recognized by Demaree v. Pederson*, 887 F.3d 870 (9th Cir. 2018) (per curiam), is inapposite; it did not decide the question presented by this case and, in fact, addressed no national security concerns particular to the FISA context.

The idea that the government can decide that someone is a foreign agent based on secret information; on that basis obtain computers containing "[t]he sum

[2] Plain error review is the appropriate standard because Gartenlaub did not assert the Fourth Amendment argument predicated on alleged misuse of the FISA warrant before the district court.

of [that] individual's private life," *Riley v. California*, 134 S. Ct. 2473, 2489 (2014); and then prosecute that individual for completely unrelated crimes discovered as a result of rummaging through that computer comes perilously close to the exact abuses against which the Fourth Amendment was designed to protect.[3] However, the district court did not commit plain error by concluding otherwise.

3. Based upon our independent review of the classified record evidence, we conclude that the FISA warrant was supported by probable cause. The FISA application and supporting materials demonstrated probable cause to believe that Gartenlaub was an agent of a foreign power when the FISA order was issued. *See* 50 U.S.C. §§ 1801(b), 1821(1), 1824(a)(2).[4] The district court did not err in denying Gartenlaub a *Franks* hearing. The district court did not err in "finding that the government did not intentionally or recklessly make false statements." *United States v. Christie*, 825 F.3d 1048, 1069 (9th Cir. 2016) (citation omitted); *see Franks v. Delaware*, 438 U.S. 154 (1978).

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[3] We thank amici curiae, Electronic Frontier Foundation and American Civil Liberties Union, for their thought-provoking briefing.

[4] Although there is a split in the circuits as to what deference to afford a district court's determination that a FISA order was based on probable cause, we do not resolve here which level of deference is appropriate as we are convinced probable cause existed under either a de novo or an abuse of discretion standard of review. *See United States v. Turner*, 840 F.3d 336, 340 (7th Cir. 2016) (applying a de novo standard of review); *United States v. Hassan*, 742 F.3d 104, 139 n.29 (4th Cir. 2014) (noting that the Fourth Circuit applies a de novo standard although the Fifth and Second Circuits apply a more deferential standard).

4. We have conducted an *in camera* review of the underlying FISA materials. We conclude that the disclosure of the FISA materials to Gartenlaub was not "necessary to make an accurate determination of the legality of the search." 50 U.S.C. § 1825(g); *see also United States v. Ott*, 827 F.2d 473, 476–77 (9th Cir. 1987) (finding "no indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of non-foreign intelligence information, or any other factors that would indicate a need for disclosure" (internal quotation marks omitted)). In point of fact, disclosure was not necessary even under a less rigorous standard than that proposed by the government. As well, the non-disclosure violated neither Gartenlaub's due process nor *Brady* rights. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Ott*, 827 F.2d at 476–77.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

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Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
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Name of Counsel: _____

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Date _____ Costs are taxed in the amount of $ _____

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By: _____ , Deputy Clerk