

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	No. 08 CR 888
)	Hon. James B. Zagel
ROD BLAGOJEVICH)	

**GOVERNMENT’S RESPONSE TO MOTION TO SUPPRESS WIRETAPS
BECAUSE THE AFFIDAVIT FAILED TO RECITE PROBABLE CAUSE OR, IN
THE ALTERNATIVE, REQUEST FOR EVIDENTIARY HEARING**

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully responds to Defendant Rod Blagojevich’s Motion to Suppress Wiretaps Because the Affidavit Failed to Recite Probable Cause Or, in the Alternative, Request for Evidentiary Hearing as follows:

I. BACKGROUND

On October 21, 2008, Chief Judge James F. Holderman signed an order authorizing the interception of oral communications for a 30-day period in the Friends of Blagojevich (“FOB”) Office and FOB Conference room (collectively referred to herein as the “FOB Office”). On the morning of October 22, 2008, the FBI began intercepting oral communications in the FOB Office. Defendant seeks to suppress this Title III wiretap, and the subsequent Title III wiretaps on a variety of telephone lines, on the grounds that the affidavit filed in support of the October 21, 2008 wiretap of the FOB Office failed to recite probable cause. Alternatively, defendant claims that the government engaged in misconduct when it omitted certain critical facts from the Title III Affidavit. Defendant’s arguments are

unsupported by the facts and the law. Abundant evidence existed in the attached Title III Affidavit to support the Chief Judge's order authorizing the interceptions at the FOB Offices. Defendant's allegations of government misconduct with respect to the information contained in the affidavit are baseless. Defendant has offered nothing that would support suppression of the Title III, or even a *Franks* hearing. Further, the arguments defendant now makes in this motion were explicitly waived by him on February 10, 2010 and therefore should not be considered.

II. Waiver

On February 10, 2010, in a pleading personally signed by the defendant, defendant Blagojevich "knowingly, intentionally, willfully, and voluntarily waive[d] any right that he possess[ed] to move to suppress [conversations intercepted pursuant to court-authorized wiretaps in October, November, and December 2008]," and sought to have all recorded conversations played in open court. R. 241, ¶ 10. This waiver expressly included motions based on any ground stated in 18 U.S.C. § 2518(10) and Fed. R. Crim. P. 12(b)(3)(C), including but not limited to a failure to meet "the requirements of minimization, completeness, and authenticity," as well as motions based on claims that the interception orders were issued without probable cause, and motions grounded on the claims that "many of the recordings violate the marital privilege, the attorney-client privilege, spoliation and the executive privilege," R. 241, ¶¶ 6,7, 9, 10. Consistent with defendant's waiver, no motion to suppress intercepted conversations was filed prior to the initial trial in this case. Based on defendant Blagojevich's explicit waiver, the arguments advanced in his instant motion should

be deemed waived and therefore not considered by the Court.

III. There Was Ample Probable Cause to Support the Application for the Title III.

1. Legal Standard

Title III establishes the probable cause requirements that must be met before a wiretap can be authorized. Pursuant to Title 18, United States Code, § 2518, a judge may issue an *ex parte* order authorizing or approving the interception of wire, oral, or electronic communications if the judge determines based on the facts submitted by the applicant that:

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the places where, the wire, oral or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

18 U.S.C. § 2518(3).

The probable cause standard in Title III cases is coextensive with the constitutional requirements of the Fourth Amendment. *See United States v. Plescia*, 773 F. Supp. 1068, 1074 (N.D.Ill. 1991), *aff'd*, 48 F.3d 1452 (7th Cir. 1995); *United States v. Zambrana*, 841 F.2d 1320, 1332-33 (7th Cir. 1988) (applying traditional standard of probable cause from *Illinois v. Gates* in Title III cases). Thus, the starting point for the probable cause analysis

is *Illinois v. Gates*, 462 U.S. 213 (1983). The Supreme Court in *Gates* adopted a “totality of the circumstances” approach for reviewing probable cause determinations in warrant cases. *Id.* at 230. The standard of review under *Gates* is one of deference. A reviewing court is limited to determining whether the issuing judge had a substantial basis for concluding that probable cause existed. *Id.* at 238-39.

Determining the existence of probable cause requires “a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”

Id. at 238. This circuit, in analyzing probable cause, has summarized the standard as follows:

Probable cause is only a reasonable probability of criminal activity; it does not require certainty or even a prima facie showing of criminal activity . . . Even if there is an innocent explanation, as long as there is a reasonable probability that there is criminal activity afoot, despite the presence of other probabilities, probable cause is present.

United States v. Dorfman, 542 F. Supp. 345, 359 (N.D.Ill. 1982) (citations omitted), *aff’d sub. nom. United States v. Williams*, 737 F.2d 594 (7th Cir. 1984). Thus, the review of Chief Judge Holderman’s finding of probable cause is necessarily with deference to determine whether Chief Judge Holderman had a substantial basis to conclude that probable cause existed. *Gates*, 462 U.S. at 238-39. In reviewing that decision, even doubtful cases should be resolved in favor of upholding the warrant. *United States v. Pless*, 982 F.2d 1118, 1124 (7th Cir. 1992); *United States v. Griffin*, 827 F.2d 1108, 1111 (7th Cir. 1987).

2. There Was Ample Evidence to Support the Probable Cause Finding.

There can be no doubt that probable cause existed to support the Title III application.

There were numerous pieces of evidence that established probable cause for the Title III affidavit. [REDACTED]

[REDACTED]

[REDACTED]

As described in detail in the Title III affidavit, [REDACTED]

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States v. Hanhardt, 157 F.Supp.2d 978, 991-92 (N.D. Ill. 2001) (rejecting defendant's argument that information that was decades old effected the probable cause analysis in part because, "[m]uch of the dated information provides historical context for the current information, and none of it contradicts the current information. And, some of the information concerns a long running . . . conspiracy, making the passage of time less significant.")

3. Taking All this Information Together, the Chief Judge Correctly Found Probable Cause to Support the Application for the Title III.

Based on the evidence provided in the Title III affidavit, Chief Judge Holderman correctly made "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates* at 238. In short, the totality of the evidence adequately demonstrated probable cause for the wiretap.

IV. There Were No Omissions.

Alternatively, defendant Blagojevich seeks suppression of the Title III evidence on the basis of government misconduct. Where, as here, the defendant makes allegations of misconduct concerning the government's investigation, the Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978), controls. In *Franks*, the Court held that intentionally or recklessly submitting false statements in a warrant affidavit might, under certain circumstances, violate the Fourth Amendment and, in turn, void the resulting search warrant (or, in this case, the resulting order authorizing Title III interceptions). *Id.* at 164-

65. Such a claim requires the movant to establish by a preponderance of the evidence that (i) a factual statement made in an affidavit supporting a warrant is false; (ii) the affiant made the false statement either knowingly or with reckless disregard for the truth; and (iii) without the false statement, the remainder of the affidavit is insufficient to establish probable cause. *United States v. McNeese*, 901 F.2d 585, 593-94 (7th Cir. 1990) (citing *Franks*, 438 U.S. at 155-56); *United States v. Jackson*, 103 F.3d 561, 574 (7th Cir. 1996) (to support a *Franks* claim, movant must at least show a false statement, that agent's state of mind in making the false statement was at least reckless, and that the false statement was material, i.e., necessary for a finding of probable cause).

Defendant claims that the government "omitted critical facts that misled the issuing judge into signing the wiretap order." Def. Br. at 2. [REDACTED]

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V. *Skilling* Is Irrelevant to the Analysis of Probable Cause.

At the end of his motion, defendant makes a legal argument that the Title III affidavit does not recite probable cause “based on the narrowed application of honest services (to only “core” cases of bribery and kickbacks) and where there was no allegation of an express *quid pro quo*.” Def. Br. at 28. Defendant is wrong for a number of reasons. First, even taking the current state of the law with respect to Tile 18, United States Code, Section 1346, the affidavit provided evidence that defendant Blagojevich was engaged in a classic kickback/bribery scheme in which he was seeking campaign contributions in exchange for state action with respect to state actions. Second, although it is well settled (both generally and also specifically by this Court in this case), that the *quid pro quo* need not be express, the information [REDACTED]

[REDACTED] Third, the

Title III Affidavit was premised not only on violations of Title 18, United States Code, Section 1346, but also on Title 18, United State Code, Sections 371, 1341, 1343, 1951 and

2. As such, defendant's argument is without merit.

VI. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny Defendant Rod Blagojevich's Motion to Suppress Wiretaps Because the Affidavit Failed to Recite Probable Cause Or, in the Alternative, Request for Evidentiary Hearing.

Respectfully submitted,

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