

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

v.

WALTER ANDERSON,

Defendant.

Criminal No. 05-66 (PLF)

**MEMORANDUM IN SUPPORT OF  
DEFENDANT'S MOTION TO SUPPRESS  
(Anderson Pretrial Motion No. 5)**

The government executed two searches in this case of Mr. Anderson's alleged residence, business office, and/or automobile. The warrants allowed the seizure of voluminous materials with respect to particular entities that had not been connected *anywhere* in the affidavits to the crimes alleged. Moreover, the warrants impermissibly directed the seizure of a potentially unlimited number of corporate documents, thus violating the particularity requirement of the Fourth Amendment.<sup>1</sup> Both violations were so obvious and flagrant as to make reliance on the warrants objectively unreasonable under the Supreme Court's decisions in *United States v. Leon*, 468 U.S. 897 (1984), *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), and *Malley v. Briggs*, 475 U.S. 335 (1986).

Accordingly, any materials seized in connection with entities not mentioned anywhere in the supporting affidavits, any other seized materials that are outside the scope of the warrants, and any fruits thereof, should be suppressed.

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<sup>1</sup> It is telling that the government has thus far identified only *three* boxes of materials -- of the nearly *100* seized -- that it actually intends to use at trial.

### **FACTUAL BACKGROUND**

The government's first search took place on March 19, 2002, pursuant to warrants issued the day before. The warrants incorporated an affidavit from IRS Special Agent Matthew Kutz, along with two schedules attached to the affidavit -- one listing the items to be seized ("Schedule A") and one describing the places to be searched ("Schedule B").<sup>2</sup>

At the outset of his affidavit, Agent Kutz states in conclusory terms that

the facts set forth in th[e] affidavit establish: (a) there is probable cause to believe that in the District of Columbia and elsewhere, and during the time period of November 1990 through the present, ANDERSON committed offenses, among others, in violation of 26 U.S.C. Section 7201 (Attempt to Evade or Defeat a Tax), 26 U.S.C. Section 7206(1) (Fraud and False Statements), and 18 U.S.C. 2 (Aiding and Abetting)[.]

(Kutz 3/19/02 Aff. ¶ 3(a).) A discussion of these "facts" begins in paragraph 9 of the affidavit, with a section of "Definitions." Thereafter, Agent Kutz describes the particular tax evasion scheme under investigation at the time. *See generally id.* ¶¶ 10-16.

At the outset of the discussion of the alleged scheme is an identification and description of "Relevant Business Entities" -- that is, *11 specific entities* asserted to "have been used by Anderson in furtherance of the crimes . . . referenced in the affidavit." *Id.* ¶ 10 (collectively, "Category 1" entities) (list attached as Exhibit C). Section 10 is the *only* section of the affidavit devoted to an identification and description of particular business entities. And it is

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<sup>2</sup> The three March 2002 search warrants, affidavit in support, and accompanying Schedules A and B, are attached hereto as Exhibit A. The affidavit in support of the November 2003 search warrants, as well as the accompanying Schedules A and B, are attached hereto as Exhibit B. We have been unable to obtain the two November 2003 search warrants from the Clerk's Office, however, and thus those warrants are not attached hereto. For present purposes, we assume *arguendo* that the warrants themselves are valid and that they properly incorporate the supporting affidavit. But because we have not actually seen the November 2003 warrants, we respectfully reserve our right to challenge their sufficiency if and when we obtain them.

the *only* section that groups particular entities together and asserts that they “have been used by Anderson in furtherance of the crimes previously referenced in the affidavit.” *Id.*

Without explanation, however, Schedule A expands the scope of the search from 11 entities to “at least” 37 entities. *Id.* at 37. Agent Kutz makes no showing whatsoever of a nexus between the additional entities listed and the crimes alleged. Nor does he allege that all of Mr. Anderson’s affairs were so permeated with fraud as to allow the indiscriminate seizure of records relating to entities not mentioned anywhere in Schedule A or the affidavit itself.<sup>3</sup>

Moreover, it is plain from the directions in Schedule A that the discretion given to the executing officers was unconstitutional. As we mentioned above, the officers were invited to seize materials with respect to entities not even mentioned in Schedule A, let alone in the affidavit. *See id.* (directing the seizure of items “relative to *at least* the [37] . . . corporations or entities” listed in the schedule) (emphasis added). And, in a stand-alone paragraph at the end of the Schedule, the executing officers were instructed to seize “any and all fruits, instrumentalities, and evidence (at this time unknown) of the [designated crimes].” *Id.* at 38. There is no

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<sup>3</sup> Of the 37 entities included on Schedule A to the March 2002 affidavit, only 15 appear anywhere in the affidavit itself. Category 1 accounts for 11 of the 15 entities. The other four appear elsewhere in the affidavit (collectively, “Category 2” entities) (list attached as Exhibit D). The additional 22 entities appear on Schedule A, but not in the affidavit itself (collectively, “Category 3” entities) (list attached as Exhibit E).

Likewise, of the 11 entities included on Schedule A to the November 2003 affidavit, only four appear anywhere in the affidavit itself (collectively, “Category 2a” entities) (list included within Exhibit D). An additional seven entities appear on Schedule A, but not in the affidavit itself (collectively, “Category 3a” entities) (list included within Exhibit E).

Finally, in both the March 2002 and November 2003 searches, materials were seized with respect to entities completely outside the scope of the warrants -- *i.e.*, not included on the Schedules A and not mentioned in the affidavits. There were 22 such entities in March 2002 and 19 such entities in November 2003 (collectively and respectively, “Category 4” and “Category 4a” entities) (lists attached as Exhibit F).

indication that this instruction was intended to be limited by the preceding language in Schedule A or in the affidavit itself; indeed, it is not incorporated into a more specific list, and it does not say “any and all *other* fruits, instrumentalities, and evidence.” Instead, the executing officers were given general license to seize undefined fruits, instrumentalities, and evidence of the crimes alleged.

The same deficiencies are evident in the November 2003 affidavit. In this second affidavit, while Agent Kutz does not include a stand-alone section discussing “relevant business entities,” he again describes, in the affidavit itself, the connection of particular entities to the crimes alleged. (*See* Kutz 11/6/03 Aff. ¶¶ 7-20.) He again broadens the list in the attached Schedule A. He again offers no information about how the additional entities connect to the offenses alleged in the affidavit. And he again invites the executing officers to use their discretion with respect to both the scope and substance of the seizure. (*See id.* at 23.)

### **ARGUMENT**

The Fourth Amendment states that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the . . . things to be seized.” U.S. Const. amend. IV. The Fourth Amendment thus “serves to protect two distinct interests”:

First, the warrant requirement seeks to guarantee that any searches intruding upon an individual’s privacy must be justified by probable cause, as determined by a neutral and detached magistrate. Second, where probable cause is found and a warrant issues, the particularity requirement seeks to assure that those searches deemed necessary should be as limited as possible.

*United States v. Heldt*, 668 F.2d 1238, 1256 (D.C. Cir. 1981) (citations and internal quotation marks omitted). These requirements ensure “that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the

Framers intended to prohibit.” *United States v. Maxwell*, 920 F.2d 1028, 1031 (D.C. Cir. 1990) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

**I. THERE WAS NO PROBABLE CAUSE TO SEIZE CATEGORY 3/3a AND CATEGORY 4/4a MATERIALS.**

“The fourth amendment categorically prohibits the ‘general, exploratory rummaging [of] a person’s belongings.’” *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). Searches are thus necessarily limited “to the specific areas and things for which there is probable cause to search[.]” *Id.* Accordingly, where, as here, searches for long lists of documents are at issue, there must be “probable cause for *each item* on the list.” *United States v. \$92,422.57*, 307 F.3d 137, 148 (3d Cir. 2002) (emphasis added); *see also In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991) (noting the “that there [must] be probable cause to seize the *particular thing* named in the warrant”) (emphasis added).

Although a magistrate judge’s finding of probable cause is entitled to deference, the reviewing court still has the “duty” to “ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (citation omitted). Here, it is plain that there was no reasonable basis -- let alone a “substantial” one -- to find probable cause with respect to the Category 3/3a and Category 4/4a materials.

Agent Kutz devotes a stand-alone section of his March 2002 affidavit to the identification and description of 11 specific entities alleged to “have been used by Anderson in furtherance of the crimes” set forth in the affidavit. (Kutz 3/19/02 Aff. ¶ 10.) The inclusion of this stand-alone discussion is understandable; it was essential for Agent Kutz to establish probable cause with respect to these 11 entities because the tax evasion scheme described in the affidavit revolved around them. Indeed, Agent Kutz made no attempt to demonstrate that *all* of Mr. Anderson’s affairs were “permeated by fraud,” a showing that is required before a more

“generalized seizure of business documents” can be allowed. *United States v. Kow*, 58 F.3d 423, 427-28 (9th Cir. 1995). To the contrary, the March 2002 affidavit makes clear that the scheme alleged involved *particular acts* and *particular entities*.

It is thus reasonable to infer that Agent Kutz ignored the Category 3/3a and Category 4/4a entities in both affidavits because such entities either had no connection to the crimes alleged or because Agent Kutz did not have sufficient facts at the time to establish probable cause. Indeed, his identification and description of particular entities in the affidavits should have alerted the magistrate judge that probable cause was lacking with respect to any others. *See, cf., Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (invoking the maxim *expressio unius est exclusio alterius*, “the mention of one thing implies the exclusion of another thing”) (citation omitted).

Put simply, the magistrate judge had no basis -- substantial or otherwise -- to find probable cause with respect to the Category 3/3a and Category 4/4a materials.<sup>4</sup>

## **II. THE WARRANTS ARE NOT SUFFICIENTLY PARTICULAR.**

The Fourth Amendment requires a search warrant to “particularly describe[] the place to be searched and the persons or things to be seized.”

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<sup>4</sup> At least one other court has confronted similar facts. As described by the Ninth Circuit in *In re Grand Jury Subpoenas*, 926 F.2d at 857, the district court had been presented with search warrants that included a list of documents to be seized. This list “was qualified by the requirement that the document seized be ‘in the name of or have reference to’ . . . one of the twenty-one persons or entities that had been linked to [defendant] through the investigation.” *Id.* The district court held, however, that the warrants were “overbroad . . . as to nine of the persons or entities named in the warrants” because these nine persons or entities had not been sufficiently linked to the alleged scheme. *Id.* The district court’s remedy was to invalidate the warrants with respect to the seizure of property relating to those nine persons or entities. *Id.* at 857-58. Although the Ninth Circuit was not asked to review that portion of the district court’s ruling, its application here is obvious.

Like the probable cause requirement, the particularity requirement guards against a “general, exploratory rummaging [of] a person’s belongings.” *Maxwell*, 920 F.2d at 1031 (citation and internal quotation marks omitted). Indeed, by requiring that warrants particularly describe the things to be seized, the Fourth Amendment ““makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.”” *Heldt*, 668 F.2d at 1256 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). The standard in the D.C. Circuit is that the warrant must be “particular enough if read with reasonable effort by the officer executing the warrant.” *United States v. Dale*, 991 F.2d 819, 846 (D.C. Cir. 1993) (citations and internal quotation marks omitted).

Here, each Schedule A suffers from two facial deficiencies. The March 2002 Schedule A, for example, directs various items “to be seized for the period November 1990 through the execution date of this search warrant . . . relative to *at least* the [37] . . . corporations or business entities” listed therein. (Kutz 3/19/02 Aff. at 32, 37 (emphasis added).) The November 2003 Schedule A contains similar language. (See Kutz 11/6/03 Aff. at 23.) The use here of “at least” is indistinguishable from the use in *Dale* of “including, but not limited to”. See 991 F.2d at 846. And, in *Dale*, the D.C. Circuit made clear that “explicit authorization to . . . agents to seize ‘business records including, but not limited to’ those specifically identified” is “not sufficiently particular.” 991 F.2d at 846. Such language has the effect of “subjecting essentially all of [a defendant’s] records . . . to seizure.” *Id.*

The second deficiency comes at the end of each Schedule A. There, *in a stand-alone paragraph*, the Schedule directs the seizure of “[a]ny and all fruits, instrumentalities, and evidence (at this time unknown) of the [designated crimes].” (Kutz 3/19/02 Aff. at 38; Kutz 11/6/03 Aff. at 23.) Such language, which effectively authorizes the seizure of evidence of “just

any violation” of the referenced statutes is, in the words of the D.C. Circuit, “impermissibly broad.” *United States v. Pindell*, 336 F.3d 1049, 1053 (D.C. Cir. 2003).

In *Pindell*, the list of items to be seized ended with a catch-all phrase:

[A] green card and driver’s license [in] the name of Osman Dainkeh, cash money in the amount of approximately \$500, a white gold chain, a dark blue police uniform, *and any other evidence of a violation of Title 18 U.S.C. § 242.*

*Id.* The court noted that “had the warrants” -- as here -- “*merely* authorized the seizure of ‘evidence of a violation of’” the designated statute, “they would indeed have been impermissibly broad.” *Id.* But there -- unlike here -- the “phrase *did not stand alone*, and instead came in the same sentence as, and at the conclusion of, a quite specific list of items to be seized.” *Id.* (emphasis added). As a result, the court concluded that the “list constrained the interpretation of the last phrase,” thus satisfying the particularity requirement. *Id.*; *see also Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (reaching a similar conclusion and noting that the catch-all phrase was “not a separate sentence,” but instead appeared at the end of a list of specific items).

Here, because the offending paragraph *does* stand alone, its interpretation is not constrained, and the warrants are thus not “particular enough.” *Dale*, 991 F.2d at 846.

### **III. THE EXECUTING OFFICERS DID NOT REASONABLY RELY ON THE DEFECTIVE WARRANTS.**

“The exclusionary rule bars the prosecution from using in its case-in-chief evidence obtained during a search that violated the Fourth Amendment.” *United States v. Johnson*, 332 F. Supp. 2d 35, 38 (D.D.C. 2004) (Friedman, J.). The Supreme Court has decided, however, that “the exclusionary rule should not be applied to exclude evidence seized pursuant to a defective search warrant if the officers conducting the search acted in ‘objectively reasonable reliance’ on the warrant and the warrant was issued by a detached and neutral

magistrate.” *Maxwell*, 920 F.2d at 1034 (citing *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984)).

At the same time, the Court recognized in *Leon* that it is not appropriate to apply the “good faith” exception where the warrant is (1) “based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable’”; or (2) “so facially deficient -- *i.e.*, in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.” *Johnson*, 332 F. Supp. 2d at 38-39 (quoting *Leon*, 468 U.S. at 923).<sup>5</sup>

#### **A. Probable Cause**

Agent Kutz’s affidavits were “so deficient” as to make a belief in the existence of probable cause objectively unreasonable. *Id.* at 39.

As we discussed above, the affidavits “insufficiently linked” the Category 3/3a and Category 4/4a entities to the crimes referenced in the affidavit. *Id.* In fact, the affidavits drew no link at all. But the red flags did not end there. The affidavits themselves did identify and describe other entities, and they did explain, in considerable detail, those entities’ role in the alleged tax evasion scheme. Even a casual perusal of the affidavits and each Schedule A reveals this glaring discrepancy. Simply put, no reasonable officer here could have believed in the existence of probable cause. *See Leon*, 468 U.S. at 919 n.20 (“The objective standard we adopt . . . requires officers to have a reasonable knowledge of what the law prohibits.”).

Regardless, the Supreme Court has made clear that “[i]t is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also

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<sup>5</sup> The other two situations recognized in *Leon* -- where the magistrate issues the warrant based on a deliberately or recklessly false affidavit or where the issuing magistrate fails to act in a neutral and detached manner -- are not at issue here.

of the officers who originally obtained it or who provided information material to the probable-cause determination.” *Leon*, 468 U.S. at 923 n.24. Thus, where the officer who procured the warrant “should himself have been aware that a proposed search would be illegal, a judicial official’s concurrence in the improper activity does not serve to bring it within the rule of *Leon* and *Sheppard*.” *United States v. Baker*, 894 F.2d 1144, 1149 (10th Cir. 1990) (citing *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986)).<sup>6</sup>

Agent Kutz certainly cannot claim ignorance of the fact that the Category 3/3a and Category 4/4a entities appeared nowhere in his own affidavits. Nor can he deny that *his* description of Mr. Anderson’s alleged schemes revolved entirely around the Category 1 and Category 2 entities. Indeed, he elected to make a detailed and lengthy showing of probable cause with respect to the Category 1 entities, to the exclusion of all others. On these facts, Agent Kutz “clearly should have known . . . that the search . . . would be illegal.” *Baker*, 894 F.2d at 1149 n.3. And “although mistakes in a probable cause determination are chiefly attributable to the magistrate, an officer who himself knows probable cause is lacking cannot take advantage of a magistrate’s obvious mistake.” *United States v. Hopkins*, 128 F. Supp. 2d 1, 9 (D.D.C. 2000).

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<sup>6</sup> In *Malley*, a state trooper claimed that the qualified immunity available to him in a Section 1983 action meant that “he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant.” 475 U.S. at 345. The Court stated that “[t]his view of objective reasonableness is at odds with . . . *Leon*.” *Id.* Instead, applying *Leon*, the Court stated the question as “whether a reasonably well-trained officer in [the affiant’s] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.” *Id.* Accordingly, at least where the affiant “clearly should have known . . . that the search . . . would be illegal,” *Baker*, 894 F.2d at 1149 n.3, “the Court now seems to have concluded . . . [that the] question of reasonableness is to be judged as of the time of the warrant application and thus without consideration of the fact that the magistrate thereafter acted favorably upon the affidavit presented.” 1 Wayne R. LaFare, *Search & Seizure: A Treatise on the Fourth Amendment* § 1.3 (4th ed. 2004). See generally *Martin v. D.C. Metro. Police Dep’t*, 812 F.2d 1425, 1434 n.20 (D.C. Cir 1987) (suggesting in *dicta* that, in grey areas, the magistrate’s determination “should carry some weight”) (subsequent procedural history omitted).

Accordingly, because, with respect to the Category 3/3a and Category 4/4a materials, the affidavits were “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” any such materials and any fruits thereof should be suppressed.<sup>7</sup>

### **B. Particularity**

The Category 3/3a and Category 4/4a materials also should be suppressed because of the broad discretion given to the executing officers by the instructions in each Schedule A. Indeed, each Schedule A allows the executing officers to determine for themselves what constitutes a fruit, instrumentality, or evidence of the designated crimes. (*See* Kutz 3/19/02 Aff. at 38; Kutz 11/6/03 Aff. at 23.) Such “unfettered discretion to seize anything which in their opinion is evidence of a violation of [one or all] of the involved federal statutes should have been enough to give them reason to pause.” *United States v. Nader*, 621 F. Supp. 1076, 1084 (D.D.C. 1985). But each Schedule A also allows the executing officers to determine for themselves which other companies might fall within the scope of the warrants. Taken together, it is even

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<sup>7</sup> During the searches, the government also seized “publications [allegedly] relating to privacy [and] living life abroad[.]” (Notice of Intention to Introduce Evidence Pursuant to Fed. R. Evid. 404(b) at 16 (Doc. #106).) The government intends to offer such materials under Rule 404(b) in order “to show consciousness of guilt.” *Id.* We have already identified the reasons why such evidence should not be admitted under Rule 404(b). But a more fundamental bar exists: Such publications are outside the scope of the two search warrants, were seized illegally, and thus must be suppressed. To be sure, neither affidavit specifically connects such publications to the crimes referenced in the affidavits. And the respective Schedules A refer only to corporate, financial, and address or telephone “books” (*see, e.g.*, Kutz 3/19/02 Aff. at 32 (¶ 3), 33 (¶¶ 4, 6)), not to Mr. Anderson’s personal reading collection about such topics as “privacy” and “living life abroad.”

In addition, it appears that the government intends to use at trial a number of other personal documents and items that were seized illegally during the execution of the warrants. We are still in the process of identifying these materials and will be prepared to address them more specifically in our reply brief and/or during the hearing on this motion. For now, we simply wish to note generally that any such personal items, and any fruits thereof, also should be suppressed.

more apparent that the executing officers had so much discretion under the warrants that they “could not reasonably [have] presume[d] [them] to be valid.” *Id.*

**CONCLUSION**

For the foregoing reasons, any Category 3/3a and Category 4/4a materials, any other seized materials that are outside the scope of the warrants, and any fruits thereof, should be suppressed.

Respectfully submitted,

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Michelle M. Peterson (D.C. Bar No. 438930)  
Assistant Federal Public Defender  
OFFICE OF THE FEDERAL PUBLIC DEFENDER  
625 Indiana Ave., N.W., Suite 550  
Washington, DC 20004  
(202) 208-7500

Steven E. Fagell (D.C. Bar No. 474618)  
V. Paige Pratter (D.D.C. Bar No. D00273)  
COVINGTON & BURLING  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 662-6000

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*Attorneys for Defendant*