

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Case No.: S 3 16 cr 0289 (ALC)

Plaintiff,

AFFIRMATION IN SUPPORT OF

AMENDED

MOTION TO SUPPRESS CONTENTS OF
INTERCEPTED WIRE
COMMUNICATION AND
DERIVATIVE EVIDENCE

Vs.

BIBA KAJTAZI, et al.

Defendant.

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Anthony Suarez, an attorney duly licensed to practice in the State of New York and before the United States District Court for the Southern District of New York, affirms under the penalty of perjury as follows:

1. That I am an attorney with the Suarez Law Group and Associates, attorneys for the defendant Biba Kajtazi, hereinafter "KAJTAZI" and or "defendant" and make this affirmation in support of this Motion to Suppress Contents of Intercepted Wired Communication and Derivative Evidence.
2. That Kajtazi moves to suppress the fruits of the eavesdropping warrant. As grounds for this request

counsel states the following:

Procedural Background

3. On February 8, 2016, Drew Johnson Skinner ("Skinner"), Assistant United States Attorney, Southern District of New York, applied for a warrant authorizing interception of communications on cellular telephone 917-417-9619 ("Kajtazi cell phone"). The warrant application was supported with the affidavit of Christopher Kaley ("Kaley"), a Special Agent

with the Federal Bureau of Investigations. Defendant Kushtrim Demaj was named as the main Target and was under investigation since 2012 for dealing in stolen cars and exchanging them for narcotics.

4. United States District Judge Esther Salas, District of New Jersey issued an order authorizing the interception of wired communications for a period of thirty (30) days. Reportedly, interception commenced on February 9, 2016 and ceased on March 9, 2016.

5. The order for such interceptions is not supported by probable cause and as required under the U.S. Constitution and 18 U.S.C. 2518 (4) (d).

6. A close review of the application supports that there were insufficient statement of the facts and circumstances to support a judicial finding that Kajtazi was committing, about to commit, or had committed the crimes described within the application as required in 18 U.S.C. 2518(3) (a).

POINTS AND AUTHORITIES

7. [In addition to the following points and authorities, the defendant hereby incorporates by reference the “Legal Argument” set forth in the “Defendant’s Motion to Dismiss.” filed by Kajtazi on October 17, 2016. See doc. 96 and 97]

The Fourth Amendment is an absolute guarantee that a search warrant will not be valid, unless there is a prior determination, by a neutral and detached magistrate, that probable cause exists to support the action requested by the applicant. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

In this matter, the warrant to intercept wire communication was improvidently issued on the basis of an affidavit which utterly failed to provide the essential specifications of facts and circumstances that might have supported a finding of probable cause vis-à-vis Mr. Kajtazi.

Standing

8. An “aggrieved person”—any person “who was a party to any intercepted wire ... communication or [any] person against whom the interception was directed,” 18 U.S.C. § 2510(11)—may move to suppress the contents of the wire communication. *Id.* § 2518(1)(a). In order for a defendant to have standing to seek suppression of electronic surveillance evidence, the surveillance must be “violative of his own Fourth Amendment right to be free of unreasonable searches and seizures.” *Alderman v. United States*, 394 U.S. 165, 176, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). “[T]he prohibition against assertion of another's rights normally would preclude an aggrieved person from suppressing a conversation in which he did not participate.” *United States v. Scott*, 504 F.2d 194, 197 n. 5 (D.C.Cir.1974), *aff'd*, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). Under this standard, each defendant has standing to challenge the interceptions of the communications from his own telephone as well as conversations in which he was a participant that were intercepted during the wiretap of another defendant's telephone. However, a defendant does not have standing to challenge a wiretap in which he was not intercepted or a conversation in which he did not participate

The Lack of Probable Cause in Agent Christopher Kaley Affidavit warrants suppression of the intercepted wire communications.

9. On February 8th, 2016 FBI Special Agent Christopher Kaley executed a sworn “Affidavit in Support of a warrant for interception of electronic communication.” (See Affidavit of Agent Christopher Kaley in discovery USAO_DE_0000297 to USAO_DE_0000334.) On the basis of such affidavit, a judicial officer in the United States District Court for the District of New Jersey approved the issuance of telephone interception order.

10. The 38-page affidavit provided by Agent Kaley contains multiple representations of drug dealing in exchange for vehicles on the part of defendant Kishtrim Demaj.

The affidavit does not set forth any facts or circumstances pertaining to any participation by Mr. Kajtazi in any specified (i.e., time and place) act of criminal conduct.

Presumably, the prosecution will endeavor to introduce hearsay statements of co-conspirators (previously named and unnamed) as proof of the conspiracy.

A page to page analysis of the February 8, 2016 Agent Christopher Kaley’s Affidavit shows the following:

- A. Pages 1 to 2 is the Table of Contents. Agent Christopher Kaley states that under the penalty of perjury to the contents of his affidavit .
- B. Page 3 is the regular boilerplate language establishing the Agent Kaley’s credentials.
- C. Page 4 Section C Target Subjects. This section discusses targets to include Kushtrim Demaj, Petrit Bicaj, Biba Kajtazi and others unknown as potential targets for wired communication interception. (No probable cause established against Kajtazi)
- D. Pages 5 to 6. Section E discusses in boilerplate language the Objectives of the Interception. Section F deals with Target Cellphone and Service provider naming phone number 917-684-6980 as the main target phone used by Kushtrim Demaj. (No probable cause is established)

- E. Page 7. Section **G** discusses Communication Features of Target Cellphone, Background Conversations and Territorial Scope and Jurisdiction. (No probable cause established)
- F. Pages 8 and 9. Section **J** discusses Period of Interception for a 30 day application. Section **K** discusses Monitoring Agents and Personnel. Section **L** discusses Minimization of Wired Communications. Section **K** discusses Prior Application and states that no prior application was made. (No probable cause is established)
- G. Page 10. Section II Titled as the Investigation and Probable Cause. Here Agent Kaley states in boilerplate language that he believes that one or more of the targets are currently committing, and will continue to commit for at least 30 days a target offense, and that the interception sought will achieve the Objectives of the Interpretation. Section **B** discusses the Basis and Scope of Declaration (No probable cause is established)
- H. Page 11 to 15. Section **C** discusses Details of Investigation and the Background to Investigate. In this section Agent Kaley explains in detail his reasons for probable cause to intercept the wire communication. Agent Kaley stated that in or about 2012 DHS-HIS agents obtained information from Kosovo law enforcement that Target Kushtrim Demaj had shipped vehicles with false Vehicle Identifications from the United States to Kosovo. (No mention of Kajtazi-no probable cause established against Kajtazi)
- I. On page 12, paragraph 2 stated that, “ In or about 2012, a confidential informant source (“CS-1”) informed DHS-HIS agents that CS-1 knew an individual, Xhevdet Kelmendi, who was interested in sending drugs to CS-1 in the United States in exchange for vehicles that CS-1 would send abroad.” That Kelmendi informed CS-1 and another confidential source (“CS-2”) who participated in the investigation, that CS-1 and CS-2 should speak to

Demaj , who was in the United States---about sending vehicle abroad in exchange for drugs. (No mention of Kajtazi, no probable cause)

- J. In a footnote on page 12 of the Affidavit, Agent Kaley stated that CS-1 had pleaded guilty in unrelated offenses and was cooperating with law enforcement in return for leniency in sentencing. That CS-2 was convicted pursuant to the Hobbs Act for robbery, firearm violations, and possession and distribution of cocaine. CS-2 agreed to cooperate in the hopes of obtaining leniency at sentencing and immigration benefits. (No mention of Kajtazi and no probable cause)
- K. In paragraphs 3 and 4, Agent Kaley jumps to February 12, 2014 and states that CS-1 and CS-2 met with Demaj in Elizabeth, New Jersey. That CS-1, and CS-2 discussed with Demaj exchanging vehicles for heroin and cocaine. And discussions regarding importation of drugs from Europe and South America in exchange for vehicles. (No mention of Kajtazi, no probable cause.)
- L. On page 13, paragraph 5, Agent Kaley discusses that in April 2015 Demaj spoke with CS-2 about a bad drug deal , and that Demaj offered to help CS-2 obtain drugs. (No mention of Kajtazi, no probable cause)
- M. On pages 13 to 15, paragraphs 6, 7, 8, 9, 10, and 11 Agent Kaley discusses several monitored drug transaction between CS-1 and CS-2 purchasing cocaine from Demaj. For example, on May 20, 2015 CS-2 gave \$1,000.00 to Demaj to purchase cocaine. Demaj instructed CS-2 to follow Bicaj to a restaurant location in the Bronx, where CS-2 allegedly states that Bicaj gave CS-2 a small package containing a white powdery substance containing 24.8 grams of cocaine. In another example, Demaj gave CS-2 the keys for a Mercedes Benz with the intent to have it reported stolen. CS-2 gave Demaj \$8,500.00

dollars-\$6,000 for drugs and \$2,500 for the Mercedes Benz. In August to October, 2015, Demaj on seven occasions sold cocaine to CS-2. On October 2015 Demaj sold 284 grams of cocaine to CS-2 for \$12,000. These funds were provided by the government to CS-2 to purchase the narcotics from Demaj. (Again, no mention of Kajtazi-no probable cause during this time frame against Kajtazi)

N. On page 15 to 21, Section 2 Agent Kaley discusses Demaj's usage of Communication Over the Target Cellphone. In those pages Agent Kaley discusses further drug transactions between CS-2 and Demaj. In one instance Demaj talks about selling 10 ounces for \$12,000. However, only \$6,000 was provided by CS-2 to Demaj from a remaining balance from a previous drug transaction.

(No mention of Kajtazi-no probable cause against Kajtazi)

O. On page 22, Section D. Analysis of Communication Records for Target Cellphone. In this page of his affidavit, Agent Kaley discusses that Demaj cell phone has placed or received 2,766 calls between November 17, 2015 and January 22, 2016. Agent Kaley states that he learned that Demaj cell phone was in contact 126 times with Bicaj between this same time frame.

P. Then on Page 22, *for the first time*, Biba Kajtazi's name comes up. Here, Agent Kaley states that he (Kaley) learned for the *first time* that Demaj Cell phone was in contact 72 times with Kajtazi between November 17, 2015 to January 22, 2016. Here, Agent Kaley is trying to tie Kajtazi into the drug activities of Demaj. As this Court knows, mere association with a known criminal does not create probable cause. *See infra*. (Any reviewing authority will agree that this statement alone does not establish probable cause against Kajtazi.)

- Q. In the same paragraph, Agent Kaley states under the penalty of perjury that on October 29, 2015 CS-2 informed Agent Kaley that Demaj informed CS-2 that Kajtazi recently traveled to Colombia to find a cocaine supplier. C-2 further stated to Agent Kaley, that Demaj allegedly played an audio recording communication where Kajtazi and Demaj were discussing cocaine distribution, and that it was stored on the target (Demaj) cell phone, and sent from Kajtazi to Demaj via messenger application. This Statement by CS-2, we allege is a fabrication. First, there is no evidence in the discovery provided that states such a tape exists. Secondly, the reliability of CS-2 has not been established, nor is there any detail information as to what was said in the alleged tape it was conclusionary and imprecise. Third, CS-2 could not possibly positively identified Kajtazi as the person talking on this alleged tape because C-2 has never met Kajtazi in person. Fourth, Agent Kaley does not state that he himself heard the contents of the alleged tape. He completely relies on the hearsay of CS-2 to seek a warrant. However, if such tape does exist, then the government must produce this evidence in discovery. A Frank hearing is required. *See infra*. If the government cannot produce this alleged tape, then this motion must be granted.
- R. In the last part of the paragraph, Agent Kaley tries to tie the alleged sale of cocaine where CS-2 met Defendant Bicaj at a restaurant location and sold 24 grams of cocaine to CS-2. Nowhere in the affidavit does it say CS-2 met with Kajtazi, however the affidavit seems to imply that Bicaj obtained his drugs from the restaurant and thus from Kajtazi, this is a false impressions being put forward. In his affidavit, Agent Kaley states that a review of the New York State Department of Labor shows Biba Kajtazi to be the owner of Restaurant-2. The defendant alleges that is not true. This is a material misrepresentation and meant to give the court the impression and lead it to believe that Bicaj went to

Restaurant to obtain his drugs for sale. Kajtazi does not own a restaurant in his name. Mr. Kajtazi manages a sports bar in a different location. Moreover, as argued in the motion to dismiss, this alleged purchase by CS-2 from Bicaj is the same and only sale against Bicaj where CS-2 removed his body wire to enter the restaurant to meet Bicaj and buy the cocaine. Agent Kaley omits this information from his affidavit. Nor does Agent Kaley state if CS-2, Bicaj, and Bobby met in the restaurant when this alleged sale took place. Nor does he explain why C-2 would break protocol which could effect C-2 credibility. (Again, there is no probable cause on mere allegations from an unreliable informant trying to make a federal case against Kajtazi to save himself from his unrelated criminal case pending in New Jersey.)

- S. On page 24, Section III, Normal Investigative Techniques , Agent Kaley states that consistent with 18 USC 2518 (3)(c) normal investigative procedures have been tried and have failed, or “too dangerous to achieve the object of the Interception herein sought.”
 - T. The agent does not set forth what investigative procedures have been tried against Kajtazi, or why they cannot attempt them. As stated above, Agent Kaley sworn under the penalty of perjury that he learned of Kajtazi for the first time on October 2015 when CS-2 informed him as an associate of Demaj. However, there is no allegation that Agent Kaley, or his CS-2 ever met Kajtazi to discuss a drug deal. It’s all based on mere association that Demaj phone had 72 registered calls to Kajtazi.
 - U. The remaining pages 24 to 37 of the affidavit do not mention Kajtazi and is standard boilerplate protocol requesting authority to intercept target cellphones.
11. The evidence discovered through the use of electronic communications based on the applications and affidavits noted herein should be suppressed because the initial affidavit

of Agent Kaley failed to set the reliability of informant CS-2.

12. Where information contained in the supporting affidavit for a wiretap order originated with an informant, the court must go one step further in its determination of probable cause by satisfying the standards governing informant testimony enunciated by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Under *Aguilar*, to support a probable cause determination, an affidavit based on an informant's information must: (1) demonstrate that the source of the information is reliable and (2) indicate the nature of the underlying circumstances upon which the informant based his conclusions.

13. In the instant case, the information contained in the supporting affidavit against Kajtazi comes from confidential informant CS-2, the Court's search for probable cause must be guided by and measured against the familiar standards set forth in *Aguilar v. State of Texas, supra*, and *Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)*. Under those standards, the Court must be told of the underlying circumstances and particular facts which support the confidential informant's conclusions, and he must also be told why the informant should be considered reliable. The application for the order is insufficient if either of these tests is unmet.

14, Next, mere association with known drug traffickers (like Demaj) cannot form basis for probable cause for finding necessary to support issuance of wiretap authorization. 18 U.S.C.A. § 2518(3)(a-d). See *United States v Aniello Ambrosio*, 898 F.Supp. 177 (SDNY) The mere fact that a pen register shows 72 calls between Kajtazi and Demaj between November 17, 2015 and January 22, 2016 does not create probable cause.

***Probable Cause
Standards***

15. In order to have probable cause for wired tap, the affidavit must reasonably support that Kajtazi was committing a crime, or about to commit a crime. This is lacking in Kaley's affidavit.

16. As stated above, many of the facts set forth in Agent Kaley's affidavit are based on an allegedly non-existent audio recording as alleged by the CI's, whose basis of reliability is not adequately set forth in the affidavit; that many of the facts set forth in the affidavit are based on hearsay; that many of the facts in the affidavit are based on opinion of the investigating Officer; that the evidence set forth in the affidavit is false and misleading and that the investigating Office failed to explain properly why other normal investigative procedures against Kajtazi have not been tried or failed if they had been tried.

17. Wiretap warrants are governed by 18 U.S.C. § 2510 *et seq.* (also referred to as "Title III"). Section 2518(3)(a-d) requires that before ordering the interception of wire communications, a judge must determine, based on the facts presented in an affidavit, that 1) *there is probable cause to believe that an individual is committing, has committed, or is about to commit, a crime (the alleged tape the CS-2 said existed does not establish that Kajtazi was committing, or about to commit a crime)(emphasis)*; 2) there is probable cause that communications about the crime will be obtained through the wiretap; 3) alternative means have failed or are too dangerous or unlikely to succeed; and 4) there is probable cause to believe that the premises to be wiretapped are being used for criminal purposes or are used or owned by the target of the wiretap. *See United States v. Wagner*, 989 F.2d 69, 71 (2d Cir.1993); *United States v. McGuinness*, 764 F.Supp. 888, 898 (S.D.N.Y.1991). Kajtazi

argues that all the elements are lacking. Even if one element is missing the motion to suppress must be granted.

A FRANKS HEARING IS REQUIRED

18. Mr. Kajtazi alleges that Agent Kaley's affidavit was made in bad faith. Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally is made, or with reckless disregard for the truth, and it was included in an affidavit for wire tap, and if the allegedly false statement is necessary to the finding of probable cause. See *Franks*, 438 U.S. at 163–64 n. 6, 98 S.Ct. at 2680 n. 6,

19. To be entitled to a Franks hearing, a defendant must make a "substantial preliminary showing" that: (1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the judge's probable cause finding. See United States v. Levasseur, 816 F.2d 37, 43 (2d Cir. 1987). If, after setting aside the allegedly misleading statements or omissions, the affidavit, nonetheless, presents sufficient information to support a finding of probable cause, the district court need not conduct a Franks hearing.

20. In this case, at a minimum the Court should grant a Frank hearing. In support of Kajtazi's claim of recklessness the following is proffered. First, there was false information given by Agent Kaley that a tape recording existed between Demaj and Kajtazi discussion drug dealing on Oct 29th 2015. The defendant alleges this is totally untrue and borderlines government misconduct. Secondly, Agent Kaley tries to imply that Kajtazi was in a restaurant setting with Bicaaj and CS-2 on May 20, 2015 is a untrue and disingenuous . At no time was Kajtazi seen with Bicaaj or CS-2 on the day of the alleged sale of 24 grams of cocaine. Thirdly, the fact that Agent Kaley states that the restaurant is registered to Biba Kajtazi is not ture. These untruths or

implications not based on facts were used to convince the court of the existence of probable cause for execution of the warrant.

Hence, for these reasons this Court should grant a Franks hearing.

WHEREFORE, the Defendant, Biba Kajtazi, respectfully prays that all evidence obtained through interception of electronic communications be suppressed. In the alternative, that this Honorable grant a Franks hearing, and to compel the government to produced the alleged tape recording stated in paragraph Q.

Dated: January 20, 2017

Respectfully submitted:

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I HEREBY CERTIFY a true and correct copy of the foregoing was furnished electronically by the CM/ECF electronic system this 17th day of January 2017 to the persons on the attached Service List and to all other persons entitled to electronic notice in this cause.

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