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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF IDAHO
(HONORABLE B. LYNN WINMILL)

7 UNITED STATES OF AMERICA,)
8)
Plaintiff,) CR-10-148-N-BLW
9) MEMORANDUM IN SUPPORT OF
vs.) MOTION FOR PRELIMINARY
10) INJUNCTION FROM SEARCH OR
EDGAR STEELE,) INVESTIGATION OF COMPUTERS
11) AND FILES SEIZED FROM
Defendant.) DEFENDANT'S HOME
12)

13 TO: THOMAS E. MOSS, UNITED STATES ATTORNEY
TRACI J. WHELAN, ASSISTANT UNITED STATES ATTORNEY

14 EDGAR STEELE, through counsel, Roger J. Peven and Kailey
15 Moran for the Federal Defenders of Eastern Washington and Idaho,
16 submits the following memorandum of authorities in support of his
17 motion for a temporary injunction to prevent the search of any computer
18 seized from Mr. Steele's home.

19 **I. INTRODUCTION AND RELEVANT FACTS**

20 On June 11, 2010, Mr. Steele was arrested on a complaint charging
21 him with one count of Use of Interstate Commerce Facilities in the
22

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1 Commission of Murder for Hire in violation of 18 U.S.C. §1958. While no
2 discovery has been received as of yet other than two audio recordings, it
3 is believed that Mr. Steele had computers and files at his home which
4 were used in his legal practice which may have been seized by the
5 Government pursuant to a search warrant. Mr. Steele has not received
6 the search warrant as of this time. Mr. Steele is a licensed attorney who
7 has been engaged in the practice of law for many years and has used his
8 office as a home legal office. Mr. Steele had client files and information
9 on his computer and in his home. Much of this information would be
10 covered by attorney-client confidentiality and privilege issues. Because
11 it is not known what was seized and what the warrant authorized, Mr.
12 Steele is moving the Court for an emergency injunction prohibiting the
13 Government from conducting any investigation activity with respect to
14 materials seized from the law office pending a determination of the
15 attorney-client confidentiality and privilege issues.

16 **II. RELIEF SOUGHT**

17 Mr. Steele requests that this Court enter a preliminary injunction
18 directing the Government to cease and desist from all investigation
19 activity with respect to case files, computer records, and all other
20 materials seized from Mr. Steele's law office, and to preserve the
21 confidentiality of the seized materials until this Court has an
22 opportunity to review the search warrant and make determinations as to

1 what materials are privileged and should be returned under Federal
2 Rule of Criminal Procedure 41(g).

3 III. LAW AND ARGUMENT

4 As Mr. Steele has not yet seen search warrants, if any, in this case,
5 this motion is precautionary in nature and seeks to protect law office
6 files from review and dissemination by the Government. It is believed
7 that a search warrant was in fact served on the residence of Mr. Steele,
8 and documents as well as computers were seized from the residence. Mr.
9 Steele's position as an attorney places special duties and responsibilities
10 on the Government in applying for and executing a search warrant on
11 client files. *In Re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d
12 847, 856 (9th Cir. 1991); *see also, United States v. Derman*, 211 F.3d 175,
13 181 (1st Cir. 2000)(noting, with respect to execution of a search warrant
14 for law office premises, that the "particularity of the warrant and the
15 breadth of the search...are matters that should be considered with
16 special care in the context of a law office because of the pervasiveness
17 there of privileged items"). The expectation of privacy in an attorney's
18 client files is recognized as a legitimate expectation of privacy. *DeMassa*
19 *v. Nunez*, 770 F.2d 1505, 1506 (9th Cir. 1985).

20 In order for a search to be reasonable, the warrant must be specific.
21 *In Re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 856.

22 Specificity has two aspects: particularity and breadth. *Id.* Particularity

1 is the requirement that the warrant must clearly state what is sought.
2 *Id.*, (further citation omitted). Breadth deals with the requirement that
3 the scope of the warrant be limited by the probable cause on which the
4 warrant is based. *Id.*, at 856-57 (further citation omitted). While law
5 offices are not immune to search, a law office search “should be executed
6 with special care to avoid unnecessary intrusion on attorney-client
7 communications, it is nevertheless proper if there is a reasonable cause
8 to believe that the specific items are located on the property to be
9 searched.” *United States v. Mittelman*, 999 F.2d 440, 445 (9th Cir. 1983).
10 In *United States v. Tamura*, the Ninth Circuit set forth procedures for
11 the search and seizure of documents pursuant to a search warrant.
12 *United States v. Tamura*, 694 F.2d 591, 595-597 (9th Cir. 1982). The
13 *Tamura* Court held that the wholesale seizure for later detailed
14 examination of records not described in a warrant is too intrusive and
15 “the kind of investigatory dragnet that the fourth amendment was
16 designed to prevent.” *United States v. Tamura*, 694 F.2d at 595 (further
17 citation omitted). The *Tamura* Court set forth procedures based upon
18 the American Law Institute’s Model Code of Pre-Arrangement
19 Procedures for the search of documents. *Id.*, at 596. The procedures
20 include the sealing and holding of documents pending approval by a
21 magistrate of a further search; once that step is completed, the
22 documents sought must be identified. *Id.* If the documents are

1 intermingled with documents not covered by the warrant, the person
2 executing the search shall not review the documents and hold them
3 under seal pending further proceedings. The executing officer should
4 identify the fact and circumstances of the intermingled documents to the
5 issuing magistrate to give notice to the party from whom the documents
6 were seized as well as any interested parties and hold a hearing for the
7 return of the documents or for specification of such conditions and
8 limitation on the further search for the documents to be seized to
9 prevent the unnecessary or unreasonable invasion of privacy. *Id.*

10 Recently, the Ninth Circuit had an opportunity to revisit the issue
11 of seizure of documents in the electronic age. *See United States v.*
12 *Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009). The
13 Court noted that the point of the *Tamura* procedures had been to
14 maintain the privacy of materials that are intermingled with seizable
15 materials and to avoid turning a limited search for particular
16 information into a general search of office files and computer databases.
17 *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d at 998. The
18 Court noted that the government should not be able to seize documents
19 and then rely upon the plain view exception that would allow it to retain
20 data to which it had gained access only because it was required to
21 segregate seizable from non-seizable data. *U.S. v. Comprehensive Drug*
22 *Testing.*, 579 F.3d at 998. The Court then updated the procedures for the

1 search of documents given that now most people store records
2 electronically. *Id.* The Court set forth a detailed guide and stated that
3 the issuing magistrate must be vigilant in observing the guidelines set
4 forth in the opinion. *Id.*, at 1006.

5 In this case, Mr. Steele is not yet aware of what information has
6 been seized nor has the warrant been received as of yet. The concern is
7 that Mr. Steele is a licensed attorney and had ongoing representation of
8 clients at the time of his arrest. There is a concern that Mr. Steele
9 represents clients and groups that are of interest to the government.
10 Based upon the information contained in the Affidavit in Support of the
11 Complaint, the records seized appear to be far more inclusive than
12 necessary given the allegations. For these reasons, it is requested that
13 this Court enter a preliminary injunction from the search or
14 investigation of computers and files seized from Mr. Steele's home until
15 the warrant can be reviewed to determine if proper procedures are in
16 place to protect the privacy of the information seized. A preliminary
17 injunction is further proper to determine if there are third-party
18 interests for which those third parties should receive notice of the
19 seizure of their files so they may object to the search. After a review, Mr.
20 Steele and any third party with an interest may move for the return of
21 the documents and computers under Rule 41.

22 ///

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1 **IV. CONCLUSION**

2 For the reasons contained herein, it is requested that this Court
3 enter an Order for Preliminary Injunction to stop any further search or
4 investigation into the computers and files seized from Mr. Steele’s home
5 until such time as the warrant can be reviewed for particularity and
6 breadth as well as to allow any third-party to be notified and object to
7 the search.

8 Dated: July 12, 2010

9 Respectfully Submitted,

10 s/ Roger J. Peven
11 WA 6251
12 s/ Kailey Moran
13 WA 27857
14 Attorneys for Steele
15 Federal Defenders of
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17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on July 12, 2010, I electronically filed the
19 foregoing with the Clerk of the Court using the CM/ECF System which
20 will send notification of such filing to the following: TRACI J. WHELAN,
21 Assistant United States Attorney.

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