IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
v.	:	**CR. NO. 09-00276 (PLF)**
	:	
STEWART DAVID NOZETTE	:	
	:	
Defendant.	:	

DEFENDANT'S REPLY TO GOVERNMENT'S SENTENCING MEMORANDA

Counsel for Dr. Nozette submit this short reply to the government's sentencing memoranda. Most of the matters noted in the Government's Sentencing Memorandum have already been addressed and with exception of the note below will not be further discussed here.[1]

At the outset of its Reply, and again in its penultimate paragraph, the government makes much of the fact that Dr. Nozette did not express remorse in Defendant's Sentencing Memorandum. But, the government overlooks the fact that Dr. Nozette did not write the memorandum and it does not purport to speak through his voice. Dr. Nozette accepted

[1]Some of the statements in the Government's Sentencing Memorandum are subject to misinterpretation. For instance, the government states that "the defendant admitted to the UCE that over the years he had illegally secreted classified material in safe deposit boxes because he knew the information would become valuable one day." Government's Memorandum in Aid of Sentencing, at 2. The statement is phrased in a manner that suggests this material bore classification markings rather than, as was the case with the material stored in his home, having been later classified. *See* Defendant's Sentencing Memorandum, at 15. It bears repeating that: (a) both categories (home and safe-deposit box) constituted materials that bore no classified information markings, were initially created (and circulated) in a non-classified context and were only later classified when the ideas contained therein were moved into classified programs and (b) the thrust of the technology involved in many of these programs was never classified and was important to the non-classified scientific missions described in Defendant's Sentencing Memorandum.

responsibility at the plea hearing and will be afforded an opportunity to further do so in allocution.

Next, the government alleges that the defense is guilty of "spinning (if not shredding)" the facts, yet a close examination of both its Sentencing Memorandum and Reply shows that it does not allege that a single quote or fact in Defendant's Sentencing Memorandum is inaccurate or taken out of context. Unsurprisingly, the government takes issue with the conclusions drawn therefrom, but the underlying premise of its reply is little more than misplaced umbrage that its judgments and tactics have been directly called into question. Contrary to the government's attempted diversion, no one is challenging the agents' "dedication" or "patriotism," but rather their judgment and misplaced zealotry. While not claiming the agents here violated the law in any way, it is worth noting that the same types of justifications were proffered in years past as supposedly extenuating now widely-condemned FBI practices such as illegal wiretapping, warrantless mail openings and "black bag" burglaries. The agents perpetrating those acts were likely "dedicated" and undoubtedly saw a "patriot" when they looked in the mirror. But neither attempts to garland the agents with such embroidery nor the fact that they successfully nabbed their prey ultimately immunized their judgment and behavior from public scrutiny. Those objectionable practices were abandoned after they were subjected to the light of day. Here, too, the judgments and tactics of the FBI in this case are now in the public domain for anyone who is interested to draw their own conclusion as to whether this is the manner in which a democratic society wants its most powerful law enforcement agency to operate.[2]

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[2]After complaining of "inflated rhetoric," *Reply* at *3*, the government immediately turns around and, without elaboration, proclaims the idea of the agents directly addressing their concerns with Dr. Nozette and his attorneys as "preposterous." *Id.*, at 4. In so doing, the

Finally, the defense must respond to the distortions in fn 1 of the government's Reply. There, the government claims that it determined to play the videos at sentencing because it "accurately anticipated that the defense would attempt to paint a picture of the defendant as a victim." The record directly refutes this assertion. Shortly after the plea and after the defense proposed a very abbreviated sentencing hearing, the government responded that it intended to play clips of the final meeting between the UC and Dr. Nozette on October 19.[3] Because of the posture of this case, counsel complained that playing the videos was pointless. Counsel argued that Dr. Nozette had suffered enough and that playing of the videos at an uncontested sentencing was, to borrow a football phrase, unnecessarily "piling on." In return for the government bypassing this gratuitous and mean-spirited exercise, we stated our willingness to forego getting into the particulars of the agents' behavior, which had never been put on the public record, and instead simply briefly reference Dr. Nozette's professional accomplishments and his depressed and suicidal state during this period. Counsel explained that we were actually a little uneasy about our offer in that we arguably had a duty to Dr. Nozette to place all the circumstances

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government does not take issue with the then-available evidence dispelling the agents' suspicions and adds nothing new to what was discussed in the Defendant's Sentencing Memorandum, other than the rather vanilla observation that Dr. Nozette had once searched the internet for information relating to Julius and Ethel Rosenberg, a case which still holds an abiding interest to many. The government nonetheless urges the reader to conclude that interviewing Dr. Nozette would have overly taxed the agents' ability to determine whether he was spying for Israel because he was, after all, an "admitted fraudster." *Id.* One can judge for his or her self whether this is what truly motivated the agents or whether they were aware that while the evidence overwhelmingly failed to establish that Dr. Nozette had been spying for Israel he might nonetheless be vulnerable to a carefully orchestrated approach.

[3]As noted in defendant's Sentencing Memorandum, the events of September 3 and 4 shed more light on how these events ultimately came to pass.

leading to his fall in the record in any event, but were nonetheless willing to not do so. The prosecutors then asked us to present our proposal to their supervisor in the U.S. Attorney's Office. On January 10, 2012, the following e-mail was sent to their supervisor:

> An issue has arisen in the Nozette case concerning the parties' approach to the upcoming sentencing hearing. In response to our suggestion that the parties limit their presentations, [prosecutors] have told us that they contemplate a more expansive approach, including playing portions of the videotapes of the undercover sting. After we responded that such an approach will require us to reconsider our plans, [prosecutor] suggested that I write you and set out position in more detail.
>
> It is our view that the sentencing hearing should be a short and summary proceeding in light of the fact that Judge Friedman has already accepted the Rule 11(e)(1)(C) agreement and the factual basis of the plea has been expansively spread on the public record through the Indictment, Complaint and Factual Proffer, the latter of which Dr. Nozette adopted in open court at the plea proceeding. Thus, we believe that the government need do nothing more than inform Judge Friedman that Dr. Nozette has fulfilled his cooperation requirement and state that it does not oppose the request that the Court recommend that Dr. Nozette be designated to a low or minimum security institution. While we believe it unnecessary, we recognize that the government may feel it important to stress the seriousness of the offense but that can also be done in a summary manner that does not require playing the videotapes etc. Consistent with this approach, we initially planned to make a short presentation of perhaps 5 minutes, simply reciting the contributions Dr. Nozette has made in his career and referencing his mental state during the time of the offense.
>
> We understand that there are few limits on what the parties can do at sentencing and do not question the government's discretion to approach the hearing in the manner it deems best, including playing portions of the videotapes. But, assuming that is how the government elects to proceed, our obligation to Dr. Nozette will require us to take a significantly different approach in both the sentencing memorandum and hearing itself than initially planned.
>
> As noted, the basic facts from the government's perspective have

> been set out in several publicly-filed documents. But, as we set out in our sealed letter of June 7, 2011, there are several troubling aspects of this operation including the planning of the sting despite knowledge of Dr. Nozette's precarious mental state, the undercover agent's obsession with getting Dr. Nozette to reveal classified information despite his repeated initial refusals, the agent's playing on Dr. Nozette's religion and long-time family support of Israel, the agent's unnecessary dangling of monetary and other enticements in front of Dr. Nozette, as well as other matters referenced in the aforementioned letter and our later oral presentation. These aspects of the operation, which potentially shed a much different light on Dr. Nozette's actions than that shone by the government, have not been publicly revealed or discussed. In light of the fact that the approach adopted by the agents in this case raises issues of public interest and puts Dr. Nozette's actions in a richer and more sympathetic context, we arguably have a duty to ensure that the record is complete. *But, in light of the agreed disposition that has already been accepted by the Court, we concluded that there is no necessity to gratuitously embarrass or criticize the agents or the government or otherwise get into unnecessary matters. If, however, the government insists on a different approach and opening up the sentencing hearing beyond what is strictly necessary, then we feel we have no other choice than to fulsomely defend and explain Dr. Nozette's actions on the public record.*

(Emphasis added). After the defense received no response to the above e-mail (we never did), the undersigned again spoke with the lead prosecutor and reiterated the same message - again, to no avail.

The defense's multiple offers could not have more clear. The government's claim in fn. 1 could not ring more hollow.

Respectfully submitted,

Robert L. Tucker
John C. Kiyonaga
Counsel for Dr. Nozette

CERTIFICATE OF SERVICE

I hereby state that on Sunday, March 18, 2012, I made the above Reply to Government's Sentencing Memoranda available to the Court Security Officer for filing.

Robert L. Tucker