IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**no. 1:21-cr-00350-PLF**
	:	
ANTIONNE D. BRODNAX,	:	
	:	
Defendant.	:	

GOVERNMENT'S CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTIONS TO UNSEAL SEARCH WARRANT AFFIDAVIT AND TO QUASH SEARCH WARRANT

The United States of America, by and through the Acting United States Attorney for the District of Columbia, hereby opposes the defendant's motion to unseal search warrant affidavit (doc. 16) and the defendant's motion to quash search warrant issued in 21-SC-1371 (sic) (doc. 15). The government submits that the defendant does not have standing to challenge any search warrant relating to this case until after the warrant is executed and that the affidavit should not be disclosed until the warrant has been executed.

Background

Antionne De Shaun Brodnax, aka bugziethedon, has been charged by Information with offenses relating to the January 6, 2021 attack on the Capitol Building. Specifically, he is charged with knowingly entering and remaining in a restricted building, in violation of 18 U.S.C. § 1752(a)(1); knowingly engaging in disorderly conduct in a restricted building, with the intent to disrupt, and causing the disruption of, government business, in violation of 18 U.S.C. § 1752(a)(2); willfully and knowingly engaging in disorderly conduct on the Capitol grounds, in violation of 40 U.S.C. § 5104(e)(2)(D); and willfully and knowing demonstrating in a Capitol

building, in violation of 40 U.S.C. § 5104(e)(2)(G). He is aware of but has not yet been arraigned on the Information.[1]

On April 29, 2021, the Hon. G. Michael Harvey, U.S. Magistrate Judge, issued a search warrant for the Twitter account @xxxxxxxxxxx in connection with both the investigation of Brodnax for the above violations and the investigation into the January 6, 2021 attack on the Capitol generally. The warrant was expressly issued pursuant to rule 41 of the Federal Rules of Criminal Procedure and was electronically served on Twitter, Inc. on April 30, 2021. The warrant has been docketed as 1:21-SC-1387-GMH.

On May 14, 2021, the defendant moved to quash a search warrant issued for the defendant's Twitter and Facebook accounts.[2] The motion alleges that the warrant was overbroad. It includes as an attachment a copy of the warrant issued for the Twitter account @xxxxxxxxxxx as well as an email the defendant had received from Twitter, dated May 9, 2021. In that email Twitter advised the defendant that it had received legal process with respect to his Twitter account, @xxxxxxxxxxx.

The defense apparently served its motion on Twitter, for on May 14, 2021, the FBI received an email stating:

> Dear [FBI] SA Sean Van Schaften:
>
> We've received notice that a Motion to Quash and Motion to Unseal Search Warrant Affidavit have been filed. We will suspend processing your request regarding @xxxxxxxxxxx

[1]The defendant was presented on a complaint consisting of the same charges based on the same conduct, on March 17, 2021, in U.S. v. Antionne Brodnax, 1:21-mj-192-ZMF. That case was closed on May 11, 2021, after the government filed the information.

[2]The defendant seems to believe that there is a single search warrant was issued for his Twitter and Facebook accounts. In fact there was a search warrant issued for each. The search warrant for his Facebook account is docketed as 1:21-sc-1386-GMH.

pending resolution of the motion to quash.

Twitter Legal

To date, the government has not received any production from Twitter pursuant to the Twitter search warrant issued in 1:21-SC-1387-GMH.

Argument

1. The defendant has no right to challenge the search warrant prior to execution.

As the Supreme Court has held, neither the Constitution nor rule 41 of the Federal Rules of Criminal Procedure requires the government to serve a property owner with a copy of a search warrant prior to its execution. U.S. v. Grubbs, 547 U.S. 90, 98-99 (2006). If there is no requirement that the property owner be so notified, there cannot be a right for the property owner to contest execution of the warrant.[3] As the Court held in Grubbs:

> The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante,* the deliberate, impartial judgment of a judicial officer between the citizen and the police and by providing, *ex post,* a right to suppress evidence improperly obtained and a cause of action for damages.

[3]Rule 41 discusses the timing for the "execution" of a search warrant. See Fed. R. Crim. P. 41(f)(1). Completing execution of a search warrant simply means conducting a search and making seizures in accordance with the terms of the warrant. The execution of a search warrant directed to an electronic communication service provider, such as the warrant at issue here, is contemplated and expressly authorized by 18 U.S.C. § 2703(a). An agent's transmission of a search warrant to the porvider does not constitute "execution" of the warrant. Instead, such a warrant is executed only sometime later, when the provider discloses to the agent the digital records associated with the account described in the warrant and the agent subsequently segregates and "seizes" the records and information the warrant authorizes the government to seize.

Id. at 99 (internal quotation and alteration marks and citation omitted); accord Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (declining to interpret the Fourth Amendment to require notice and hearing before execution of a search warrant).

The defendant's reliance on Gravel v. United States, 408 U.S. 606 (1972), in support of his purported right to bring his motion to quash, is completely misplaced. Gravel involved a challenge to subpoenas issued by a grand jury, id. at 608-09, not to a search warrant. The Zurcher case explains that there are legitimate law enforcement reasons for an investigator to rely on a search warrant as opposed to a subpoena, even if by choosing the former the result is that the property owner cannot prevent disclosure of the information. See id. at 560-61 & n.8.

In this case the defendant learned of the warrant because he was notified by Twitter, not because he was notified by the government. But that does not change the analysis.
In particular, it is of no moment that the search warrant, although issued under rule 41, is for an account maintained by the provider of an electronic communication service and therefore governed by the Stored Communications Act, 18 U.S.C. § 2701 – 2712 ("SCA"), specifically 18 U.S.C. § 2703. For nothing in the SCA authorizes the holder of such an account, like the defendant here, to challenge a search warrant for the account before the search is completed.

In explaining why an account holder may not challenge a § 2703 warrant prior to execution, it is helpful to begin with an explanation of how § 2703 functions. Section 2703 creates a code of criminal procedure that the government must follow to compel an electronic communications service provider to disclose information. It offers varying degrees of legal protection to different classes of information. Some information can be obtained only with a § 2703 warrant; other information can also be obtained with a 2703(d) order, and some information can also be obtained with a subpoena. First, the contents of communications held

by an electronic communications service in electronic storage for less than 181 days may be obtained only pursuant to a search warrant. See 18 U.S.C. § 2703(a). Second, contents greater than 180 days old, or contents stored by a remote computing service, may be obtained pursuant to any process (such as a search warrant, § 2703(d) order, or subpoena). See id. § 2703(a), (b). Third, all non-content information can be obtained pursuant to a search warrant or 2703(d) order, and a limited set of non-content information can also be obtained pursuant to a subpoena. See id. § 2703(c). the use of a § 2703 warrant. In particular, § 2703(a) and § 2703(b)(1)(B) provide that the government may use a subpoena or 2703(d) order to compel disclosure of contents stored in a remote computing service or contents held in electronic storage by an electronic communication service for more than 180 days "with prior notice from the governmental entity to the subscriber or customer."

In addition, the SCA specifies the narrow circumstances in which the government must give prior notice of SCA process to a customer or subscriber; in other circumstances no notice to the customer or subscriber is required. The SCA requires the government to provide a customer or subscriber with prior notice of the use of a subpoena or 2703(d) order to compel disclosure of the contents of communications, but the statute does not require the government to give prior notice in any other circumstance. The statute explicitly states that when the government uses a warrant to obtain communications held by a remote computing service or held in electronic storage by an electronic communication service for more than 180 days, it may do so "without required notice to the subscriber or customer." 18 U.S.C. § 2703(b)(1)(A). Similarly, § 2703(a) does not mandate prior notice to the account holder when the government uses a warrant to obtain communications less than 181 days old held in electronic storage by an electronic communication service. Finally, when the government uses a warrant, 2703(d) order, or

subpoena to obtain non-content information, the SCA specifies that the government need not provide prior notice to the account holder. See id. § 2703(c)(3).

The SCA's limited prior notice requirement is critically important, because where Congress allows an account holder to challenge SCA process before the provider produces information to the government, it mandates that the government give prior notice to the account holder. This approach makes sense: in circumstances in which Congress sought to allow an account holder to challenge SCA process prior to disclosure by a service provider, it needed to ensure that the account holder receive prior notice. Otherwise, the government or service provider could unilaterally prevent the account holder from making the challenge allowed for by the statute. Conversely, when the SCA does not require such notice to the account holder, it correspondingly provides no authorization for the account holder to make a pre-production challenge.

2. The defendant is not entitled to pre-production of the search warrant affidavit.

The defendant asserts that the search warrant affidavit should be unsealed now, prior to production by Twitter, in order "to respond to Twitter and Facebook notice in a meaningful way." Defendant's Motion to Quash at 2. But Twitter cannot decline to produce information in its possession, ordered to be produced by a search warrant, on the ground merely that an account holder objects, whether in a meaningful way or otherwise.[4] Moreover, the defendant's assertion that the affidavit should be unsealed now, before execution of the warrant, "because he is the sole defendant in this case," woefully understates the seriousness of the investigation into the Capitol riot. While

[4]The government has filed a motion, under the case directly associated with the search warrant, to compel Twitter's compliance with the warrant. A redacted copy of that motion, with its attachments, is attached here as an exhibit.

there are no other defendants charged with him in the Information, there are hundreds of others who are charged in connection with the riot.

Finally, neither the limited common-law right of access to judicial records, nor the general First Amendment right of such access, requires disclosure of the affidavit prior to the warrant's execution. As the court held in Matter of the Application of WP Co., 201 F. Supp. 3d 109 (D.D.C. 2016), the right of access to search warrant materials, under both theories, is a qualified one. Id. at 117-18. In WP Co., Chief Judge Howell denied an application for further disclosure of certain search warrant materials, notwithstanding that the search warrants had been issued years before. Id. at 112-13. By contrast the warrant in this case was issued last month and has not yet been executed.

Conclusion

Accordingly, for the reasons set forth, and for any additional reason the government might offer in a hearing on the defendant's motions, the motions should be denied.

Respectfully submitted,

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EXHIBIT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE THE SEARCH OF INFORMATION	**:**	
ASSOCIATED WITH ONE ACCOUNT	**:**	
STORED AT PREMISES CONTROLLED	**:**	**1:21-SC-1387-GMH**
BY TWITTER PURSUANT TO 18 U.S.C. §	**:**	
2703 FOR INVESTIGATION OF	**:**	
VIOLATIONS OF 18 U.S.C. §§ 111(a)(1), 2	**:**	**xxxxxxxx**

GOVERNMENT'S MOTION TO COMPEL COMPLIANCE WITH SEARCH WARRANT

The United States of America, by and through the Acting United States Attorney for the District of Columbia, hereby moves the Court to issue an order requiring Twitter, Inc. (Twitter), a company headquartered in San Francisco, California, to comply with the search warrant issued in this case with respect to the account @xxxxxxxxxxxxxx, which is stored, maintained, controlled and operated by Twitter.

Background

Antionne De Shaun Brodnax, aka bugziethedon, has been charged by information with offenses relating to the January 6, 2021 attack on the Capitol Building, in case number 1:21-cr-00350-PLF. Specifically, he is charged with knowingly entering and remaining in a restricted building, in violation of 18 U.S.C. § 1752(a)(1); knowingly engaging in disorderly conduct in a restricted building, with the intent to disrupt, and causing the disruption of, government business, in violation of 18 U.S.C. § 1752(a)(2); willfully and knowingly engaging in disorderly conduct on the Capitol grounds, in violation of 40 U.S.C. § 5104(e)(2)(D); and willfully and knowing demonstrating in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G). He is aware of but has not yet been arraigned on the information.[1]

[1]The defendant was presented on a complaint consisting of the same charges based on the same conduct, on March 17, 2021, in U.S. v. Antionne Brodnax, 1:21-mj-192-ZMF. That case was closed on May 11, 2021, after the government filed the information.

On April 29, 2021, this Court issued a search warrant for the Twitter account @bugziethedon in connection with the investigation of Brodnax for the above violations, as well as the investigation into the January 6, 2021 attack on the Capitol generally. The warrant was expressly issued pursuant to rule 41 of the Federal Rules of Criminal Procedure and was electronically served on Twitter on April 30, 2021.

On May 14, 2021, the government was served with the Defendant's Motion to Quash Search Warrant in Case 21-SC-1371 (sic), filed in U.S. v. Antionne Brodnax, 1:21-cr-00350-PLF. In that motion the defendant sought to quash a search warrant for the defendant's Twitter and Facebook accounts. The motion alleged that the warrant was overbroad and attached a copy of the warrant issued in this case, i.e., in 1:21-sc-1387, as well as an email the defendant had received from Twitter, dated May 9, 2021. That email advised the defendant that it had received legal process with respect to his Twitter account, @xxxxxxxxxxx (motion and attachments collectively attached as exhibit 1).

On May 14, 2021, the FBI agent who served the warrant in this case on Twitter received an email stating:

> Dear [FBI] SA Sean Van Schaften:
>
> We've received notice that a Motion to Quash and Motion to Unseal Search Warrant Affidavit[2] have been filed. We will suspend processing your request regarding @xxxxxxxxxxx pending resolution of the motion to quash.
>
> Twitter Legal

To date, the government has not received any production from Twitter pursuant to the @xxxxxxxxxxxxx search warrant.

[2]The government was also served with the separate defense motion to unseal the search warrant affidavit, filed in U.S. v. Antionne Brodnax, 1:21-cr-00350-PLF. The government intends to oppose that motion.

Argument

Unless and until an order from this Court is issued requiring Twitter not to comply with this Court's warrant, Twitter should be required to process the warrant for the @xxxxxxxxxxx Twitter account issued in this case. The government intends to file an opposition to the motion in U.S. v. Antionne Brodnax, 1:21-cr-00350-PLF, taking the same position, i.e., that it is this Court, the Court that issued the warrant, and only this Court, that has the authority to quash the warrant.[3] Moreover, Brodnax lacks standing to challenge the warrant in any court prior to its execution.

1. The authority of this Court to issue the search warrant in this case flows from 28 U.S.C. § 636(a)(1) and therefore is not appealable or reviewable by a U.S. District Judge prior to execution.

Title 28, U.S. Code, section 636, subsection (a) provides in pertinent part:

> (a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—
>
> > (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts[.]

As the U.S. District Court for the Eastern District of Pennsylvania recently held, 28 U.S.C. § 636(a)(1) "preserve[s] the historic power of commissioners[, one of which] is the power to issue search warrants," and is therefore the source of a magistrate judge's authority to do so. United

[3]The defense motion also attached an email from Facebook advising the defendant that his Facebook account was recently the subject of legal process. The defense motion seems to assume, incorrectly, that the search warrant in this case for the Twitter account @xxxxxxxxxxx also applies to a Facebook account. In fact, the defendant's Facebook account is the subject of a separate search warrant, issued in case number 1:21-sc-1386-GMH. To date, the government has not received notice from Facebook, Inc. that it has suspended processing of that separate search warrant.

States of America v. Information Associated With Email Account (Warrant), 449 F. Supp. 3d 469, 472 (E.D. Pa. 2020).

By contrast, the authorities of a magistrate judge set out in 28 U.S.C. § 636(b)(1), such as to make certain pretrial rulings and to conduct evidentiary hearings, arise only when a district judge "designate[s]" a magistrate judge to perform those duties. For authorities exercised under that provision the statute expressly allows for review by a district judge. 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law'), (b)(1)(B), (C) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."). Similarly, a magistrate judge's authority under 28 U.S.C. § 636(b)(2) to serve as a special master, again upon a district judge's designation, is subject (with very limited exceptions) to the Federal Rules of Civil Procedure. Which rules allow a party to challenge the master's findings before a district judge and provide that a district judge "may adopt or affirm, modify, wholly or partly reject or reverse" the rulings of the special master. Fed. R. Civ. P. 53(f).

While subsection (b)(3) provides that a magistrate judge "may be assigned . . . additional duties," without specifying who may make the assignment, the provision's grouping with others that expressly refer to duties designated by a district judge makes clear such an assignment must come from a district judge. See Wellness Internat'l, Ltd. v. Sharif, 575 U.S. 665, 676 n.8 (2015). Notwithstanding the lack of express language within this provision permitting review by a district judge, it is well settled that the exercise of a magistrate judge's duties, pursuant to such an assignment, is subject to such review, should a party seek it. See Peretz v. United States, 501 U.S. 923, 939 (1991).

When a magistrate judge issues a search warrant pursuant to his or her authority under 28 U.S.C. 636(a)(1), the judicial officer is exercising the historic power of a commissioner for which there is no right of appeal, express or implied, to a district judge, at least until the warrant is executed. Information Associated With Email Account (Warrant), 449 F. Supp. at 473-75.

2. Broadnax, the defendant in 1:21-cr-00350-PLF, does not have standing to challenge the warrant prior to its execution.

Although this Court has the authority to review the propriety of its own rule 41 search warrant, even before execution, Brodnax does not have standing to seek such a review. As the Supreme Court has held, neither the Constitution nor rule 41 requires the government to serve a property owner with a copy of a search warrant prior to its execution. U.S. v. Grubbs, 547 U.S. 90, 98-99 (2006). If there is no requirement that the property owner be so notified, there cannot be a right for the property owner to contest execution of the warrant. As the Court held in Grubbs:

> The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante,* the deliberate, impartial judgment of a judicial officer between the citizen and the police and by providing, *ex post,* a right to suppress evidence improperly obtained and a cause of action for damages.

Id. at 99 (internal quotation and alteration marks and citation omitted); accord Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (declining to interpret the Fourth Amendment to require notice and hearing before execution of a search warrant).

In this case Brodnax learned of the warrant because he was notified by Twitter, not because he was notified by the government. But that does not change the analysis.

3. Twitter has not challenged the warrant.

Finally, it is most significant that the only individual or entity who could challenge the warrant, Twitter, has not sought to do so, either in this Court or any other. There thus remains in place an order of this Court that "Twitter is required to disclose [certain] information to the government," as the warrant expressly commands. The fact that someone with no standing has filed a motion to quash the warrant, in a court having no authority to do so, is no basis for Twitter to delay its compliance.

Conclusion

Based on the foregoing, this Court should issue an order compelling Twitter to comply with the warrant previously issued in this case. A proposed Order is attached.

Respectfully submitted,

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EXHIBIT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE THE SEARCH OF INFORMATION	**:**	
ASSOCIATED WITH ONE ACCOUNT	**:**	
STORED AT PREMISES CONTROLLED	**:**	**1:21-SC-1387-GMH**
BY TWITTER PURSUANT TO 18 U.S.C. §	**:**	
2703 FOR INVESTIGATION OF	**:**	
VIOLATIONS OF 18 U.S.C. §§ 111(a)(1), 2	**:**	

O R D E R

Upon motion of the government, and for good cause shown, it is hereby ORDERED that Twitter, Inc., shall immediately resume processing the search warrant issued in this case, with respect to the Twitter account @xxxxxxxxxxx, and shall timely produce to the government the information required by the warrant.

SO ORDERED.

_____
G. Michael Harvey, U.S. Magistrate Judge