UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)(	
	)(	**Criminal No. 21-204 (BAH)**
v.	)(	**Chief Judge Howell**
	)(	**Trial: July 18, 2022**
MATTHEW BLEDSOE	)(	

REPLY TO GOVERNMENT'S OPPOSITION
TO DEFENDANT BLEDSOE'S MOTION TO SUPPRESS
FACEBOOK AND INSTAGRAM DATA

COMES NOW the defendant, Matthew Bledsoe, by and through undersigned counsel, and replies to the Government's Opposition to Defendant Bledsoe's Motion to Suppress Facebook and Instagram Data. Towards this end, Mr. Bledsoe would show:

1. On April 29, 2022, Mr. Bledsoe filed a Motion to Suppress Data Recovered from Facebook and Instagram Accounts and Derivative Evidence and Information and Points and Authority in Support Thereof (Motion to Suppress) (ECF #182). In the Motion to Suppress, Mr. Bledsoe seeks to suppress data obtained from non-public portions of Facebook and Instagram accounts that the government says belong to him.

2. On May 27, 2022, the government filed a Government's Opposition to Defendant Bledsoe's Motion to Suppress Facebook and Instagram Data (Opposition) (ECF #192).

3. Mr. Bledsoe now replies to the some of the arguments that the government makes in its Opposition.

No Probable Cause

4. In this case, Mr. Bledsoe seeks to suppress data that was obtained from Facebook, Inc. pursuant to a warrant (Warrant). See Motion to Suppress at 1-3. The Warrant sought data from certain Facebook and Instagram accounts that were identified by User ID numbers and Object ID numbers. See id. at 1-2 (citing Warrant at 1 & Attachment A at 1-2). The affidavit that was submitted to obtain the Warrant (Affidavit) indicated that these User ID numbers and Object ID numbers had been obtained by law-enforcement through an earlier request to Facebook, Inc. in which it was asked to "identify… any users that broadcasted live videos which may have been streamed and/or uploaded to Facebook from physically within the building of the United States Capitol during the time on January 6, 2021 in which the mob had stormed and occupied the Capitol building." See Motion to Suppress at 2 (quoting Affidavit at 15) (emphasis added).

5. According to information provided to Mr. Bledsoe in discovery, the data that was provided pursuant to the Warrant included data from a Facebook account and an Instagram that the government now claims belong to Mr. Bledsoe. See Motion to Suppress at 1-2. Apart from indicating that Facebook, Inc. provided the User ID number and Object ID number for the Facebook and Instagram accounts that the government now claims belong to Mr., Bledsoe pursuant to a request for it to identify persons who may have streamed and/or uploaded videos to their Facebook and Instagram accounts from inside the U.S. Capitol at the time the events of January 6 were ongoing, the Affidavit provides no additional particularized reason to further establish that those accounts were

in fact used by someone inside the Capitol at the relevant time to steam and/or upload videos. Thus, it provides no additional particularized reason for thinking that the accounts would contain evidence of criminal activity. See id. at 2-3.

6. In his Motion to Suppress, Mr. Bledsoe points out that the Affidavit only establishes, at the most, that it is possible that the Facebook account and the Instagram account that the government now says belong to him were used by someone inside the Capitol to stream and/or upload videos while the events of January 6 were ongoing. Accordingly, at the most, the Affidavit only establishes a possibility that the Facebook and Instagram might contain evidence of criminal activity. For this reason, the Affidavit fails to make out probable cause for obtaining the data from those accounts. Motion to Suppress at 2-3.

7. In its Opposition, the government asserts that the Affidavit establishes probable cause that the Facebook account and the Instagram account that it now says belong to Mr. Bledsoe might contain evidence of criminal activity because it establishes a "fair probability" that those accounts "would contain video evidence of the January 6 attack at the U.S. Capitol building." Opposition at 13.

8. It bears emphasizing here that, in connection with that the Facebook account and the Instagram account that the government now says belong to Mr. Bledsoe, the only particularized reason the Affidavit gives for establishing that those accounts might contain evidence of criminal activity is that Facebook, Inc. says those accounts "may" have been used by someone inside the Capitol to stream and/or upload videos at the time the events of January 6 were ongoing. It does not explain, what specific reason

Facebook, Inc. had for making this claim, not does it even explain what degree of probability is indicated by the word "may." Accordingly, read fairly, all the Affidavit does is establish that Facebook, Inc. indicated that there is a possibility that the Facebook account and the Instagram account that the government now says belong to Mr. Bledsoe were used by someone inside the Capitol to stream and/or upload videos at the time the events of January 6 were ongoing. Thus, all the Affidavit does is establish that there is a possibility that the Facebook account and the Instagram account might contain evidence of criminal activity. But this is not anywhere close to making out probable cause that those accounts contain evidence of criminal activity.

No Good-Faith Reliance

9. In his Motion to Suppress, Mr. Bledsoe argues that the Affidavit's basis for finding probable cause that the Facebook account and the Instagram account the government now says belong to him might contain evidence of criminal activity is so flimsy that the government cannot rely on the Leon good-faith exception to avoid application of the exclusionary rule. Motion to Suppress at 5-7. The government of course takes issue with this argument. Opposition at 14-15.

10. It bears repeating here that only particularized reason that the Affidavit gives for finding that there is probable cause to believe that the Facebook account and the Instagram account that the government now says belong to Mr. Bledsoe might contain evidence of criminal activity is that Facebook, Inc. says those accounts were used to stream and/or upload videos by someone who "may" have been inside the Capitol when the events of January 6 were ongoing. Thus, for the reasons stated in Mr. Bledsoe's

Motion to Suppress, the government cannot rely on the Leon good-faith exception to avoid application of the exclusionary rule to the data obtained from those accounts. See Motion to Suppress at 5-7.

C. No Inevitable Discovery

11. In its Opposition, the government argues that, even if it is found that, because of deficiencies in the Affidavit, the data obtained from the Facebook account and the Instagram account that it now claims belong to Mr. Bledsoe was acquired in violation of the Fourth Amendment and even if it is also found that the Leon good-faith is not applicable, the data should still not be suppressed. This is because, in the government's view, the data would have nevertheless been inevitably discovered. Opposition at 17.

12. In its Opposition, the government points out that a tipster turned over to law-enforcement agents a video compilation that was posted to Mr. Bledsoe's Instagram account that purportedly showed Mr. Bledsoe and others entering and being inside the Capitol at the time the events of January 6 were ongoing. Opposition at 15-16. Because of this, the government claims that, had it not obtained the data from the Facebook account and the Instagram account that it now claims belong to Mr. Bledsoe with the warrant at issue in Mr. Bledsoe's Motion to Suppress, it "would have sought, and a magistrate judge would have approved, [another] warrant to search Bledsoe's social-media accounts based on [the tipster's] video." Opposition at 17.

13. The government's claim that it would have sought a warrant for the data from Mr. Bledsoe's social-media accounts based on the above-referenced video-compilation evidence provided by the tipster had it not obtained that data with the

warrant at issue in Mr. Bledsoe's Motion to Suppress must be met with skepticism. The video-compilation evidence was in the government's possession on January 14, 2021, when it applied for a warrant to search Mr. Bledsoe's house. Opposition, Attachment at 18-20, 36 (Statement in Support of an Application under Rule 41 for a Warrant to Search and Seize at 4-6, 22). However, the government did not apply for the warrant at issue in Mr. Bledsoe's Motion to Suppress until March 3, 2021. Thus, before it applied for the warrant at issue in Mr. Bledsoe's Motion to Suppress, the government had seven weeks to apply for a warrant based on the video-compilation evidence provided by the tipster, and it did not do so. It therefore seems unlikely that that it would have applied for a warrant based on the video-compilation evidence had it not applied for the warrant at issue in Mr. Bledsoe's Motion to Suppress.

14. Even if it is assumed for the sake of argument that the government would have sought a warrant for data from Mr. Bledsoe's social-media accounts based on the video-compilation evidence provided by the tipster had it not obtained that data with the warrant at issue in Mr. Bledsoe's Motion to Suppress, the government still cannot show that that warrant would have yielded the same data that it recovered with the warrant at issue in the Motion to Suppress. The government does not indicate when it would have applied for the other warrant or provide any reason for thinking that the data in Mr. Bledsoe's social media accounts would have still been there when it executed that warrant.

15. The government's claim that the inevitable-discovery doctrine should be used to preclude suppression of the data obtained from the Facebook account and the

Instagram account it now claims belong to Mr. Bledsoe with the warrant that was applied for on March 3, 2021 because, had it not obtained the data with that warrant, it would have nevertheless obtained it with a warrant based on the video-compilation evidence provided by the tipster is at odds with what courts have said about the inevitable-discovery doctrine in those situations where there is an illegal warrantless search by law enforcement and the government then claims that, but for the illegal search, law enforcement would have obtained a valid warrant. On this point, Mr. Bledsoe would call the Court's attention to United States v. Echegoyen, 799 F.2d 1271 (6th Cir. 1986); United States v. Griffin, 502 F.2d 959 (6th Cir. 1974); and Brierley v. City, 390 P.3d 269 (Utah 2016).

16. In Echegoyen, the Sixth Circuit indicated that, where the government is claiming that the inevitable-discovery doctrine should apply to prevent suppression of evidence obtained through an illegal warrantless search because, had the evidence not been illegally obtained, law-enforcement agents would have obtained a warrant and conducted the search legally, the government needs to show that there were in fact "two independent investigations or searches in progress [one that conducted the illegal search and one that would have sought the warrant]" and not "one continuous investigation." Echegoyen, 799 F.2d at 1280 n.7. Additionally, the Sixth Circuit noted that "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." Id.

17. In Griffin, the Ninth Circuit rejected the government's argument that the evidence from an illegal warrantless search should not be suppressed because the police would have otherwise got a valid warrant for the search. Griffin, 502 F.2d at 96. In doing so, the Ninth Circuit stated:

> The assertion by the police (after an illegal entry and after finding evidence of a crime) that the discovery was "inevitable" because they planned to get a warrant… would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment.

Id.

18. In Brierly, the Supreme Court of Utah rejected an inevitable-discovery argument where the prosecution claimed that the police officers who conducted an illegal warrantless search would have gotten a warrant had they not found the evidence through that illegal warrantless search. Brierley, 390 P.3d at 271. The court noted that the prosecution's argument "consists entirely of the discredited argument that the officers 'would have done it right' if they 'hadn't done it wrong.' Id. (quoting State v. Topanotes, 760 P.3d 1159, 1164 (Utah 2003).

19. Because the government has not shown that, as a practical matter, it would have inevitably obtained the data from the Facebook account and the Instagram account it now claims belongs to Mr. Bledsoe with the warrant based on the video-compilation evidence provided by the tipster had it not obtained that data with the warrant at issue in Mr. Bledsoe's Motion to Suppress and because the government's inevitable-discovery argument is, as a legal matter, highly questionable, the government cannot rely on the

inevitable-discovery doctrine to prevent suppression of the data it obtained with the warrant at issue in Mr. Bledsoe's Motion to Suppress.

CONCLUSION

WHEREFORE, the defendant, Matthew Bledsoe, replies to the Government's Opposition to Defendant Bledsoe's Motion to Suppress Facebook and Instagram Data.

Respectfully submitted,

/s/
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