

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Case No. 1:19-cr-20693-UU

UNITED STATES OF AMERICA

Plaintiff,

v.

PETER SOTIS and  
EMILIE VOISSEM,

Defendants.

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**DEFENDANTS' REPLY TO UNITED STATES' RESPONSE  
IN OPPOSITION TO JOINT MOTION FOR AUTHORIZATION FOR ISSUANCE  
OF A RULE 17 SUBPOENA *DUCES TECUM***

COMES NOW, Defendants PETER SOTIS and EMILIE VOISSEM, by and through their respective attorneys, and submit their Reply to the United States' Response in Opposition to the Joint Motion for Authorization for Issuance of a Rule 17 Subpoena *Duces Tecum* for the Production of the Personal Computer of Government Witness Shawn Robotka for Forensic Analysis and to Require the Preservation of Electronically Stored Evidence (DE 119), and state:

The government asserts in its Response that the defendants have failed to meet their burden under *United States v. Nixon*, 418 U.S. 683, 699 (1974). There, the Supreme Court described the three hurdles the Special Prosecutor had to clear in order to carry his burden: 1) relevancy; 2) admissibility; 3) specificity. *Id.* at 700. While the Court did not have specific knowledge of the contents of the (*Watergate*) tapes sought by the prosecutor, the Court found that there "was a sufficient likelihood that each of the tapes contain[ed] conversations relevant to the offenses charged in the indictment." *Id.* In the instant case, counsel has consulted with a forensic examiner who has indicated it is likely that a determination can be made from a limited examination of Robotka's computer as to when the entries on his electronic calendar were made. While, of course,

we have no way of knowing *specifically* whether such evidence would support Robotka's testimony or disprove it, it should clearly be relevant to the offenses about which he testified. It is also clear that metadata is admissible to establish reliability of certain evidence, as the government offered numerous documents at trial to show the metadata behind the emails it submitted into evidence, presumably to establish the reliability of those email documents.

The government argues that some potential use of the materials sought as evidence must be for a purpose other than impeachment before a subpoena can be allowed. However, the government offers no Eleventh Circuit decision to support its position. Indeed, the Supreme Court in *Nixon* observed that while “[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production *prior to trial*,” there can be other valid potential uses for the same material. *Id.* 701-02 (emphasis added). Moreover, the production sought is for use at a post-trial hearing on matters concerning not just whether Robotka lied on the witness stand, but whether he obstructed justice by manufacturing false documents, as the government contended these defendants did. The reasons for limiting production of impeachment evidence prior to trial – that is, preventing the use of a subpoena as a discovery device prior trial – is not present where the defense seeks to view metadata prior to a hearing on this post-trial motion. *Cf., United States v. Wittig*, 2008 U.S. Dist. LEXIS 55011,14 (D.Kan. July 17, 2008)(citations omitted)(“*prior to trial*, impeachment materials may not be obtained through a Rule 17(c) subpoena . . .”)(emphasis added).

Ultimately, the Court in *Nixon* denied the then president's motion to quash the Special Prosecutor's request for a Rule 17(c) subpoena *duces tecum* for the production of the *Watergate* tapes and concluded that the prosecution had made a sufficient showing as to relevancy, admissibility and specificity of the evidence sought. *Id.* at 702. So too, in the instant case, the Court should find the defense has made a sufficient showing that, rather than embarking on a “fishing

expedition,” they are attempting to develop evidence that should be readily available, result in minimal intrusion<sup>1</sup> and likely would resolve significant, disputed issues in this case. Rule 17(c) allows this Court to direct production of Robotka’s computer prior to a hearing on this motion “so that it may be inspected in advance, for the purpose of enabling the [defendants] to see whether [they] can use it or whether [they] want[] to use it.” *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220, n. 5 (1951).

Finally, the government asserts that the relief the defendants seek should be denied because they failed to exercise due diligence in attempting to obtain this evidence pretrial. While the government acknowledges that defense counsel requested that the government produce the metadata on March 11, 2020, at calendar call, it asserts that the defense “made no further effort to obtain that information until filing of the instant motion.” Gov’t’s Resp. at 6-7. Curiously, the government omits to mention that it had assured the defense it would not be admitting the calendars in its case-in-chief, unless it became necessary to show a prior consistent statement. For that reason, and in reliance upon the representation of the prosecutor, counsel for Mr. Sotis elected not to cross-examine Robotka as to any possible prior inconsistent statement and other possible matters and, instead, elected to pursue other issues on cross examination.<sup>2</sup>

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<sup>1</sup> The subpoena can hardly be considered to be an attempt at a “sweeping search,” as portrayed by the government in its Response at 5. Indeed, it should be obvious that the defense is not seeking “an entire file” as the government has suggested, but merely an analysis limited to examination of data necessary to a determination of the dates of the calendar entries.

<sup>2</sup> While counsel for Mr. Sotis has not seen a copy of the transcript of Robotka’s cross-examination, it is believed that he also did not make any focused effort to impeach on the basis of faulty memory, concentrating instead on the witness’s biases, financial motives and personal animus against Mr. Sotis.

WHEREFORE, for the reasons set forth above and in their Joint Motion for Authorization for Issuance of a Rule 17 Subpoena *Duces Tecum* for the Production of the Personal Computer of Government Witness Shawn Robotka for Forensic Analysis and to Require the Preservation of Electronically Stored Evidence (DE 116), the Defendants respectfully requests that the Court set this matter for hearing, and for all other and further relief deemed just and appropriate under the circumstances.

Dated: November 24, 2021

Respectfully submitted,

**BRUCE L. UDOLF, P.A.**

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**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system on this 24<sup>th</sup> day of November, 2021 and was served electronically to all counsel of record.

By: Bruce Udolf