TICK TOCK: SDNY TELLS PROJECT VERITAS, AGAIN, TO WAIT UNTIL JAMES O'KEEFE IS INDICTED TO COMPLAIN

As I noted back in March, when Project Veritas discovered what was clear from the start — that SDNY had relied on material obtained from emails involving James O'Keefe and two other Project Veritas associates to get warrants to obtain their phones — they tried to claw back not just the emails but also the phones.

> [B]efore obtaining warrants to seize James O'Keefe's phones, DOJ had first obtained emails that provided the evidence to get the warrants for his phones.
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> > The Government disclosed many of its covert investigative steps in the *ex parte* context of the Affidavit, including each email search warrant it had obtained pursuant to the SCA in this investigation.

This is precisely what SDNY did with Michael Cohen and Rudy Giuliani, and it's what Magistrate Judge Sarah Cave was talking about when she referred to the "considerable detail" in the affidavit.

> > Third, the Court has reviewed the Materials in camera and observes that they contain considerable detail about individuals who may have already provided information to the Government—voluntarily or involuntarily—such that

> > unsealing of the Materials "could subject [them] to witness tampering, harassment, or retaliation."
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> PV revealed that in a motion asking Judge Analisa Torres to claw back this information.

In March, DOJ told PV to wait until they were indicted to complain (here's my thread on that response).

Days later, on March 30, PV tried again, petitioning Judge Torres to force the government to return all their phones and their emails.

Tick tock, tick tock.

On April 11, Judge Torres set a briefing schedule: the government had to file a response by May 6, and PV should file their reply by May 20.

Tick tock, tick tock.

Right on schedule, the government filed its response last night. The response is 28-pages long, much of which is dedicated to explaining to PV how the Fourth Amendment works and asserting that SDNY is quite confident the magistrates' rulings findings there was probable cause that these accounts and devices would contain evidence of enumerated crimes will hold up. The discussion includes a particular focus on how SDNY already has precedents approving investigations that first obtain emails covertly and then seize phones overtly, as they did with Rudy Giuliani and (while they don't rely on the precedent) did with Michael Cohen before that.

> To the extent that the Movants are attempting to raise arguments with respect to execution of the warrants for email account data, there is no legal basis for such challenges at this stage of an ongoing grand jury investigation. Last year, Judge Oetken denied a similar

challenge where the circumstances were materially the same: in the course of a multi-year, covert investigation, the Government obtained electronic data pursuant to judicially-authorized search warrants issued under 18 U.S.C. § 2703, the Government had reviewed that electronic data prior to the overt execution of search warrants for electronic devices, and a Special Master was appointed to oversee the review of the contents of the electronic devices (but not the electronic data obtained previously). Specifically, Judge Oetken ruled:

> Giuliani and Toensing also seek pre-indictment discovery of the Government's privilege and responsiveness designations in connection with the 2019 warrants [obtained covertly, pursuant to 18 U.S.C. § 2703]. They cite no legal authority for this request, and the Court is aware of none. If there is a criminal proceeding, any defendants will be entitled to discovery under Rule 16. There is no basis for compelling the Government to produce this information now, during an ongoing grand jury investigation.
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> Finally, the Court sees no legal basis for Toensing's request for detailed information about the filter team review process, at least at the pre-charge phase of this matter.

In re Search Warrants Executed on Apr. 28, 2021, 2021 WL 2188150, at *2. The circumstances confronted by Judge Oetken are indistinguishable from those presented here. The Movants offer no authority contrary to Judge Oetken's ruling, and the Government is aware of

> none. To the extent the Movants may potentially be entitled at some point to the disclosures that they seek, any such entitlement would only be triggered, if at all, by the filing of an indictment charging them in connection with the investigation, and not before.12
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> 12 Or, potentially, by the filing of a civil claim, should one exist, that survives a motion to dismiss and proceeds to discovery.

Just for good measure, though, SDNY makes it clear they had reviewed all the emails before obtaining the overt warrants on O'Keefe and his flunkies, which makes it a good bet they relied on the email content to show probable cause to get the phone warrants.

> With respect to the subscriber, non-content, and content information for email accounts referenced by the Movants, which were obtained pursuant to a grand jury subpoena and orders and warrants issued by federal magistrate judges pursuant to the Stored Communications Act (the "SCA"), 18 U.S.C. § 2703, the Government's review of those materials was completed months ago, before the Movants initiated this Part I matter in November 2021.

I've stated repeatedly this was what happened here, only to have a PV lawyer claim I was wrong.

I was not wrong.

As I said, the bulk of this filing is just a primer in how the Fourth Amendment works, as applied. It is thorough, but it mostly feels like T-crossing.

More specific to the facts at hand, however, SDNY accuses PV of attempting to bypass the Special Master process they themselves demanded

and Judge Torres approved last year.

> Consisting of equal parts rhetoric, speculation, and inaccurate factual assertions, the motion is little more than a misguided attempt to end-run the Special Master process that this Court put in place and prematurely litigate the merits of the Government's prior investigative steps.
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> [snip]
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> With respect to the devices that are subject to the Special Master's review, the Movants' attempt to put these arguments before the Court while the same arguments are pending before the Special Master appears to be an improper end-run around the Special Master. As explained above, these very arguments were fully briefed as of April 20, 2022, and are in the process of being decided by the Special Master. The Movants should not be permitted to short-circuit the process that this Court put in place, at their request, and which will adequately safeguard any potentially privileged materials that were contained on the devices.11
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> 11 In the event the Court finds any of these issues material to the resolution of the motion, the Court should defer consideration until after the Special Master has issued a ruling on the same.

Even if Torres is sympathetic to poor James O'Keefe's plight (and she accorded him better treatment than Rudy Giuliani got in the same court), she's likely to be pissed about this aspect of things, that she went to the trouble of approving a Special Master and splitting the costs to pay for Barbara Jones' services, only to have PV demand more.

And here's why that matters: as SDNY noted, Jones is *as we speak* making final decisions

about what SDNY gets.

> The Special Master's responsiveness review has largely been completed, with the contents of only one device currently under review. The parties have submitted briefs outlining their positions regarding the law and principles that should be applied to the Movants' objections to the release of the items that the Special Master has deemed responsive to the search warrants to the investigative team. 2
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> 2 The Movants submitted their briefs to the Special Master on April 1, 2022, the Government submitted its response on April 13, 2022, and the Movants submitted a reply on April 20, 2022.

Tick tock, tick tock.

Project Veritas was, almost certainly, already preparing their briefing for Jones when they demanded this end-run around the Special Master process. They had, almost certainly, reviewed what was about to be turned over to SDNY and how, having read the affidavits that PV is still trying to get, Jones interpreted the scope of the investigation. So not only does this timing seem to substantiate SDNY's claim they're trying to back out of their demands for a Special Master, but it makes it likely that by the time they file their own reply two weeks from now — tick tock, tick tock — Jones will already have submitted her recommendations regarding what materials SDNY gets.

And until then, SDNY explained in their law school primer to PV about how the Fourth Amendment works in practice, SDNY gets to keep all the evidence implicating a criminal investigation until they decide whether or not to charge anyone.

> To the contrary, the electronic devices retained by the Government were obtained pursuant to search warrants issued by a

> Magistrate Judge after a finding of probable cause, and are currently in the final stages of the Special Master's review process. Similarly, the contents of email accounts were also obtained pursuant to search warrants issued by Magistrate Judges after findings of probable cause, and the Government's review of materials obtained pursuant to those warrants was completed months ago. There can be no dispute that the Government's investigation is ongoing, that these materials include evidence relevant to that investigation, and that, if a prosecution results from the investigation, these materials will have evidentiary value.
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> [snip]
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> *Third*, the Government's retention of the items and materials at issue is reasonable because its investigation remains ongoing and the return of the property sought would impair the Government's investigation. The electronic devices at issue either have been determined by the Special Master to contain responsive items, are currently under review by the Special Master, or have not yet been reviewed by the Special Master due to technical impediments. Similarly, the email account content has been reviewed by the Government and has been determined to contain material responsive to the search warrants. See, e.g., In re Search Warrants Executed on Apr. 28, 2021, 2021 WL 2188150, at *2 (denying pre-indictment motion to "return" to movants the "results from earlier search warrants of [movants'] iCloud and email accounts" because, among other reasons, "the review of the [earlier] warrant returns is now largely complete"). These items and materials are anticipated to have evidentiary value if a prosecution

> arises from the Government's ongoing grand jury investigation. In light of the character of these items and materials and the status of the Government's investigation, retention of the items and materials is reasonable at least until the Government's investigation is completed or, in the event a prosecution arises from the investigation, until such time that the criminal case reaches its conclusion.

SDNY is not saying *that* a prosecution will arise from the materials seized from PV. But they are saying they've found evidence that would be relevant if they chose to do so.

And, SDNY repeats again in their primer on how the Fourth Amendment works, it's only after SDNY makes that decision that James O'Keefe will have standing to challenge these searches.