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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 18-CR-00681 (NGG)

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:
-against- : United States Courthouse
: Brooklyn, New York

MANUEL CHANG, :
:
:
Defendant. : March 25, 2024
: 10:30 a.m.

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UNCERTIFIED TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Computer-aided Transcription.

1 (In open court.)

2 THE COURTROOM DEPUTY: Interpreters.

3 (Interpreters sworn.)

4 INTERPRETER de ALMEIDA: Yes, I do.

5 Adelia Ramos de Almeida, D-E, space,

6 A-L-M-E-I-D-A, Federally-qualified Portuguese interpreter.

7 INTERPRETER LADD: I do.

8 Alex Ladd, Federal District Interpreter.

9 THE COURTROOM DEPUTY: Criminal cause for a motion
10 hearing.

11 Beginning with the Government, please state your
12 appearances.

13 MR. SIEGEL: Good morning, Your Honor.

14 Jonathan Siegel, Genny Ngai, Peter Cooch and
15 Morgan Cohen for the United States.

16 And if it's all right with the Court, we are
17 joined at counsel table by FBI Special Agent Babatunde
18 Adediran.

19 SPECIAL AGENT ADEDIRAN: Good morning.

20 MR. SIEGEL: And we provided the spelling to the
21 court reporter.

22 THE COURT: Thank you.

23 And for the defense.

24 MS. HOXIE SOLANO: Good morning, Your Honor.

25 Jamie Hoxie Solano on behalf of Defendant Manuel

1 Chang, who is here, and I'm accompanied by my colleague,
2 Anjula Prasad.

3 THE COURT: And Mr. Ford?

4 MS. HOXIE SOLANO: Mr. Ford, unfortunately, had
5 something come up and he is resigned to Dubai at the moment,
6 but he wishes that he was going to be here.

7 THE COURT: He is in Dubai?

8 MS. HOXIE SOLANO: He is in Dubai, Your Honor.

9 THE COURT: Okay. And you are co-counsel with
10 him?

11 MS. HOXIE SOLANO: That's correct, Your Honor. I
12 am his partner.

13 THE COURT: At Ford O'Brien Landy?

14 MS. HOXIE SOLANO: That's correct.

15 THE COURT: Just give me your name again.

16 MS. HOXIE SOLANO: Jamie, J-A-M-I-E.

17 THE COURT: Yes.

18 MS. HOXIE SOLANO: Middle name Hoxie, H-O-X-I-E.

19 And last name Solano, S-O-L-A-N-O.

20 THE COURT: And your colleague is?

21 MS. HOXIE SOLANO: Anjula Prasad.

22 MS. PRASAD: It's A-N-J-U-L-A, P-R-A-S-A-D.

23 THE COURT: And the Defendant, Mr. Chang, is
24 present. Good morning, sir.

25 All right. Please be seated, everybody.

1 We are here to consider oral argument regarding
2 Mr. Chang's motion to suppress and the motion comes from the
3 defense. So the defense will have the first opportunity to
4 address the Court. In the post-COVID world, I allow people
5 to sit when they argue or stand if they feel more
6 comfortable standing.

7 Will you be handling the argument, ma'am?

8 MS. HOXIE SOLANO: Yes, Your Honor.

9 THE COURT: Okay. And so why don't we get
10 started.

11 MS. HOXIE SOLANO: Yes, Your Honor. Thank you.

12 Mr. Chang's motion is seeking suppression of the
13 content of his phone, his personal phone, that was seized
14 while he was in South Africa in 2018. We have several basis
15 that we believe suppression is appropriate here.

16 The first being that the seizure of the phone in
17 2018 was unreasonable, but, more importantly, that the
18 Government delayed in obtaining a warrant to get into the
19 phone in violation of the Second Circuit's opinion in *Smith*.
20 And here, it's our position that each of the four *Smith*
21 factors would warrant suppression under this case. And it's
22 important to remember that *Smith* was operative at the time
23 that the Federal Government obtained the phone and then
24 waited 42 days before -- before seeking a warrant.

25 THE COURT: Forty-two days?

1 MS. HOXIE SOLANO: Yes, Your Honor.

2 Now, each of the factors, in our opinion, supports
3 suppression hearing.

4 First, 42 days is long past the 30 days of *Smith*.

5 Second, this is a personal cell phone, which,
6 under the *Smith* factors, has heightened consideration. This
7 was in, I believe *Smith* was a tablet. Here, this was his
8 personal cell phone. And, in this instance, Your Honor,
9 Mr. Chang, through counsel, demanded return of the phone
10 within 24 hours after we understood that law enforcement had
11 seized the phone and obtained a search warrant in a delayed
12 period of time.

13 THE COURT: So you are not claiming that the
14 seizure of the phone in South Africa was the origin of the
15 delay? In other words, it's only once the phone was
16 delivered to the agent, there was a delay from that point
17 forward to the date of the application?

18 MS. HOXIE SOLANO: Yes, Your Honor.

19 For purposes of deciding how long the delay is,
20 that's our position.

21 THE COURT: Okay.

22 MS. HOXIE SOLANO: We do think that it is
23 pertinent that the Government knew that they requested the
24 phone from South Africa, who acted as the U.S. Government's
25 agent in 2018.

1 Now, the Government hasn't explained when it
2 became aware that that phone was actually seized, but for
3 purposes of determining the delay, we believe that the
4 appropriate determination --

5 THE COURT: All right.

6 MS. HOXIE SOLANO: -- is from the time it became
7 in the hands of the U.S. Government.

8 And obviously, Your Honor, the Defendant asks --
9 so to be clear, because there's -- it seems to be unclear in
10 the briefing, on September 18th, defense counsel learned
11 that the U.S. Government now had possession of Mr. Chang's
12 phone. And then on September 21st, we learned that it was
13 searched via a warrant. We obtained the warrant papers on
14 the 21st. And then within 24 hours of reviewing the warrant
15 and seeing that there was this unreasonable delay, we
16 demanded return of the phone.

17 THE COURT: All right.

18 MS. HOXIE SOLANO: And as we've elaborated, in
19 this instance, the warrant that was obtained did not -- did
20 not allow for delayed notification; however, the Government
21 did not notify us when the warrant was actually executed.

22 THE COURT: Are they under an obligation to notify
23 you?

24 MS. HOXIE SOLANO: Yes, Your Honor. They were
25 under an obligation to at least notify Mr. Chang, because

1 delayed notification was not authorized by the warrant and
2 they failed to do that. And so within a matter of days of
3 us understanding that the U.S. Government possessed his
4 phone and that they had waited 42 days, which is
5 unconstitutional and unreasonable, we requested that the
6 phone be returned. And it has not been returned to us.

7 THE COURT: But the materials in the phone were
8 provided to you?

9 MS. HOXIE SOLANO: Yes. We have since received a
10 bit-for-bit copy of Mr. Chang's phone.

11 THE COURT: All right.

12 MS. HOXIE SOLANO: The third factors also is in
13 favor of Mr. Chang because he did not -- he's never
14 consented to anyone taking his phone, which is similar to
15 the third factor in *Smith*.

16 Now, in *Smith*, they talk about that the third
17 factor can be diminished or they analyze that the third
18 factor can be diminished where an arrestee, there's probable
19 cause at the time of the arrest to take his phone. But
20 *Smith* is clear that any diminished property interest is
21 limited to whether that delay was reasonable. And here, the
22 delay was not reasonable, and there was no probable cause to
23 believe that there would be evidence of any crimes on that
24 phone because it was taken in 2018 and the allegations that
25 are in the search warrant and the allegations against

1 Mr. Chang are for signing loan guaranty document in his
2 capacity as the former minister of finance in 2013 and 2014.

3 THE COURT: So there would be nothing -- you are
4 claiming, you are alleging, there would be nothing on that
5 phone that would relate to the transactions that are alleged
6 for 2014 and 2013.

7 MS. HOXIE SOLANO: Correct, Your Honor. And
8 especially given the fact that at the time the U.S.
9 Government knew that Mr. Chang was no longer the minister of
10 finance and had not been since 2014.

11 And in addition, this was his personal cell phone.
12 They knew that he had previously left his job as the
13 minister of finance four years prior. And this is not an
14 instance, this is not the type of case where Mr. Chang or
15 his alleged involvement in the purported criminal activity
16 involved the use of a cell phone. In fact, I am not aware
17 of a single allegation in the affidavit that says that
18 Mr. Chang had a cell phone in 2013 or 2014 at all. The
19 allegations regarding this device, in particular, suggesting
20 that this device could have been present in 2013 and 2014,
21 are not true, because a simple Google search reveals that
22 the serial number on the back of the phone shows that it was
23 not manufactured until the spring of 2014. And so there is
24 not a single factual allegation in the affidavit that says
25 that Mr. Chang either sent or received a single e-mail, much

1 less a single e-mail, about the scheme under investigation.
2 There is not a single instance where Mr. Chang is alleged to
3 have spoken on a cell phone. There is not a single instance
4 where Mr. Chang is alleged to have sent any text messages
5 whatsoever from a cell phone, whether it be about this,
6 about the alleged scheme or anything else.

7 THE COURT: Were there cell phones in Mozambique
8 in 2012, 2013, and 2014, to your knowledge? I mean, were
9 cell phones available at that time; do you know?

10 MS. HOXIE SOLANO: I believe so, Your Honor.

11 THE COURT: And so arguably, someone changing cell
12 phones would have the opportunity to transfer data from cell
13 phone A to cell phone B, when purchasing cell phone B.

14 MS. HOXIE SOLANO: Well, I think that would depend
15 on the type of data you are talking about, Your Honor.

16 And I think that it's important to note that none
17 of those types of allegations, which I have seen in search
18 warrants before several times, they are quite common, none
19 of that was in this search warrant affidavit.

20 THE COURT: Okay. All right.

21 MS. HOXIE SOLANO: And so this is not the type of
22 case, which is what we commonly see, where the individual
23 whose device is seized, there's wire taps or there's e-mail
24 communication or there's something to believe that the type
25 of conduct at issue would be captured and memorialized in

1 the device that's being searched.

2 Here, under the allegations in the warrant and the
3 allegations of this case, Mr. Chang's alleged involvement is
4 signing official loan documents on behalf of the Government
5 of Mozambique. That would not be something that would be
6 memorialized in an electronic device.

7 And, in addition, he's alleged to have -- he's
8 alleged to have received payments --

9 THE COURT: Right.

10 MS. HOXIE SOLANO: -- but, however, those
11 allegations are also inconsistent with discovery that the
12 Government has provided to us. So the Government alleged in
13 the affidavit that Mr. Chang controlled the Thyse
14 international entity and he controlled the Thyse
15 International Bank account. And they actually alleged that
16 he received -- that Mr. Chang received directly from
17 Privinvest, money through these accounts. That's not true.
18 So evidence that the Government produced to us after
19 these -- after our opening brief, reflects that somebody
20 other than Mr. Chang controlled the Thyse International
21 entity and somebody other than Mr. Chang controlled the
22 Thyse International bank account.

23 And so again, the idea that a phone that did not
24 exist in 2013, that there was probable cause to believe that
25 that phone would contain evidence of checking a bank

1 account, because he purportedly controlled this account,
2 which seems to be the main crux of what the probable
3 cause -- the hook was in this case, each of those are based
4 on -- on incorrect information and though there was no
5 probable cause to believe that this device would have any
6 evidence of activity from 2013 and 2014 on it.

7 THE COURT: All right.

8 MS. HOXIE SOLANO: And finally, Your Honor, the
9 fourth factor under *Smith*, the reason for delay, also runs
10 in Mr. Chang's favor.

11 Here, the agent now has explained part of the
12 reason for the delay, but the reason for the delay is that
13 the Government waited until they got the phone in order to
14 start their investigation. The information -- the
15 Government previously represented that the investigation of
16 Mr. Chang was complete and then after they received the
17 phone, it appears that the agent decided to go to London to
18 try to interview witnesses likely because there is a lack of
19 probable cause and they understood that.

20 And so the only thing that the agent was able to
21 ascertain from that -- from that meeting, that at least is
22 reflected in the search warrant affidavit, is that one of
23 the Government's cooperating witnesses now, in 2023, has
24 recalled that in a conversation with Jean Boustani, who is
25 the gentleman who went to trial previously, that in a

1 conversation in September of 2013 with Mr. Boustani, this
2 other cooperator now believes that Mr. Boustani said that he
3 spoke with Mr. Chang on a phone at some time prior to that
4 conversation -- prior to that meeting. That information
5 could have been gleaned any time before -- before they
6 obtained this phone. This witness has been in a cooperative
7 posture with the Government since at least 2019, and the
8 Government requested that South Africa take the phone in
9 2018.

10 So under those circumstances, Your Honor, it's not
11 reasonable for the Government to sit on its hands and wait
12 beyond the 30 days, when they could have spoken with the
13 cooperator at any point in time.

14 THE COURT: All right.

15 MS. HOXIE SOLANO: Anyway, they talk about travel
16 difficulties, but it's my understanding, from the
17 information before us, that these conversations took place
18 in London. The FBI has attaches in London. If the purpose
19 of these meetings were to ask the question of, do you recall
20 anything about Mr. Chang using a phone, speaking on a phone,
21 those are conversations that could have been had by the
22 staff in -- in London. And there's no explanation why they
23 waited until they had the phone in hand before they started
24 undertaking these investigative steps.

25 THE COURT: Okay. Anything else on that?

1 MS. HOXIE SOLANO: No, Your Honor.

2 I will just say that the Government argues that
3 *Smith* does not apply. It plainly applies here. This phone
4 had no evidentiary value other than getting into it for the
5 content thereof. The Government, in its brief, I believe on
6 page 8, equates this to a search incident to arrest and that
7 is what -- a search incident to arrest, *Smith* applies. And
8 so a suggestion that *Smith* shouldn't apply here, just
9 because the U.S. Government told the South African
10 Government to touch the device first, is not acceptable.
11 This Fourth Amendment applies to this seizure -- this was a
12 seizure -- and they were required to get a warrant prior to
13 the limitations set out in *Martin* and *Smith*.

14 And of note, Your Honor, the Government did
15 provide Mr. Chang's property, all of his other property that
16 was collected, they dumped on us when Mr. Chang had his
17 initial appearance here --

18 THE COURT: They returned it to you?

19 MS. HOXIE SOLANO: They returned it to us when
20 Mr. Chang had his initial appearance. But they did not
21 return the phone, nor did they tell us that they had the
22 phone. So this is not a circumstance where the Government
23 believed that we had abandoned or that they needed to
24 inventory property. This was an instance where they kept
25 the phone, they didn't tell us about it, they didn't

1 disclose the warrant even though they were obligated to.
2 And then after the fact when they do tell us about this, we
3 review the warrant, we ask for it back immediately, and by
4 then, it had already been an unreasonable delay under *Smith*.

5 THE COURT: All right. Let's talk about *Smith* for
6 a minute.

7 Thank you.

8 Why wouldn't *Smith* apply here, Mr. Siegel?

9 MR. SIEGEL: Thank you, Your Honor.

10 THE COURT: And if it does apply, how would you
11 analyze the four *Smith* factors?

12 MR. SIEGEL: Sure.

13 So I think it's helpful to talk about the facts of
14 *Smith* and the context of *Smith*, because I think that really
15 does illuminate what is the rule of *Smith* and how it
16 applies.

17 So the facts of *Smith* is that there was a -- a
18 drunk driver. He was arrested. After they went back to the
19 car, they saw a tablet in the seat. And the officer said
20 that on the tablet he saw what appeared to be a picture of a
21 naked minor. So the phone was seized, in that case, not
22 incident to arrest, because *Smith* had previously been
23 arrested, but purely based on the probable cause that they
24 saw this device that they thought might contain child
25 pornography. *Smith* gets out of jail. He's never detained.

1 But the Government doesn't give back his phone. 30 days go
2 by, during which time no investigation happens, and at that
3 point they file, they submit a warrant which says I saw this
4 phone, I saw this picture. They get a warrant. And the
5 Second Circuit says that that was unreasonable because what
6 happened there was effectively -- effectively, they stole
7 Mr. Smith's phone. They didn't have a warrant. He wasn't
8 in custody, where they were holding his property. They took
9 his phone. They let him go. And the Second Circuit said,
10 you can't just take a person's phone; there is an exception
11 that you can take a person's phone, where, if you hadn't had
12 the opportunity to get a warrant, you can take the phone in
13 order to get your warrant, but that exception has built into
14 it the idea that you are going to act diligently. You can't
15 say we're taking this phone in order to get a warrant and
16 then not get a warrant and sit around for 30 days with no
17 investigation, using the exact same probable cause you had
18 on day one to then get a warrant.

19 Now, that's different from other situations where
20 the basis for the seizure isn't that exception of we are
21 seizing this phone to get a warrant. So for an example, and
22 this is an example from *Smith*, let's say you see a phone
23 where the phone, itself, is physical evidence. You are not
24 seizing it with the intention of getting a warrant; you are
25 seizing it because the phone is evidence, for example, and

1 this came up in the *Corbett* case, the IMEI written on the
2 phone links someone to a crime.

3 Well, in that case, you don't necessarily -- you
4 don't need to get a warrant for that phone to be evidence.
5 You've lawfully seized it. And therefore --

6 THE COURT: You don't need to examine the contents
7 of the phone beyond looking at the back of the phone where
8 it identifies the serial number.

9 MR. SIEGEL: Exactly.

10 So in those circumstances, *Smith* says you can hold
11 the phone indefinitely. That's not a -- that's not an
12 exception based on your anticipation of getting a warrant.
13 That's a wholly separate exception.

14 THE COURT: I don't think that's the claim here.

15 MR. SIEGEL: No, no, no. But I am just giving an
16 example that where you fall outside of the exception that
17 governs *Smith*, *Smith* doesn't apply.

18 Other examples, let's say someone's taken into
19 custody and the police have their property. They put it
20 all -- they put it all into an evidence locker. That person
21 stays in jail for a year. The Second Circuit has held in
22 those circumstances the fact that the Government held on to
23 your phone for a year while you were in custody, if it was
24 reasonable when it was seized, it doesn't become an
25 unreasonable seizure just because the Government has held on

1 to it because the thing that justified the seizure there --
2 the fact that you were taken into custody, the Government
3 had to do something with your property -- that doesn't, in
4 itself, impose a time limit on it.

5 Now, it's different -- and Your Honor has a
6 decision on this, I believe it's *Herron*, H-E-R-R-O-N --
7 where someone's held in custody and then they get released,
8 but they don't give the property back. Well, that sets off
9 a different analysis. Why are you still holding this
10 person's property? The answer as to why you are holding
11 this person's property, it must be justified by probable
12 cause. If that's what's justifying it, then you need to be
13 obtaining a warrant. And there is a different analysis.

14 But so I say all that just to explain that *Smith*
15 governs particular exception to the Fourth Amendment, which
16 is where you have seized a phone with the purpose of
17 obtaining a warrant, you must actually obtain a warrant.

18 Now, let's talk about the circumstances here.
19 Here, the phone was seized in South Africa by South African
20 authorities. It is, I think, uncontested that there is no
21 Fourth Amendment right for Mr. Chang at that point. The
22 phone doesn't need to be seized based on probable cause. It
23 doesn't need to be seized based on anything because the
24 Fourth Amendment doesn't apply to seizures outside the
25 United States for non-U.S. persons.

1 Now, at that time it's seized, there is no Fourth
2 Amendment implications. He is in South Africa for four
3 years. He is extradited. When he is extradited here, the
4 Government still doesn't have the phone. He's extradited
5 here, I think, on July 14th. On July 20th, South African
6 authorities give the phone to the FBI. The phone is then
7 flown here, mailed to Special Agent Adediran, you know,
8 there's some dispute on the numbers, I don't think it
9 ultimately matters. We get the phone 35 days before the
10 warrant, they say 42. It's all over the 30 in *Smith* --

11 THE COURT: Right.

12 MR. SIEGEL: -- but I just want to explain the
13 difference in the numbers.

14 But when we get that phone, it comes over
15 separately of: Here is this phone. It's not something that
16 we had seized. It's given to us by a foreign country.

17 At that point, the decision is made, if we are
18 going to seek a warrant for this, we need to investigate
19 what is the use of Mr. Chang's phone. We had never had his
20 phone before. It was, until quite recently, unclear if we
21 would ever get Mr. Chang, because as Your Honor knows, there
22 was the long, drawn-out fight between us and Mozambique.

23 And so Special Agent Adediran sets to work, he
24 reviews the case file, he flies to London. The argument
25 that someone else in London could have done this interview

1 for him, doesn't really fit with the practicalities of how
2 these cases work. You want the person doing the
3 investigation to be someone who is familiar with the case.
4 He flies to London, he gathers evidence, he comes back, and
5 we submit a warrant to Judge Reyes.

6 All of the facts about the delay, about when the
7 phone was seized, about when we -- the Government received
8 the phone is presented to Judge Reyes and Judge Reyes signs
9 the warrant.

10 So now, let me walk back through why all those
11 facts, I think, are relevant.

12 In terms of does *Smith* apply, we submit that *Smith*
13 just doesn't apply to these facts at all because this phone
14 wasn't seized, under the exception that *Smith* was
15 addressing, of temporary seizures justified by the fact that
16 you are going to be seeking a warrant. That wasn't why this
17 phone was seized, that wasn't what justified it under the
18 Fourth Amendment. What justifies it under the Fourth
19 Amendment is that the Fourth Amendment didn't apply to
20 seizure at all.

21 So given that this is an entirely different
22 situation, *Smith*, we submit, just doesn't apply.

23 And I think it's also important, Your Honor, and I
24 am going to address the --

25 THE COURT: You don't think that the looking at

1 the overall circumstances of the seizure which took place
2 and the handoff to the FBI by South African authorities,
3 that that wouldn't be considered a trigger or consideration
4 of the factors under *Smith*?

5 MR. SIEGEL: No, Your Honor.

6 And, again --

7 THE COURT: You can be hopeful about that?

8 MR. SIEGEL: Hm?

9 THE COURT: You can be hopeful, but I don't know
10 that you can be certain.

11 MR. SIEGEL: Well, look, this is our position and
12 I have explained why it's our position.

13 THE COURT: Right.

14 MR. SIEGEL: But -- but, I mean, let me answer
15 that question and then I want to explain an additional issue
16 and then get to the factors of *Smith*.

17 THE COURT: Go ahead.

18 MR. SIEGEL: But to that question, *Smith* -- *Smith*
19 doesn't say that getting a warrant too late is
20 unconstitutional. *Smith* says that the seizure is
21 unconstitutional. And even if it was reasonable at the
22 beginning, because you were going to get a warrant, if you
23 delay it too long, at a certain point, the fact that you
24 have still held on to this person's phone instead of just
25 given it back to him and he is out living his life with his

1 property taken by the Government, that that becomes
2 unreasonable.

3 Now, a man in the circumstance here, where someone
4 is arrested in South Africa, there is no Fourth Amendment
5 implication. He is in custody in South Africa. He's flown
6 to the United States, and his property is transferred from
7 South Africa to the United States. Since he is still in
8 jail in the United States, the FBI just puts all his
9 property -- his wallet, his shoes, his belt, his phone -- in
10 an evidence locker.

11 Second Circuit law already says if that property
12 stays in an evidence locker for three years, it doesn't
13 become unreasonable just because the Government has retained
14 it. So at no point does that seizure become unreasonable.
15 And that's exactly what *Smith* was addressing. If you seize
16 a phone with the purpose of searching it, then if you don't
17 actually search it, you don't get the warrant, that seizure
18 becomes unreasonable. But if you have a phone for another
19 reason, because of an arrest, because it was given to you by
20 another law enforcement agency, the fact that we hold it
21 until he is released does not become unreasonable. And
22 that's Second Circuit caselaw that postdates *Smith* that we
23 cite in our brief.

24 So that's why we submit that *Smith* doesn't apply.

25 But ultimately, Your Honor doesn't even have to

1 decide that, one, because as we will explain under the *Smith*
2 factors, we think we are fine, but also under the good faith
3 exception.

4 *Smith*, itself, didn't suppress the phone. *Smith*
5 said that the law in this area hasn't been entirely clear.
6 There is no evidence that the Government acted in bad faith
7 or acted recklessly. And the fact that here they got it
8 wrong, is not enough to suppress.

9 THE COURT: We haven't discussed the good faith
10 exception. We will get to that later on.

11 Go ahead.

12 MR. SIEGEL: But here, even if Your Honor
13 disagrees, there is no case that -- with circumstances like
14 this where a Court has said *Smith* applies. Usually to find
15 suppression, you need to find a violation of clearly
16 established law. Clearly established law usually needs to
17 be clearly established by the Supreme Court or the Second
18 Circuit. There is nothing from the Supreme Court or the
19 Second Circuit that is like these facts. The facts of *Smith*
20 are incredibly different. The person wasn't incarcerated.
21 There was no interplay of the phone being seized abroad
22 provided by a foreign law enforcement agency.

23 So there isn't a case that would govern this that
24 it would be appropriate to say that the Government acted --
25 that the agent acted in bad faith or recklessly because

1 there wasn't a fact that applied. And even if Your Honor
2 says, I find that under these contexts *Smith* does apply to
3 this, there wasn't a case that had done that. And we've
4 looked, I assume the defense has looked. I have not seen
5 and they have not cited any case that is like this case
6 where *Smith* was found to apply.

7 THE COURT: Well, what about the argument that
8 this is a cell phone that was manufactured or sold beginning
9 in 2018 and that the events that are alleged involving
10 illegal activity on the part of a plaintiff occurred back in
11 2013, 2014, and you should have known, and this was a
12 personal cell phone, and that you should have phone that
13 there is no likelihood that anything on that phone would
14 relate to those events back five years previous?

15 MR. SIEGEL: Sure.

16 So --

17 THE COURT: So starting out, you know, you are
18 looking at a cell phone that has a serial number. That
19 serial number relates to sale in 2018 or thereafter. And
20 what you are investigating took place, based on your
21 cooperating witnesses or other witnesses, five years
22 earlier, why would you even bother? And what is the
23 justification for even seeking a search warrant?

24 MR. SIEGEL: Sure.

25 Well the first thing I would say about that is

1 that that's separate from the *Smith* analysis. That's
2 getting into probable cause.

3 THE COURT: I understand, but I am getting back to
4 that question, which isn't part of the *Smith* analysis. We
5 can get back *Smith* in a moment.

6 MR. SIEGEL: I think there's two things. One -- I
7 mean, candidly, until the defense filed their motion, I
8 didn't know when this phone had been manufactured. There is
9 no case that says that the Government has a duty to find out
10 when a phone was manufactured. They cite some website that
11 appears to be a -- a public database of when particular
12 phones were manufactured, but there's no case that suggests
13 that such duty exists. And even if such a duty exists, and
14 the Government failed to do it here, you know, at most, that
15 would arise to negligence. And the law in terms of
16 information not provided in a search warrant is that a
17 negligent failure to include information is not sufficient
18 to affect probable cause or to raise *Franks*. You need an
19 intentional misrepresentation or an intentional or reckless
20 omission.

21 So here, they don't cite anything that would
22 suggest that the Government acted intentionally or
23 recklessly by not including that information, but they also
24 cite no information that the Government was even aware of.

25 But -- but -- but let's say the Government was

1 aware of that information. This phone, they can correct me,
2 I think, was manufactured in spring of 2014. Well, in
3 spring of 2014, this conspiracy was still ongoing.
4 Mr. Chang was still the minister of finance. Some of the
5 bonds that he signed -- some of the guarantees that he
6 signed came after spring of 2014. And the evidence that we
7 are seeking here is -- is not just did he sign the guaranty,
8 I mean, candidly, we know he signed the guaranty, it's
9 signed, but it's about the payments and about what happened
10 with the money. And the defense talks about information
11 that was discovered after the warrant that is therefore
12 really irrelevant to the warrant about who controlled the
13 bank accounts and what was the flow of money as it made its
14 way to Mr. Chang.

15 Well, that's all information that even after it's
16 paid, there's probable cause to believe that will be on the
17 phone. If the money goes from bank A to bank B to bank C,
18 evidence on Mr. Chang's phone showing that he has a
19 relationship with bank A or bank B or bank C is all going to
20 be evidence of the crime. If it's going to other people --
21 the defense notes that there is a third-party that this
22 money is routed through, evidence that Mr. Chang has a
23 relationship with that third-party, which is likely to be
24 found on the phone even after this, is important evidence of
25 the crime and -- and that's not theoretical; that's --

1 that's true. On this phone, saved in his contacts, is
2 multiple contacts for that third-party for whom this money
3 traveled through.

4 So for the idea that a lot of the scheme happened
5 before the spring of 2014, even if that were known to the
6 Government, that doesn't really undermine probable cause.

7 And Your Honor, and that's not without even saying
8 about the point you raised about how data between phones can
9 be backed up. And defense counsel is correct, there isn't
10 an explicit allegation, data between phones can be backed
11 up, but probable cause, as the Supreme Court has said again
12 and again, is a common sense -- is a common sense analysis.
13 Your Honor knows, I know, Judge Reyes knew, Agent Adediran
14 knows, anyone who's had a phone in the last 15 years, knows
15 that you can back up data between phones and that most
16 people do when they get new phones. So the fact that there
17 isn't an explicit allegation on it, it is not the law that a
18 common sense inference -- the agent has to spell out every
19 common sense inference in the affidavit. The -- in making
20 the probable cause determination, the Magistrate Judge is
21 entitled to rely on probable cause, common sense --

22 THE COURT: Would I need a *Franks* hearing to
23 ascertain that for the record?

24 MR. SIEGEL: No, Your Honor.

25 In order to have a *Franks* hearing, there needs to

1 be a strong preliminary showing that the Government, that
2 the agent, acted recklessly or intentionally in leaving
3 information out. They have made no showing that that
4 information was in any way known to Special Adediran or that
5 it was reckless or intentional for him to not know that
6 information. So they haven't made that showing at all and
7 it would be, under the law, inappropriate to have a *Franks*
8 hearing.

9 THE COURT: So get back to the factors.

10 MR. SIEGEL: But -- and for *Smith*, just the last
11 thing I want to say on the good faith. In addition to the
12 fact that there was no law that would have clearly alerted
13 Special Agent Adediran that *Smith* applied to these factors,
14 the Second Circuit has also made clear exactly what the
15 Government is supposed to do when the law is not entirely
16 clear. They are supposed to present the facts to a
17 Magistrate Judge, and let the Magistrate Judge decide. The
18 Second Circuit in *Bank*, in *Ganias*, G-A-N-I-A-S, explicitly
19 said that where there is some doubt in the law, but the
20 Government presents the relevant facts to the Magistrate
21 Judge and the Magistrate Judge issues the warrant, that is
22 good faith. We are allowed to rely on Judge Reyes's
23 determination that knowing exactly what this delay was and
24 issuing the warrant.

25 And the defense says, well, we didn't alert Judge

1 Reyes to *Smith*, we didn't include some kind of legal
2 briefing, but Agent Adediran is not an attorney, there are
3 cases saying it's not appropriate for a warrant affidavit to
4 include a legal briefing to the Magistrate Judge because
5 that's not in the knowledge of the affiant. And Judge Reyes
6 is well aware of *Smith*, he's cited it in other decisions.
7 This is an issue that magistrates in our court deal with
8 constantly. I have had warrants denied where the judge
9 found that *Smith* was not -- that *Smith* was violated.

10 Here, Judge Reyes, he had all the facts, nothing
11 relevant to *Smith* was not disclosed and Judge Reyes issued
12 the warrant. And under those facts, where I would say at
13 least there's a very strong, you know, plausible argument
14 that *Smith* doesn't apply at all and where Judge Reyes, faced
15 with these facts, issued the warrant, it would be
16 inappropriate to suppress under the good faith doctrine and
17 candidly exactly as it was in *Smith*, where they did not
18 suppress.

19 Now, let's say you disagree with all of that and
20 let's say you say, no, *Smith* does apply and we are not going
21 to reach the good faith exception.

22 So what are the factors in *Smith*? The first
23 factor is the delay. We say that, you know, at most,
24 there's 35 days of delay.

25 THE COURT: Let's assume delay is more than

1 30 days and, presumptively, that factor would argue for
2 suppression, taking into account the other three factors.
3 So let's move on to the other factors.

4 MR. SIEGEL: So let's do that.

5 So the second factor is the importance of the
6 device to the defendant.

7 Now, in *Smith*, where it was a tablet, a personal
8 tablet, and where he wasn't in jail, the Second Circuit, I
9 believe, said that that factor weighed against *Smith*. And
10 the reason that that factor weighed against *Smith* was
11 twofold -- well, threefold: One, he had access to other
12 devices, that doesn't apply here; two, he didn't request the
13 tablet back; and, three, he hadn't provided appropriate or
14 really detailed testimony about why this tablet was
15 important to him.

16 Now, here, the defense, although they dress it up
17 in a lot of sort of accusatory language, there's no dispute
18 that the defense did not request the phone back until after
19 the warrant was issued. And Ms. Solano said something that
20 wasn't in the briefing, but I don't understand how it helps
21 the defendant's case. She said that on July 13th when he
22 was extradited here, his personal effects were turned over
23 to the defense. Now, at that time the Government didn't
24 even have the phone, so we couldn't have turned it over. We
25 didn't get it until a week later. But Mr. Chang knows that

1 he had a phone. He knows that that phone was taken in South
2 Africa. And then he knows that his other property has been
3 given back.

4 The argument that he didn't know that his phone
5 had been seized and that he didn't know to ask for it back,
6 it -- candidly, it doesn't make a lot of sense to me.
7 And -- and courts have repeatedly held that where a
8 defendant does not ask for the phone back, that weighs
9 against them in the *Smith* analysis. That's what the Court
10 said in *Smith*. That's what Your Honor said in -- I hope I
11 pronounce it right -- the *Daska1* case, D-A-S-K-A-L.

12 THE COURT: *Daska1*.

13 MR. SIEGEL: *Daska1*.

14 THE COURT: *Daska1*.

15 MR. SIEGEL: Your Honor said that, where even the
16 defense said, you know, it's not really fair to weigh this
17 against us. Your Honor said courts do it all the time and
18 it weighs against you.

19 And here, in terms of the testimony about the use
20 and significance of the phone, when they filed this motion
21 and, as Your Honor knows, they filed this motion twice,
22 because it was originally stricken from the record, they
23 included no testimony from Mr. Chang about the importance of
24 this phone. The first time they included anything was on
25 their -- on their second reply, they included an affidavit

1 where he said whatever my lawyer said in the brief, that's
2 true. But what they say in the brief is, this was my
3 personal phone, if has photos, it relates to my family. And
4 almost identical kind of testimony in other cases has been
5 found not really sufficient.

6 In the *Watson* case, W-A-T-S-O-N, before Judge
7 Komitee, the defense submitted an affidavit saying this has,
8 you know, information about my sick father, this has
9 information about family members who passed away, this has
10 photographs. Judge Komitee said that's -- that's not really
11 a lot of information about what is important and personal on
12 this phone.

13 So under any of -- under those factors, there
14 really hasn't been a showing of why this phone is important
15 to Mr. Chang and that's before getting to really the
16 elephant in the room that he is in jail. And courts, I
17 think courts again and again have said that when you are in
18 jail, a phone is not important to you. You can't have a
19 phone. And that that interest is diminished basically to
20 zero.

21 So the second factor we submit, just as in *Smith*
22 and just as in other cases, District Court cases that have
23 addressed this, the second factor weighs in favor of the
24 Government.

25 Now, the third factor, the possessory interest

1 Mr. Chang has on the phone.

2 In *Smith*, the Court said that where there is
3 probable cause to seize the phone, that possessory interest
4 can be reduced. Other District Court cases have given other
5 factors that can reduce the interest, the property interest
6 in the phone. For example, Judge Matsumoto in the *Corbett*
7 case, C-O-R-B-E-T-T, said that if the phone is seized,
8 incident to arrest, that weighs against the defendant. And
9 there are also cases, several of which we cite in our brief,
10 on pages 7 through 8, that hold that the fact that a
11 defendant is in jail strongly diminishes their property
12 interest in the phone because, again, he can't possess that
13 phone. He hasn't been able to possess this phone since it
14 was seized because he's been incarcerated the whole time.

15 So again, if you look at the cases -- if you look
16 at *Smith* and if you look at the cases interpreting *Smith*,
17 under this fact pattern, that third factor also weighs in
18 favor of the Government because he doesn't really have a
19 meaningful property interest or an interest in possessing
20 this phone at this time.

21 And then the fourth factor is the justification
22 for delay. And, again, District Court cases have repeatedly
23 said where there is an ongoing investigation, where the
24 Government is working to investigate to build up their
25 probable cause, that that is a basis to delay seeking a

1 warrant because, candidly, you don't want the Government
2 going off halfcocked and submitting an affidavit that
3 doesn't include all the appropriate probable cause and the
4 appropriate allegations.

5 And in terms of the delays that have been
6 authorized under that, the *Corbett* case, I think, was a
7 hundred-day delay, where a phone was seized, incident to
8 arrest, the defendants were incarcerated, and the Government
9 was continuing its investigation.

10 So delays far longer than here, based on the fact
11 that the Government is investigating, have been found to
12 justify the delay.

13 So I think even if you -- even if you put aside
14 the argument that *Smith* doesn't apply, cases that have fact
15 patterns, even putting aside the international aspect,
16 putting aside that it wasn't the U.S. Government that seized
17 the phone, cases where it's just onuses for a person who is
18 arrested, it's a complex case, and *Smith* was about as simple
19 a case and simple of probable cause as there could be. But
20 a complex case where they are continuing to investigate and
21 the defendant is in jail the entire time and therefore
22 really isn't prejudiced by the fact that their phone is
23 taken, those cases consistently find the *Smith* factors weigh
24 in favor of the Government.

25 THE COURT: Is there anything in the agent's

1 affidavit which would indicate a reason for an interest in
2 the phone? In other words, is there anything that Judge
3 Reyes may have considered in that regard, or was this just a
4 fishing expedition?

5 MR. SIEGEL: When you say an interest in the
6 phone, you mean the defendant's interest in the phone or our
7 interest?

8 THE COURT: No. That the defendant's activities
9 back in 2013 would be somehow related or there would be
10 something on the phone that would focus on his conduct back
11 in 2013.

12 MR. SIEGEL: Sure. So --

13 THE COURT: Because I think that was in the
14 papers, too, on the part of the --

15 MR. SIEGEL: Yeah.

16 THE COURT: -- defense. In other words, you know,
17 there is this whole big affidavit and if you look at the
18 charges, there is no reason to presume that there would be
19 anything on the phone in 2018 that would relate to something
20 that happened involving wire fraud and securities fraud or
21 whatever other fraud, and conspiracy, that occurred back in
22 2013.

23 MR. SIEGEL: So that's not so for -- for several
24 reasons.

25 And so, you know, talking about was there

1 sufficient probable cause for this for Judge Reyes, I think
2 it's important that the standard there is it's not a de novo
3 review of Judge Reyes of did he have probable cause.
4 It's -- I think it's did he have a substantial basis for
5 finding probable cause.

6 And so let's talk about what that substantial
7 basis was. Now, Your Honor talks about how this phone was
8 seized in 2018, but the conduct went back to 2014, 2013.

9 So first of all, as -- as --

10 THE COURT: Did I get that wrong?

11 MR. SIEGEL: No, no, that's right.

12 THE COURT: The dates are right?

13 MR. SIEGEL: No, no, that's right.

14 THE COURT: Okay. Go ahead.

15 MR. SIEGEL: But phones can contain data going
16 back years. And, again, that's not hypothetical. This
17 phone contains data going back to 2014.

18 There are many cases, again, that we cite in our
19 brief, that -- the sort of traditional staleness argument of
20 why you think there is still going to be evidence, it
21 doesn't really apply well to electronic data because
22 electronic data, it can stay for years, it can be backed up
23 from device to device and it -- and it remains. So there
24 isn't any reason to think there wouldn't be data from 2014
25 on this phone even excepting their arguments about when the

1 phone is produced, because there is data from 2014 on this
2 phone.

3 But, again, even if there weren't, this isn't
4 about did he sign those loan guarantees. We know he signed
5 the loan guarantees. But it's about, well, this money that
6 went through, these sort of shell accounts, these hops,
7 where did that money go and how did it get to him and what's
8 the relationship between him and the people that were
9 involved?

10 Evidence that he has Jean Boustani saved in his
11 phone. You know, people have contacts saved in their phone
12 from decades ago, but the fact that he has Jean Boustani --

13 THE COURT: Including a lot of dead people,
14 potentially.

15 MR. SIEGEL: Including a lot of dead people.

16 THE COURT: They never were removed from the phone
17 years later.

18 MR. SIEGEL: But even if he has -- the fact that
19 he would still have Jean Boustani saved in his phone, that's
20 evidence of the relationship with Jean Boustani and evidence
21 of the relationship among conspirators is important evidence
22 of the conspiracy. Evidence that he has saved in his phone
23 the third party the money was funneled through, that's
24 evidence of conspiracy. And -- and that -- that's likely to
25 remain on the phone and in this case did remain on the phone

1 years after the event, where we're talking about bank
2 accounts and the flow of money. If he has e-mails that show
3 he's getting statements from these banks, if he has an app
4 from that bank saved on his phone, that's all evidence of
5 his relationship to these. If he has unexplained wealth.
6 He was a -- he was a Government servant for many years in
7 a -- in a very poor country. If there is evidence of him
8 going on an all-expense paid trip to the French Riviera in
9 2015, that's evidence of unexplained wealth and that's
10 evidence of the fact that he would be engaged in this.

11 So the fact that we are talking about stuff on a
12 phone from after the crime occurred, that doesn't -- that
13 doesn't really undermine probable cause at all. And that's
14 what Judge Reyes found, and I submit that he had a
15 substantial basis for it.

16 And, again, even if Your Honor were to disagree
17 with that, we come back to the good faith exception. There
18 was a warrant. There was probable cause. There was a lot
19 of factual allegations laid out. And the argument that we
20 were -- it would have been unreasonable of us to rely on
21 Judge Reyes's finding, who is an experienced then-Magistrate
22 Judge, it doesn't hold up.

23 THE COURT: All right. Anything else from you,
24 sir?

25 MR. SIEGEL: You know, Your Honor, it's sort of a

1 side thing, but I just want to -- they keep talking about we
2 are required to provide a receipt and notice. They haven't
3 cited a single case for that. The way that Rule 41 has been
4 practiced as long as I have been doing this and as far as I
5 know the DOJ guidance on it is that if there is a phone that
6 is already in law enforcement custody, when you do a warrant
7 on that phone, you don't need to provide notice to the
8 person whose phone it is. The notice requirement is if you
9 seize property from a person pursuant to a warrant, you need
10 to say, this is the property that we seized, so you would
11 like leave the receipt at the house.

12 But it doesn't apply to these circumstances. I am
13 not aware of a case and they don't cite a case. It's just
14 something they throw around, but I don't think there is any
15 basis for it.

16 THE COURT: Thank you.

17 Ms. Solano?

18 MS. HOXIE SOLANO: Thank you, Your Honor.

19 I will just start with the last thing the
20 Government said which is that there is no citation.

21 The warrant, itself, which is provided as
22 Exhibit 3V to our opening, says there is a box and this box
23 is on the form for every warrant and the box is not checked
24 and that box deals with delayed notification. And it
25 provides the statutory context that requires notification at

1 the time the warrant is executed.

2 Now, I was with the Department of Justice for
3 eight years. I left, you know, a matter of months ago. I
4 am not aware of some exception to complying with the terms
5 of the warrant or complying with 18 U.S.C. 3103(a)(b),
6 whether the device is in custody or not.

7 But more importantly, Your Honor, it's important
8 to remember that here, this isn't just something where the
9 South African authorities found the phone and took it and
10 then later on gave it to the U.S. Government. The entire
11 reason that the South African authorities took the phone is
12 because the U.S. Government demanded it and they were
13 serving as their agents. So this is distinguishable from
14 cases where a third-party or somebody else or even a
15 parallel investigation comes along and collects evidence and
16 then turns it over to the Government.

17 This is only in the U.S. Government's hands
18 because they demanded it and told the South African
19 Government that this was consistent and required with their
20 treaty obligations.

21 Now, the Government talks about how there were,
22 you know, that there is a dispute as to whether the phone
23 was taken with the intent to get a search warrant for it or
24 if it had some sort of independent evidentiary value. If
25 that is actually a concern, then we need to have a factual

1 evidentiary hearing so that we can understand what the
2 purpose was for taking this phone. If the purpose -- if the
3 Government is going to say that their actions are justified
4 as long as they didn't think that they were going to get a
5 search warrant down the road to get into the phone and that
6 it had some other independent evidentiary value, then I
7 think that that would require a hearing so that we can
8 understand why this phone was taken and what purpose it
9 served, other than getting a warrant to get inside the
10 phone.

11 I will say, as I said before, that the Government
12 in its brief equates this to a search incident to arrest.
13 And under Your Honor's opinion in *Daska1* and the opinion in
14 *Corbett*, in both of those cases, a search incident to
15 arrest, the *Smith* analysis and the *Smith* temporal limitation
16 was applied under those circumstances. So this isn't a
17 situation where the Government would not know that it was
18 required to follow the *Smith* temporal limitation and that
19 this would be applied to their conduct.

20 And with respect to the probable cause on the
21 device, itself. It's important to remember that there is
22 this conversation about backing up data or that the data
23 could have been transferred. That only matters if there was
24 a shred of probable cause to believe that there was any data
25 on the device, itself, in 2013. But not the device, itself,

1 because we know that that couldn't have happened because it
2 didn't exist in 2013. But there is not a single factual
3 allegation to suggest that there would be evidence on any
4 cell phone obtained or possessed by Mr. Chang in 2013 or
5 2014.

6 And so the fact that other courts have found and
7 is sometimes in search warrants that data can be copied,
8 data can be backed up, that -- that presupposes that there
9 is probable cause to believe that there was data recorded in
10 2013 or 2014. And here there are no factual allegations
11 that would support that. And, in fact, the factual
12 allegations that tie any cellular device to any electronic
13 evidence are not true.

14 So when they talk about the bank accounts or him
15 controlling the accounts, they say that he received the
16 money directly, that he controlled these accounts, but we
17 know that that's not accurate. We know that somebody else
18 controlled these accounts. And there is no explanation of
19 that in the search warrant, itself.

20 There is also no explanation about -- there is no
21 reason to believe that there would be any phone activity
22 that would tie Mr. Chang to a bank account at all. They say
23 that it's possible that this device was used to check a bank
24 account that we now know he did not directly control and
25 that the device, itself, could not have done that, because

1 it didn't exist.

2 Now, all of the allegation else here are from --
3 all of the allegations that are tied to this sort of banking
4 activity that have a date are in 2013. That's a five-year
5 delay. And this is a paper case, Your Honor. They are
6 talking about loan guarantees for the official government of
7 Mozambique, which we know Mr. Chang was no longer the
8 finance minister as of 2014. And then they are talking
9 about payments, but the payments that they have alleged are
10 from 2013. And now we know it's not true that they were
11 controlled directly by Mr. Chang. They are now revising
12 that and admitting that it's controlled by somebody else
13 entirely.

14 So the key deficiency with this warrant is that
15 aside from the numerous, the numerous misleading and false
16 statements is that it does not tie probable cause to the
17 place to be searched. If this was a case -- I am only
18 pausing because I --

19 THE COURT: No, go ahead.

20 MS. HOXIE SOLANO: This is not the type of case
21 that we have seen in other circumstances where there is
22 evidence to believe that the person who owned the device at
23 the time the alleged conduct was occurring was talking to
24 co-conspirators on a cell phone, was sending text messages,
25 was sending be e-mails. That's the type of electronic

1 evidence that you would believe would be on the phone.
2 There's nothing what -- there is no factual allegations
3 whatsoever to suggest that in 2013 or 2014, Mr. Chang was
4 doing anything with a cell phone that would create
5 electronic evidence, whether it was going to be backed up to
6 another phone or not.

7 And here, I think it's important to note that the
8 search warrant here contains a tremendous amount of
9 allegations that have nothing to do with Mr. Chang, and the
10 Government has provided no explanation as to why these
11 allegations would be contained in this search warrant.

12 Now, a lot of these allegations deal with events
13 that occurred in 2018, in 2016, times that are closer in
14 time to when the device was actually seized. It's our
15 position that these allegations that have nothing to do with
16 Mr. Chang are the types of allegations that are designed to
17 mislead. So if you are looking at this search warrant
18 quickly, that you would look and see that there's all of
19 these dates, there's the allegations that Mr. Chang directly
20 controlled the bank account and directly controlled the
21 entity, which neither of those allegations are true, and
22 that there's probable cause to believe that he would still
23 have these because it's the sort of continuing longstanding
24 crime. But we also know that that's not true. We know that
25 his conduct, as alleged, stopped and it had to stop in 2014.

1 And all the payments, there's dates on them, it's from 2013.

2 So this is not the type of case, the case involving -- for
3 example, the Government cites the case where a search
4 warrant involved the CEO of Ozy Media, I believe. And the
5 allegation was that there was staleness over the course of,
6 I think, 18 months in between the last factual allegation in
7 time the CEO of Ozy Media and the time the search warrant
8 was excused or the time the search warrant was obtained.

9 But in that case, the time the search warrant was
10 obtained, the individual remained in that position as the
11 CEO and there were allegations that he was -- that he was
12 going to try to raise capital from investors at the time
13 that they were actually seeking the warrant. So there was
14 reason to believe that this conduct would be continuing
15 beyond the 18 months and throughout the course of the
16 18 months, which leads to it not being stale.

17 Here, the conduct is not the type of conduct that
18 would be captured by electronic evidence. And also because
19 Mr. Chang stopped being the minister of finance in 2014,
20 there is no allegation, nor is there any reasonable basis to
21 think that this would be the type of continuing activity
22 that there would be continued electronic evidence on a
23 personal device in 2018.

24 And so omitting the fact that Mr. Chang actually
25 didn't control the account, admitting the fact that he

1 didn't control either the entity or the bank account, and
2 that he was no longer the minister of finance, these are
3 kind of the critical facts that would have been the hook for
4 the probable cause determination. If you strip the
5 incorrect facts from the affidavit, there are no factual
6 allegations that would support a probable cause
7 determination.

8 All you have, if you strip away the facts that are
9 either untrue or are misleading by omission, you have the
10 fact that in 2023, a cooperator suddenly recalls a
11 conversation with somebody else in 2013 saying that they
12 spoke to Mr. Chang on the phone once.

13 Now, that is not sufficient for a probable cause
14 determination especially where the type of conduct that
15 occurred is signing loan guarantees and purportedly
16 receiving payments, now indirectly, even further removed,
17 from what the Government put in its initial search warrant
18 papers.

19 THE COURT: So you don't think, having said all of
20 that, that the good faith exception to the exclusionary rule
21 might apply?

22 MS. HOXIE SOLANO: I don't believe it does under
23 the facts here, Your Honor.

24 I don't believe that it should apply with *Smith*
25 because the Government has equated this as a search incident

1 to arrest, and I believe it's clear that *Smith* would apply
2 under the circumstances, nor has the Government articulated
3 any evidentiary basis that they would have kept the phone
4 but for they intended to get a search warrant for the phone.

5 And I think when you look at the totality that
6 they returned some of Mr. Chang's, property but not all of
7 Mr. Chang's property, that they did not notify us of the
8 warrant, it's very clear that they intended to get a search
9 warrant for this device. And if there is any question to
10 that, I think we need a factual evidentiary hearing on that
11 point.

12 THE COURT: Thank you.

13 Anything else?

14 MR. SIEGEL: You know, Your Honor, just very quick
15 things.

16 THE COURT: Quick.

17 MR. SIEGEL: Yes.

18 So Ms. Solano noted that the Government has
19 subsequently learned that the Thyse account that we cite in
20 the warrant was actually just a passthrough account, but
21 that has nothing to do with the analysis under *Franks* or --
22 or anything, because the fact that something turns out to be
23 incorrect doesn't matter for the probable cause analysis or
24 for suppression. It would only be that if they had a basis
25 to believe that we knew that at the time and they haven't

1 offered it and it wouldn't be true.

2 They say that there are some things in here that
3 if you read this warrant quickly and weren't paying
4 attention, it could mislead the Magistrate. Candidly, I
5 don't think anyone who practices in this district or knows
6 Judge Reyes could suggest that that's what would have
7 happened here. He is an incredible thorough and careful
8 judge.

9 THE COURT: Well, the Senate thought so.

10 MR. SIEGEL: The Senate and the President and
11 everyone who practices before him.

12 As for the arguments about how *Smith* applies to a
13 search incident to arrest, you know, search incident to
14 arrest is a -- usually you search someone and then you seize
15 devices based on probable cause to believe that that's
16 evidence. That is not what we are arguing here. There is
17 an analogy. I mean, he was arrested and this was seized
18 from him by South Africa. But the only cases that apply
19 *Smith* to search incident to arrest are District Court cases.
20 And in terms of clearly established law, which they would
21 need to show a violation of, District Court cases can't
22 create clearly established law.

23 THE COURT: I am well aware of that.

24 MR. SIEGEL: So there is no -- there is no Second
25 Circuit case that applies *Smith* to a search incident to

1 arrest or any circuit case, that I am aware of.

2 They talk about how we demanded this from South
3 Africa and South Africa was our agents. Your Honor, I think
4 this case makes very clear that our power to demand things
5 from South Africa is -- is very limited. **And the Second**
6 **Circuit has actually explicitly held that where the**
7 **Government makes a request pursuant to a treaty, that that**
8 **does not turn the foreign country into an agent.**

9 THE COURT: Good.

10 Now --

11 MR. SIEGEL: That's it.

12 THE COURT: Let me just -- I am going to reserve
13 on this. I will have a decision very soon.

14 **And let me just go over some of the steps should**
15 **we be going to trial on the 29th I think it is, of July.**

16 There is no request for this to be a questionnaire
17 case, I take it, right?

18 MR. SIEGEL: Not from the Government.

19 THE COURT: I don't think I heard anything from
20 Mr. Ford either, but you can double check.

21 MS. HOXIE SOLANO: If you give me the opportunity
22 to confer with co-counsel?

23 THE COURT: Absolutely, precisely.

24 MS. HOXIE SOLANO: We will get back in short
25 order.

1 THE COURT: We are going to have a Magistrate
2 Judge selecting the jury. I think that was agreed to at a
3 previous conference; am I right?

4 MR. SIEGEL: I think that's right. And if it
5 wasn't, the Government consents.

6 THE COURT: Okay.

7 Anything else in terms of motions in Limine? Do
8 you want to set a schedule now, or can you confer and let me
9 know?

10 MR. SIEGEL: So Your Honor, we started conferring
11 on that. I think some of the things, we are still working
12 on. Your Honor's rules say motions in Limine due 45 days
13 before trial, and that's what we had been planning to do.

14 THE COURT: If it can be sooner, you know, you
15 will have my deepest appreciation and that of my law clerk,
16 Ms. Corine Forward White.

17 Is that it?

18 MS. HOXIE SOLANO: Yes, Your Honor.

19 I believe we do have a schedule with maybe one
20 deadline not agreed upon, so hopefully we will get something
21 to you in very short order.

22 THE COURT: Okay, good.

23 Let me just say this, I really appreciate --
24 Ms. Solano, you were very well prepared and, you know, you
25 made an excellent presentation, but if someone other than

1 the lawyer who has been standing up on a regular basis is
2 not going to be here, I think it's a courtesy to the Court
3 to let the Court know that that person is not going to be
4 available. You know, I was looking forward to seeing
5 Mr. Ford, but I am not disappointed. I just wanted to make
6 it clear that it's a general policy of mine. And that
7 goes -- believe me, the Government now knows that, too,
8 because I have had people appear here for the Government who
9 I had never seen before in cases that were ongoing. So I
10 prefer that everyone advise Mr. Recoppa in advance so that I
11 can be prepared for who will be in court at any given
12 appearance. All right? That's just a standard rule.

13 I see Mr. Mehta in the back of the room. He knows
14 the rule for the Government, but I will repeat the rule for
15 everyone.

16 Anything else for today?

17 MR. SIEGEL: No. Thank you very much, Your Honor.

18 THE COURT: Anything else from the defense?

19 MS. HOXIE SOLANO: No, Your Honor.

20 I will just say that Mr. Ford meant no disrespect
21 by not being here.

22 THE COURT: I know that.

23 MS. HOXIE SOLANO: He intended to be here. It was
24 a last-minute situation that arose.

25 THE COURT: I know that. Now, this was a very

1 pleasant surprise, but I just want this to be a general -- I
2 should put it in my rules, but I think it's just a standard
3 procedure that I follow, and I just wanted to make that
4 clear to everybody.

5 MS. HOXIE SOLANO: Thank you, Your Honor.

6 THE COURT: Time is excluded until trial, I
7 believe, on the 29th, so we don't need to have an exclusion
8 of time here on out.

9 And that's it. Thank you, everyone, for coming
10 in.

11 MR. SIEGEL: Thank you, Your Honor.

12 MS. HOXIE SOLANO: Thank you.

13 THE COURT: Thank you, Marshals.

14 (Matter adjourned.)

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18 I certify that the foregoing is a correct transcript from
19 the record of proceedings in the above-entitled matter.

20

/s/ Jamie Ann Stanton

March 25, 2024

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JAMIE ANN STANTON

DATE

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