IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF STETSON

Case No. 15:16-cr-02342-CHR-ESW

United States of America

v.

Charlie Wyatt,

Defendant.

Government's Memorandum of Law in Response to Defendant's Motion to Suppress and in Support of Government's Motion in Limine.

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TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

QUESTIONS PRESENTED

I. Did the Government violate Defendant Rep. Wyatt's Fourth Amendment right to be free from unreasonable searches and seizures in obtaining the content of his SkyCloud storage account without a warrant supported by probable cause?

II. Is Counselor Mona Ralphio permitted to testify as an expert witness pursuant to Federal Rule of Evidence 702?

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Stetson has jurisdiction over this case pursuant to 18 U.S.C. § 3231, which states that the United States district courts shall have jurisdiction over offenses against the laws of the United States. Venue is proper according to 18 U.S.C. § 3232 and Federal Rule of Criminal Procedure 18, which state that the government must prosecute an offense in the district where the offense was committed.

STATEMENT OF FACTS

Search and Seizure: In 2015, United States Representative Charlie Wyatt passed through the United States Congress the "Up and At 'Em Act" employment program to create jobs for senior citizens and reformed convicted felons. (Factual Stip. ¶ 5). He hired two assistants, Sebastian Swanson, a convicted felon, and

Leslie Winters, a "senior citizen," to help him with the program. (Factual Stip. ¶ 6). Rep. Wyatt compiled a list of twenty-five senior citizens who he would personally assist. (Factual Stip. ¶ 7). This compilation was not required under the "Up and At 'Em" Act, nor was it within the duties of Rep. Wyatt's office, and Rep. Wyatt was not compensated for doing this work. (Factual Stip. ¶ 7). Rep. Wyatt had each of the twenty-five senior citizens fill out paperwork containing personal identifying information, such as name, social security number, address, birthdate, and family members. (Factual Stip. ¶ 9). He then compiled this information into his personal computer. (Factual Stip. ¶ 10). Rep. Wyatt later purchased a laptop, which came with the SkyHigh cloud-computer storage company's "SkyCloud" one-year account. (Factual Stip. ¶ 13). This account allowed users to store their data on, and retrieve their data from, a server located in Crummer, Stetson, rather than on their personal hard drives. (Factual Stip. ¶ 13). Rep. Wyatt agreed to SkyHigh's Terms and Services Agreement, which stated that SkyHigh would not permit the release of its users' data to any government agency or law enforcement official unless it was sought with proper legal authority. (Factual Stip. ¶ 14). Rep. Wyatt copied the compiled information regarding the twenty-five senior citizens onto his SkyCloud. (Factual Stip. ¶ 17).

From January 20, 2016 to April 15, 2016, fraudulent federal tax returns were filed with the Internal Revenue Service (IRS) under the twenty-five senior citizens' names (Factual Stip. ¶ 19). IRS Agents Alex Avery and Kristen Smith received word from their confidential informant H.H. that a Stetson politician was transmitting unlawfully obtained means of identification for its use in fraudulent tax returns. (Factual Stip. ¶ 23). Agents Avery and Smith sent a letter to SkyHigh requesting the content of Rep. Wyatt's SkyCloud. (Factual Stip. ¶ 24). Soon after, SkyHigh delivered an external hard drive to Agents Avery and Smith containing the content of Rep. Wyatt's SkyCloud. (Factual Stip. ¶ 26). Agents Avery and Smith matched all of the compiled names on Rep. Wyatt's SkyCloud with the fraudulent filing of twenty-five tax returns earlier in the year. (Factual Stip. ¶ 27).

Expert Witness Qualification: Sebastian Swanson is one of Wyatt's co-defendants. (Factual Stip. ¶ 29). Swanson and his attorney met with the IRS agents on July 15, 2016. *Id*. After a six-hour meeting, Swanson agreed to testify against his co-defendants in exchange for a plea agreement with the government. *Id*. Wyatt wants to call Mona Ralphio as an expert witness during trial. (Factual Stip. ¶ 30). Ralphio has a bachelor's degree in family, youth and community sciences. (Factual Stip. ¶ 37). Ralphio published the article: "*Why You Always Lying: The Invisible Tie Between Education, Low Socioeconomic Status and Lying*." (Factual Stip. ¶

38). Ralphio works as a social work counselor for the county school district. Ralphio works with high-risk youths in diagnosing any learning disabilities or mental defects. (Factual Stip. ¶ 33). In addition, Ralphio has testified as an expert in court as to the competency of minors to testify in divorce and paternity cases. (Factual Stip. ¶ 39). Ralphio has never testified as an expert witness as to the mental state of an adult. *Id*.

Ralphio met Swanson in 2009, when Swanson was around fifteen-years-old. (Factual Stip. ¶ 33). Ralphio diagnosed Swanson with attention deficit hyperactivity disorder, sociopathy, and "a personality disorder that makes him susceptible to suggestion" at their initial meeting. (Factual Stip. ¶ 34). Ralphio is expected to testify that Swanson was susceptible to suggestion due to his troubled youth, and therefore Swanson will not be a truthful witness at trial (Factual Stip. ¶ 31; 36). Ralphio bases this conclusion on only Swanson's 2009 interview, Swanson's school records, and Swanson's disciplinary records. (Factual Stip. ¶ 34). Swanson dropped out of high school when he was in tenth grade. (Factual Stip. ¶ 32). Ralphio has not interviewed or met with Swanson since then. (Factual Stip. ¶ 35).

SUMMARY OF THE ARGUMENT

No Fourth Amendment Violation: The first question courts ask when faced with a search and seizure issue is whether the Fourth Amendment right to be free from unreasonable seizures is even implicated. To implicate the Fourth Amendment, there must have been a "search" of something deemed private, and the search must have stemmed from governmental action.

In this case, the latter requirement is satisfied because IRS Agents Avery and Smith work for the Government. Thus, the remaining inquiry is whether there was a "search" for Fourth Amendment purposes.

The modern standard by which courts consider whether a Fourth Amendment "search" occurred is two-pronged. The first inquiry is whether the person had a reasonable expectation of privacy. The second asks whether that subjective expectation is one that society is prepared to recognize.

Here, Rep. Wyatt may have had a subjective expectation of privacy in his SkyCloud because he secured his SkyCloud with an individual username and sixteen-digit password and SkyHigh guaranteed its users protection from intrusion by both private and governmental entities. However, because this subjective expectation is not one that society is prepared to recognize, Rep. Wyatt had no reasonable expectation of privacy. Because SkyHigh had access to Rep. Wyatt's

SkyCloud such that it had the right to release the content of that account upon a showing of proper legal authority, Rep. Wyatt assumed the risk that the information on his SkyCloud would be conveyed to the IRS agents. Thus, he did not have a reasonable expectation of privacy in the account. Because Rep. Wyatt had no reasonable expectation of privacy, the Government's search did not constitute a Fourth Amendment "search," and the Fourth Amendment right was not implicated.

However, even if Rep. Wyatt had a reasonable expectation of privacy, the Government's warrantless search of his SkyCloud Account was nonetheless permissible because it falls within the third party consent exception to the warrant requirement.

So long as a third party giving authority to search has joint access to the locked or otherwise protected area, then the consent is valid and constitutes an exception to the warrant requirement. Here, SkyHigh had joint access to Rep. Wyatt's SkyCloud such that it could access and turn over to IRS agents the contents of his SkyCloud. Therefore, SkyHigh's consent meets the third party consent exception to the warrant requirement, and the Government's search was reasonable.

Witness does not qualify to testify as expert: Counselor Mona Ralphio should not be permitted to testify as an expert witness under Rule 702. First, Ralphio does not meet the Rule 702 qualifications to testify as to the credibility of Swanson. Second, even if this Court finds that Ralphio does meet the Rule 702 qualifications, Ralphio's testimony will not be helpful to the jury. Therefore, this Court should grant the Government's Motion in Limine and prohibit Ralphio from offering improper expert testimony as to the credibility of a witness in court.

DISCUSSION

I. This Court Should Deny Defendant's Motion to Suppress Because the Government Did Not Violate His Fourth Amendment Right to be Free from Unreasonable Searches and Seizures when it Obtained Content from His SkyCloud Storage Account Without a Warrant Supported by Probable Cause.

To implicate the Fourth Amendment, there must have been a "search" of something deemed private, and the search must have stemmed from governmental action. In this case, the latter requirement is satisfied because IRS Agents Avery and Smith work for the Government. Thus, the remaining inquiry is whether there was a "search" for Fourth Amendment purposes.

The modern standard by which courts consider whether a "search" occurred is two-pronged. The first inquiry is whether the person had a reasonable

expectation of privacy. The second asks whether that subjective expectation is one that society is prepared to recognize.

A. The Government's Search Did Not Constitute a "Search" for Fourth Amendment Purposes Because Rep. Wyatt Did Not Have a Reasonable Expectation of Privacy in his SkyCloud Account.

If a government search does not violate a person's "reasonable" or "legitimate" expectation of privacy, then it does not constitute a Fourth Amendment "search," and no warrant is required. *See Katz v. United States*, 389 U.S. 347 (1967). Whether a person has a reasonable or legitimate expectation of privacy hinges on two inquiries: first, whether the person's actions exhibited a subjective expectation of privacy, and second, whether this subjective expectation is one that society is prepared to recognize as reasonable. *United States v. Young*, 350 F.3d 1302, 1308 (11th Cir. 2003).

In *Young*, Young contended that the IRS violated his Fourth Amendment right when it conducted a warrantless search of Federal Express packages addressed to him and turned over to the IRS upon request. *Id*. at 1303. The court held that when Young elected to ship his ill-gotten proceeds of his tax fraud scheme through Federal Express despite explicit warnings on the envelopes, and because the Federal Express, as bailee of the packages, retained the right to inspect any package, Young had no legitimate expectation in the contents of the packages.

Id. The court recognized that Young undoubtedly had a subjective expectation of privacy because he clearly tried to hide the packages' contents, evidence of his illegal scheme. *Id*. at 1307. However, the court held that this subjective expectation was not one that society was prepared to recognize as reasonable because no reasonable person would expect to retain his privacy interest after signing an air bill containing a written warning that the carrier could act directly against that interest. *Id*. at 1308. Because Young's subjective expectation of privacy was not one that society was prepared to recognize as reasonable, Young had no reasonable expectation of privacy in the contents of the Federal Express packages. *Id*. Thus, the IRS's search of Young's packages did not constitute a Fourth Amendment "search," and the Fourth Amendment right was not implicated. *Id*.

Here, Rep. Wyatt may have had a subjective expectation of privacy in his SkyCloud for two reasons. First, Rep. Wyatt secured his SkyCloud with an individual username and sixteen-digit password. (Factual Stip. ¶ 15). Second, SkyHigh guaranteed its users protection from intrusion by both private and governmental entities. (Factual Stip. ¶ 14). However, even if Rep. Wyatt had a subjective expectation of privacy, this is not a subjective expectation that society would recognize. According to the SkyHigh SkyCloud Terms and Services Agreement, SkyHigh ensured that it would not release its users' data to any

government agency unless the agency had proper legal authority. (Factual Stip. ¶ 14). In other words, SkyHigh retained the ability to release its users' data to a government agency so long as that agency had proper legal authority. After signing this agreement, no reasonable person would expect to retain his privacy interest in the SkyCloud account. This is especially true if the person's account contained evidence of a crime because a government or law enforcement agency would be interested in obtaining that evidence. Because SkyHigh had access to Rep. Wyatt's SkyCloud such that it had the right to release the content of that account upon a showing of proper legal authority, Rep. Wyatt assumed the risk that the information on his SkyCloud would be conveyed to the IRS agents. Thus, he did not have a reasonable expectation of privacy in the account. Because Rep. Wyatt had no reasonable expectation of privacy, the Government's search did not constitute a Fourth Amendment "search," and the Fourth Amendment right was not implicated.

B. Even if Rep. Wyatt had a Reasonable Expectation of Privacy, the Government's Warrantless Search of Rep. Wyatt's SkyCloud Account was Nonetheless Permissible Because it Falls Within the Third Party Consent Exception to the Warrant Requirement.

The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that the confidence placed in the

third party will not be betrayed. *Hoffa v. United States*, 385 U.S. 293, 302 (1966). The authority which justifies a third party's consent to search rests on the joint access of the property, such that it is reasonable to recognize that any of those with access has the right to permit an inspection of his own right and that others have assumed the risk the one of their number might permit the property to be searched. *U.S. v. Matlock*, 415 U.S. 164, 171 n. 7 (1974). So long as the party giving authority to search has the "key" to the locked or otherwise protected area, then the consent is valid and constitutes an exception to the warrant requirement. *See U.S. v. Block*, 590 F.2d 535 (4th Cir. 1978).

In *Block*, law enforcement officials were conducting a general search of Mrs. Block's home when she gave consent to search her 23-year-old son's room. *Id*. at 537. Inside the room, officers located a padlocked footlocker belonging to the son. *Id*. Mrs. Block told officers that she did not have a key to the locker. *Id*. The officers nevertheless opened the locker and found heroin inside. *Id*. The court found that because Mrs. Block had normal, free access with respect to her son's room, she clearly had authority to permit inspection of his room. *Id*. at 541. However, that authority did not extend to the interior of the locker within the room because Mrs. Block did not have access to it without a key. *Id*. Because Mrs. Block shared no access to the locker and thus did not have authority to consent to a

search, her consent to search the locker was invalid, and the officers acted unreasonably when they opened it. *Id*.

This case is distinguishable from *Block* in that we know SkyHigh had the "key" to Rep. Wyatt's SkyCloud because it accessed Rep. Wyatt's SkyCloud and provided the data contained within to IRS agents Avery and Smith. Additionally, SkyHigh made clear that it had access to Rep. Wyatt's SkyCloud because its Terms and Services Agreement provided that it would permit the release of its users' data to a government agency if the agency had proper legal authority. SkyHigh had joint access with Rep. Wyatt to his SkyCloud, such that a reasonable person would recognize that SkyHigh had the right to permit an inspection of Rep. Wyatt's SkyCloud, and that Rep. Wyatt assumed the risk that SkyHigh might permit his SkyCloud to be searched by the Government.

II. This Court Should Grant the Government's Motion in Limine Because Counselor Mona Ralphio Should Not Be Permitted to Testify As an Expert Witness Under Federal Rules of Evidence 702.

The admission of expert testimony is governed by Federal Rule of Evidence 702, which provides as follows: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a

fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

First, Ralphio is not qualified to testify as an expert witness under Rule 702. Second, Ralphio's testimony will not assist the trier of fact because Ralphio's purported testimony is impermissible credibility testimony. Therefore, this Court should grant the Government's First Motion in Limine and exclude Ralphio's testimony about the credibility of the Government's witness Sebastian Swanson.

A. Counselor Mona Ralphio Is Not Qualified to Testify As an Expert.

A witness can be qualified as an expert based on the expert's 1) education, 2) knowledge, 3) experience, 4) training, or 5) skill. Fed. R. Evid. 702. The court acts as gatekeeper with regards to expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As the gatekeeper, the court must only allow reliable expert testimony at trial. *Id*. In addition, the court must make sure that the expert testimony is based on the intellectual rigor applied in that field, and not on just the *ipse dixit* of the expert. *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137,

152 (1999) ("The objective of the *Daubert* inquiry 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'").

Ralphio cannot qualify to testify as an expert about Swanson's credibility based on any of the qualifying factors: education, knowledge, experience, skill or training. It is expected that Ralphio will testify that Swanson is susceptible to suggestion and therefore he is unlikely to be a truthful witness. Swanson is a 22-year-old man. (Factual Stip. ¶ 32). However, Ralphio's career, including training, education, skill, knowledge, and experience, have all been centered around working with youth, and not in working with troubled adults. Therefore, Ralphio cannot qualify as an expert witness, and any opinions Ralphio offers will be *ipse dixit*, and not based on reliable expert testimony.

In addition, an expert opinion must be based on sufficient facts and data to be reliable. Fed. R. Evid. 702. Ralphio's opinion that Swanson is susceptible to suggestion is not based on sufficient facts or data, and is therefore inadmissible under Rule 702. Fed. R. Evid. 702. Ralphio's opinion is based on only three items. First, the interview Ralphio had with Swanson nearly seven years ago, where Ralphio diagnosed Swanson during the very first visit. Second, Ralphio reviewed

Swanson's disciplinary records. Third, Ralphio reviewed Swanson's school records. Ralphio formed the opinion that Swanson will be an untruthful witness based on these three things alone. Because the facts and data that Ralphio based an opinion on are meager and inconclusive, Ralphio's opinion is not based on sufficient facts and data. Therefore, Ralphio's opinion is not reliable and is therefore inadmissible.

B. Counselor Mona Ralphio's Testimony Will Not Assist the Trier of Fact.

As a general rule, a party may introduce expert testimony at trial if the expert opinion "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Expert testimony on a subject within the common knowledge of the trier of fact is not helpful, and is therefore improper. *Id*.; *See Am. Auto. Ins. Co. v. Omega Flex, Inc.*, 783 F.3d 720, 725 (8th Cir. 2015). It is exclusive function of the trier of fact to weigh evidence and determine credibility. *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981). An expert may not usurp the exclusive function of the jury and proffer testimony on the credibility of a witness. *Id*. Therefore, because it is within the common knowledge and province of the trier of fact to determine credibility, a party cannot offer expert testimony on the credibility of a witness. *United States v. Hill*, 749 F.3d 1250, 1258 (10th Cir. 2014).

Ralphio's testimony concerns the credibility of Sebastian Swanson, a witness for the government. It is expected that Ralphio's opinion will be that Swanson is susceptible to suggestion due to his troubled youth, and therefore Swanson will not be a truthful witness. (Factual Stip. ¶ 31; 36). However, it is within the province of the trier of fact to determine if a witness is truthful, and therefore credible.

The courts have recognized a narrow exception, and have allowed expert testimony that bears on witness credibility when the defendant suffers from a specific and well-known psychiatric disorder that is linked to excessive lying. *United States v. Shay,* 57 F.3d 126, 133 (1st Cir. 1995). In *Shay*, the defendant suffered from Munchausen's Syndrome, which is a mental disorder that results in extreme and pathological lying. *Id*. at FN 1. Because of the complex nature of this psychological disorder, the court held that the defendant should have been allowed to introduce expert testimony concerning the link between the disorder and lying.

Here, Ralphio diagnosed Swanson with attention deficit hyperactivity disorder, sociopathy, and "a personality disorder that makes him susceptible to suggestion" at their initial meeting in 2009 when Swanson was fifteen-years-old. (Factual Stip. ¶ 34). However, Ralphio did not identify a specific psychiatric disorder that is linked to excessive lying. Because Ralphio's expert opinion is not based on a complex psychological disorder that bears on the truthfulness of the

witness, the trier of fact will be able to determine the credibility of Swanson without the help of Ralphio. Therefore, Ralphio's expert testimony will not aid the jury, and is thus impermissible under Rule 702.

However, even if this Court finds the Ralphio's opinion could assist the trier of fact, Ralphio's opinion is inadmissible as unfairly prejudicial and misleading to the jury under Rule 403. Fed. R. Evid. 403. The court in *Shay* reiterated an important statement made by the United States Supreme Court:

> " '[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.' "

Daubert, 509 U.S. at 595. Allowing Ralphio to give the categorical and unqualified opinion that Swanson is not a credible witness would unduly prejudice the Government, especially given the great value that the trier of fact may place on an expert opinion. Therefore, it would be misleading to allow Ralphio to make this blanket and baseless assertion, and it would be unfairly prejudicial to the government's case.

CONCLUSION

This Court should deny Defendant's Motion to Suppress because the Government did not violate his Fourth Amendment right to be free from

unreasonable searches and seizures when it obtained content from his SkyCloud storage account without a warrant supported by probable cause.

This Court should grant the Government's Motion in Limine because Counselor Mona Ralphio should not be permitted to testify as an expert witness under Federal Rules of Evidence 702.

Dated: September 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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