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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	Docket No. CR16-5110RJB
Plaintiff,)	Tacoma, Washington
vs.)	March 14, 2017
DAVID TIPPENS,)	REDACTED
Defendant.)	DAY 2

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ROBERT J. BRYAN
SENIOR UNITED STATES DISTRICT COURT JUDGE

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1 default incoming files; is that correct?

2 A. Yes.

3 Q. Okay. And is it correct that there were no search terms
4 in the eMule program or elsewhere for the specific file names
5 listed in Count 1?

6 A. The specific file names, that is correct. Well, it was
7 correct that it was not in the 30 saved eMule search terms.

8 Q. Okay. Thank you. So for example, just to make sure we
9 are clear on that, the first file that is listed in Count 1
10 is -- and I am quoting -- "2015-01 6sucks.mp4," correct?

11 A. Correct.

12 Q. As we just established, there was no eMule searches for
13 that file name?

14 A. For that exact string, that is correct.

15 Q. Thank you. Now, I just want to make sure that we are
16 clear on what's encompassed by user interactions in general,
17 and get some basic concepts reaffirmed.

18 So is it correct that, in general, files can be downloaded
19 and received onto a computer automatically in a variety of
20 ways?

21 A. Sure.

22 Q. Again, all these questions are in general.

23 A. In general.

24 Q. Is it also possible that files can be downloaded and
25 received as a result of virus or malware activity?

1 A. In general, that is a possibility.

2 Q. In general, is it correct that files can be downloaded and
3 received as a result of someone other than the primary user
4 intentionally downloading a file?

5 A. That is a possibility, yes.

6 Q. Have you seen what's been titled the stipulation of the
7 parties regarding the NIT and related matters?

8 A. I have not.

9 Q. I have a copy of it, if you could take a look at it.

10 A. (Witness reading.)

11 Q. Now, Mr. Powers, focusing on paragraph n is of the NIT
12 stipulation, do you agree that it's possible that security
13 settings on a computer can be changed by an NIT or, more
14 broadly, malware that would allow someone to subsequently run
15 commands on the computer without the user's knowledge?

16 A. As a general case, yes.

17 Q. Okay. When the stipulation references commands, would
18 that in general include things such as downloading and storing
19 files on a computer? Could that be a command or a series of
20 commands?

21 A. Those are commands.

22 Q. Is it correct to say, as a general principle, that just
23 because a file was received on a computer, that does not
24 necessarily mean that the user knew that the file was received
25 or on his computer?

1 A. That is a possible situation.

2 Q. Is it correct that one other possible situation is that a
3 file may be received on a computer without the user's
4 knowledge and the user later finds and interacts with the
5 file?

6 A. That is a possibility.

7 Q. When we talk about interactions, just to recap from
8 yesterday, that might include such things as opening a file?

9 A. That would be an interaction.

10 Q. Viewing the file?

11 A. Yes.

12 Q. Moving the file to another folder from where it was
13 originally found?

14 A. Yes.

15 Q. Or copying the file?

16 A. Correct, yes.

17 Q. All those types of interactions can occur after a file is
18 received, correct?

19 A. Yes.

20 Q. And in and of themselves, those interactions do not
21 necessarily tell you whether the user knew the file was on the
22 computer before the interaction?

23 A. I don't want to get all meta physical on you --

24 Q. Is it too meta physical a question? Should I break it
25 down?

1 A. Let's do that.

2 Q. Is it fair to say, for example, one thing that can happen
3 after a file is received on a computer is that the user will
4 open it and look at it?

5 A. Yes.

6 Q. Is it correct to say that the mere act of opening and
7 looking at a file does not tell you in and of itself whether
8 the user knew the file was on the computer before opening it,
9 in and of itself, that action?

10 A. I am not trying to be a difficult geek here, but in order
11 to open it, you know it's there, so you'd have to see it to
12 decide to open it. Now, it might be the case, if this makes
13 your point easier, that the user did not know it till hey,
14 what's this doing in my folder this second, now I see it, now
15 I open it and I didn't know about it three seconds ago.

16 Q. That's fine. That's a clarification that is consistent
17 with what I understood. Thank you.

18 So just to kind of wrap up these general principles, is it
19 fair to say that forensics is a little bit like investigating
20 the Watergate scandal? An important question is: What did
21 the user know about a file and when did he or she know it?

22 A. I don't know if I want to reduce the whole field of
23 forensics to that, but that is a valid forensic question.

24 Q. Okay. Thank you. Now, let's go to the specific user
25 interactions or lack of interactions with the Count 1 files.

1 Yesterday, as I indicated, we were just starting a little bit
2 out of order because I had worked through the reports rather
3 than the files chronologically.

4 So let's pick up where we left off with Government
5 Exhibit 23, which is No. 5 listed in Count 1, and then I will
6 make this easier by going in serial order.

7 Mr. Powers, just for the record, is it correct that
8 Government Exhibit 23 has the file name "pthc 2016 18-3.avi"?

9 A. It's 18_3.avi.

10 Q. Thank you. Now, is it also correct that this was found --
11 this particular file was found only in the eMule incoming file
12 directory or file folder?

13 A. That was the only place I noted it.

14 Q. Again, just so we are clear, that incoming file folder is
15 the default eMule setting for files that eMule collects
16 pursuant to a search?

17 A. Pursuant -- that's where it collects it after it downloads
18 it.

19 Q. And again, that's a default setting?

20 A. Yes.

21 Q. In fact, I think you described it -- and you can refer to
22 Exhibit A-15 at Bates 900 -- that you describe the eMule
23 incoming directory as the default -- excuse me, the directory,
24 the default directory, for files loaded by eMule; is that
25 correct?

1 A. Yes.

2 Q. Now, yesterday --

3 THE COURT: Just a minute, you are going too fast
4 here. You referred to Bates 900. There's no such number.

5 MR. FIEMAN: It is Exhibit A-13 at Bates 900.

6 THE COURT: A-13. All right. Now, what is the
7 question?

8 MR. FIEMAN: I was just confirming, Your Honor, that
9 Mr. Powers had described the eMule incoming folder as the
10 default directory for files downloaded by eMule.

11 BY MR. FIEMAN:

12 Q. So let's focus on possible user interactions with that
13 Government Exhibit 23 in the incoming file.

14 A. Okay.

15 Q. Now, in your reports, you indicated -- with the exception
16 of one file I am going to get to, the Mon file -- that there
17 was some -- maybe possible indications of user interactions
18 with the Count 1 files?

19 A. Yes.

20 Q. One of the indications that you listed is that there was
21 user interaction with directories containing possible child
22 pornography plus the existence of various shellbags. Were
23 those two indications?

24 A. Yes.

25 Q. Now, there are lots of directories containing possible

1 child pornography on the hard drives; is that correct?

2 A. That is correct.

3 Q. And my concern is entirely with the files in Counts 1 and

4 3. So you had just testified earlier that Government's

5 Exhibit 23 was found in the incoming file directory, correct?

6 A. That's correct.

7 Q. So the fact that there may have been user interactions

8 with various directories that contained other possible files

9 of child pornography does not tell us anything about this

10 particular file, does it?

11 A. Keeping in mind that one of those directories is this one.

12 Q. Okay. So you were referring -- when you said other -- I

13 see.

14 The clarification is, you are referring throughout here

15 just to the incoming file?

16 A. I would have to look at the actual text of each point

17 where you are talking about. I can tell you that there are

18 indications of interaction with the incoming folder, and there

19 was indications with interactions with other folders as well.

20 Q. What I want to know, and all I am asking about, is

21 indications of interaction with each specific file as I

22 address it.

23 A. Okay.

24 Q. So is it fair to say that for Government's Exhibit 23,

25 there are in fact no user interactions?

1 A. I would not make that statement.

2 Q. Can you tell me what the user interaction with file 23
3 was? And I am not talking about the -- I want to know about
4 "the file."

5 A. Okay. So in regards specifically to "pthc 2016 18_3.avi,"
6 I cannot tell you just from the file itself that any
7 particular action happened on any particular date and time.

8 Q. Okay.

9 A. Now, if we start incorporating other points, you get a
10 bigger picture, but I do not have an artifact that says at
11 this moment, this action happened with this file.

12 Q. Okay. And that's most of the way where we are going, but
13 I want to get a little bit further into my point.

14 Mr. Powers, we are not even challenging possession counts
15 here. We know that Mr. Tippens was looking at a lot of child
16 porn at various times. All right. So any evidence about
17 interactions with a directory over here that had some porn in
18 it or a file over there that had some porn in it, is not
19 telling me anything about the specific listed files, okay.

20 A. I would not agree with that statement.

21 Q. Well, what I want to know is, can you show me anywhere in
22 your report where it shows that this particular file,
23 Exhibit 23, was in fact, for example, moved or copied
24 anywhere?

25 A. A specific artifact indicating that kind of specific

1 thing, I do not have.

2 Q. Nothing of that nature?

3 A. Correct.

4 Q. Now, I want to pursue that same line, a very focused
5 inquiry in connection with this picture, this file and the
6 shellbags.

7 A. Okay.

8 Q. Could you remind the Court what shellbag data consists of?

9 A. The shellbags basically exist to allow an operating system
10 to keep track of things that the user is doing with a given
11 folder. So if you say hey, I want to list the items in this
12 folder in this particular way, the shellbag will track that.
13 If you make the folder a different size, it will track that.

14 The existence of a shellbag means that a user went into
15 that folder. It does not appear, just for the system, some
16 background system function was something there. It means that
17 the user took an action to go to that folder and do something.

18 Q. So there are all sorts of things that you can do with a
19 computer: open a file, resize it, view it once that file is
20 on there after it's received, correct?

21 A. Correct.

22 Q. So first of all, that shellbag data, that isn't telling
23 you -- that's telling you stuff that's happening to the file
24 or the picture after it's already on the computer, correct?

25 A. It is discussing stuff that happens to the folder once

1 it's already in existence, yes.

2 Q. So again, it's not really telling you anything about how
3 that particular file or picture got on the computer in the
4 first place?

5 A. Not in and of itself, no.

6 Q. Now, we have in an exhibit from the government,
7 Government's Exhibit 40, that consists of shellbag data; is
8 that correct?

9 A. Sounds familiar.

10 Q. Please check.

11 A. Yes, that's correct.

12 Q. And the government asked you about various files that
13 appear in the shellbag directory, correct?

14 A. Folders.

15 Q. Folder, sorry. What's the difference between a folder and
16 a directory?

17 A. A folder and a directory are the same. There might be
18 some who will get upset and scream that no, they are not, but
19 folder and directory are the same.

20 Q. Okay, but you just corrected me when I used directory --

21 A. You said file.

22 Q. -- so I just wanted to make sure my terms -- oh, the file?

23 A. File and directory are different.

24 Q. Got it. So this is a shellbag file?

25 A. Folder.

1 Q. Thank you. Shellbag folder.

2 So again, Government Exhibit 40 consists of information or
3 data extracted from the shellbag folder or folders on the
4 Tippens's hard drives, correct?

5 A. I am really not trying to bog on technical detail. It was
6 actually extracted from a registry key.

7 Q. All right. But it relates to the shellbags?

8 A. The shellbags live in a registry key; it talks about
9 folders.

10 Q. Okay. You recall yesterday during the direct the
11 government was asking you about various file names that appear
12 in the shellbag related data?

13 MR. HAMPTON: I will object. That mischaracterizes
14 the testimony yesterday. It was asking about folder names,
15 not file names, and there is an important distinction.

16 BY MR. FIEMAN:

17 Q. Well, let's put it this way --

18 THE COURT: Wait a minute. Rephrase the question.

19 MR. FIEMAN: Thank you, Your Honor. I will withdraw
20 and rephrase to clarify.

21 BY MR. FIEMAN:

22 Q. Is there anything in Government Exhibit 40 that references
23 this specific file by file name?

24 A. No.

25 Q. Is there anything in Exhibit 40 that in fact references

1 any of the files listed in Counts 1 or 3 by file name?

2 A. No.

3 Q. Now, you were also asked some questions yesterday about
4 Government Exhibit 25, the My Videos files.

5 Now, Exhibit 25 has a subpart -- two subparts in 25-002 in
6 the government's exhibits, 25-003 in the government exhibits.
7 So when I am referencing Exhibit 25, I am referring to the
8 exhibit and its sub parts, okay?

9 A. Okay.

10 Q. Is there anything indicated in there regarding -- for
11 example, does file Exhibit 25, Government Exhibit 25, appear
12 anywhere in the My Videos directory?

13 A. I completely don't understand that question.

14 Q. Well, you have, for example, in Exhibit 25, various file
15 names and thumbnails or screen captures associated with the My
16 Video files data?

17 A. With the My Videos folder, yes.

18 Q. Is it correct to say that Government Exhibit 25 is not one
19 of the files that appears in there?

20 MR. HAMPTON: Collin, are you talking about
21 Government Exhibit 23?

22 MR. FIEMAN: Excuse me, Exhibit 23. Thank you, Matt.

23 A. Okay, that makes far more sense.

24 BY MR. FIEMAN:

25 Q. This is again the "pthc 2016 18_3.avi file"?

1 THE COURT: You are talking about Exhibit 23?

2 MR. FIEMAN: I am asking him if Exhibit 23 appears in
3 Exhibit 25.

4 A. Exhibit 23 does not appear in Exhibit 25.

5 BY MR. FIEMAN:

6 Q. Is it correct that, in fact, none of the videos or
7 pictures that are listed in Count 1 or Count 3 appear in
8 Exhibit 25?

9 A. That is correct.

10 Q. And then just in terms of evidence that has been
11 introduced by the government, can we please turn your
12 attention to Government Exhibit 33, which consists of the
13 recently viewed videos files.

14 Have you had an opportunity to look at that, Mr. Powers?

15 A. I have.

16 Q. Is it correct that Government Exhibit 23, depiction five
17 listed in Count 1, does not appear in Government Exhibit 33,
18 the recently viewed video files?

19 A. That is correct.

20 Q. Is it correct that, in fact, none of the files listed in
21 Count 1 or 3 appear in Government Exhibit 33?

22 A. That is correct.

23 Q. All right. So let's proceed to the rest of the depictions
24 listed in Count 1, the receipt count now in sequential order,
25 and ask you first to turn your attention to file number one

1 there, which appears as "2015-01 6sucks.mp4".

2 Do you see that file?

3 A. I do.

4 Q. Is it correct in fact, Mr. Powers, that there are here no
5 user interactions noted for this file? Excuse me, not in the
6 indictment but in your reports?

7 A. Excuse me, my report --

8 Q. Let me back up. I am asking a preliminary question. Is
9 it correct that, according to your analysis, no user
10 interactions were noted for this specific file?

11 A. No specific artifacts that can say that on this specific
12 time, this specific action was taken with this specific
13 artifact.

14 Q. Well, okay. I understand that's a technically very
15 narrow, correct statement, but I just want to go back through.
16 We have looked for evidence of interactions with the previous
17 exhibit, 23, correct, such as --

18 A. Right.

19 Q. -- shellbag data? Correct, that's one thing?

20 A. I would agree that the situation with this file is
21 essentially -- in terms of what I believe you are looking for
22 -- what we just finished discussing with Exhibit 23.

23 Q. It's in the same condition?

24 A. Yes.

25 Q. No user interactions noted in your reports?

1 A. No artifacts that directly state a specific action
2 happened at a specific time with this specific file.

3 Q. How about any action at any time with this specific file?

4 A. There is evidence of actions which had to have affected
5 this file.

6 Q. Well, you are talking about, for example, that it appeared
7 in the incoming directory, correct?

8 A. That would be an example.

9 Q. But that's the default eMule directory, correct?

10 A. Sure.

11 Q. What I am asking is then for a user interaction showing,
12 for example, was it viewed?

13 A. Right. So I cannot say that at any particular date and
14 time, an action such as being viewed happened with this
15 particular file.

16 Q. We'll leave that, and I will clean it up with Mr. Young.
17 But thank you, if that's as comfortable as you feel like
18 going.

19 Let's do the same with Government Exhibit 20. It is named
20 "[pthc] _12y_Eidothea.avi," end quote; is that correct?

21 A. Yes.

22 Q. That appears as number 2 of a list of depictions in Count
23 1; is that correct?

24 A. It does.

25 Q. Once again, this was found in the eMule default incoming

1 file, correct?

2 A. That is correct.

3 Q. It was not found anywhere else?

4 A. That exact spelling of that file name was not, no.

5 Q. And it is also again -- just to recap, you have no
6 forensic evidence, for example, that it was opened at any
7 particular time, viewed in the shellbags, et cetera? Related
8 directly to this file. I don't want to know about general
9 user activity, I want to know about this file.

10 A. This particular file, there are two other files of
11 substantially similar content. They are somewhat shorter; I
12 can't remember how much. It was a different spelling on the
13 file name. Whether they represent a completely external
14 source or a change made on the system is open to debate. But
15 there's related content elsewhere on the computer.

16 Q. But not the file?

17 A. But not this file name.

18 Q. Not the exact same content either?

19 A. Correct.

20 Q. That's kind of my point. You can have different files
21 with different names and they will have different content?

22 A. That is true.

23 Q. You can have different files with very similar names and
24 they will have different contents?

25 A. That is also true.

1 Q. That's why in order to be precise, I am focussing very
2 much on the files listed in the indictment.

3 A. Certainly.

4 Q. Turning now to Government's Exhibit 21, which is number
5 three, Count 1, receipt, the file name "Mon_film" --

6 A. .

7 Q. I'm sorry -- "space Film space" --

8 A. No space.

9 Q. You put it in the record.

10 A. "Mon Film2.mp4."

11 Q. And just for shorthand, because I am not going to be
12 talking about -- I will just refer to as the Mon film.

13 A. That works for me.

14 THE COURT: Just a second. This real-time quit on
15 me.

16 (Pause.)

17 BY MR. FIEMAN:

18 Q. Now, this was a file that was found actually in two
19 locations?

20 A. That's correct.

21 Q. The first was the eMule default incoming, correct?

22 A. Correct.

23 Q. It was also --

24 THE COURT: Okay. Now I missed a little bit. You
25 were talking about Government's Exhibit 21.

1 MR. FIEMAN: Correct, Your Honor. It is the exhibit
2 that's numbered 3 in Count 1, and has as part of its exact
3 file name, Mon film.

4 THE COURT: All right.

5 BY MR. FIEMAN:

6 Q. And I had just established, or Mr. Powers had confirmed,
7 that it was found in two locations.

8 THE COURT: What's the question?

9 MR. FRIEDMAN: I just wanted to make sure that you
10 were ready for me to proceed, Your Honor.

11 BY MR. FIEMAN:

12 Q. So actually, just as an aside, Mr. Powers, I guess this
13 real-time difficulty is a perfect example of how glitchy and
14 unpredictable some technology can be?

15 A. Technology is lots of fun.

16 Q. So the second directory where you found this file was in
17 the more stuff/video directory, correct?

18 A. Correct.

19 Q. And that's separate from the recent videos and other
20 files, directories we were speaking about earlier in
21 connection with the other Count 1 counts?

22 A. That's correct.

23 Q. So this is sort of an outlier, is that correct, in terms
24 of the Count 1?

25 A. Depending on how you define your terms. There is a few

1 differences from the other files we were discussing.

2 Q. And it's fair to say that the fact that there's a copy
3 outside of the incoming directory is a possible indication of
4 user interaction; is that correct?

5 A. It is, yes.

6 Q. Do you have any information about how that copy was made?

7 A. Not specifically, no.

8 Q. Do you have any information about who made the copy?

9 A. I do not.

10 Q. So based on the available forensic evidence, is it correct
11 to say that we know that the Mon film file was originally or
12 initially downloaded by eMule into the incoming directory?

13 A. We know that it was loaded into that directory, yes.

14 Q. And then at some point after it was received in that
15 directory, someone or something may have made a copy and put
16 it in a separate directory?

17 A. That is definitely a possibility, yes.

18 Q. But you have no information about what that someone -- who
19 that someone or what that something was?

20 A. I do not.

21 Q. And is it correct that there were no eMule searches or
22 other searches, say with Chrome browser, for that file with
23 the name Mon Film2.mp4 as most accurately described?

24 A. There were no email searches of that name, and I do not
25 have the Chrome browser search list memorized so I can't say

1 one way or another.

2 Q. But to your knowledge at this point, no such searches?

3 A. I cannot say there was one. I would have to actually look
4 at the data to go through it to be definitive.

5 Q. Well, would it surprise you if it wasn't noted in your
6 reports at this point, or would you want to look at your
7 reports?

8 A. No.

9 Q. Then the final file should be Government 22, since we
10 started with 23, which would be No. 4 in Count 1; is that
11 correct?

12 A. Yes.

13 Q. That is, in fact, the fifth and final file that is shown
14 in Count 1, correct?

15 A. Correct.

16 Q. That has the title "2014-02" -- I believe there's a "-TLZ"
17 and it keeps going?

18 A. Yes.

19 Q. And again, did you note in regard to this specific file
20 any user interactions?

21 A. Basically, the same situation as the other ones we
22 discussed.

23 Q. Okay. We can go quickly now because I am going to turn to
24 the Count 3 files which relate to the transportation charge.

25 Is it correct, Mr. Powers, that the files listed in Count

1 3 appear as Government's Exhibits 3, 5 and 6 among the
2 government's exhibits?

3 A. That is correct.

4 Q. And I have read your reports very carefully. I am not
5 going to have you agree with anything, but is it correct to
6 say that in regard to these Count 3 files, you did not find or
7 note any particular possible user interactions?

8 A. We are in the same situation as the other group of files
9 we discussed.

10 Q. Okay. So that situation being the Count 3 files don't
11 appear in the shellbags or video file directories, recently
12 viewed directories, any other directories apart from wherever
13 you found them?

14 A. No files at all appear in the shellbag. Those are all
15 folders, but yes.

16 Q. No indication of shellbag related activity; is that a
17 better way to say it?

18 A. No.

19 Q. All right. But my general proposition is no possible user
20 interactions were specifically noted for this specific file?

21 A. I have no artifacts to say that at a specific point in
22 time, a specific action happened with these specific files.

23 Q. Is it fair to say, in fact, that there's nothing noted in
24 your reports about where the Count 3 files originally came
25 from?

1 A. I believe that's correct.

2 Q. And is it also fair to say that given the available
3 forensic data, there's no clear evidence of where the Count 3
4 files came from?

5 A. I will agree with that.

6 Q. Or any clear indications how it got on the computer?

7 A. Now you are going to make me think.

8 Q. For example, not related to eMule, right? It was not
9 among the known.mets. Those three files, actually I am
10 referring --

11 A. The difficulty I am having with your question, the way it
12 was phrased, is these file names, some of them contain
13 elements that were in eMule search terms. These specific file
14 names in their entirety was not.

15 Q. And also these files were not found in the incoming eMule
16 files, correct?

17 A. I believe that is correct.

18 Q. That's why I believe you indicated you really weren't sure
19 where they came from?

20 A. I can't say it specifically came from this spot in the
21 universe and that's how it got there.

22 Q. All we know is just they were on the computer?

23 A. We know they were on the computer.

24 Q. That's about it, right, in terms of their history and DNA?

25 A. In and of themselves, all we know about the files by

1 themselves is that they are there, creation times, file names
2 and metadata associated with that.

3 Q. We covered the creation date; that's part of the time
4 stamps, right?

5 A. Right.

6 Q. I think you used the phrase that time stamps get really
7 messy really quickly?

8 A. Time gets messy.

9 Q. I just have a couple more questions, three or four, to be
10 more precise.

11 A. Okay.

12 Q. Is it correct that there was no antivirus software on the
13 computer?

14 A. I do not recall that one way or the other.

15 Q. Could you look at Exhibit 27, Defense Exhibit 27 at Bates
16 1685?

17 A. What was the Bates number?

18 Q. 1685. I will just confirm that.

19 THE COURT: Are you talking about A-27?

20 MR. FIEMAN: A-27, Your Honor.

21 BY MR. FIEMAN:

22 Q. If you'll look approximately at the middle of the page,
23 Mr. Powers -- this is where I am getting my information
24 from -- there is a reference to "third-party antivirus
25 installed?"

1 A. Yes. It says "no."

2 Q. Now, antivirus software is a pretty common and basic
3 program for most computers and users to have, is it not?

4 A. Yes.

5 Q. In fact, it's one of the important security systems by
6 which, according to its name, it prevents -- helps prevent
7 viruses or malware from reaching the data on a computer?

8 A. That is correct.

9 Q. And is it fair to say that given -- based on your training
10 and experience and the common practice of computer users, most
11 people want and have antivirus software of some sort?

12 A. I don't really have a percentage in mind; I will say it's
13 extremely common.

14 Q. It's extremely common to have antivirus software?

15 A. Yes.

16 Q. So that by reverse analysis, it would be highly uncommon
17 not to have some sort of antivirus software?

18 A. See, that's what I was trying to avoid the most, because I
19 don't really have any valid statistics to say what the
20 percentage is here or there. It's not shocking when I
21 encounter it but it's ...

22 Q. Unusual?

23 A. It's more usual to see it, I would suppose.

24 Q. In this case, there was no antivirus software?

25 A. That's what TAU says. I trust them.

1 Q. I hope so. Is it also correct that the recent items
2 folder on, I guess, the computer, was empty?

3 A. Are you referring to the space on the start menu?

4 Q. Let's go to Bates 1692. So I will make sure I am -- and
5 this is the same exhibit, 27, Your Honor.

6 THE COURT: A-27?

7 MR. FIEMAN: Yes, Your Honor.

8 BY MR. FIEMAN:

9 Q. In No. 8 on 1692, do you see the caption "recent items?"

10 A. I do.

11 Q. The bubba account is the user account for the computer
12 itself, correct?

13 A. That's correct.

14 Q. It is noted there that the recent items folder for the
15 bubba account was empty, correct?

16 A. That is correct.

17 Q. It also notes that the recent items folder was in fact
18 disabled, correct?

19 A. That is what it says.

20 Q. Now, a final couple of questions. You noted in your
21 reports that the presence of child pornography on the hard
22 drives was the result of several years of computer activity;
23 is that correct?

24 A. Not that specific verbiage, but yes.

25 Q. And is it also true that, according to your report, "this

1 was based upon time stamp access of folders with descriptive
2 folder names"?

3 A. Can we be a little bit more -- I am not totally
4 understanding your question.

5 Q. Well, was the timeframe of activity on this computer based
6 primarily on various time stamps?

7 A. Yes.

8 MR. FIEMAN: If I may have one moment, Your Honor.

9 (Pause.)

10 MR. FIEMAN: Nothing further, Your Honor. Nothing
11 further, Mr. Powers.

12 A. Thank you.

13 MR. HAMPTON: Just one moment, I need to look at
14 something in an exhibit. I would ask Mr. Leupold to help me
15 to make sure I am looking at the right button before I pull it
16 up.

17 (Pause.)

18 REDIRECT EXAMINATION

19 BY MR. HAMPTON:

20 Q. Mr. Powers, I am pulling up what's been previously
21 admitted as Government's Exhibit 33. Is that appearing on
22 your monitor?

23 A. Not as of yet. There it is.

24 Q. Now, Mr. Powers, this depicts the recent media files from
25 the VLC media player; is that correct?

1 A. That's correct.

2 Q. What does that mean again?

3 A. These are the last 10 files that the VLC media player has
4 played.

5 Q. And you testified on cross that none of the files listed
6 in Count 1 as numbered 1 through 5, which are Exhibits 19
7 through 23 --

8 THE COURT: Just a second, counsel, this quit again
9 on me.

10 BY MR. HAMPTON:

11 Q. Mr. Powers, so to recap, we are looking here at
12 Exhibit 33, which shows, I believe you said, the 10 most
13 recently played media files with the VLC media player?

14 A. That's correct.

15 Q. You testified on cross that nowhere in this list are
16 Exhibits 19 through 23, which are also items 1 through 5
17 charged in Count 1. Do you recall that testimony?

18 A. I do.

19 Q. Now, is there any reason -- this file list only shows the
20 most recently played 10 files?

21 A. That's correct.

22 Q. Is it correct that there were many, many media files on
23 this Dell laptop?

24 A. There were.

25 Q. It is also accurate that there were many, many more media

1 files on QSE14, the Western Digital hard drive that was
2 attached to this laptop in Mr. Tippens's bedroom?

3 A. Yes, that's correct.

4 Q. So, is there any way to know from this list of ten files
5 whether or not any of those other files had been accessed?

6 A. No. This is only a list of the last ten, so if one of
7 those other files was the 11th, it's not going to make this
8 list.

9 Q. So maybe it was accessed, maybe it wasn't. There's no way
10 to know from this?

11 A. Not from this.

12 Q. Now, Mr. Powers, I am now showing you what's previously
13 admitted as Government's 32-008. What do we see in this,
14 again?

15 A. These are the last 30 -- a portion of the last 30 search
16 terms entered into the eMule.

17 Q. This is the screen that would have appeared on the
18 defendant's Dell laptop?

19 A. Correct.

20 Q. In the lower left-hand corner, do you see a button called
21 "download"?

22 A. I do.

23 Q. What would be the effect of hitting that button when using
24 eMule?

25 A. A file would be downloaded.

1 Q. Now, referring to Exhibits 19 through 23, also numbers 1
2 through 5 for Count 1, those were found in the eMule incoming
3 folder, correct?

4 A. That's correct.

5 Q. And is the eMule incoming folder where downloaded files,
6 completed downloads, are stored?

7 A. Yes, that is its significance.

8 Q. How would a user get files into that directory?

9 A. By hitting that download button.

10 Q. What would happen when that download button is hit?

11 A. EMule would basically do its thing to go grab those files
12 and bring them onto the computer. And then while they were
13 downloading, they would be put into a temp folder. When it
14 was completed, it would be moved into this incoming folder.

15 Q. So in order for those folders to be downloaded, the user
16 has to actually select them and ask eMule to do the
17 downloading?

18 A. Correct.

19 Q. If you will take your sensitive binder and flip to
20 Exhibit 25.

21 Now, Mr. Powers, you testified on cross that none of
22 Exhibits 19 through 23, numbers 1 through 5 in Count 1, were
23 found in the My Videos folder shown on the first page of
24 Exhibit 25. Do you recall that?

25 A. Yes, I do.

1 Q. Was that correct?

2 A. Yes.

3 Q. Is that surprising?

4 A. No.

5 Q. Why is that not surprising?

6 A. Because this is a list from a completely different folder
7 than from the one they were found in.

8 Q. Mr. Powers, looking at Exhibit 25, when we spoke on direct
9 yesterday, you mentioned what are called thumbnails?

10 A. That is correct.

11 Q. What are thumbnails, again?

12 A. They are basically small pictures that the computer uses
13 to show the user what kind of content is in the file.

14 Q. So would it be possible for someone to see a thumbnail and
15 know, or at least have some idea, of the contents of a file
16 without actually accessing it?

17 A. That's the entire point of its existence.

18 Q. And when you say this, you mean the existence of a
19 thumbnail?

20 A. Yes.

21 Q. I believe you testified yesterday that the setting which
22 would display thumbnails is something selected by a computer
23 user?

24 A. That is correct.

25 Q. And what selection was there on Mr. Tippens's Dell laptop

1 when you examined it?

2 A. The one we are looking at here.

3 MR. FIEMAN: I am sorry, I couldn't hear the answer.

4 Would you please repeat the answer?

5 A. The view we are looking at here is the view that was
6 present on Mr. Tippens's computer.

7 BY MR. HAMPTON:

8 Q. So when a folder or image and video files would have been
9 accessed on that Dell laptop, what would the user have been
10 able to see?

11 A. These thumbnails.

12 Q. Mr. Powers, we talked a little also on direct, and you
13 spoke about this also on cross, you talked about shellbags?

14 A. Yes, sir.

15 Q. You can put 25 to the side for now.

16 Shellbags are -- is it accurate to say they are evidence
17 of user interaction with a particular folder?

18 A. Yes.

19 Q. What inference would you draw from the fact that someone
20 has interacted with a particular folder?

21 MR. FIEMAN: I will object to that. If we can just
22 stick to what conclusions the expert did or did not draw. I
23 think inferences are for the Court to draw.

24 MR. HAMPTON: Your Honor, it would seem
25 appropriate for an expert --

1 THE COURT: I think he may answer.

2 A. So, if I am understanding your question correctly, given
3 that I have a shellbag for this folder, what does that tell
4 me?

5 BY MR. HAMPTON:

6 Q. Yes.

7 A. Okay. What that tells me is that at some point in time, a
8 user went into this folder and therefore, for instance, the
9 views we were just looking at, would be visible to said user.

10 Q. Would you say that the existence of a shellbag would make
11 it more likely that a user had actually interacted with the
12 contents of a particular folder?

13 A. I wouldn't phrase it quite like that. I would say that
14 the easiest way for a user to interact with the contents of a
15 folder is to go to that folder and interact with them there,
16 and in order for the user to go to the folder, a shellbag will
17 exist.

18 Q. Now, Mr. Powers, in your review of the shellbags, did you
19 identify any shellbags associated with the eMule incoming
20 folder?

21 A. I did.

22 Q. So does that mean that at various points in time, the user
23 of the Dell computer was interacting with the eMule incoming
24 folder?

25 A. We know to a certainty that because the shellbag exists,

1 the user of the Dell laptop computer did in fact open that
2 folder.

3 Q. Now, turning to Exhibits 3, 5 and 7, which are items 1, 2,
4 and 3 in the transportation count alleged in Count 3, can you
5 remind us again where those files were found, on what device
6 they were found?

7 A. These were found on the Dell laptop computer, and one copy
8 of the Mon film file was also found on the Western Digital
9 hard drive.

10 Q. I think you may be mistaken. I am speaking now not of the
11 five files, 19 through 23 --

12 A. Okay, I am sorry.

13 Q. -- but of files 3, 5 and 6.

14 A. So we are talking about the files referenced in Count 3?

15 Q. Yes.

16 A. That's where I went astray.

17 Q. Yes. So Exhibits 3, 5 and 6, which are numbered 1, 2 and
18 3 in Count 3.

19 A. Okay. So these files were found on the Western Digital
20 hard drive.

21 Q. And that is QSE14, correct?

22 A. QSE14, the device pictured in Exhibit 29.

23 Q. And that's the same hard drive that was connected to the
24 Dell laptop at the time of the search?

25 A. That is correct.

1 THE COURT: Just a second. You said they were found
2 on the Western Digital hard drive. How did you find them?
3 What do you look at to find them?

4 A. So, when I processed the evidence, basically my forensic
5 software will gather all of, in this case, the pictures and
6 videos and put them in one spot so we can just look at all the
7 pictures and videos. Then when we find one that we are
8 interested in, we can say hey, let's look at this one and it
9 will tell us where the forensic software originally found it.

10 So that is what this path is in Government Exhibit -- the
11 A series, where it says path. When the path starts with
12 QSE14, that's how we know that that file was originally found
13 on the Western Digital hard drive pictured in Exhibit 29, the
14 hard drive that was attached to the computer.

15 If it was found on the Dell, the path would start with
16 QSE15. If it was found on the other hard drive that we
17 haven't talked much about, that path would start with QSE2.

18 THE COURT: Exhibits 19 to 23, you indicated were in
19 the eMule incoming folder or file or whatever?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Okay. Where were Exhibits 3, 5 and 6
22 found?

23 THE WITNESS: Okay. Specifically with 3, the path on
24 that one is we go to that hard drive, that Western Digital
25 hard drive, and that's going to start kind of with the

1 partition 1, "my book stuff." Then there's a folder called
2 "more stuff." Within the folder "more stuff," there's another
3 folder named "video."

4 Within that folder that says "video," we have this file.
5 Then with 5, it starts out the same, we have the folder "more
6 stuff." But then we go to a different folder, and that folder
7 is "rar files."

8 Then we have another folder, and this folder's name is
9 "hardcore childporn - pthc - kinderporno - preteen - R@Ygold."
10 Then inside that folder, we have yet another folder called
11 "bp." Within that folder is where the file is located.

12 THE COURT: Okay. I think I understand. All right.

13 MR. HAMPTON: May I proceed, Your Honor?

14 THE COURT: Go ahead.

15 BY MR. HAMPTON:

16 Q. Mr. Powers, showing you again 33 on the screen, this
17 Western Digital hard drive on which you found, among others,
18 Exhibits 3, 5, 6, when that was connected to the Dell laptop,
19 can you remind us again what was the name of that drive? Was
20 it C, D, E, F, Q?

21 A. The drive letter was G.

22 Q. Do you see any references to the G drive in Exhibit 33?

23 A. I do.

24 Q. What are those references?

25 A. Items 2 through 10 on the most recent list.

1 Q. Are those media files located -- or that were at one time,
2 at least, located on this Western Digital hard drive?

3 A. Yes.

4 Q. And does the fact that they were in this recent media list
5 mean that someone played those media files from that Western
6 Digital hard drive?

7 A. That is correct.

8 Q. In your experience as a forensic analyst, is that an
9 indication of user interaction with a media device?

10 A. It is.

11 Q. And is user interaction with a media device an indication
12 that the user may have interacted with the contents of that
13 media?

14 A. It would be a prerequisite.

15 Q. I will refer you again, Mr. Powers, to Exhibit 25 in the
16 sensitive binder, specifically 25-002.

17 A. Okay.

18 Q. This is a screen capture we talked about yesterday. What
19 is this a screen capture of?

20 A. This is a screen capture of the RAR file within the "more
21 stuff" file on the Western Digital hard drive that was
22 connected to the computer at the time of the search.

23 Q. Is this the same folder in which one of the exhibits we've
24 just been talking about would have been found, Exhibit 6?

25 A. Yes. So this folder is within the path of Exhibit 6;

1 Exhibit 6 is another folder deep.

2 Q. But Exhibit 6 would have been within that folder?

3 A. Yes. It's contained within the container in here.

4 Actually, it's, I think, a couple folders deep but, yes.

5 Q. You can put that to the side.

6 Mr. Powers, I am now showing you Exhibits 32-008, 32-009,
7 previously admitted. These are the search terms -- the recent
8 search terms from the eMule program found on Mr. Tippens's
9 computer; is that correct?

10 A. That's correct.

11 Q. Now, you testified on cross that you did not identify any
12 search terms that specified the exact file name of Exhibits 19
13 through 23, also 1 through 5 in Count 1. Do you recall
14 testifying to that?

15 A. I do.

16 Q. Now, although you didn't find those exact search strings,
17 did you find examples within the recent search terms that are
18 consistent with the file names for Exhibits 19 through 23?

19 A. I did.

20 Q. What are those?

21 A. So we are talking again about Count 1 now?

22 Q. We are.

23 A. So some points of commonality would be the pthc.

24 Q. I am sorry, I didn't hear you.

25 A. Pthc. Eidothea. I will resay that Greek word.

1 Q. Mr. Powers, is it correct to say that there were at least
2 two search terms, pthc and that Eidothea, that overlapped with
3 the file names -- among the file names of 19 through 23?

4 A. Yes, and 2015 appears to be a search term.

5 Q. The year 2015?

6 A. Yes. And that is also in some of these files.

7 Q. Do you remember on cross, specifically in reference to the
8 file containing the word "Eidothea," which is number 2 for
9 Count 1, also Exhibit 20; do you recall that?

10 A. I do.

11 Q. Do you recall that you testified that you found other
12 files within the devices that appeared similar in nature?

13 A. That is correct.

14 Q. You also testified, if I am correct, that the content
15 differed slightly among those files?

16 A. Correct. The other files were somewhat shorter than the
17 first one.

18 Q. Did all the files, nonetheless, depict what you believe
19 were children engaged in various sex acts?

20 A. They did, and seemed to depict the same child
21 specifically.

22 MR. HAMPTON: If I may have just one moment, Your
23 Honor.

24 (Pause.)

25 BY MR. HAMPTON:

1 Q. Mr. Powers, just one last topic. You testified on cross
2 about how time can sometimes be a complicated matter when it
3 comes to digital forensics. Do you recall that?

4 A. I do.

5 Q. In your review of the digital media here, did you review a
6 lot of time information and time stamps as we've been
7 referring to them?

8 A. I guess that depends on what you mean by a lot. I
9 certainly looked at such information.

10 Q. Would you say you looked at a fair number?

11 A. I looked at the time information for all the exhibits we
12 have been discussing here. I looked through the logs
13 associated with the time clock, so sure.

14 Q. Based on what you've seen in your digital review, was
15 there anything that leads you to conclude there is some
16 problem with the accuracy of those time stamps?

17 A. I have not seen any such indication.

18 Q. Any indication that those time stamps were tampered with?

19 A. I did not see any such indication.

20 MR. HAMPTON: Your Honor, that's all I have.

21 THE COURT: Briefly.

22 MR. FIEMAN: Yes, Your Honor.

23 RECROSS-EXAMINATION

24 BY MR. FIEMAN:

25 Q. Mr. Powers, you were asked about thumbnail depictions that

1 were visible on the computer; do you recall that?

2 A. I do.

3 Q. Were there any thumbnails for depictions listed in Count 1
4 or Count 3?

5 A. I do not recall off the top of my head.

6 Q. None in evidence?

7 A. They aren't in any of the exhibits, if that's your
8 question.

9 Q. Now, one file, for example, an incoming file, they can
10 have lots and lots of sub files or files stored within those
11 files, correct?

12 A. You know what, I think you are probably correct, but not
13 for the reasons you think you are.

14 Q. All right. Well, I will go with correct, because what I
15 am trying to get is that if there were references to various
16 folders and directories and files in the course of this, and
17 it's fair to say that any single directory or folder or file
18 contain lots of sub directories, subfolders or subfiles?

19 A. They have the potential. It varies widely. Sometimes you
20 have a very straight tree going straight down; there are not a
21 lot of sub things. Sometimes you get a gazillion. It really
22 varies wildly. It's a possibility.

23 Q. Because of that possibility, is it correct that that's one
24 of the reasons why we were going through together interactions
25 with specific depictions and files?

1 A. There are quite a few of them --

2 Q. Let me ask it this way; I will give a quick analogy. Now,
3 these various folders and directories and files, they contain
4 like libraries of data in sub files?

5 A. Sure, absolutely.

6 Q. Just to make this concrete, just because you go into a
7 library, that does not mean that you know that the library has
8 any particular book, correct, just in and of itself?

9 A. Not in and of itself, not necessarily.

10 Q. You may not know if that library has a copy of the *Grapes*
11 *of Wrath* or not unless you go and look for it and find the
12 book and take a look at it, correct?

13 A. Obviously, there are many ways you could get that
14 information, but that is a possibility.

15 Q. Now, similarly you were asked about direct interactions
16 with media devices. Do you recall that?

17 A. I do.

18 Q. Is that basically just like a video player or -- a video
19 player on a computer would be one example, correct?

20 A. That would be one example.

21 Q. Just because I used the video player to watch *Bambi*
22 doesn't mean I also used it to watch *Snow White*, does it?

23 A. That is true.

24 Q. You'd want to know if there was evidence that *Snow White*
25 was actually viewed before saying that somebody viewed it?

1 A. Run that by me again.

2 Q. I will stop with, just because you watched *Bambi* doesn't
3 mean you watched *Snow White*.

4 A. Yes.

5 Q. We already covered the interactions or lack of
6 interactions with Counts 1 and 3 during your cross
7 examination?

8 A. Yes, we did.

9 Q. And a couple of final questions. There was an example of
10 an eMule search for 2015, correct?

11 A. That is correct.

12 Q. And boy, you could get a lot of files in response to that
13 search, right?

14 A. I would think so.

15 Q. News files with 2015 dates, correct?

16 A. Certainly.

17 Q. Any type of title or book that had 2015 in its name,
18 correct?

19 A. Yep.

20 Q. Some of it might be -- some child pornography might be
21 scooped up with that search too, correct?

22 A. Given the evidence in this case, I would say that's
23 clearly correct.

24 Q. And a lot of things that were not child pornography would
25 be scooped up too, correct?

1 A. It would be found by the search term.

2 Q. EMule?

3 A. Right.

4 Q. All right. Again, you don't really know if a 2015 file is
5 child pornography or not until you open it and look at it and
6 see its contents?

7 A. There could be a little bit more context to it than that.
8 If all you know about the file is that hey, I have this file,
9 it says 2015 on it, if that's all you know, then you'd have to
10 open it. If you had this inside your favorite CP collection,
11 then maybe you already accessed the information. But just in
12 and of itself, 2015 is not a child pornography term.

13 Q. Thank you. Hold on one second.

14 MR. FIEMAN: Nothing further, Your Honor. Thank you.

15 THE COURT: Thank you, Mr. Powers. You may be
16 excused.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: I guess it's time for a break here.
19 We'll take ten.

20 (Morning recess.)

21 THE CLERK: All rise, Court is again in session.

22 THE COURT: Please be seated. Okay. You may call
23 your next witness.

24 MR. LEUPOLD: The government calls Special Agent Kyle
25 McNeal to the stand, Your Honor.

1 THE COURT: If you'll raise your right hand to be
2 sworn.

3 KYLE MCNEAL, called as a witness, duly sworn.

4 THE COURT: Please be seated here.

5 DIRECT EXAMINATION

6 BY MR. LEUPOLD:

7 Q. Sir, please state your name for the record.

8 A. Kyle McNeal.

9 Q. Spell your last name.

10 A. M-c-N-e-a-l.

11 Q. How are you employed?

12 A. I am a special agent with the Federal Bureau of
13 Investigation.

14 Q. What is the current location of your duty assignment?

15 A. In Tacoma, Washington.

16 Q. What previous locations have you worked?

17 A. I have also worked in Olympia, Washington.

18 Q. Sir, how long have you been a special agent with the FBI?

19 A. I started with the FBI in April of 2011.

20 Q. Can you briefly summarize the specific nature of your
21 training and experience with respect to child exploitation
22 investigations?

23 A. I am the coordinator for the South Sound Child
24 Exploitation Task Force in Tacoma, Washington. So the
25 majority of our cases involve the exploitation of children. I

1 think we predominantly investigate sex trafficking cases and
2 child pornography cases.

3 Q. In the context of those duties, have you had occasion to
4 participate in investigations involving child pornography?

5 A. Yes.

6 Q. Have you had the opportunity to review images allegedly
7 depicting child pornography?

8 A. Yes.

9 Q. Approximately how many such investigations have you
10 participated in?

11 A. Numerous.

12 Q. Approximately how many child pornography images have you
13 viewed in your career?

14 A. Thousands.

15 Q. Sir, were you involved at all in the investigation of the
16 defendant, Mr. David Wayne Tippens?

17 A. I was.

18 Q. Do you recall specifically participating in a residential
19 search on February 11, 2016?

20 A. Yes.

21 Q. What was the address of that search?

22 A. 8522 20th Street Court West, University Place, Washington.

23 Q. I published what's been previously admitted as 27-009.

24 Sir, if you'll look at the monitor to your left, do you
25 recognize the published exhibit?

1 A. I do.

2 Q. What is it?

3 A. That is Mr. Tippens's residence.

4 Q. What role did you undertake during the search of
5 Mr. Tippens's residence that morning?

6 A. I was on the entry team, and I was designated the evidence
7 custodian for the search.

8 Q. Once agents made entry into that residence, did you have
9 the opportunity to visit the defendant's master bedroom in
10 that home?

11 A. I did.

12 Q. I have published for you on the screen what's been marked
13 and admitted as Government's Exhibit 27-002. Do you
14 recognize this image?

15 A. Yes.

16 Q. What is it?

17 A. That is Mr. Tippens's bedroom.

18 Q. Does that fairly and accurately depict the nature of the
19 defendant's bedroom at the time that agents, including you,
20 entered his bedroom?

21 A. It does.

22 Q. Now, I have published for you what's been admitted as
23 Government's Exhibit 27-013. Sir, do you recognize the image
24 on the screen?

25 A. As in the TV? Yes.

1 Q. In the defendant's bedroom?

2 A. Yes.

3 Q. Now, if you can just briefly describe the nature of the
4 circumstances, how and when you entered the defendant's
5 bedroom that morning on February 11, 2016.

6 A. So I entered the defendant's bedroom at some point during
7 the entry process when we were securing the residence.

8 Q. When you entered that room and you encountered the
9 television depicted in Government's Exhibit 27-013, did you
10 observe any content on that screen?

11 A. I did.

12 Q. What specifically did you see?

13 A. I saw a video of child pornography.

14 Q. It was playing at the time you glanced at the screen?

15 A. Correct.

16 Q. Now, sir, you are familiar with FTK reports?

17 A. Yes.

18 Q. What are FTK reports?

19 A. It's a report that our Cart examiner generates from
20 digital devices, the content on the digital devices.

21 Q. Can you describe in typical child pornography
22 investigations, the process by which you first receive an FTK
23 report and then view the suspected child pornography?

24 A. I'd receive the report -- our Cart examiner, in this case
25 John Powers, would let me know that the FTK report has been

1 generated. After that, I go to the FTK report.

2 Q. And that FTK report contains digital media files including
3 both still images and videos typically, correct?

4 A. Yes.

5 Q. Did you have occasion to review the FTK report in the case
6 involving devices seized from Mr. Tippens's home?

7 A. Yes.

8 Q. You are aware that the government has marked and now
9 admitted Exhibits 1 through 23 which depict child pornography,
10 correct?

11 A. Yes.

12 Q. Now, have you had an opportunity to first determine
13 whether or not those 23 child pornography files are identified
14 in the FTK report?

15 A. I don't believe all of them are identified in the FTK
16 report, no.

17 Q. But Mr. Powers identified them, another agent identified
18 them to you as coming from the devices?

19 A. Correct.

20 Q. And you had an opportunity to review those files,
21 specifically Exhibits 1 through 23?

22 A. I did.

23 Q. Now, I want to direct your attention to the -- there is a
24 small binder to your right which we have designated as the
25 sensitive binder. If you can please turn to tab 18C.

1 Sir, are you familiar with the image that is depicted at
2 tab 18C?

3 A. I am.

4 Q. What is it?

5 A. It's a still shot of the video that was found in
6 Mr. Tippens's residence that we saw during the search.

7 Q. And that you observed on the television that is depicted
8 in Government's Exhibit 27-013?

9 A. Correct.

10 Q. Now, if you could also then turn to 18D, the very next
11 exhibit. Is there an 18D next to the 18C?

12 A. No, sir.

13 Q. Then let me direct you to 18B, which is in the big binder
14 of exhibits. Have you found 18B?

15 A. Yes.

16 Q. What is 18B, sir?

17 A. It's a description of the video.

18 Q. Okay. Now, you just testified about a video that you
19 observed on the screen depicted in 27-013, correct?

20 A. Yes.

21 Q. You've also testified that 18C is a still image taken from
22 that video, correct?

23 A. Yes.

24 Q. And in fact, Exhibit 18, which has been previously
25 admitted, is in fact the video that you observed on the

1 television in Exhibit 27-013, correct?

2 A. Yes.

3 Q. And now directing your attention to 18B, 18B is a summary
4 of Government Exhibit 18, correct?

5 A. Yes.

6 Q. Who drafted the summary contained in 18B?

7 A. I did.

8 Q. What did you view prior to creating the summary?

9 A. The video itself.

10 Q. So does the summary contained in 18B fairly and accurately
11 depict the video that has been admitted as Government
12 Exhibit 18?

13 A. It does.

14 Q. Does that summary also correspond to the path and file
15 name contained in 18A?

16 A. It does.

17 Q. So just to be clear, with respect to the child pornography
18 in the 18 series, Exhibit 18 is the admitted video of the
19 victim you observed depicted on the defendant's television,
20 correct?

21 A. Correct.

22 Q. 18A is the admitted path for that specific file?

23 A. Yes.

24 Q. 18B is in fact a fair and accurate summary of the contents
25 of the admitted video in 18?

1 A. Yes.

2 Q. And 18C is a still image that was taken from the video of
3 18?

4 A. Yes.

5 MR. LEUPOLD: Your Honor, at this point the
6 government offers for admission Government exhibits marked for
7 ID, 18B and 18C.

8 MR. FIEMAN: No objection, Your Honor.

9 THE COURT: They may be admitted.

10 (Exhibit Nos. 18B and 18C admitted.)

11 BY MR. LEUPOLD:

12 Q. Now, sir, have you had an opportunity to review Exhibits
13 1B, 2B, 3B, all the way through 23B?

14 A. Yes, sir.

15 Q. And what are the B series of each one of those Exhibits 1
16 through 23?

17 A. They will be my description of the actual videos and/or
18 still images.

19 Q. So each one of the child pornography summaries contained
20 in 1B all the way through 23B, do they fairly and accurately
21 depict Government's Exhibits 1 through 23?

22 A. They do.

23 Q. In fact, you have viewed all of the materials, whether
24 they be images or videos, 1 through 23; is that right?

25 A. Correct.

1 Q. And you personally drafted each of those summaries
2 contained in exhibits marked for ID, 1B through 23B?

3 A. Correct.

4 MR. LEUPOLD: Your Honor, at this point, the
5 government offers for admission Government's Exhibits 1B
6 through 23B.

7 MR. FIEMAN: Your Honor, I just have a question
8 regarding relevance. I believe the images speak for
9 themselves and are in evidence. I don't know why we need an
10 additional descriptive account.

11 MR. LEUPOLD: May I respond, Your Honor? For the
12 appellate record, Your Honor, the government believes that
13 it's appropriate for a description of the items to be
14 contained in the record.

15 MR. FIEMAN: Your Honor, I have no objection. The
16 pictures themselves are in so --

17 THE COURT: Pardon?

18 MR. FIEMAN: I have no objection, since we already
19 stipulated to the pictures; they can have the summaries as
20 well.

21 THE COURT: They may be admitted.

22 (Exhibit Nos. 1B through 22B admitted.)

23 BY MR. LEUPOLD:

24 Q. Now I want to direct your attention to the smaller binder
25 containing contraband to your right.

1 Now, did you previously recall your testimony concerning
2 18C?

3 A. Yes.

4 Q. Now I want to direct your attention to 3C. What is that?

5 A. It's a still image that was taken from another one of the
6 videos.

7 Q. And specifically, you had an opportunity to review the
8 video that has now been admitted as Government Exhibit No. 3;
9 is that correct?

10 A. Correct.

11 Q. In fact, 3C is a still image that was taken from the video
12 that has been admitted as Exhibit 3, correct?

13 A. Correct.

14 Q. Does 3C fairly and accurately depict what you observed in
15 Government Exhibit 3?

16 A. Yes.

17 Q. Now I want to direct your attention to 5C. What does that
18 depict?

19 A. It's another still image of a pornography video.

20 Q. And in fact, this still image that is marked as Government
21 Exhibit 5C for ID is a still shot taken from a video that was
22 previously admitted as Government Exhibit No. 5; is that
23 correct?

24 A. Yes.

25 Q. In fact, 5C fairly and accurately depicts at least one

1 still segment of that video, correct?

2 A. Correct.

3 Q. Now, if you could, just briefly take a look at the
4 remaining C designations in that folder, which include 18C,
5 19C, 20C, 21C and 22C and please look up when you are
6 finished.

7 Have you had an opportunity to review each one of the
8 still images contained in the C series?

9 A. I have.

10 Q. So for 18C, 19C, 20C, 21C and 22C, do each one of those
11 still images -- are each one of those images taken from the
12 corresponding admitted videos?

13 A. Yes.

14 Q. And they fairly and accurately represent one portion of
15 those videos that you have viewed; is that correct?

16 A. Correct.

17 Q. Can you now finally look at both 20D and 22D? Have you
18 had an opportunity to read those two exhibits?

19 A. Yes.

20 Q. Like the C series for each one of those exhibits, do 20D
21 and 22D reflect still images taken from their corresponding
22 admitted videos?

23 A. They do.

24 Q. Specifically, 20D is associated with admitted Exhibit 20;
25 is that correct?

1 A. Yes.

2 Q. And Government Exhibit 22D marked for identification is
3 associated with Government Exhibit 22, correct?

4 A. Yes.

5 MR. LEUPOLD: Your Honor, at this point, the
6 government then offers for admission Government exhibits
7 marked for ID, 3C, 5C, 18C, 19C, 20C, 21C, 22C, 20D and 22D.

8 MR. FIEMAN: No objection, Your honor.

9 THE COURT: All right, they may be admitted.

10 (Exhibit Nos. 3C, 5C, 18C, 19C, 20C, 21C, 22C, 20D
11 and 22D admitted.)

12 MR. LEUPOLD: May I have a moment, Your Honor?

13 Your Honor, just one -- the government has concluded with
14 this witness, but one administrative matter. The government
15 will file a motion to seal the necessary exhibits at the
16 conclusion of the trial.

17 MR. FIEMAN: I have no objection to that, Your Honor.

18 THE COURT: Yes, that's fine.

19 MR. LEUPOLD: Thank you. That's all.

20 MR. FIEMAN: No questions for this witness.

21 THE COURT: Thank you, Agent McNeal. You may be
22 excused.

23 MR. HAMPTON: Your Honor, if I may have a moment to
24 confer with co-counsel, I believe we may be resting at this
25 point and reserving anything for possible rebuttal, if I could

1 just consult.

2 (Pause.)

3 MR. HAMPTON: Your Honor, the government rests at
4 this time.

5 MR. FIEMAN: Your Honor, I know we are at the 11:30
6 mark, but I just wanted to note two things and possibly
7 request a little bit of an early break -- I think we are ahead
8 of schedule. One is, this morning we filed a memorandum of
9 law in support of our Rule 29 motion, and I would like both
10 the government and the Court to have an opportunity to read
11 that.

12 THE COURT: You filed that this morning? I didn't
13 see it.

14 MR. FIEMAN: I will bring a hard copy. And then I
15 would also like to talk to Mr. Tippens. We have a issues to
16 clean up, so if we could break at this point, I would
17 appreciate it.

18 THE COURT: Mr. Tippens, I want to talk to you about
19 your rights in this matter. You have a right to testify on
20 your own behalf if you wish to, but you are not required to
21 testify. You have a right to remain silent. Either choice
22 you make, you are giving up a right. You understand that?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: If you testify, you should know that what
25 you say can be used or interpreted against you as well as in

1 your favor. You should also know that if you testify in
2 response to your lawyer's questions, the government has the
3 right to cross-examine you and you are required to answer
4 proper questions put to you by the government on
5 cross-examination.

6 You should also understand that if you choose to remain
7 silent, I will not hold your silence against you in any way.
8 Do you understand that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: I will be asking you before we are
11 through for the day here at some point whether you wish to
12 testify or not, and I will also be asking you whether you have
13 thoroughly discussed that issue of your testimony with your
14 lawyer. So I want to be sure that between now and that time,
15 whenever that comes up again, that you have discussed it
16 thoroughly with your lawyer as to whether you wish to testify
17 or not.

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Okay, all right. You are asking that we
20 break now?

21 MR. FIEMAN: Yes, Your Honor.

22 THE COURT: And reconvene at 1:30?

23 MR. FIEMAN: As you please, Your Honor.

24 THE COURT: Okay.

25 (Luncheon recess.)

1 THE CLERK: All rise, Court is again in session.

2 THE COURT: I read your motion, and if it does not
3 make any difference in your presentation, it is easier to hear
4 it as part of the closing argument, but I don't want to
5 interrupt if you have a plan that that would --

6 MR. FIEMAN: No. In fact, Your Honor, what I was
7 mostly concerned -- I assume you are going to want to hear our
8 expert testimony. We've come this far, and it's certainly
9 going to be elucidating. I was primarily concerned that I
10 need to make the motion to preserve anything for an appellate
11 record. For purposes of a bench trial, I don't think that's
12 necessary, so I think we can just proceed.

13 THE COURT: All right. Now, I hate to tell you, but
14 these hearing aids that I am having trouble with and have to
15 use all this technology are adjusted with my telephone, which
16 is pretty fancy, but I can't adjust them if I don't have my
17 telephone, which I left in chambers.

18 THE CLERK: I will go get it.

19 THE COURT: Okay, I think I am wired in. We'll see.
20 Mr. Hampton, you had something?

21 MR. HAMPTON: Yes, Your Honor. After we came back
22 from the break and were reviewing the defendant's supplemental
23 exhibits, there's information in here that we believe may be
24 classified and, unfortunately, under the applicable statutes,
25 even information that may be obtained publicly, if it's still

1 classified, it is in fact classified. So we -- the government
2 wishes to ask for a few minutes to consult with our
3 supervision about how to handle this procedure. We want to be
4 very careful. We certainly don't want to introduce evidence
5 or allow things to go into the public record that shouldn't be
6 in the public record, especially given criminal penalties
7 surrounding disclosure of classified information.

8 THE COURT: Well, for now, the supplemental trial
9 brief filed this morning should be filed under seal.

10 MR. HAMPTON: The supplemental exhibits, Your Honor.
11 It's not the trial brief; there are supplemental exhibits.

12 THE COURT: I'm sorry, you weren't talking about the
13 supplemental brief?

14 MR. HAMPTON: No, Your Honor, the supplemental
15 exhibits that the defense provided in anticipation of
16 Mr. Young's testimony.

17 THE COURT: These are ones I haven't seen. Okay.
18 What are you asking for?

19 MR. HAMPTON: We need some time for Mr. Leupold and I
20 to consult with our management for the process of how we
21 handle this information.

22 THE COURT: Okay, fine.

23 MR. HAMPTON: Thank you, Your Honor.

24 THE COURT: Let me know when you are ready. Don't
25 take too long.

1 MR. HAMPTON: Thank you, Your Honor.

2 (Brief recess.)

3 THE CLERK: All rise.

4 THE COURT: Please be seated. Okay, what's the deal
5 here?

6 MR. HAMPTON: Your Honor, thank you for the
7 indulgence and the time for us to have a consultation. At
8 this point, what the government would propose doing -- and I
9 want to emphasize that the government will not make a request
10 lightly, recognizing the constitutional implications, but
11 given the nature of the information that we need to discuss,
12 at least on some level, the government would move in limine to
13 exclude this.

14 We would propose at this time clearing the courtroom for a
15 discussion on the record and then, of course, depending on the
16 results of how the government(sic) would rule on that motion,
17 if there were any testimony about materials related to these
18 exhibits or information in these exhibits, that we would also
19 request that any of that testimony occur in a closed courtroom
20 and certainly that the transcript, at a minimum, be sealed.

21 Finally, the government, regardless of what happens, would
22 simply ask that at the end of the day or the end of these
23 matters, that the Court would order, or maybe the defense will
24 agree, to simply give the government its copy of these
25 exhibits to retain that classified information, and we can

1 certainly explain why. I don't want to go into the substance
2 at this point, just to explain to the Court what we are
3 requesting.

4 MR. FIEMAN: Well, we seem to be going down another
5 rabbit hole, Your Honor. I am not going to go into substance,
6 but everything that is there is obviously from the -- it is
7 public, it's widely disseminated. I can pull it up on the
8 internet for you right now. So there's no secrecy at this
9 point in terms of actual secrecy.

10 Any closed proceedings, you know my feeling about that.
11 They are anathema to a fair trial, and I would object to any
12 information that is relevant to the defense being limited or
13 excluded in any way when this is in fact -- millions of people
14 have looked at this stuff. There's nothing actually secret in
15 it.

16 THE COURT: Mr. Hampton, are you asking for a hearing
17 to determine how to handle this or on the merits of it, the
18 subject matter of it?

19 MR. HAMPTON: Your Honor, we are asking first for a
20 closed hearing to address whether or not any of these exhibits
21 or any of the information contained should be admissible at
22 all, as the government would plan to file a motion in limine.

23 And then depending on the results of that, and the Court's
24 ruling on the admissibility of any of this, we would offer
25 further how to proceed.

1 MR. FIEMAN: Can I make one other -- I don't know
2 that the government is going to consider this a helpful
3 suggestion, but I am going to put it on the record. These
4 exhibits go to Count 1 and Count 3 of the indictment, and if
5 we are going to have a situation where what are now public
6 records are going to be limited or withheld from the public in
7 the course of this trial, one solution here -- and I renew my
8 request -- is to dismiss Counts 1 and 3. The possession count
9 does not rely on these records, and the Court knows our
10 position in regard to taking responsibility for that.

11 MR. HAMPTON: Your Honor, I would be happy to respond
12 to that. I don't want to delve into substance.

13 THE COURT: Wait a minute. I think it's appropriate
14 to clear the courtroom for the limited purpose of finding out
15 just exactly what the issue is here and determining how to
16 handle this particular stuff.

17 I don't want to go into the merits of it, but I think I
18 have to respect the government's request to consider this on
19 the record, but not in public, if we are dealing with
20 classified information. The fact that people know about it
21 may not change its classified nature.

22 So I think everyone other than counsel should be excused
23 from the courtroom.

24 MR. FIEMAN: I assume that Mr. Tippens can remain,
25 Your Honor?

1 MR. HAMPTON: Your Honor, the government won't object
2 to Mr. Tippens remaining.

3 THE COURT: All right.

4 (Courtroom cleared.)

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

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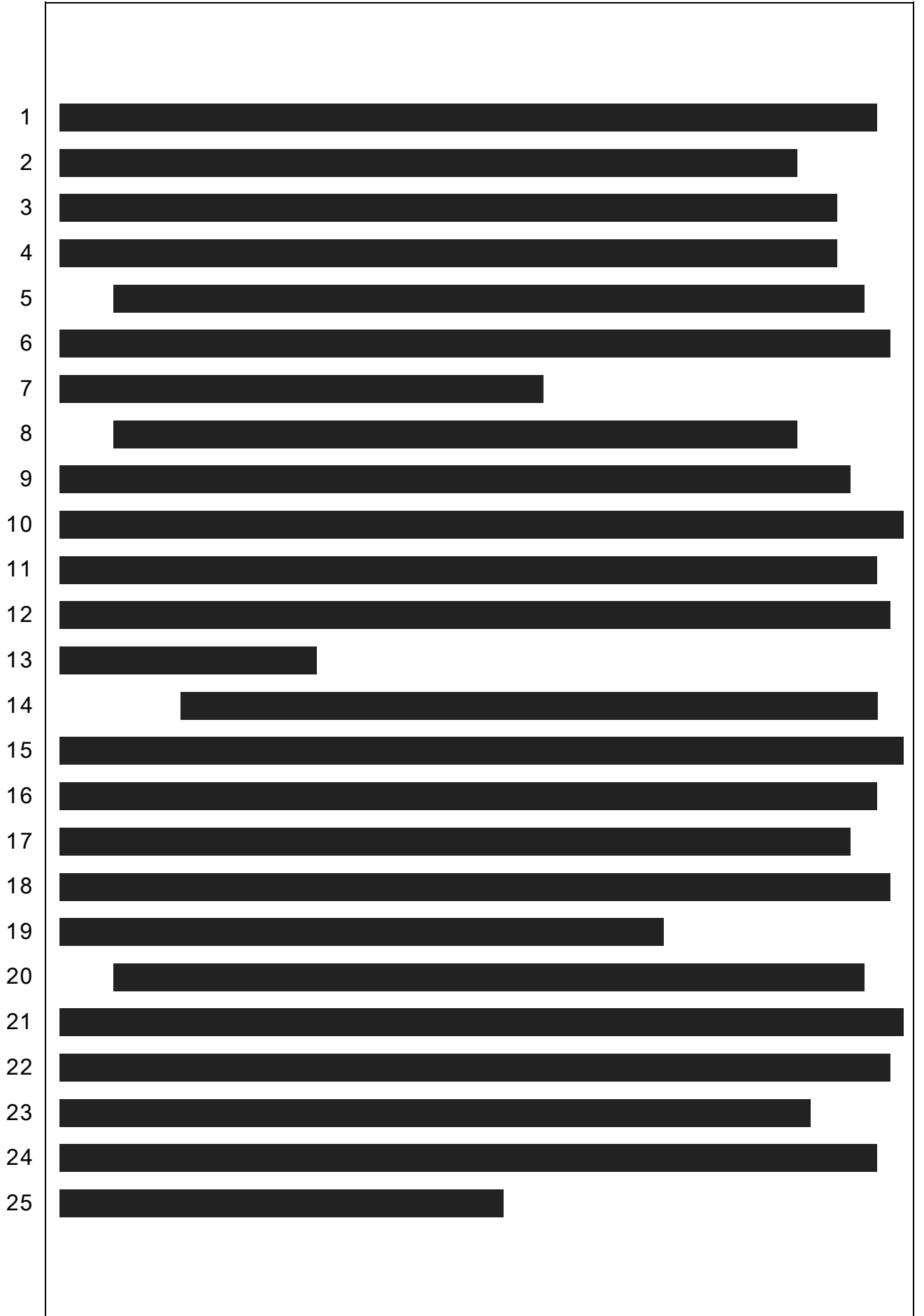
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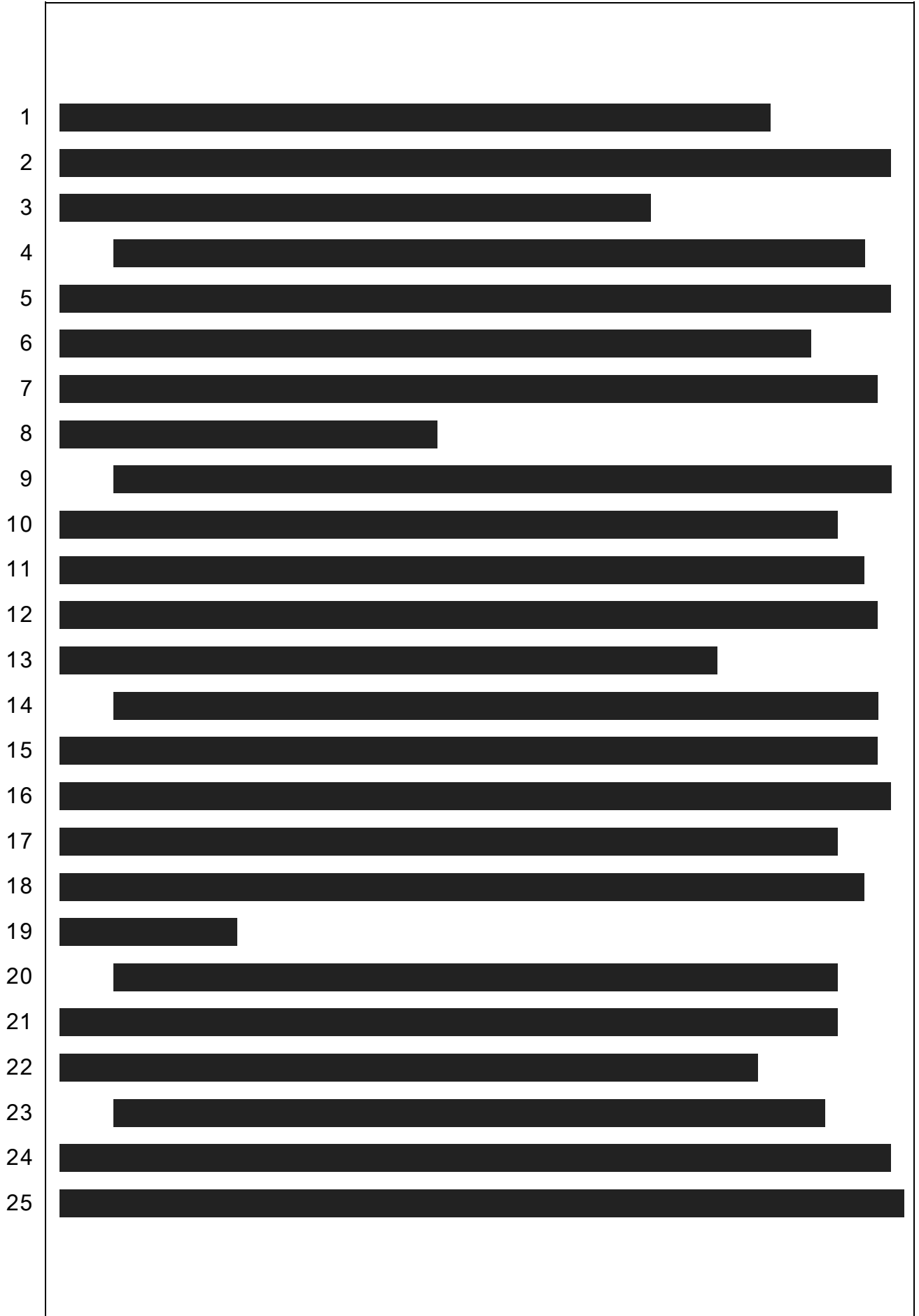
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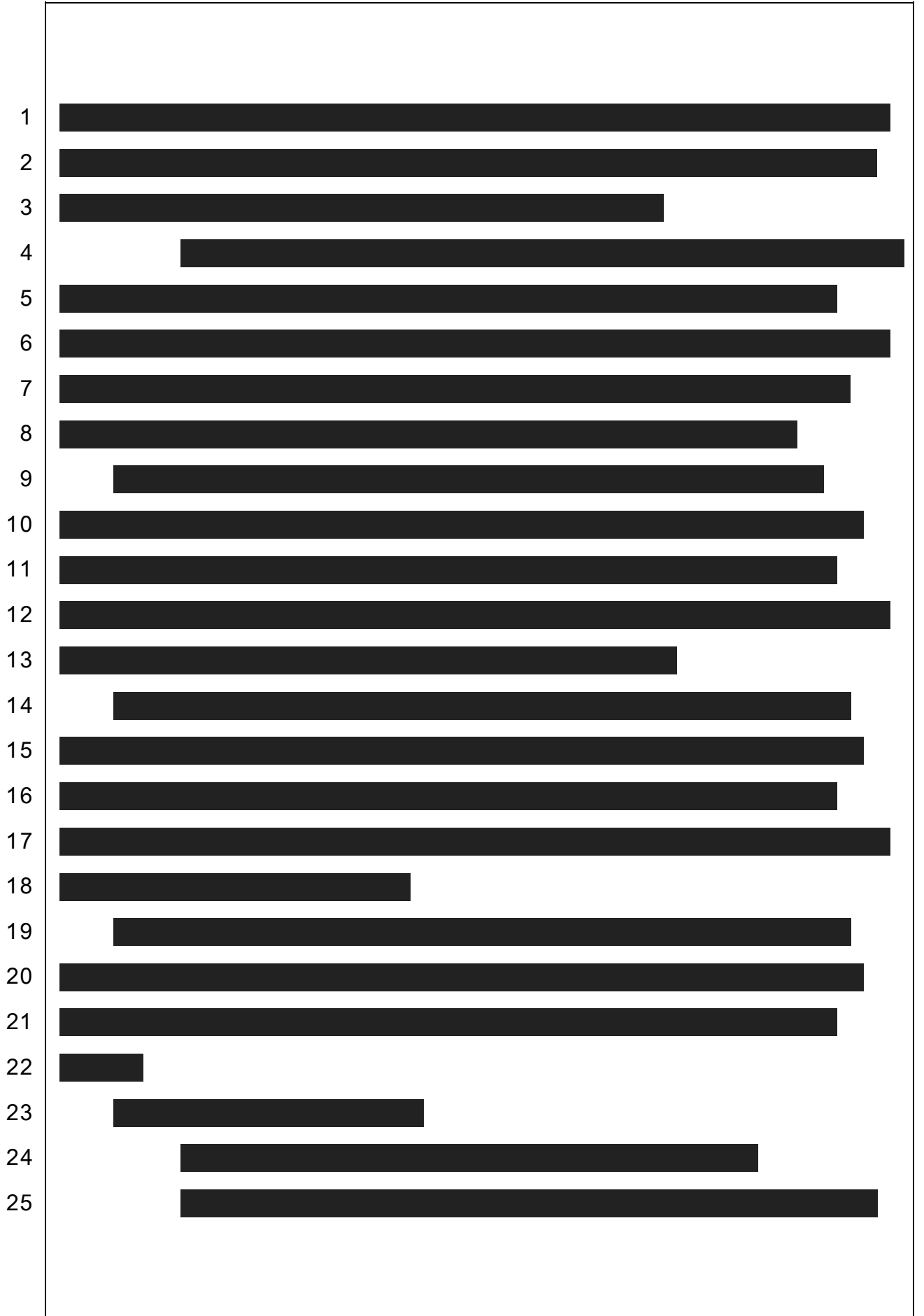
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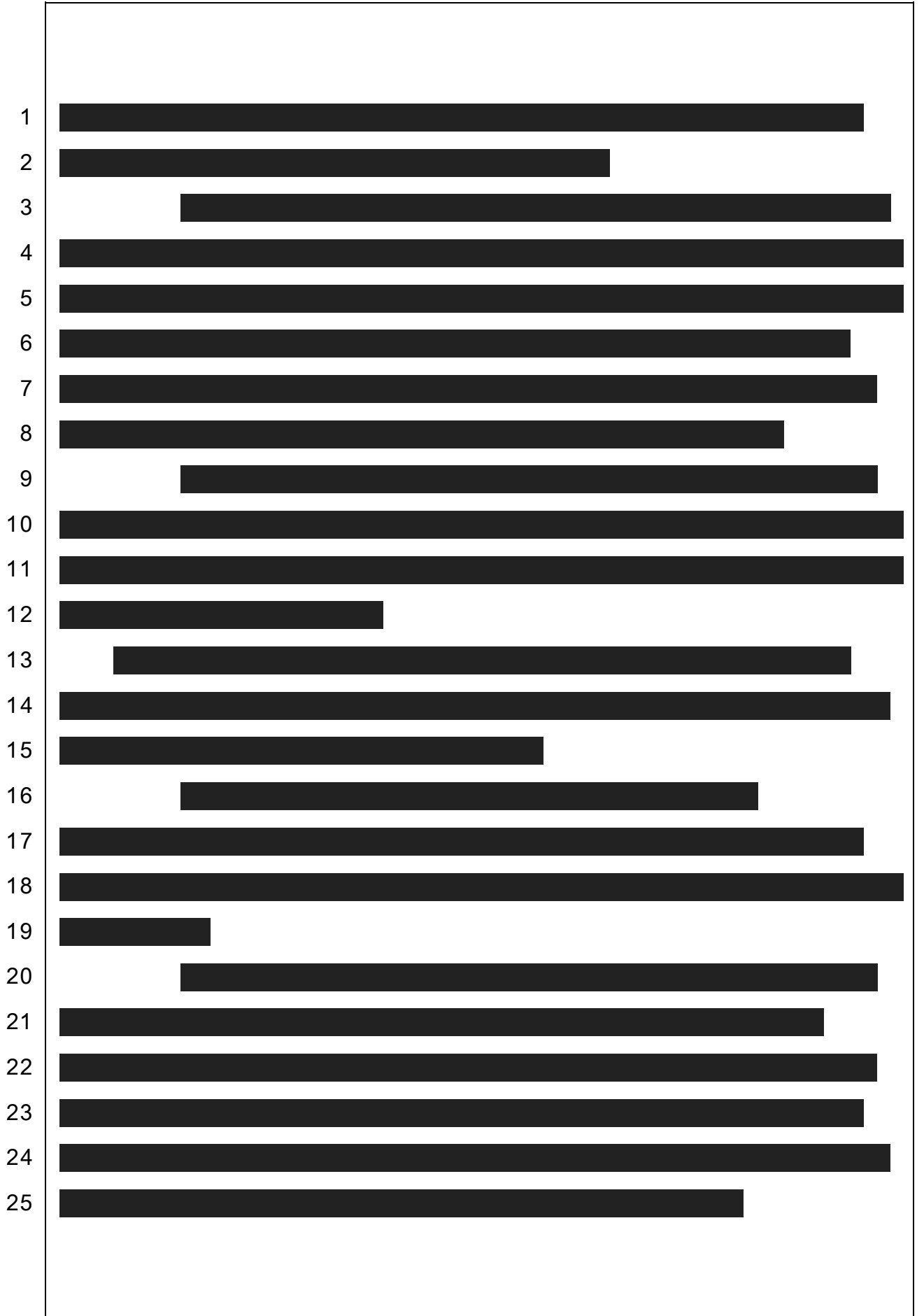












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9 THE COURT: Okay. Let's take a couple minutes to
10 open the courtroom back up.

11 (Brief recess, thereafter courtroom open.)

12 THE CLERK: All rise, Court is again in session.

13 MR. FIEMAN: So, Your Honor, if I understand the
14 posture, we've moved to my request for remedies under CIPA,
15 Section 6, and I would note preliminarily a couple things.

16 We are now beyond even the information that led the Court
17 to exclusion in the Michaud case. We have an extra layer of
18 issues now. Under CIPA, Section 6, there is a presumption of
19 dismissal of the indictment in the interest of justice. I am
20 not requesting dismissal of the superseding indictment. I am
21 requesting dismissal of Counts 1 and 3 that this information
22 goes to.

23 There are, of course, alternative remedies available to
24 the Court. I honestly, at this point, do not think my client
25 is getting a fair trial and not through any fault of the

1 Court. I respect how complicated this has been, but we are
2 now at a posture where, if we are talking about the interests
3 of justice which CIPA, Section 6, specifically requires the
4 Court to consider, there are some very compelling issues here.

5 Mr. Tippens has offered to enter a conditional plea to
6 possession. He's not seeking to evade responsibility or
7 conviction. This entire case has been marked by the
8 government's overreaching, in my view, in various respects.
9 And as an equitable and interest of justice matter, trying to
10 force these mandatory minimum counts is contrary to the
11 interests of justice.

12 It is fundamentally an issue of a fair trial. We have
13 made a record of the materiality of this information. It is
14 focused on Counts 1 and 3. So once again, I am not seeking
15 dismissal of the indictment, but of those two counts.

16 In the alternative, I had proposed originally -- I don't
17 think it's adequate, but I know the Court is looking for
18 options. I had previously suggested in our pretrial briefing
19 that there be a missing evidence inference that should apply
20 across the board that would create a presumption, not just a
21 theoretical possibility, that the NIT and the vulnerability
22 and third-party hacks were in fact responsible for changing or
23 altering data on this computer and responsible for remote
24 storage of child pornography.

25 I believe at a minimum, that is the only way we can be put

1 on equal footing with what the evidence -- if I had access to
2 it -- would otherwise lead us to.

3 Your Honor, I really have to express to the Court that we
4 have really struggled with how to present the case where we
5 are using all of the available information to mount our
6 defense. Any additional information is exclusively under the
7 government's control, and at every juncture the government
8 comes back and says well, that's just a theory, that's just a
9 possibility.

10 There is one way to resolve this: Give us access to the
11 evidence. That's what *Jencks* and all the cases say. That's
12 what CIPA says. There are protective measures. We've offered
13 to get classified -- counsel classified clearance. There is
14 nothing more we can offer. If the Court has another
15 suggestion, I will honor it. But this man is facing five
16 years in prison, and the Court will still have the opportunity
17 to sentence him on the possession count.

18 All we ask is that he have the opportunity for you to do
19 that, without being constrained by these mandatory minimums
20 that they are forcing down our throat without giving us access
21 to any evidence that might be relevant to his defense, let
22 alone evidence of such materiality.

23 Thank you, Your Honor.

24 THE COURT: Mr. Fieman, if you want to address your
25 Rule 29 motion, I would like to cover that at the same time,

1 since we got sidetracked here.

2 MR. FIEMAN: Yes, Your Honor. As I indicated, I was
3 going to make that in the course of my formal opening
4 statement. But let's step back. The Court has read my memo.
5 We had focused on certain knowledge elements and certain data,
6 including the timing stamps that again go to the heart of how
7 these pictures got on the computer, when they got on the
8 computer, who put them on the computer.

9 And with all this evidence of corrupted data, of
10 third-party access, the vulnerabilities, we believe that even
11 if you take the prosecution's case at face value and the
12 concessions it's made -- the limited concessions it's made in
13 terms of the NIT stipulation -- that there's reasonable doubt
14 on those two counts just based on the stipulation.

15 So I guess another way to get to the remedy is through our
16 Rule 29 motion. You know, in the interest of trying to do
17 this the right way, I assume the Court would want to hear
18 evidence about that, to the extent that we can present that.
19 That's available. But everything seems to be convergent at
20 this point.

21 We have more evidence we can't get access to, we have
22 defects in the government's case that cannot be conclusively
23 resolved without some of this evidence, we have a defendant
24 who's ready to accept responsibility that's measured and
25 appropriate. And frankly, I feel like I am swimming upstream,

1 and I ask the Court, you know, again, to consider under CIPA 6
2 the presumptive dismissal of the indictment, which we are not
3 requesting, followed by a dismissal of specific counts, at a
4 minimum, the missing evidence inference, which quite frankly
5 if the Court grants that missing evidence inference, I believe
6 you should grant the Rule 29 motion because that's
7 irrebuttable.

8 If there is a finding based on a missing witness or
9 evidence charge, that the Court is supposed to presume that
10 the NIT and the exploit and the vulnerabilities to the parties
11 were capable of doing all these things, that's reasonable
12 doubt on Counts 1 and 3 right there.

13 So that may be another way to get to the same result. But
14 that result I believe is the one that's required by fairness
15 and the Constitution, unfortunately.

16 MR. HAMPTON: Your Honor, first I will address the
17 notion of the interests of justice. I certainly acknowledge
18 everyone has a different view, but I don't believe that
19 justice is giving a defendant the plea offer that he would
20 find acceptable. The defendant is not obligated to plead
21 guilty, the government is not obligated to extend a plea
22 offer, and I think those considerations are irrelevant to the
23 issues here.

24 They are certainly irrelevant to guilt. And the fact that
25 the parties could not come to an understanding as to a plea

1 that was mutually acceptable, is not a failure of justice. It
2 is parties that are too far apart in their assessment of the
3 risks and benefits of a particular plea deal.

4 I would also note that the defense has, in effect, built
5 or attempted to build a poisoned pill in this case. They
6 waited -- although admittedly late disclosure of
7 information -- they waited until the middle of trial to
8 provide more classified information that the government has an
9 obligation to protect.

10 Would it be easier if I could just say, you know what,
11 let's have at it? I can't do that. And the defendant has
12 simply declared it's relevant. They could have asked for a
13 continuance to further investigate that matter. But no, we
14 went forward. The government had no notice that this was
15 coming, and here we are. If the Court is truly concerned
16 about the relevance of this evidence, I would of course be
17 prepared to provide Special Agent Alfin ex parte and in-camera
18 to address that, although I won't address it more specifically
19 here.

20 The fact is that yes, it is possible for someone to be
21 hacked. That is true, but Mr. Tippens admitted to using
22 peer-to-peer software, to obtaining child pornography. He
23 admitted to using search terms. He admitted to downloading
24 child pornography. He admitted to doing it for years. And
25 everything in the government's case-in-chief, from his

1 confession, from what he was doing on the morning of that
2 search, watching a child being raped on an infinite loop and
3 masturbating to it, is confirmed by the examination of his
4 devices.

5 His devices show someone used eMule, someone put in search
6 terms intending to obtain child pornography, and someone
7 downloaded child pornography. That device had one owner, and
8 it was David Tippens. There was a hard drive. It had a huge
9 volume of child pornography. Tippens acknowledged it had over
10 a terabyte. It was where he stored his child pornography.
11 And he had that for years. The date information shows that he
12 had that child pornography for years.

13 The three files charged in the transportation count,
14 according to the date created which, given the evidence in the
15 record, there's no evidence that that date information was
16 corrupted. The defense is free to present that, but there is
17 no evidence as yet.

18 The forensic expert from the FBI didn't see any evidence
19 of that. All three of those files were on that hard drive,
20 that Western Digital hard drive, before the NIT was ever
21 deployed, because that didn't happen until February 20th, at
22 the earliest -- February 20th of 2015, at the earliest.

23 One of the files charged in the count for transportation
24 had been on Mr. Tippens's hard drive since 2012. That's not
25 all. There was also a file from January of 2012 with

1 Mr. Tippens's name on it, from the military, involving his own
2 benefits.

3 All the evidence points to Mr. Tippens knowingly
4 possessing, transporting and receiving child pornography. And
5 to be sure there is a -- it could be argued that someone could
6 have hacked him, and the defense is free to do that and in its
7 case-in-chief can present whatever evidence of that it deems
8 necessary, and the government will respond as appropriate.

9 But that is what this trial is about. It is about what
10 actually happened, what the evidence actually shows, not
11 theories and not what could happen, and I would urge the Court
12 to deny that motion to dismiss.

13 One final matter with respect to the acquittal motion and
14 the knowledge requirement. The defense cites a case called
15 *Weldon*, and I just want to be very clear about the
16 circumstances of that case. There was a stack of child
17 pornography that was found somewhere, that the government
18 could show not where it came from. There were general
19 admissions from the defendant about having collected child
20 pornography at some time. That's not the case we have here.

21 We have a defendant who watched child pornography. He was
22 doing it on the day of the search. He sought out child
23 pornography. When he searched for the things that he wanted,
24 he clicked on them, he downloaded them and he saved them. And
25 that is the evidence in this case. And that is unequivocally

1 knowledge, unequivocally knowledge to support -- supports
2 knowledge of the content as he was receiving it.

3 Certainly, given that the evidence must be viewed in the
4 light most favorable to the government, and even if the Court
5 is concerned that that is still not quite enough, I would note
6 that this case, Counts 1 and 3, were charged as substantive
7 offenses and attempted offenses. So even if it is conceivable
8 that David Tippens downloaded child pornography from eMule and
9 had no idea what he was getting until he finished the
10 download, the evidence absolutely shows what he wanted and
11 what he hoped for.

12 He wanted child pornography. He wanted to see children
13 being raped, so he searched for it and he downloaded it, and
14 that in and of itself is sufficient to establish attempt.

15 Thank you.

16 MR. FIEMAN: Very briefly, Your Honor.

17 Mr. Hampton just made one of my points very effectively.
18 So much of this is argument related to the date, created dates
19 and this data about data, and he's saying no evidence was
20 corrupted.

21 Well, for reasons related directly to issues in those
22 Wikileaks documents, it cannot be reverse engineered. This all
23 comes down to time stamps and similar information. I refer
24 the Court back to the *Budziak* case of the Ninth Circuit, and a
25 much simpler case without any of this secret evidence that it

1 would be unconscionable to require a defendant to go to trial
2 depending upon data that it's had no opportunity to
3 independently examine or any programs that it has had no
4 opportunity to examine. The *Budziak* case is discussed in our
5 pretrial discovery motions.

6 I also note that their theory about attempt is precluded.
7 During their opening argument, their position throughout has
8 been that those specific files listed in the indictment were
9 actually knowingly received and knowingly transported, but we
10 are just beyond that. This is an interest of justice
11 assessment, Your Honor, and I simply want to point out the law
12 on this in the Ninth Circuit, *Budziak* in particular -- I can
13 pull up my pleadings and find you the -

14 THE COURT: I'm sorry, what case now are you talking
15 about?

16 MR. FIEMAN: It's *United States versus Budziak*,
17 B-U-D-Z-I-A-K. It is referenced in our pretrial motions to
18 exclude and related pleadings. Once I have an opportunity to
19 get on our electronic filing directory, I can direct you to
20 the docket numbers.

21 But compared to *Budziak* -- *Budziak* was a simple case. It
22 had to do with -- it's essentially just a law enforcement
23 version of eMule, peer-to-peer software that they used to
24 identify people who were on the network, very simple compared
25 to this. And again, you know, we can prove what actually

1 happened here, Your Honor, if we simply get access to the
2 evidence.

3 So every time I hear it's a theory or possibility, I do
4 bring it up because I am not trying to circumvent the facts; I
5 have been trying to drill down on it.

6 Thank you, Your Honor.

7 THE COURT: Mr. Hampton, in the motion that is before
8 the Court, the Rule 29 motion, defense makes a lot out of what
9 must be known at the time of certain events --

10 MR. HAMPTON: Yes, Your Honor.

11 THE COURT: -- described. You didn't comment on
12 that. I guess I want to invite you to comment on that
13 question.

14 MR. HAMPTON: Certainly, Your Honor.

15 THE COURT: They added that to their elements.

16 MR. HAMPTON: Yes, Your Honor, and I apologize. I
17 think I probably thought I covered it implicitly, but you are
18 right, I didn't specifically address it.

19 The government certainly agrees that it's correct, there
20 is -- the Supreme Court has made clear that with these
21 statutes, the Scienter element applies to the other elements
22 of the offense. The defendant -- at least as to knowledge
23 about the content. So at the time of receipt, yes, the
24 defendant must know that he is receiving child pornography.

25 But what I would simply note is that the way the defense

1 has articulated that knowledge requirement is that no one can
2 know unless they see. So as I could see their theory, I don't
3 quite understand how one could ever charge that statute, and
4 that just doesn't make sense. It does not make sense that
5 someone who knowingly seeks out child pornography using child
6 pornography associated searches, finds the files that match
7 those searches and then downloads them, can credibly say: Oh,
8 good heavens, I guess that is child pornography.

9 Of course the defendant knew what he was looking for, and
10 of course he knew what he was getting. If you go to Domino's
11 and you order a pizza and you ask for pepperoni and mushrooms,
12 and then you receive a box that says Domino's, you've
13 knowingly received pizza even if you don't check the box
14 first.

15 The same holds with the transportation count. The idea
16 that Mr. Tippens didn't know the nature of the content of his
17 hard drive because he didn't know those specific three
18 files -- first of all, I don't know that that would be
19 entirely credible. It's certainly not credible given the
20 position where all the evidence should be construed in the
21 light most favorable to the government.

22 It was his hard drive. He had it for years. He'd been
23 collecting child pornography for years, as he told. He even
24 said he put it on the hard drive. He collected it because you
25 don't know what's going to happen, you may not be able to get

1 it in the future.

2 For him to hide behind the quantity of images and say
3 well, there's a lot there, who knows, that can't be how the
4 law works. That can't be what the law countenances. It's a
5 clever argument, but it doesn't work.

6 One final matter, opening is not evidence. The evidence
7 that the government has put on supports that the defendant
8 knowingly committed all three of the charged crimes, and it
9 supports it overwhelmingly, and that would be the government's
10 argument at close.

11 But the case was charged both as an attempt and as the
12 substantive offense. And the evidence also -- if there's any
13 doubt in the Court's mind about this knowledge requirement, it
14 also absolutely supports an attempt theory, because what
15 better indication of what was in Mr. Tippens's mind, what he
16 wanted, than what he was doing on a Thursday morning when he
17 had a little bit of extra time, and what better indication of
18 what he wanted was what he told the police what he wanted.
19 His devices confirm exactly that, and the Court should deny
20 the motion.

21 THE COURT: All right. Thank you. We'll take a
22 break. This will take a little time for me to sort this out,
23 so stand by. Take a break first, and then I will deal with
24 what's available.

25 (Afternoon recess.)

1 THE CLERK: All rise, Court is again in session.

2 (In open court at 4:40 p.m.)

3 THE COURT: Please be seated. Well, these are not
4 easy questions that you've given me. First, let me address
5 the motion to dismiss Counts 1 and 3 based on lack of
6 discovery or withheld evidence in accord with CIPA.

7 The *Budziak* case in the Ninth Circuit, 697 F.3d, 3705,
8 teaches us that when a defendant seeks discovery from the
9 government and has demonstrated materiality, the district
10 court should not merely defer to government assertions that
11 discovery would be fruitless. Criminal defendants should not
12 have to rely on the government's word that further discovery
13 is unnecessary.

14 That's an important concept in considering this matter,
15 but another very important part of that is the materiality
16 requirement, and the defense has to show that the withheld
17 information is material to the defense; that is, that it
18 contained or would have led to information that might have
19 altered the verdict or would have changed the outcome of the
20 trial.

21 The defendant -- let me start with the stipulation.
22 There's a stipulation in court regarding the NIT and related
23 matters. The important part of that is paragraph 6 that it's
24 possible that an exploit could make temporary or permanent
25 changes to the security setting of a user's computer that

1 could allow someone to subsequently run commands on that
2 computer without the user's knowledge. So that's a fact in
3 the case.

4 The defendant here wants to show in more detail, as part
5 of Mr. Tippens's defense, wants to expand on that stipulation.
6 If I understand what they hope to do, it is to show that there
7 is an increased likelihood of a hack, if I can put it that
8 way. That it's more than an idea, that it really can happen,
9 in other words.

10 Plaintiff wants to show that there was no hack here, as I
11 understand it, based on an examination of the equipment
12 involved. And the defendant wants to show, by using
13 information that is withheld, wants to show that if there was
14 a hack, it wouldn't show up because of information that they
15 have.

16 In all of that, the idea is something that is material to
17 the Court, which is how likely is it that this possibility
18 would in fact occur, and that's something that I have thought
19 about, and not in connection just with this case, but with the
20 other cases, because it seems to me that when you say there's
21 a possibility of a hack, the next step is how big is the
22 possibility? Is it a mathematical one in a million or is it
23 much more likely than that?

24 Whether we would ever get a definitive answer on that
25 question regardless of what information is shown, I don't

1 know. But it is a question that is material to the
2 defendant's case and, of course, if they were allowed to go
3 down that road, which I have precluded them from doing, I
4 don't know exactly where that would lead. And I don't think
5 anyone can tell me because the information is not available
6 because of the CIPA rules and the classified information
7 rules.

8 The Classified Information Procedures Act tells me what
9 the Court should do when the Court finds itself in this
10 situation where classified information is being withheld, and
11 the options are to dismiss the entire indictment or specified
12 counts of it, or other things that seem to me to be not
13 relevant.

14 It seems to me, under the circumstances, you have put me
15 in a situation where I have no choice but to dismiss Counts 1
16 and 3 based on a CIPA violation.

17 Now, that is the first part of this.

18 We also have pending the motion to dismiss under Rule 29,
19 and I want to make some comments about that. It involves the
20 same counts. Both sides have submitted to the Court, at my
21 request, statements regarding the elements of the offenses
22 charged. I think you both missed the boat in a substantial
23 way that's important, and that is that the way the government
24 charged this, there are five specific items charged in Count 1
25 and three specific items charged in Count 3. So these counts

1 are not -- don't raise the question of whether there's some
2 general child pornography received or transported, but these
3 specific items alleged, that's the way the government chose to
4 charge the case.

5 Now, I am not going to get into detail on these things,
6 but let me tell you this. I have dealt with reasonable doubt
7 and circumstantial evidence for a long time, but as judges
8 should always do before you apply some rule of law, is to look
9 at those rules, and I looked at the pattern jury instructions
10 for the Ninth Circuit on reasonable doubt and circumstantial
11 evidence just before I came back into court.

12 There is a lot of direct evidence on these two counts.
13 Both of them then get to the point where, in order to complete
14 the analysis, you have to apply circumstantial evidence, and
15 there's ample circumstantial evidence to justify a conviction
16 if the Court chooses to interpret and apply the circumstantial
17 evidence in that way.

18 But there is also room for the Court to determine if
19 there's reasonable doubt on some of the elements of the
20 offense. I am not making a decision either way at this point,
21 but I want to point out that these charges are not a slam --
22 Counts 1 and 3 are not a slam-dunk, as the government thinks,
23 partly because of the way they have chosen to charge the case
24 and partly because when you get to circumstantial evidence,
25 you've got to determine whether it became evidence beyond a

1 reasonable doubt in the mind of the trier of fact or whether
2 it didn't. That's not an easy thing for the Court to do, and
3 I have been dealing -- thinking about that with these issues
4 in mind and have not come to a conclusion on that.

5 So I am not going to rule definitively on that. If I had
6 to or have to in the future, I will do it. But I have decided
7 that I would not try to rule definitively on the basis of the
8 Rule 29 challenge for those counts.

9 I was tempted, I guess, to also look at this as an ends of
10 justice analysis, and I have chosen not to do that as not
11 necessary, although it makes for good argument on both sides.

12 So I am making this conclusion on a legal basis and not on
13 an equitable basis.

14 Okay. We have -- wait a minute. It's almost 5:00. I
15 thought it was almost 4:00. Sorry, I lost track of time. In
16 view of the hour, I guess what we'll do is come back tomorrow
17 at 9:30 and finish things.

18 MR. HAMPTON: Your Honor, just two very brief
19 matters, the first of which relates to the classified binders,
20 or the binders that contain classified information. I was
21 wondering if we could have the Court's copy and also the
22 defense copy. We have a courier that can take them back to
23 lock them up at FBI.

24 THE COURT: You can have mine.

25 MR. FIEMAN: They can have mine.

1 Your Honor, just to update the Court, with the dismissal
2 of Counts 1 and 3, I anticipate -- I will consult -- but I
3 anticipate we will be asking essentially for the Court on the
4 record to -- and I will confer with Mr. Tippens -- to convict
5 on the possession count. Our whole point here has been to
6 preserve the pretrial issues, but I will update you in the
7 morning.

8 THE COURT: We'll deal with that tomorrow.

9 MR. FIEMAN: Thank you, Judge. I suspect tomorrow
10 we'll be brief.

11 MR. HAMPTON: Your Honor, my second question -- it is
12 a clarification. I should take it then that the Court is also
13 denying the government's request to present evidence on the
14 materiality issues ex parte and in-camera?

15 THE COURT: Yes.

16 MR. HAMPTON: Thank you, Your Honor, just to clarify.

17 (The Court recessed to Wednesday, March 15, 2017, at the
18 hour of 9:30 a.m.)

19 * * * * *
20 C E R T I F I C A T E

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

22 /S/ Teri Hendrix
23 Teri Hendrix, Court Reporter

March 20, 2017
 Date

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