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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA . 4:15-CR-00467
VERSUS . HOUSTON, TEXAS
LOUIS CLIFFORD SMITH . SEPTEMBER 14, 2016
. 10:00 A.M.

TRANSCRIPT OF SUPPRESSION HEARING
BEFORE THE HONORABLE MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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9 Proceedings recorded by mechanical stenography. Transcript
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2 **PROCEEDINGS**

3 THE COURT: This morning we have a hearing in United
4 States versus Louis Clifford Smith, Criminal Number H-15-467.

5 MS. LEO: Good morning, Your Honor. Kimberly Leo on
6 behalf of the United States.

7 THE COURT: Good morning.

8 MR. WOMACK: Good morning, Your Honor. Guy Womack on
9 behalf of Mr. Smith.

10 THE COURT: I guess you go first, right?

11 MR. WOMACK: Your Honor, if I could, if I can make one
12 clerical amendment to my motion.

13 On page three, the second to last paragraph, I
14 put down that the motion that was signed by Judge Froeschner
15 was on February 27th. It was July 27th. I didn't catch it
16 until last night.

17 THE COURT: Okay. July 27th.

18 MR. WOMACK: It was actually July 27, 2015.

19 THE COURT: The search warrant, you mean?

20 MR. WOMACK: Yes, Your Honor.

21 THE COURT: Not the motion. That's what you said.
22 But, you know, you are like me, you kind of misspeak sometimes.

23 MR. WOMACK: All right. Thank you.

24 THE COURT: Thank you.

25 MS. LEO: Your Honor, I guess just for clarification,
I spoke with defense counsel earlier. And in regards to this

10:12 1 hearing, at this point we don't have any witnesses to present
2 to the Court. We believe that the facts are really not in
3 dispute. It is just more of a legal argument.

4 THE COURT: All right. Okay.

10:12 5 MS. LEO: Unless the Court wished to hear from the
6 affiants in the Eastern District of Virginia or something of
7 that sort.

8 THE COURT: No. That's fine.

9 MR. WOMACK: We agree, Your Honor. The facts are
10 basically agreed upon.

11 THE COURT: So why don't you go ahead, if that's okay
12 with you?

13 MR. WOMACK: Yes, ma'am.

14 THE COURT: All right.

10:13 15 MR. WOMACK: The sole issue of the case is whether the
16 U.S. magistrate judge in the Eastern District of Virginia had
17 the authority to issue a search warrant of computers that were
18 being searched outside the Eastern District of Virginia. And
19 we have cited case law, and I think the government agrees, if
20 the search occurred outside the Eastern District of Virginia,
21 it was an unlawful search. I understand the government's
22 position is the search occurred inside the Eastern District of
23 Virginia. Let me explain how that is wrong.

24 THE COURT: All right.

10:13 25 MR. WOMACK: A man was arrested in Florida, and he

10:13 1 told them about this server that had website A on it and it
2 could be found in North Carolina. Agents apparently got a
3 warrant. They went to North Carolina. They found that server
4 and they seized it. It is the one sending child pornography
10:14 5 through the dark web. But they took that computer, that server
6 to the Eastern District of Virginia, for whatever reason. And
7 once they got to the Eastern District of Virginia, they set up
8 shop and for a couple weeks, 20 February until, I think it
9 was, 4 of March of that year, they continued sending out child
10:14 10 pornography, just like the server had been used criminally.
11 But what they did -- and it was novel. The experts or the FBI
12 and whatever other agencies were helping them figured out a way
13 they could send a ghost signal attached to the child
14 pornography, and it would go to these computers that were
10:14 15 operating in anonymity in the dark web. There was no way
16 sitting in Virginia the FBI could tell whose computers were
17 seeking child pornography. They couldn't do it from -- in
18 Virginia. So they had to send -- using what they call a
19 network investigative technique, what I'm going to call a novel
10:15 20 illegal tactic, they sent this ghost signal with child
21 pornography to computers all over the -- I guess all over the
22 world. And for our case, one of those sets of images with the
23 ghost signal came to Missouri City, Texas, in the Southern
24 District of Texas. And that ghost signal caused Mr. Smith's
10:15 25 computer to send back his IP address, Internet protocol

10:15 1 address. It is like a unique address for the computer. And so
2 the search of Mr. Smith's computer occurred in Missouri City
3 where that signal went into his computer and ordered him to
4 send back -- his computer to send back to Virginia his IP
10:16 5 address.

6 Once they got the IP address, it was no longer
7 anonymous. As you noticed, if you had a chance to read both
8 attachments, both the Virginia warrant and subsequent warrant,
9 Virginia knew they were sending signals and searching computers
10 outside the Eastern District. And they even said in the order
11 that when we get information on computers outside the district,
12 we will share that with the FBI here in these other districts.
13 And that's what they did. They got the IP address. After
14 searching a computer in Missouri City and identifying Louis
10:16 15 Smith, they took that information and they shared it with the
16 FBI in Houston. And they went down and they got a warrant
17 using this information that was unlawfully obtained by the
18 Eastern District of Virginia.

19 So really I think the government and I would
10:16 20 agree that really the issue in the case is: Did the search
21 occur in Virginia? Or as I say, the search occurred in the
22 Southern District of Texas. And the authority was by a
23 magistrate judge in the Eastern District of Virginia. And
24 clearly, if we are right and the search occurred in the
10:17 25 Southern District, it is not lawful. There are no exceptions

1 of Rule 41 that apply here. It is either the search occurred
2 here and it was unlawful, or the government is right and it
3 actually occurred in Virginia somehow and it's okay. And
4 clearly, the search occurred when that novel illegal tactic hit
5 a computer in Texas and had that computer send back its
6 identity.

7 THE COURT: And the ghost signal was the novel illegal
8 act? Is that what you are saying?

9 MR. WOMACK: Yes, Your Honor. It is illegal. I mean
10 it is novel. It is a brilliant idea. You know, these people
11 know what they are doing. It was a brilliant plan. Because of
12 this dark web thing -- I don't know the history of it, but
13 apparently the Navy invented it so that they could have secure
14 communications. And somehow everybody -- if you know how to do
15 it, you can access that system and you can operate anonymously
16 on the Internet. And so the government knew that when they had
17 that server, they could not track, they could not identify
18 these activated computers. And they said, How can we do it?
19 The only way they could do it -- and it was brilliant. They
20 said, We are going to send a signal and we are going to
21 actually send back child pornography. The government normally
22 wouldn't do that kind of thing. But here, they said, As
23 immoral as it may seem, we are going to send child pornography
24 to these computers, but we're going to attach this ghost signal
25 to it and that thing will give instructions to those activated

10:18 1 computers; an activated computer being in somebody's house. We
2 are going to give it a direction that it will send back this IP
3 address. And once we have that, there is a search occurring in
4 that house sending back this IP address. And they will ask the
10:19 5 FBI to identify these computers and go arrest them.

6 So, yes, Your Honor, we are saying that that
7 tactic of sending out the ghost signal and actually receiving
8 information from the Southern District of Texas, that was the
9 search that we are complaining of.

10:19 10 THE COURT: Okay.

11 MR. WOMACK: Thank you.

12 MS. LEO: Your Honor, it's the government's position
13 that the search occurred in the Eastern District of Virginia.
14 We believe that the magistrate in the Eastern District of
10:19 15 Virginia was proper when she went ahead and signed off on the
16 search warrant authorizing that network investigative
17 technique.

18 We believe that under Rule 41, three different
19 sections would allow for that. Under Section 41(b)(1), it
10:19 20 discusses "property located within the district." Here, the
21 server was located within the Eastern District of Virginia, and
22 so we believe that the magistrate did have the proper
23 authority.

24 Furthermore, it was up to the defendant or other
10:19 25 users to actually go into the Eastern District of Virginia in

10:20 1 order for the NIT to actually attach. It wasn't that the -- it
2 wasn't that the magistrate authorized a search of a computer
3 located in the Southern District of Texas just because; it was
4 because of the fact that the defendant reached into the Eastern
10:20 5 District of Virginia to that server, particularly which, again,
6 is located within the Eastern District of Virginia, which the
7 magistrate had the proper authority to issue the warrant for.

8 Further, under Subsection (b) (2) dealing with the
9 property located outside the district, if it is first started
10:20 10 within the district, we believe that the magistrate had the
11 authority under that subsection, as well.

12 Again, it is not that the -- the only way that
13 the NITs became deployed were in situations where the defendant
14 or other users affirmatively took steps to access the server,
10:20 15 and the server was located in the Eastern District of Virginia.

16 The third section would be 41(b) (4) which deals
17 with tracking devices. Again, the investigators installed the
18 NIT within the Eastern District of Virginia. The magistrate
19 authorized the NIT for the Eastern District of Virginia. And
10:21 20 just because it moves outside the state like a tracking device,
21 we believe that it was proper and that the magistrate had the
22 authority to go ahead and to issue that.

23 Your Honor, in the event that the Court did not
24 find that the magistrate had the authority under Rule 41(b), we
10:21 25 do believe that the NIT was reasonable under the Fourth

10 : 21 1 Amendment and should not be suppressed.

2 There are certain exceptions to the requirement
3 of the search warrant, one of them being exigent circumstances.
4 And the Court can look at the totality of the circumstances to
10 : 21 5 see, the circumstances in a particular case. Particularly, if
6 there is going to be destruction of evidence, if it is an
7 urgent matter or if the possessors of the contraband are aware
8 that the police are on to them and are investigating them. So
9 those are different exigent circumstances.

10 : 22 10 Here what we have is this website which is
11 hosting child pornography where children are being sexually
12 abused, and it is continuous abuse. And so there was an
13 urgency in order for investigators to go ahead and to stop this
14 abuse and to be able to rescue the victims.

10 : 22 15 In our Attachment B, I believe, that we attached
16 to our response, it indicates that during the timeframe that
17 this website was being used, there were 26 children who were
18 ultimately recovered who had been abused. And there were also
19 35 individuals who were considered hands-on abusers and 17
10 : 22 20 individuals who were actual producers. So we believe there
21 were definitely exigent circumstances that would allow for a
22 warrant to search in this case, if the Court were to find that
23 the magistrate in the Eastern District of Virginia did not have
24 the authority to issue that NIT.

10 : 22 25 Furthermore, the information that was collected

1 was definitely fleeting. As defense counsel pointed out, which
2 is contained within both our motion and response, this child
3 pornography website was operating on the dark web. And because
4 of that, all the IP addresses, law enforcement were not able to
5 detect who was accessing this site because of the anonymity of
6 the IP addresses on the dark web. So because of the use of the
7 TOR and the dark web, the evidence was fleeting, the IP address
8 was fleeting. So we believe that that is also something that
9 the Court can take into account as far as it being an exception
10 to the search warrant requirement.

11 Furthermore, this search was minimally invasive.
12 The information that the search received was basically, and
13 most importantly, the IP addresses of different computers who
14 were going into the Eastern District of Virginia to access this
15 site. They had to access this site with a unique user name and
16 password, and it came back to these IP addresses.

17 Your Honor, the government's position is there is
18 no expectation of privacy in an IP address. We believe that
19 the IP addresses go through an Internet service provider and
20 because they go through this third party, there is no
21 expectation of privacy. Because when an individual accesses a
22 website, the particular site that's accessed, there is no
23 expectation of privacy because they had to go through the
24 Internet service provider to be able to connect to that
25 particular website. So we don't believe that that is protected

10:24 1 in any event. But, Your Honor, looking at those circumstances,
2 we believe that that would be the exception to obtaining the
3 search warrant.

4 Furthermore, Your Honor, even if the NIT warrants
10:24 5 should have been issued and it wasn't done properly within the
6 Eastern District of Virginia, we believe that the good faith
7 exception would apply. Looking at the underlying search
8 warrant on the NITs, it was done. There were no knowingly or
9 recklessly false statements in the affidavit. It was signed by
10:25 10 a detached neutral magistrate. The affidavit had probable
11 cause, and the description of the place to be searched and the
12 things seized were sufficient.

13 So, Your Honor, the agents, after obtaining that
14 search warrant, acted in good faith when they went ahead and
10:25 15 deployed the NIT, even if that meant that the defendant when
16 accessing the NIT in the Eastern District of Virginia had the
17 NIT deployed onto his computer to get that IP address, which,
18 again, the government believes has no expectation of privacy.

19 Thank you.

10:25 20 THE COURT: Thank you.

21 MR. WOMACK: Your Honor, briefly, if I may respond?

22 THE COURT: Sure.

23 MR. WOMACK: First of all, your Honor, Federal Rule of
24 Criminal Procedure 41(b), I believe it was, does not offer any
10:25 25 exception of bias in this case. The server, and only the

1 server, that contained website A was located in the Eastern
2 District of Virginia. Nothing else. Just that server. And as
3 the government could see, looking at that server, you could
4 have never figured out the IP addresses of the activated
5 computers in other districts. So the search of that computer
6 in Virginia was done. And that's great. But it gave them
7 nothing that would lead to Missouri City, Texas.

8 Exception 41(b) (2) deals with the property -- and
9 here we are talking about something like putting a GPS on a
10 car. That's where the property starts out in that district,
11 here in the Eastern District of Virginia, and as the car drives
12 away, you can continue to track it as it is driving across the
13 country, but the vehicle had to be in the Eastern District of
14 Virginia. Mr. Smith's computer has never been in the Eastern
15 District of Virginia, so they could not attach anything to his
16 computer lawfully unless it was done by a judge here. They
17 couldn't do it in the Eastern District of Virginia, but that is
18 what they did. So that exception doesn't apply.

19 There is another exception they cited, something
20 about, again, using a tracking device. Well, again, the
21 tracking device exception only applies if you attach it to the
22 vehicle while it is in your district. And the vehicle here is
23 a computer. And the vehicle that matters where the search was
24 done was always in the Southern District of Texas. So, again,
25 that Eastern District judge in Virginia had no authority to

1 authorize something to be tracking a computer in Texas.

2 They talk about exigent circumstances. Well,
3 there were none here in the Southern District of Texas. They
4 would have to concede that the interaction between that server
5 in Virginia and Mr. Smith's computer in Texas was solely
6 electronic images that were going from Virginia to Texas.

7 If they were worried about exigent circumstances,
8 they could have turned the server off. Done. It wouldn't send
9 anything else out forever and ever if the server was turned
10 off. They didn't do that. They chose to continue sending out
11 pornography because they were trying to get -- they were trying
12 to search computers in other districts around the world, and
13 they did a search here in the Southern District of Texas. It
14 occurred here.

15 As far as an expectation of privacy, well, I
16 guess there is an expectation of privacy in one's computer.
17 And if you go to the extreme, if you will, of going to this
18 dark web thing and navigating through this anonymous region of
19 the Internet, you have an expectation that nobody will know who
20 you are and the FBI would concede we don't know who you are
21 unless we use this novel tactic.

22 And then the last thing is that if this dark web
23 truly is such a high curve that it cannot legally be breached,
24 all they have to do is go to Congress and ask for an amendment
25 of Article 41 adding in this new thing because now we know

10:29 1 there is something called a dark web, we need a better way to
2 combat it, so let's let judges authorize searches around the
3 country or around the world. In fact, as I reference in my
4 brief, the government hasn't done that. They haven't gotten
10:29 5 approval. I don't think it has been done yet, and certainly it
6 had not been amended when this case came up. So at the time
7 they did the search in Missouri City, Texas, or whenever it
8 was, and ultimately going to the computer in July of 2015, at
9 the time the government did the illegal search of Mr. Smith's
10:30 10 computer, the rules were as they are right now. There was no
11 exception that allowed a judge in the Eastern District of
12 Virginia to search a computer in the Southern District of
13 Texas. And, clearly, they have to admit the only search
14 occurred -- the only meaningful search occurred when that ghost
10:30 15 signal, wrapped around child pornography, was transmitted down
16 to Texas. And that's my argument. Thank you.

17 THE COURT: Thank you. Anything else?

18 MS. LEO: If I may, Your Honor, just briefly in
19 regards to that?

10:30 20 THE COURT: Sure.

21 MS. LEO: Your Honor, again, the server is in the
22 Eastern District of Virginia. The defendant had to get to the
23 Eastern District of Virginia logging into that server or that
24 particular website which was in the Eastern District of
10:30 25 Virginia. He had to use a specific login name and password in

10:30 1 order to access it. So as far as everything taking place, that
2 all took place because the defendant himself went to the
3 Eastern District of Virginia. Physically he didn't but by use
4 of his computer he did. So we believe that, again, under
10:31 5 Rule 41 that that would apply and that the magistrate was
6 proper in authorizing the NIT.

7 Your Honor, also, in regards to the computer
8 being searched, the computer, Mr. Smith's computer was not
9 searched until the search warrant was authorized by Judge
10:31 10 Froeschner, and that occurred in July of 2015 after the
11 information about the IP address came back to law enforcement
12 authorities here in the Southern District of Texas. That's
13 when his computer was searched based off of that search
14 warrant.

10:31 15 This underlying NIT, all that it did was to get
16 the IP address of the defendant. It did not search the
17 defendant's computer to find out what was on the computer and
18 what he had been looking at. It only got the IP address. And
19 that was then used by law enforcement to figure out where he
10:31 20 was living and then ultimately get a subsequent search warrant
21 for. So I know Mr. Womack brought up that the government
22 searched his computer, but it was just the IP address which was
23 found which was then given to law enforcement to be able to
24 then obtain a subsequent search warrant for the defendant's
10:32 25 computers.

10:32 1 Again, Your Honor, we believe that the exigent
2 circumstances -- first off, we believe that the magistrate was
3 proper in authorizing that NIT. And, again, if the Court were
4 to find that it wasn't proper, we believe that there were
10:32 5 exceptions to the search warrant requirement, the exigent
6 circumstances as well as the fact that there is no expectation
7 of privacy in the defendant's IP address which was obtained.

8 Thank you.

9 THE COURT: I want to be sure that I understand this.
10 The server is in Virginia. If it sends out all over the
11 Internet, all over the world these pornographic images of
12 children, along with this ghost thing, this ghost --

13 MR. WOMACK: Ghost signal.

14 THE COURT: Ghost signal, along with the ghost signal.
15 Is that right?

16 MS. LEO: Your Honor, what had happened were
17 individuals were accessing the website. When they were
18 accessing the website, the website had this program installed
19 in it, which would then be sent back to the defendant's
10:33 20 computer. At that point, it would obtain the IP address and I
21 believe it would obtain a few other identifiers about the
22 computer, not the content of the computer but as far as the
23 operating system and the IP address.

24 THE COURT: Okay. So the computer is in Florida.
10:33 25 They move it to Eastern Virginia and they are sitting there

10:33 1 with all of that that they have got. And the defendant logs
2 onto that website that is coming out of the Virginia computer,
3 and he asked for something. And they send it to him but there
4 is this ghost signal attached to it. And when the ghost signal
10:34 5 gets to the defendant's computer, and he downloads or does
6 whatever he does with whatever is there, the ghost signal kind
7 of picks up the information and it gets transferred back to
8 Eastern District of Virginia?

9 MS. LEO: Yes, Your Honor. It picks up the IP address
10 and the operating system.

11 THE COURT: Okay. All right.

12 MR. WOMACK: Your Honor, also, our point is that is
13 the most important search, that is the initial search, the
14 unlawful search in this case. As both briefs say, because of
10:34 15 this dark web thing, as our technology was at the time and our
16 theory of how to do it, knowing how to identify the people that
17 were requesting child pornography from that server. And they
18 use a password. Because it is the dark web, these passwords
19 apparently didn't go back to anything. You couldn't trace that
10:34 20 back. The government was against a hurdle they couldn't get
21 over because they couldn't identify what was asking for child
22 pornography. They had a thing full of child pornography they
23 were sending out, but they couldn't identify who it was going
24 to. And that is when they used this novel and illegal tactic.
10:35 25 They sent out this child pornography with this ghost signal

10:35 1 wrapped around it. And the initial search we are complaining
2 of that started the ball rolling occurred when that pornography
3 with a ghost signal got into Missouri City, Texas in
4 Mr. Smith's computer, and it directed his computer to give up
10:35 5 his identity and this other information. And that was the
6 initial search.

7 Once the government had that, they knew there was
8 child pornography on it because they sent it to him. They knew
9 there was child pornography there, but once they found out his
10:35 10 address, after doing that search -- What is your name,
11 computer? Send me your name and address. When they did that
12 search in Missouri City, that is what allowed them to tell
13 Houston, hey, you have got a child pornographer -- a number of
14 them, as it turns out -- and here is where they all live. But
10:36 15 that initial search was done for him in Missouri City.

16 MS. LEO: Your Honor, just for the record, the FBI
17 that was administering the server at the time of the two-week
18 period from, I believe it was, February 20th through March 4th
19 was not sending out child pornography. What it was doing, it
10:36 20 was running this website in order to have that, as the Court
21 said, the ghosting or basically that network investigative
22 technique sent to those individuals only who logged on during
23 that time period and to that server, and whatever they did as
24 far as accessing different files, meaning whatever the users --
10:36 25 or, in this case, the defendant -- did as far as accessing

10:36 1 certain files and looking at child pornography. The FBI was
2 not sending out child pornography. It just allowed the website
3 to continue running so that way, individuals such as the
4 defendant could go and access it and at that time send to his
10:36 5 computer this network investigative technique in order to gain
6 the IP address so that they could identify who this individual
7 was.

8 THE COURT: All right. I will get you a decision, I
9 hope, before Friday.

10:37 10 MR. WOMACK: Thank you, Your Honor.

11 THE COURT: Thank you.

12 * * * *

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled cause.

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16 Date: September 27, 2016

17 */s/ Mayra Malone*

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19 Mayra Malone, CSR, RMR, CRR
20 Official Court Reporter
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