UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. CR15-5351RBJ**
	)	
vs.	)	
	)	
JAY MICHAUD,	)	
	)	
Defendant.	)	

MOTIONS HEARING & COURT'S ORAL RULING

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

May 25, 2016

APPEARANCES:

Keith Becker
U.S. Department of Justice Criminal Division
Matthew Hampton
Assistant United States Attorney
Representing the Plaintiff

Colin Fieman
Linda Sullivan
Federal Public Defender's Office
Representing the Defendant

10:00:04AM **THE COURT: Good morning.**

10:00:05AM **MR. FIEMAN: Good morning, your Honor.**

10:00:07AM **THE COURT: This is further in the case of United States versus Michaud, No. 15-5351. I guess it technically comes on on the defendant's motion to dismiss the indictment that was found in Docket 178, but it really is, I think, a Rule 16 hearing on the question of what other appropriate relief the court should grant under the circumstances.**

10:00:49AM **Before we start, I want to correct something -- a couple of things in the plaintiff's submission, Docket No. 207. You indicated on Page 1 that the court declined to revisit its conclusion that the discovery was "properly withheld" -- "though properly withheld," is material. That is a misstatement. I did revisit it on the motion to reconsider.**

10:01:37AM **A similar thing is found in the footnote on Page 3. The statement is made, "The government respectfully requested that the court reconsider that portion of its ruling and the court declined to do so." That is not an accurate statement. I reconsidered that issue. As a matter of fact, I reconsidered it again in preparing for this hearing today. And the more I reconsider it, the more I find myself with the same ruling that I originally made regarding the materiality of the withheld**

10:02:20AM 1 information. So be accurate in your briefing.
10:02:27AM 2 You also indicated on Page 4 that, "The court has
10:02:34AM 3 appropriately considered the balance of these interests
10:02:38AM 4 and determined that Michaud's asserted need for the
10:02:42AM 5 information, even if material, does not overcome the
10:02:48AM 6 government's and the public interest in nondisclosure."
10:02:56AM 7 That balancing test is what we are about here. I have not
10:03:01AM 8 engaged in that, except in preparation for this
10:03:06AM 9 proceeding, and the balancing that needs to be done.
10:03:09AM 10 So with those corrections, we should commence with
10:03:18AM 11 whatever argument you wish to make. And I guess,
10:03:22AM 12 Mr. Fieman, you are the moving party here.
10:03:27AM 13 MR. FIEMAN: Your Honor, honestly, I don't know if
10:03:30AM 14 I have anything much to add to the argument -- the rather
10:03:32AM 15 lengthy argument made at the last hearing, which went into
10:03:35AM 16 the dismissal issues and the issues of whether Mr. Michaud
10:03:39AM 17 could get a fair trial.
10:03:40AM 18 THE COURT: I'm sorry?
10:03:42AM 19 MR. FIEMAN: I think I covered at the last hearing
10:03:44AM 20 during my oral argument all of the issues regarding why we
10:03:47AM 21 believe Mr. Michaud cannot get a fair trial.
10:03:49AM 22 The only analogy that I can really think of, because
10:03:53AM 23 the technology is so new and so complicated, I -- The
10:03:57AM 24 only thing I thought back to was when DNA was new on the
10:04:01AM 25 horizon, and even things like the O.J. Simpson case. I

10:04:05AM 1 **mean, those things turned on weeks of analysis and expert**
10:04:07AM 2 **testimony, issues regarding authentication and lab**
10:04:10AM 3 **processes, and they are very complicated. And we seem to**
10:04:13AM 4 **be on the threshold of maybe similar new technology here.**
10:04:18AM 5 **I think the court has already made its findings about**
10:04:20AM 6 **why we need it for all three stages, settlement**
10:04:25AM 7 **discussions, pretrial motions, and, of course, trial. And**
10:04:28AM 8 **anything -- You know, there is just new developments all**
10:04:31AM 9 **the time. As indicated in our briefing, there was even**
10:04:34AM 10 **new testimony last week in a separate proceeding, which,**
10:04:37AM 11 **to me, even further muddied the waters, because we were**
10:04:42AM 12 **relying on representations about how and where exactly**
10:04:45AM 13 **certain data was seized. Now it looks like that has**
10:04:48AM 14 **changed.**
10:04:49AM 15 **Your Honor, we believe that the case law is clear,**
10:04:54AM 16 **that when legitimate governmental interests collide with a**
10:04:57AM 17 **defendant's constitutional trial rights, the trial rights**
10:05:01AM 18 **trump the government's interest, and dismissal is a**
10:05:07AM 19 **straightforward remedy that we think we have given the**
10:05:10AM 20 **court the Supreme Court authority and other authority to**
10:05:12AM 21 **support that.**
10:05:13AM 22 **We proposed the Rule 16 exclusion alternative for the**
10:05:16AM 23 **reasons I stated in my supplemental briefing. It may be a**
10:05:19AM 24 **little bit more narrowly tailored. And we have no**
10:05:23AM 25 **objection to the court excluding all fruits of the NIT as**

10:05:28AM 1 an alternative remedy. But short of that, I have no other
10:05:33AM 2 suggestions to propose that would provide Mr. Michaud with
10:05:35AM 3 a fair trial, your Honor.
10:05:37AM 4 THE COURT: Thank you. Mr. Becker.
10:05:43AM 5 MR. BECKER: Thank you, your Honor. First of all,
10:05:50AM 6 with respect to the matters your Honor referenced in our
10:05:54AM 7 briefing, I certainly apologize for giving the impression
10:05:58AM 8 that the court, I guess, declined to reconsider. I think
10:06:02AM 9 what we meant to suggest is that the court declined to
10:06:06AM 10 reconsider its ultimate conclusion that the information
10:06:09AM 11 was material. And so I apologize if we stated that
10:06:14AM 12 clumsily and gave the impression of something otherwise.
10:06:17AM 13 In response to the court's stated concerns in its
10:06:25AM 14 order of trying to balance what is an important
10:06:28AM 15 governmental and public interest in not disclosing this
10:06:31AM 16 information with the defendant's interests in getting a
10:06:35AM 17 fair trial, we have tried to present to the court a number
10:06:38AM 18 of legal frameworks under which the court can conduct that
10:06:41AM 19 sort of balancing. And from our view, under every one of
10:06:45AM 20 those particular frameworks, dismissal of the entire
10:06:49AM 21 indictment would be an excessive sanction to impose on the
10:06:52AM 22 government in the context of this case.
10:06:55AM 23 I just want to go through a couple of points with
10:06:58AM 24 regard to those frameworks. First, with regard to the law
10:07:01AM 25 enforcement privilege, the law enforcement privilege can

operate in order to allow for the nondisclosure of information even where it is material. If that weren't the case, then there wouldn't be a need for the law enforcement privilege at all, because the court could simply determine it's immaterial, it does not need to be disclosed under Rule 16.

And there are numerous examples of courts applying the law enforcement privilege to information, including identity of informants, including the location of an observation post, including detailed information about the government's surveillance equipment.

So we believe, certainly in light of the entirety of the facts here, and what the defense has available to them in order to conduct the sort of assessments that they can conduct, and assert the defenses that they wish to assert, that there are adequate alternative means to get at the same point.

And, therefore, the government, as the court has found, is legitimately and in good-faith withholding this information because of a compelling need. The defense has adequate alternatives. And under that analysis there is no sanction at all that would be required.

But understanding the court's interest in balancing the issue here, if there is going to be a sanction that is imposed it needs to be not greater than necessary in order

10:08:23AM to remedy the articulated prejudice. And we certainly
10:08:27AM believe dismissal of the entire indictment would be
10:08:31AM excessive. And we have presented a number of intermediate
10:08:35AM steps the court could take in the context of the overall
10:08:38AM evidence in this case.

10:08:38AM Normally, where information is withheld in discovery
10:08:41AM and not presented in discovery, the remedy would be the
10:08:44AM government doesn't get to present that evidence. And
10:08:46AM that's one possible remedy.

10:08:48AM That's what the W.R. Grace case really stands for that
10:08:52AM the defense cites in their briefing. The government
10:08:55AM didn't disclose -- timely disclose witnesses. The court
10:08:57AM said you're not going to be able to present those
10:08:59AM witnesses, a proportional remedy to excluding the actual
10:09:03AM evidence that the government would have otherwise relied
10:09:05AM on. So that's a step the court can take.

10:09:09AM And if the court decides to, the court could go
10:09:11AM further and say, government, you can't use the evidence
10:09:13AM you are not turning over, but you also can't use the
10:09:16AM evidence that the NIT derived, even what we have turned
10:09:19AM over to the defense, the NIT results which they have, the
10:09:21AM NIT code which they have, or even the information that
10:09:24AM came from the website itself, the Playpen website.

10:09:28AM Count 2. Again, Count 2 is the count that depends on
10:09:32AM proof of the Playpen site and Pewter's activity. And the

court can decide that that would be an appropriate sanction, prevent the government from introducing that evidence.

As the declaration of Special Agent Mautz makes clear, Counts 1 and 3 are based on information found on the defendant's devices, not based on child pornography that he received from the Playpen website. It is independently derived. It doesn't rely on that sort of information.

THE COURT: Doesn't it all stem from the NIT, so to speak?

MR. BECKER: The NIT is ultimately what revealed the IP address that allowed law enforcement to obtain the search warrant for the defendant's home, that's true. But that would be -- to look at it under that vein would be a Wong Son fruit of the poisonous tree sort of rationale. Here, the court has found that the search warrant here was not unlawful, and has denied that motion, the motion to suppress. And so the Wong Son doctrine operates to --

THE COURT: If I recall correctly, I found that the search warrant was not appropriate, but the good faith exception allowed the admission of the evidence.

MR. BECKER: As well as your Honor did find a technical violation of Rule 41 that did not justify suppression. My point being, the Wong Son doctrine and the exclusionary rule operates to prevent the admission of

10:11:09AM 1 **unlawfully obtained evidence, and the court has found**
10:11:11AM 2 **otherwise. So what we are dealing with here is a**
10:11:13AM 3 **discovery issue about information to be presented at**
10:11:16AM 4 **trial, and not an issue of unlawfully obtained evidence**
10:11:21AM 5 **and the fruit of the poisonous tree. They are different**
10:11:24AM 6 **analytical frameworks and they operate for different**
10:11:26AM 7 **reasons. There is not unlawful law enforcement activity**
10:11:30AM 8 **here that needs to be deterred, as the court has found,**
10:11:32AM 9 **because the court found that suppression was**
10:11:35AM 10 **inappropriate.**
10:11:37AM 11 **In addition, there are other steps that the court can**
10:11:40AM 12 **take in order to regulate the trial. Ordinarily if the**
10:11:45AM 13 **court were to find that the balance here does tip in favor**
10:11:48AM 14 **of the defense, that would argue -- under the framework of**
10:11:52AM 15 **the lost or destroyed evidence law, that framework, that**
10:11:56AM 16 **would argue for an adverse jury instruction, but not for**
10:11:59AM 17 **dismissal of an entire indictment.**
10:12:01AM 18 **THE COURT: You mentioned in your briefing a**
10:12:04AM 19 **proposed jury instruction cure. What would that**
10:12:11AM 20 **instruction say?**
10:12:11AM 21 **MR. BECKER: The instruction could commemorate the**
10:12:14AM 22 **court's order and the fact that the government -- the**
10:12:16AM 23 **defense had requested further information, and the**
10:12:19AM 24 **government had declined to provide it or has not provided**
10:12:22AM 25 **it, and that the jury would be able to draw an adverse**

10:12:28AM 1 **inference from the failure to produce that information.**
10:12:30AM 2 **And that is normally what an adverse jury instruction**
10:12:33AM 3 **would do, it would say, "This information was not**
10:12:38AM 4 **provided, and you may draw some negative inference about**
10:12:43AM 5 **the failure to provide it.**
10:12:47AM 6 **I did also want to address, Judge, the concerns that**
10:12:49AM 7 **the court has mentioned in its written order, as well as**
10:12:52AM 8 **when we were here last time about the cases of**
10:12:55AM 9 **Hernandez-Meza and Muniz-Jaquez. And this really goes to**
10:13:03AM 10 **the defense's ability to evaluate their options at this**
10:13:07AM 11 **stage in the game. And we understand that concern.**
10:13:10AM 12 **But I think it is important to put those cases in**
10:13:12AM 13 **their appropriate context. And that is that they involve**
10:13:17AM 14 **a situation where the defense goes forward with a defense,**
10:13:22AM 15 **and then at some point during trial a piece of evidence**
10:13:25AM 16 **comes up that wasn't disclosed that could have changed the**
10:13:28AM 17 **game, so to speak, and caused them to, if they had had it**
10:13:32AM 18 **sooner, reevaluate whether they would have pled guilty or**
10:13:36AM 19 **pursued a different defense, or gone to trial.**
10:13:39AM 20 **Well, the court absolutely can manage those sorts of**
10:13:42AM 21 **concerns now four months before trial. That's because,**
10:13:45AM 22 **one, the evidence that the court has found the government**
10:13:48AM 23 **has legitimately withheld is not going to be used as**
10:13:52AM 24 **evidence at trial, and the court can absolutely prevent it**
10:13:56AM 25 **from being used as evidence at trial simply by ordering**

10:14:00AM that to be the case. That means that the defense knows
10:14:04AM what is going to be admitted and what can't be admitted
10:14:07AM before trial, and so can evaluate their options about
10:14:11AM pleading or going to trial or about what defenses they
10:14:14AM wish to raise.

10:14:15AM Again, the concern there in those cases was there was
10:14:18AM some sort of evidentiary trump card about which the
10:14:21AM defense was not aware, and then the court ultimately
10:14:25AM allowed the government to play that card, where it hadn't
10:14:28AM been disclosed previously. But the court can prevent that
10:14:31AM from happening here simply by excluding evidence and
10:14:34AM information that has not been provided, or even going
10:14:37AM further, if the court chooses, as we have suggested.

10:14:43AM Not having this information, there is still -- We are
10:14:51AM not going -- We respect the court's materiality finding.
10:14:55AM Obviously we have disagreed with it, but it is the court's
10:14:59AM finding.

10:15:00AM There is still an assessment, though, of what the
10:15:02AM prejudice is to the defense of not having the information
10:15:04AM that has been withheld.

10:15:07AM And here, there is so much information that the
10:15:09AM defense has in order to be able to raise the sorts of
10:15:11AM defenses they indicate they wish to raise, whether that is
10:15:15AM a virus defense, a vulnerability defense, a possibility
10:15:19AM that some malicious actor put child pornography on their

10:15:24AM computer. They've got all of the devices. They have five
10:15:27AM purported experts to analyze those and develop those sorts
10:15:30AM of issues. They have the ability to look at the devices,
10:15:34AM determine what the vulnerabilities are, see what's on
10:15:37AM there, run tests, see if there is viruses, and put in
10:15:40AM testimony, if the court admits it, to support the general
10:15:44AM possibilities that it is possible for someone to find a
10:15:47AM vulnerability on a computer and to put code on that
10:15:50AM computer or take action regarding that computer; or
10:15:55AM evidence that there are viruses, if they contend as much,
10:15:58AM that can put child pornography on a computer. They have
10:16:01AM already submitted to the court numerous declarations from
10:16:03AM purported experts in order to support that view.
10:16:06AM Presumably, if they can qualify those experts before your
10:16:10AM Honor, they would be able to present that sort of defense
10:16:12AM at trial if they wish to do so. And they've got that
10:16:16AM information in order to do that.

10:16:18AM This comes back, again, to that first framework of do
10:16:24AM they have a means to get at the same point with the
10:16:26AM information that has been disclosed and what they have?
10:16:29AM And certainly the government's evidence is going to have
10:16:32AM to come from those devices that were seized from the
10:16:34AM defendant's home. That's what we have to analyze. And
10:16:38AM the court can make that absolutely clear through lesser
10:16:40AM sanctions than dismissing all of the charges in the entire

10:16:44AM 1 **indictment.**

10:16:49AM 2 **One point that I wish to make as well, Judge, is about**

10:16:52AM 3 **the materiality versus centrality. And we have**

10:16:56AM 4 **highlighted this in our briefing as well with regard to**

10:16:58AM 5 **the Budziac case. And that is that a finding of**

10:17:02AM 6 **materiality regarding information to be disclosed does not**

10:17:05AM 7 **necessarily make it central to the government's case. And**

10:17:08AM 8 **that's something that we see in Budziac I and Budziac II,**

10:17:12AM 9 **where the court goes through an analysis of was this**

10:17:16AM 10 **information central to the charges that were presented at**

10:17:19AM 11 **trial? And for the reasons that we put forth in the Mautz**

10:17:23AM 12 **declaration, with respect to Counts 1 and 3, the**

10:17:27AM 13 **information the court has found the government may**

10:17:29AM 14 **withhold is simply tangential at best, and the court can**

10:17:33AM 15 **make it absolutely tangential by just excluding that sort**

10:17:36AM 16 **of evidence.**

10:17:38AM 17 **The final point that I just wanted to make, your**

10:17:44AM 18 **Honor, there was an implication in the defense filing**

10:17:51AM 19 **regarding the defendant's personal laptop that was seized**

10:17:55AM 20 **from his home. As we have advised the court previously,**

10:17:59AM 21 **and as the court saw in the Mautz declaration, it had**

10:18:02AM 22 **software on it that allowed a user to essentially wipe the**

10:18:06AM 23 **computer. And the government's forensic analysis showed**

10:18:10AM 24 **that the user of the computer activated that software the**

10:18:13AM 25 **night before it was searched -- the night before his home**

was searched by law enforcement. There was an implication in the defense filing that somehow the government was responsible for that, or had taken actions to fail to preserve evidence. There is no information whatsoever that the defense submits to substantiate that allegation. I just wanted to address it.

The defense has had the forensic report -- our forensic report for months in this case that indicated the existence of that software and that it was activated. And so I wanted to just strongly reject the implication that somehow the government was responsible for wiping the defendant's computer the day before we searched his home.

THE COURT: I gathered that the search warrant was issued on the basis of the information secured through the NIT. And when the search warrant was executed at Mr. Michaud's home, they picked up that computer that you are talking about now.

MR. BECKER: Yes.

THE COURT: And then they found that it was -- had been erased or wiped or whatever.

MR. BECKER: Correct.

THE COURT: Right? Okay.

MR. BECKER: Unless the court has questions, your Honor, that's all that I have.

THE COURT: I don't think so.

10:19:33AM MR. BECKER: Thank you, your Honor.

10:19:34AM THE COURT: Mr. Fieman.

10:19:37AM MR. FIEMAN: Your Honor, I will be brief. I think the starting point is Mr. Becker's observation that there is a difference between materiality and centrality. His words were that this NIT evidence is not central to the government's case. That may be true, but the issue I think we are grappling with is its centrality to the defendant's case.

10:20:02AM As we indicated in our briefings, we intend at trial at this point to put all of these issues in front of the jury. Do we know what the FBI's malware did? Did it insert photographs? Did it render it, as even Mozilla said, in a position where a third party can take total control? Sure, we can say those things to the jury. And if they get by objections, saying, well, they are speculation, or you don't have the evidence to support that, as we even saw at the suppression hearing, all we are invited to do is lead the jury to speculate about the heart of the defense case.

10:20:42AM Now, sometimes speculation goes in a defendant's favor and sometimes it doesn't. But as I indicated, we are not looking for a trial based on speculation, we are looking for one based on facts, because we think we can find and shape our theory of the defense to one that is soundly

based on acquittal if we have the information.

This constant drumming on the location of where things are found, I can only think of an analogy. For example, in a homicide case you find DNA in the suspect's car, and then you find it later on a knife. And you say, well, carve out the DNA from the car because there are some evidentiary issues on that and we will just talk about the DNA on the knife. If the problem is the entire process for DNA analysis, whether the chain of custody on DNA is accurate, and the issues about how it got on the knife in the first place depends on expert testimony, that doesn't solve anything. It just invites more speculation.

Again, your Honor, also, it seems like we are back to dealing even with some pretrial suppression issues at this point, given the testimony that we got in Norfolk recently, which Mr. Becker did not even address. So we are kind of back where I started last week. We are almost, actually, a year into this case from the time of Mr. Michaud's initial appearance. I really have no confidence that I have covered the potential probable cause and even pretrial suppression issues, despite our intensive efforts to present everything to the court prior to our initial motion deadline. We are fast approaching trial. We have presented the court with five different specialists and experts who have explained in great deal

sort of the interlocking nature of all this evidence and its complexity. We have not had a true forensic expert response from the government.

Your Honor, unless there is something more I can provide the court in support, the only remedies -- the two options we presented as workable for us in terms of getting a fair trial, I don't know that there is anything else I can say at this point. I should just address your questions, if any.

THE COURT: Okay.

MR. FIEMAN: Thank you, your Honor.

THE COURT: I have done a good deal of work on this already. It won't take me long to put it all together. It could be an oral opinion. Stick around.

(Break.)

THE COURT: Well, what is the appropriate relief when the government properly withholds evidence that is material to the defendant's case? The answer to that question lies in part with just how material to the defendant's case is the evidence that has been withheld.

And to get to that question I think we have to start with some basics. The first basic thing that we have to consider is that the defendant is presumed innocent. That presumption remains with him, but he is accused of serious offenses, and those accusations trigger constitutional

10:42:45AM protections.

10:42:51AM There are three parts of the Bill of Rights, the
10:42:58AM amendments to the United States Constitution, that I think
10:43:01AM come into play here, and they are important. First is the
10:43:06AM Fourth Amendment, "The right of the people to be secure in
10:43:09AM their persons, houses, papers, and effects, against
10:43:13AM unreasonable searches and seizures, shall not be
10:43:19AM violated." I think we can agree that, although at the
10:43:25AM time that was written there were no computers, computers
10:43:36AM should properly be considered part of the effects of
10:43:40AM people.

10:43:42AM The second amendment that is important here is the
10:43:49AM Fifth Amendment that provides, "Nor be deprived of life,
10:43:56AM liberty, or property, without due process of law." And
10:44:01AM the procedures in criminal cases trigger due process, and
10:44:09AM that is an important consideration here.

10:44:12AM I think also the Sixth Amendment comes into play. It
10:44:20AM indicates that the accused shall enjoy the right to be
10:44:24AM informed of the nature and cause of the accusation, to be
10:44:31AM confronted with the witnesses against him. We have here a
10:44:37AM situation where the information withheld is the cause of
10:44:43AM the accusation against him, and he is not going to be
10:44:51AM confronted by that evidence.

10:44:58AM The burden of proof is on the defendant to show the
10:45:05AM need here, and I think to show what relief is appropriate.

10:45:13AM 1 **But with all that basic law in mind, we must weigh the**
10:45:18AM 2 **defendant's need for the evidence against the plaintiff's**
10:45:24AM 3 **right to withhold it. And the law provides that that**
10:45:28AM 4 **should be a balancing act.**
10:45:35AM 5 **The case law, Jencks, and Roviario, and W.R. Grace**
10:45:40AM 6 **particularly, but a lot of other cases as well, give us a**
10:45:45AM 7 **list of considerations that the court should look at and**
10:45:47AM 8 **consider in determining the proper relief. There are a**
10:45:55AM 9 **lot of those. They are not all listed just in one place.**
10:46:11AM 10 **These are considerations of what may be relevant to the**
10:46:17AM 11 **prejudice that the defendant might experience.**
10:46:23AM 12 **First is the centrality and importance of the**
10:46:27AM 13 **evidence. It seems to me, based on the evidence in the**
10:46:34AM 14 **record from expert witnesses here, that the subject**
10:46:44AM 15 **evidence is central to the case, it's central to the**
10:46:51AM 16 **search warrant that was issued, it's central to the proof**
10:46:59AM 17 **that might be offered at trial, it is the background for**
10:47:04AM 18 **the whole case.**
10:47:08AM 19 **As I have indicated before, I have found the testimony**
10:47:16AM 20 **or declarations from the plaintiff's experts -- I'm sorry,**
10:47:22AM 21 **from the defendant's experts to be credible,**
10:47:28AM 22 **Mr. Tsyrklevitch, Mr. Miller, Mr. Young, and Mr. Kasal,**
10:47:34AM 23 **notably. I think the information from them basically**
10:47:39AM 24 **overwhelms the evidence offered by the government in an**
10:47:46AM 25 **attempt to counter those declarations.**

10:47:53AM 1 **So on that first issue, it appears to me that this**
10:47:59AM 2 **withheld evidence is central to the case and important not**
10:48:05AM 3 **just to the defendant, but to both sides of the case.**
10:48:11AM 4 **The second consideration is the probative value and**
10:48:15AM 5 **reliability of secondary or substitute evidence. I am not**
10:48:18AM 6 **aware of any secondary or substitute evidence that would**
10:48:22AM 7 **meet the problems that are faced here.**
10:48:28AM 8 **The third consideration is the nature and probable**
10:48:33AM 9 **weight of the factual inferences, and the kinds of proof**
10:48:39AM 10 **lost to the defendant.**
10:48:45AM 11 **The evidence here, it seems to me, would have a**
10:49:01AM 12 **presumptive inference of truth if offered by the**
10:49:09AM 13 **government. Not the details of the NIT, but the fact of**
10:49:15AM 14 **information received through the NIT.**
10:49:22AM 15 **And in response to that the only answer for the**
10:49:28AM 16 **defense is to put on some evidence, that they have lots**
10:49:32AM 17 **of, that there may have been some error in the information**
10:49:39AM 18 **that the NIT provided. They don't have the ability**
10:49:45AM 19 **without the information to determine that there was an**
10:49:49AM 20 **error, only that there may have been. And that, it seems**
10:49:57AM 21 **to me, is a very difficult approach in a criminal case, to**
10:50:09AM 22 **hope that they can raise some doubt based on the testimony**
10:50:15AM 23 **of possible problems with the evidence.**
10:50:19AM 24 **The fourth item in my list here is the probable effect**
10:50:26AM 25 **on the jury from the absence of evidence. I think I have**

10:50:31AM 1 **just commented on that.**

10:50:40AM 2 **As I indicated, I think the discovery withheld**

10:50:44AM 3 **implicates the defendant's constitutional rights. It is**

10:50:54AM 4 **proposed that this information be withheld for trial as**

10:50:56AM 5 **well as for the suppression hearing. I don't know of any**

10:51:03AM 6 **other adequate alternative means to the same information.**

10:51:12AM 7 **The government has argued, and the government's experts**

10:51:15AM 8 **have argued, that the information that the defense has is**

10:51:19AM 9 **sufficient, but that conclusion is belied by the expert**

10:51:28AM 10 **testimony from the defense.**

10:51:34AM 11 **Also, the court should consider whether the discovery**

10:51:38AM 12 **was lost or destroyed while in the government's custody.**

10:51:41AM 13 **That's not an issue here.**

10:51:44AM 14 **Also, whether the government acted with disregard for**

10:51:47AM 15 **the defendant's interests, or in bad faith, or for some**

10:51:54AM 16 **tactical advantage. I think the government gets the**

10:51:59AM 17 **benefit of the doubt on those things. They apparently**

10:52:02AM 18 **acted in good faith in withholding this information and**

10:52:08AM 19 **did not urge to withhold it just for some tactical**

10:52:12AM 20 **advantage.**

10:52:15AM 21 **I think those are the considerations that the court**

10:52:28AM 22 **should consider and discuss in this matter.**

10:52:37AM 23 **But you add to all of that another consideration, I**

10:52:45AM 24 **guess, and that is that the warrant itself was**

10:52:47AM 25 **questionable, as it was issued in violation of Federal**

10:52:55AM **Rule of Criminal Procedure 41.**

10:53:02AM **Under all of those circumstances, what can be done**
10:53:05AM **short of dismissal, if anything? The court should adopt**
10:53:17AM **the minimal appropriate relief rather than the maximum.**
10:53:26AM **The law teaches us that sanctions, if you want to call**
10:53:31AM **them that, or appropriate relief, should be the minimal**
10:53:38AM **rather than the maximum to reach the goal. It seems to me**
10:53:46AM **that the appropriate remedy here is to rule that the**
10:53:50AM **evidence of the NIT and the search warrant issued on the**
10:53:56AM **basis of the NIT should be suppressed, and the fruits of**
10:54:00AM **that search must also be suppressed. That's my ruling.**

10:54:16AM **I think it is appropriate to suppress the evidence**
10:54:19AM **rather than dismiss the case. I have not tried to analyze**
10:54:24AM **each count in terms of where the information came from to**
10:54:29AM **support that count. That's a matter that the government**
10:54:38AM **will have to consider further, as will the defense.**

10:54:43AM **Okay. Thank you.**

10:54:47AM **MR. FIEMAN: Thank you, your Honor.**

10:54:48AM **MR. BECKER: Thank you.**

10:54:49AM **MR. HAMPTON: Thank you.**

(Proceedings concluded.)

C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

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/s/ Barry Fanning
Barry Fanning, Court Reporter