1 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
2 IN TACOMA

3

4 UNITED STATES OF AMERICA,)
)
5 Plaintiff,) No. CR15-5351RBJ
)
6 vs.)
)
7 JAY MICHAUD,)
)
8 Defendant.)

9

10 MOTIONS HEARING & COURT'S ORAL RULING

11

12

13 BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE
14

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May 25, 2016
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17 APPEARANCES:

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

21

22 Colin Fieman
Linda Sullivan
23 Federal Public Defender's Office
Representing the Defendant
24

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10:00:04AM 1 THE COURT: Good morning.
10:00:05AM 2 MR. FIEMAN: Good morning, your Honor.
10:00:07AM 3 THE COURT: This is further in the case of United
10:00:10AM 4 States versus Michaud, No. 15-5351. I guess it
10:00:25AM 5 technically comes on on the defendant's motion to dismiss
10:00:29AM 6 the indictment that was found in Docket 178, but it really
10:00:35AM 7 is, I think, a Rule 16 hearing on the question of what
10:00:42AM 8 other appropriate relief the court should grant under the
10:00:46AM 9 circumstances.
10:00:49AM 10 Before we start, I want to correct something -- a
10:01:00AM 11 couple of things in the plaintiff's submission, Docket
10:01:05AM 12 No. 207. You indicated on Page 1 that the court declined
10:01:12AM 13 to revisit its conclusion that the discovery was "properly
10:01:17AM 14 withheld" -- "though properly withheld," is material.
10:01:25AM 15 That is a misstatement. I did revisit it on the motion to
10:01:31AM 16 reconsider.
10:01:37AM 17 A similar thing is found in the footnote on Page 3.
10:01:44AM 18 The statement is made, "The government respectfully
10:01:46AM 19 requested that the court reconsider that portion of its
10:01:49AM 20 ruling and the court declined to do so." That is not an
10:01:55AM 21 accurate statement. I reconsidered that issue. As a
10:02:00AM 22 matter of fact, I reconsidered it again in preparing for
10:02:04AM 23 this hearing today. And the more I reconsider it, the
10:02:12AM 24 more I find myself with the same ruling that I originally
10:02:17AM 25 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

10:07:04AM 1 operate in order to allow for the nondisclosure of
10:07:08AM 2 information even where it is material. If that weren't
10:07:11AM 3 the case, then there wouldn't be a need for the law
10:07:14AM 4 enforcement privilege at all, because the court could
10:07:16AM 5 simply determine it's immaterial, it does not need to be
10:07:19AM 6 disclosed under Rule 16.
10:07:21AM 7 And there are numerous examples of courts applying the
10:07:24AM 8 law enforcement privilege to information, including
10:07:28AM 9 identity of informants, including the location of an
10:07:31AM 10 observation post, including detailed information about the
10:07:35AM 11 government's surveillance equipment.
10:07:38AM 12 So we believe, certainly in light of the entirety of
10:07:42AM 13 the facts here, and what the defense has available to them
10:07:45AM 14 in order to conduct the sort of assessments that they can
10:07:49AM 15 conduct, and assert the defenses that they wish to assert,
10:07:53AM 16 that there are adequate alternative means to get at the
10:07:57AM 17 same point.
10:07:58AM 18 And, therefore, the government, as the court has
10:08:02AM 19 found, is legitimately and in good-faith withholding this
10:08:05AM 20 information because of a compelling need. The defense has
10:08:08AM 21 adequate alternatives. And under that analysis there is
10:08:11AM 22 no sanction at all that would be required.
10:08:13AM 23 But understanding the court's interest in balancing
10:08:15AM 24 the issue here, if there is going to be a sanction that is
10:08:19AM 25 imposed it needs to be not greater than necessary in order

10:08:23AM 1 to remedy the articulated prejudice. And we certainly
10:08:27AM 2 believe dismissal of the entire indictment would be
10:08:31AM 3 excessive. And we have presented a number of intermediate
10:08:35AM 4 steps the court could take in the context of the overall
10:08:38AM 5 evidence in this case.
10:08:38AM 6 Normally, where information is withheld in discovery
10:08:41AM 7 and not presented in discovery, the remedy would be the
10:08:44AM 8 government doesn't get to present that evidence. And
10:08:46AM 9 that's one possible remedy.
10:08:48AM 10 That's what the W.R. Grace case really stands for that
10:08:52AM 11 the defense cites in their briefing. The government
10:08:55AM 12 didn't disclose -- timely disclose witnesses. The court
10:08:57AM 13 said you're not going to be able to present those
10:08:59AM 14 witnesses, a proportional remedy to excluding the actual
10:09:03AM 15 evidence that the government would have otherwise relied
10:09:05AM 16 on. So that's a step the court can take.
10:09:09AM 17 And if the court decides to, the court could go
10:09:11AM 18 further and say, government, you can't use the evidence
10:09:13AM 19 you are not turning over, but you also can't use the
10:09:16AM 20 evidence that the NIT derived, even what we have turned
10:09:19AM 21 over to the defense, the NIT results which they have, the
10:09:21AM 22 NIT code which they have, or even the information that
10:09:24AM 23 came from the website itself, the Playpen website.
10:09:28AM 24 Count 2. Again, Count 2 is the count that depends on
10:09:32AM 25 proof of the Playpen site and Pewter's activity. And the

10:09:37AM 1 court can decide that that would be an appropriate
10:09:39AM 2 sanction, prevent the government from introducing that
10:09:41AM 3 evidence.
10:09:42AM 4 As the declaration of Special Agent Mautz makes clear,
10:09:45AM 5 Counts 1 and 3 are based on information found on the
10:09:48AM 6 defendant's devices, not based on child pornography that
10:09:52AM 7 he received from the Playpen website. It is independently
10:09:57AM 8 derived. It doesn't rely on that sort of information.
10:10:00AM 9 THE COURT: Doesn't it all stem from the NIT, so
10:10:10AM 10 to speak?
10:10:11AM 11 MR. BECKER: The NIT is ultimately what revealed
10:10:13AM 12 the IP address that allowed law enforcement to obtain the
10:10:16AM 13 search warrant for the defendant's home, that's true. But
10:10:19AM 14 that would be -- to look at it under that vein would be a
10:10:23AM 15 Wong Son fruit of the poisonous tree sort of rationale.
10:10:28AM 16 Here, the court has found that the search warrant here was
10:10:30AM 17 not unlawful, and has denied that motion, the motion to
10:10:33AM 18 suppress. And so the Wong Son doctrine operates to --
10:10:36AM 19 THE COURT: If I recall correctly, I found that
10:10:40AM 20 the search warrant was not appropriate, but the good faith
10:10:47AM 21 exception allowed the admission of the evidence.
10:10:54AM 22 MR. BECKER: As well as your Honor did find a
10:10:58AM 23 technical violation of Rule 41 that did not justify
10:11:02AM 24 suppression. My point being, the Wong Son doctrine and
10:11:05AM 25 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 1 that to be the case. That means that the defense knows
10:14:04AM 2 what is going to be admitted and what can't be admitted
10:14:07AM 3 before trial, and so can evaluate their options about
10:14:11AM 4 pleading or going to trial or about what defenses they
10:14:14AM 5 wish to raise.
10:14:15AM 6 Again, the concern there in those cases was there was
10:14:18AM 7 some sort of evidentiary trump card about which the
10:14:21AM 8 defense was not aware, and then the court ultimately
10:14:25AM 9 allowed the government to play that card, where it hadn't
10:14:28AM 10 been disclosed previously. But the court can prevent that
10:14:31AM 11 from happening here simply by excluding evidence and
10:14:34AM 12 information that has not been provided, or even going
10:14:37AM 13 further, if the court chooses, as we have suggested.
10:14:43AM 14 Not having this information, there is still -- We are
10:14:51AM 15 not going -- We respect the court's materiality finding.
10:14:55AM 16 Obviously we have disagreed with it, but it is the court's
10:14:59AM 17 finding.
10:15:00AM 18 There is still an assessment, though, of what the
10:15:02AM 19 prejudice is to the defense of not having the information
10:15:04AM 20 that has been withheld.
10:15:07AM 21 And here, there is so much information that the
10:15:09AM 22 defense has in order to be able to raise the sorts of
10:15:11AM 23 defenses they indicate they wish to raise, whether that is
10:15:15AM 24 a virus defense, a vulnerability defense, a possibility
10:15:19AM 25 that some malicious actor put child pornography on their

10:15:24AM 1 computer. They've got all of the devices. They have five
10:15:27AM 2 purported experts to analyze those and develop those sorts
10:15:30AM 3 of issues. They have the ability to look at the devices,
10:15:34AM 4 determine what the vulnerabilities are, see what's on
10:15:37AM 5 there, run tests, see if there is viruses, and put in
10:15:40AM 6 testimony, if the court admits it, to support the general
10:15:44AM 7 possibilities that it is possible for someone to find a
10:15:47AM 8 vulnerability on a computer and to put code on that
10:15:50AM 9 computer or take action regarding that computer; or
10:15:55AM 10 evidence that there are viruses, if they contend as much,
10:15:58AM 11 that can put child pornography on a computer. They have
10:16:01AM 12 already submitted to the court numerous declarations from
10:16:03AM 13 purported experts in order to support that view.
10:16:06AM 14 Presumably, if they can qualify those experts before your
10:16:10AM 15 Honor, they would be able to present that sort of defense
10:16:12AM 16 at trial if they wish to do so. And they've got that
10:16:16AM 17 information in order to do that.
10:16:18AM 18 This comes back, again, to that first framework of do
10:16:24AM 19 they have a means to get at the same point with the
10:16:26AM 20 information that has been disclosed and what they have?
10:16:29AM 21 And certainly the government's evidence is going to have
10:16:32AM 22 to come from those devices that were seized from the
10:16:34AM 23 defendant's home. That's what we have to analyze. And
10:16:38AM 24 the court can make that absolutely clear through lesser
10:16:40AM 25 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

10:18:16AM 1 was searched by law enforcement. There was an implication
10:18:20AM 2 in the defense filing that somehow the government was
10:18:22AM 3 responsible for that, or had taken actions to fail to
10:18:25AM 4 preserve evidence. There is no information whatsoever
10:18:29AM 5 that the defense submits to substantiate that allegation.
10:18:32AM 6 I just wanted to address it.
10:18:35AM 7 The defense has had the forensic report -- our
10:18:37AM 8 forensic report for months in this case that indicated the
10:18:40AM 9 existence of that software and that it was activated. And
10:18:44AM 10 so I wanted to just strongly reject the implication that
10:18:47AM 11 somehow the government was responsible for wiping the
10:18:49AM 12 defendant's computer the day before we searched his home.
10:18:51AM 13 THE COURT: I gathered that the search warrant was
10:18:57AM 14 issued on the basis of the information secured through the
10:19:02AM 15 NIT. And when the search warrant was executed at
10:19:10AM 16 Mr. Michaud's home, they picked up that computer that you
10:19:14AM 17 are talking about now.
10:19:17AM 18 MR. BECKER: Yes.
10:19:18AM 19 THE COURT: And then they found that it was -- had
10:19:22AM 20 been erased or wiped or whatever.
10:19:27AM 21 MR. BECKER: Correct.
22 THE COURT: Right? Okay.
10:19:28AM 23 MR. BECKER: Unless the court has questions, your
10:19:30AM 24 Honor, that's all that I have.
10:19:32AM 25 THE COURT: I don't think so.

10:19:33AM 1 MR. BECKER: Thank you, your Honor.
10:19:34AM 2 THE COURT: Mr. Fieman.
10:19:37AM 3 MR. FIEMAN: Your Honor, I will be brief. I think
10:19:41AM 4 the starting point is Mr. Becker's observation that there
10:19:46AM 5 is a difference between materiality and centrality. His
10:19:49AM 6 words were that this NIT evidence is not central to the
10:19:53AM 7 government's case. That may be true, but the issue I
10:19:57AM 8 think we are grappling with is its centrality to the
10:20:01AM 9 defendant's case.
10:20:02AM 10 As we indicated in our briefings, we intend at trial
10:20:08AM 11 at this point to put all of these issues in front of the
10:20:12AM 12 jury. Do we know what the FBI's malware did? Did it
10:20:17AM 13 insert photographs? Did it render it, as even Mozilla
10:20:21AM 14 said, in a position where a third party can take total
10:20:25AM 15 control? Sure, we can say those things to the jury. And
10:20:28AM 16 if they get by objections, saying, well, they are
10:20:31AM 17 speculation, or you don't have the evidence to support
10:20:33AM 18 that, as we even saw at the suppression hearing, all we
10:20:37AM 19 are invited to do is lead the jury to speculate about the
10:20:41AM 20 heart of the defense case.
10:20:42AM 21 Now, sometimes speculation goes in a defendant's favor
10:20:45AM 22 and sometimes it doesn't. But as I indicated, we are not
10:20:49AM 23 looking for a trial based on speculation, we are looking
10:20:52AM 24 for one based on facts, because we think we can find and
10:20:56AM 25 shape our theory of the defense to one that is soundly

10:21:01AM 1 based on acquittal if we have the information.
10:21:04AM 2 This constant drumming on the location of where things
10:21:06AM 3 are found, I can only think of an analogy. For example,
10:21:10AM 4 in a homicide case you find DNA in the suspect's car, and
10:21:13AM 5 then you find it later on a knife. And you say, well,
10:21:17AM 6 carve out the DNA from the car because there are some
10:21:20AM 7 evidentiary issues on that and we will just talk about the
10:21:23AM 8 DNA on the knife. If the problem is the entire process
10:21:26AM 9 for DNA analysis, whether the chain of custody on DNA is
10:21:30AM 10 accurate, and the issues about how it got on the knife in
10:21:34AM 11 the first place depends on expert testimony, that doesn't
10:21:36AM 12 solve anything. It just invites more speculation.
10:21:40AM 13 Again, your Honor, also, it seems like we are back to
10:21:45AM 14 dealing even with some pretrial suppression issues at this
10:21:48AM 15 point, given the testimony that we got in Norfolk
10:21:52AM 16 recently, which Mr. Becker did not even address. So we
10:21:56AM 17 are kind of back where I started last week. We are
10:21:58AM 18 almost, actually, a year into this case from the time of
10:22:00AM 19 Mr. Michaud's initial appearance. I really have no
10:22:05AM 20 confidence that I have covered the potential probable
10:22:07AM 21 cause and even pretrial suppression issues, despite our
10:22:11AM 22 intensive efforts to present everything to the court prior
10:22:14AM 23 to our initial motion deadline. We are fast approaching
10:22:17AM 24 trial. We have presented the court with five different
10:22:20AM 25 specialists and experts who have explained in great deal

10:22:24AM 1 sort of the interlocking nature of all this evidence and
10:22:26AM 2 its complexity. We have not had a true forensic expert
10:22:30AM 3 response from the government.
10:22:31AM 4 Your Honor, unless there is something more I can
10:22:33AM 5 provide the court in support, the only remedies -- the two
10:22:37AM 6 options we presented as workable for us in terms of
10:22:40AM 7 getting a fair trial, I don't know that there is anything
10:22:43AM 8 else I can say at this point. I should just address your
10:22:46AM 9 questions, if any.
10:22:47AM 10 THE COURT: Okay.
10:22:49AM 11 MR. FIEMAN: Thank you, your Honor.
10:22:55AM 12 THE COURT: I have done a good deal of work on
10:22:57AM 13 this already. It won't take me long to put it all
10:23:04AM 14 together. It could be an oral opinion. Stick around.
10:41:43AM 15 (Break.)
10:41:46AM 16 THE COURT: Well, what is the appropriate relief
10:41:50AM 17 when the government properly withholds evidence that is
10:41:53AM 18 material to the defendant's case? The answer to that
10:41:58AM 19 question lies in part with just how material to the
10:42:08AM 20 defendant's case is the evidence that has been withheld.
10:42:14AM 21 And to get to that question I think we have to start
10:42:17AM 22 with some basics. The first basic thing that we have to
10:42:24AM 23 consider is that the defendant is presumed innocent. That
10:42:31AM 24 presumption remains with him, but he is accused of serious
10:42:39AM 25 offenses, and those accusations trigger constitutional

10:42:45AM 1 protections.

10:42:51AM 2 There are three parts of the Bill of Rights, the
10:42:58AM 3 amendments to the United States Constitution, that I think
10:43:01AM 4 come into play here, and they are important. First is the
10:43:06AM 5 Fourth Amendment, "The right of the people to be secure in
10:43:09AM 6 their persons, houses, papers, and effects, against
10:43:13AM 7 unreasonable searches and seizures, shall not be
10:43:19AM 8 violated." I think we can agree that, although at the
10:43:25AM 9 time that was written there were no computers, computers
10:43:36AM 10 should properly be considered part of the effects of
10:43:40AM 11 people.

10:43:42AM 12 The second amendment that is important here is the
10:43:49AM 13 Fifth Amendment that provides, "Nor be deprived of life,
10:43:56AM 14 liberty, or property, without due process of law." And
10:44:01AM 15 the procedures in criminal cases trigger due process, and
10:44:09AM 16 that is an important consideration here.

10:44:12AM 17 I think also the Sixth Amendment comes into play. It
10:44:20AM 18 indicates that the accused shall enjoy the right to be
10:44:24AM 19 informed of the nature and cause of the accusation, to be
10:44:31AM 20 confronted with the witnesses against him. We have here a
10:44:37AM 21 situation where the information withheld is the cause of
10:44:43AM 22 the accusation against him, and he is not going to be
10:44:51AM 23 confronted by that evidence.

10:44:58AM 24 The burden of proof is on the defendant to show the
10:45:05AM 25 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 1 Rule of Criminal Procedure 41.
10:53:02AM 2 Under all of those circumstances, what can be done
10:53:05AM 3 short of dismissal, if anything? The court should adopt
10:53:17AM 4 the minimal appropriate relief rather than the maximum.
10:53:26AM 5 The law teaches us that sanctions, if you want to call
10:53:31AM 6 them that, or appropriate relief, should be the minimal
10:53:38AM 7 rather than the maximum to reach the goal. It seems to me
10:53:46AM 8 that the appropriate remedy here is to rule that the
10:53:50AM 9 evidence of the NIT and the search warrant issued on the
10:53:56AM 10 basis of the NIT should be suppressed, and the fruits of
10:54:00AM 11 that search must also be suppressed. That's my ruling.
10:54:16AM 12 I think it is appropriate to suppress the evidence
10:54:19AM 13 rather than dismiss the case. I have not tried to analyze
10:54:24AM 14 each count in terms of where the information came from to
10:54:29AM 15 support that count. That's a matter that the government
10:54:38AM 16 will have to consider further, as will the defense.
10:54:43AM 17 Okay. Thank you.
10:54:47AM 18 MR. FIEMAN: Thank you, your Honor.
10:54:48AM 19 MR. BECKER: Thank you.
10:54:49AM 20 MR. HAMPTON: Thank you.
21 (Proceedings concluded.)
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1 C E R T I F I C A T E
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3
4 I, Barry Fanning, Official Court Reporter for the
5 United States District Court, Western District of
6 Washington, certify that the foregoing is a true and
7 correct transcript from the record of proceedings in the
8 above-entitled matter.
9
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12 _________________
/s/ Barry Fanning
13 Barry Fanning, Court Reporter
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