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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division

- - - - -		
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CRIMINAL CASE NO.
v.	)	4:16cr00016
	)	
EDWARD JOSEPH MATISH, III,	)	
	)	
Defendant.	)	
	)	
Interested Party:	)	
Electronic Frontier Foundation	)	
- - - - -		

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia  
May 19, 2016

BEFORE: THE HONORABLE HENRY COKE MORGAN, JR.  
United States District Judge

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE  
By: Eric M. Hurt  
Kaitlin C. Gratton  
Assistant United States Attorneys  
Counsel for the United States

FEDERAL PUBLIC DEFENDER'S OFFICE  
By: Andrew W. Grindrod  
Richard J. Colgan  
Assistant Federal Public Defenders  
Counsel for the Defendant

JAMES R. THEUER, PLLC  
By: James R. Theuer  
Counsel for Electronic Frontier Foundation

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I N D E X

ON BEHALF OF THE DEFENDANT:	Direct	Cross	Red.	Rec.
D. Alfin	4	33	49	--
D. McFarlane	60	66	--	--

E X H I B I T S

No.	Page
Defendant's Exhibit 5 (sealed)	31
Defendant's Exhibit 2	31
Defendant's Exhibit 3	31
Defendant's Exhibit 4	37
Defendant's Exhibit 1A	56
Defendant's Exhibit 1B	56
Defendant's Exhibit 6	56

1 (The proceedings commenced at 2:35 p.m. as follows:)

2 THE CLERK: United States of America v. Edward  
3 Joseph Matish, III, Case No. 4:16cr16.

4 Ms. Gratton, Mr. Hurt, is the government ready to  
5 proceed?

6 MS. GRATTON: The government is ready.

7 Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 THE CLERK: Mr. Grindrod, Mr. Colgan, is the  
10 defendant ready?

11 MR. GRINDROD: Mr. Matish is ready.

12 Good afternoon, Your Honor.

13 THE COURT: All right. Well, we have quite a few  
14 motions that have been filed, one of them just moments ago,  
15 but I think our order should follow the times when the  
16 various motions were filed, the first of those being the  
17 defendant's first motion to suppress, so I'll hear the  
18 defendant on that.

19 Does either side have any evidence to present?

20 MR. GRINDROD: Your Honor, we do have evidence. Our  
21 witness -- we're calling the same witness on the first and  
22 third motions to suppress, so if it would please the Court,  
23 Your Honor, we can consolidate that evidence into one -- that  
24 witness will only have to take the stand one time.

25 We also have two witnesses for our second motion to

—D. Alfin - Direct—

1 suppress, Your Honor. We have no evidence on our motion to  
2 dismiss the new counts in the superseding indictment.

3 THE COURT: All right. Well, let's proceed with  
4 your evidence, then.

5 MR. GRINDROD: Thank you, Your Honor. The defense  
6 calls Special Agent Alfin to the stand.

7 (The clerk administered the oath.)

8 MR. GRINDROD: Your Honor, if I might, I have some  
9 exhibit binders that I've prepared. I have a copy for the  
10 court, a courtesy copy for the witness, and a courtesy copy  
11 for the Judge, also.

12 THE COURT: All right.

13 MR. GRINDROD: The original is marked with this  
14 Post-It.

15 THE COURT: Why don't we give a copy to my law  
16 clerk.

17 All right, you may proceed.

18 MR. GRINDROD: Thank you, Your Honor.

19 DANIEL ALFIN, called as a witness, having been first  
20 duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. GRINDROD:

23 Q. Good afternoon, sir. Could you please introduce yourself  
24 to the Court.

25 A. Good afternoon. My name is Daniel Alfin, last name

—D. Alfin - Direct —

1 A-L-F-I-N. I'm a Special Agent with the FBI. I am currently  
2 assigned to FBI Headquarters, Criminal Investigative  
3 Division, Violent Crimes Against Children Section, Major Case  
4 Coordination Unit.

5 Q. Thank you, sir. You were involved in the investigation  
6 of the Playpen Web site from pretty early on, right?

7 A. I was involved in this investigation, yes.

8 Q. Okay. Just by way of background, at some point the FBI  
9 came across this Playpen site, correct?

10 A. The Playpen Web site came online approximately August,  
11 2014. It came to my attention at that time.

12 Q. And you eventually determined around that same time that  
13 there was child pornography present on the Web site?

14 A. Immediately after Playpen came online and after viewing  
15 it I observed that it was a Web site whose primary purpose  
16 was the advertisement and distribution of child pornography.

17 Q. And, so, you began investigating to try to find out who  
18 the administrator of the Web site was, correct?

19 A. We eventually received information that we followed up on  
20 and led us to the identification of the administrator of the  
21 Web site.

22 Q. And, generally, what time period was that?

23 A. We received information about the Playpen Web site in  
24 approximately December, 2014.

25 Q. And between August of 2014, when you say the site came

—D. Alfin - Direct—

1 online, and December of 2014 you and the FBI were  
2 continuously monitoring the site, correct?

3 A. We were aware that the Web site existed between August  
4 and December, 2014. We were aware of it. We were monitoring  
5 it. We were not expending a significant amount of resources  
6 on it during that time period.

7 Q. Then around December of 2014 you gathered information  
8 that eventually led you to determine that the administrator  
9 of the Web site was located at a residence in Naples,  
10 Florida. Is that right?

11 A. That is correct.

12 Q. So you obtained a warrant to search that person's  
13 residence?

14 A. That's correct.

15 Q. And that was just kind of a traditional residential  
16 search; that didn't involve the NIT technology that we're  
17 going to talk about in a minute, correct?

18 A. Correct.

19 Q. Now, you were personally present during the execution of  
20 that Florida search warrant. Is that correct?

21 A. I was.

22 Q. And that began on February 19, 2015, correct?

23 A. That is correct.

24 Q. When you were searching that residence you saw a laptop  
25 computer, correct?

—D. Alfin - Direct—

1 A. I did.

2 Q. The laptop computer appeared to be hosting the Playpen  
3 site.

4 A. No.

5 Q. The home page was displayed on the --

6 MS. GRATTON: Objection, Your Honor. He's leading  
7 the witness.

8 THE COURT: Well, he's --

9 MS. GRATTON: The witness can testify to what he  
10 observed directly, if asked what he observed.

11 THE COURT: Well, I don't -- I'm not going to  
12 restrict him from leading the witness under these  
13 circumstances.

14 MR. GRINDROD: Thank you, Your Honor.

15 BY MR. GRINDROD:

16 Q. So you saw a laptop. You're familiar -- you were  
17 familiar before you went to the Florida residence with what  
18 the home page of the Playpen site looked like, correct?

19 A. Correct.

20 Q. And when you got to the Florida residence you saw a  
21 laptop, and displayed on the screen of the laptop was what  
22 you recognized to be the Playpen site, some part of it.

23 A. That is correct.

24 Q. I want to show you a couple photographs. Do you have an  
25 exhibit binder in front of you, sir?

—D. Alfin - Direct—

1 A. I do.

2 Q. And I direct you to what's been marked as Defense  
3 Exhibit 2.

4 A. I have the exhibit in front of me.

5 Q. And do you recognize what that is, sir?

6 A. I do.

7 Q. Can you tell the Court?

8 A. This is a photograph that was taken during the execution  
9 of a search warrant at the residence of the administrator of  
10 the Playpen Web site. This is a photograph of his laptop as  
11 it was when we encountered it during the execution of that  
12 warrant.

13 Q. And that's the execution in Naples, Florida, right?

14 A. That's correct.

15 Q. The one you were present at.

16 A. Correct.

17 Q. Now, can you turn to page 2 of that exhibit?

18 A. I have it in front of me.

19 Q. Okay. And that is the home page of the Playpen site as  
20 it appeared on February 19th, 2015, correct?

21 A. No, this is the index page of the Web site that appears  
22 after you log in to the Web site.

23 Q. I see. The border across the top of there, is that the  
24 same on the home page as it is on the index page?

25 A. Could you be more specific?



—D. Alfin - Direct —

1 Q. Sure. Let me do it this way:

2 Can you turn to Exhibit 3 in that binder?

3 A. I have it in front of me.

4 Q. Is that a screenshot of the Playpen home page as it  
5 appeared on the morning of February 20th, 2015?

6 A. I don't have it dated, but it does appear to represent  
7 what the home page looked like on February 20th, 2015, yes.

8 Q. Okay.

9 THE COURT: So the search began on the 19th and  
10 continued to the 20th.

11 THE WITNESS: Yes, Your Honor. We began execution  
12 of the search warrant in Naples, Florida, the evening of  
13 February 19th, and we eventually departed the subject's  
14 residence the morning of February 20th, 2015.

15 BY MR. GRINDROD:

16 Q. Now, this same screenshot, Defense Exhibit 3, that was  
17 what the home page looked like from February 20th through  
18 February 27th, at least, correct?

19 A. That is correct.

20 Q. The warrant application in this case -- are you familiar  
21 with that document?

22 A. I am familiar with that document.

23 Q. Okay. So you know that the warrant application said that  
24 the home page showed, quote, "Two images depicting partially  
25 clothed prepubescent females with their legs spread apart,"

—D. Alfin - Direct—

1 unquote.

2 A. The warrant application cited a specific date and time,  
3 and it cited the image as it appeared on that specific date  
4 and time, and that is an accurate description of the image  
5 that appeared on that date and time.

6 Q. Okay. So let me ask you the question this way:

7 That quote I just read is exactly the quote that  
8 appears in the warrant affidavit, correct?

9 A. In which warrant affidavit?

10 Q. The one for the NIT warrant.

11 A. Correct.

12 Q. And you would agree with me that the home page that is  
13 shown on Defense Exhibit 3 does not display two prepubescent  
14 females, correct?

15 A. It does not.

16 Q. It does not depict anyone with their legs spread apart,  
17 correct?

18 A. It does not.

19 Q. Now, at the time you executed the Florida warrant back on  
20 February 19th into the 20th you clearly saw the Web site at  
21 that point, correct?

22 A. I did.

23 Q. And you clearly saw the new logo at that point, correct?

24 A. I saw it, but I did not notice it because it was an  
25 insignificant and minor change to the Web site.

—D. Alfin - Direct—

1 Q. So your testimony is that you did see the new logo,  
2 correct?

3 A. Yes. As I stated earlier, I saw the administrator's  
4 laptop in his residence, and in that photograph the new logo  
5 was present. So, yes, I did see it, and, as I stated  
6 previously, it went unobserved by me because it was an  
7 insignificant change to the Web site.

8 Q. So you saw it but it was unobserved.

9 A. Correct.

10 Q. After February 20th the FBI seized the server that hosted  
11 the Playpen site, correct?

12 A. We seized the server hosting the Playpen Web site either  
13 the evening of February 19th, 2015, or the early morning  
14 hours of February 20th, 2015.

15 Q. And after you seized the Playpen site or the server for  
16 the Playpen site the FBI continued to monitor the site,  
17 correct?

18 A. We took a copy of the Web site, and we ran that copy of  
19 the Web site from a government facility within the Eastern  
20 District of Virginia. While we ran the Web site from the  
21 Eastern District of Virginia, we did monitor activity on the  
22 Web site.

23 Q. So the answer to my question is, yes, from February 20th  
24 on, while the FBI was operating the Web site, you were also  
25 monitoring the Web site, correct?

—D. Alfin - Direct—

1 A. The answer to that question is yes.

2 Q. Okay. So that would encompass the entire period from  
3 February 20th through at least February 27th, correct?

4 A. It would.

5 Q. At no point between February 20th and February 27th,  
6 2015, did the FBI submit a new warrant application to any  
7 judge based on this new home page, correct?

8 A. We obtained one NIT warrant the morning of February 20th,  
9 2015. That is the only NIT warrant that was obtained during  
10 this investigation.

11 Q. Okay. So, then, let me ask you my question, because I  
12 think the answer is no, but you can tell me.

13 So my question was that at no point did the FBI  
14 submit a new warrant application based on the new change to  
15 the Web site.

16 A. Sir, I need to correct an earlier statement.

17 There was a second application for a separate NIT  
18 warrant. It was never executed or utilized, but it was not  
19 related to the logo change. We did not submit a second NIT  
20 warrant reflecting the logo change.

21 Q. But there was a second warrant obtained?

22 A. There was a second warrant obtained specific to an  
23 individual user on the Web site. That warrant was never  
24 executed.

25 Q. As far as you know, that second warrant was never used to

—D. Alfin - Direct—

1 justify any search against Mr. Matish, correct?

2 A. Correct.

3 Q. But when did you go back for the second warrant?

4 A. After February 20th, 2015.

5 Q. Was it before February 27th?

6 A. I don't recall the exact date.

7 Q. Did you go back to the same Magistrate Judge?

8 A. No, that second warrant was in front of a different  
9 judge.

10 Q. But at some point after February 20th and before  
11 February 27th the FBI did go get another warrant; they just  
12 didn't update the warrant that they got in this case.

13 A. I don't know if it was before February 27th.

14 Q. But just to circle back to my original question --

15 THE COURT: Well, does this have any relevance?  
16 Because it was never executed.

17 MR. GRINDROD: Well, Your Honor, I think --

18 THE COURT: It wasn't used in this case, so --

19 MR. GRINDROD: Right. I --

20 THE COURT: We seem to be spending a lot of time on  
21 it.

22 MR. GRINDROD: I'll move on, Your Honor. I think I  
23 got what I needed there.

24 BY MR. GRINDROD:

25 Q. So let's talk a little bit about the NIT. You're

—D. Alfin - Direct—

1 familiar with this technology, correct?

2 A. I am.

3 Q. And by "NIT" you understand me to be talking about the  
4 N-I-T or the Network Investigative Technique?

5 A. Correct.

6 Q. Before the government obtained the NIT warrant in this  
7 case, I think your testimony was that the FBI had already  
8 seized the server that hosted the Playpen site, correct?

9 A. That is correct.

10 Q. But, from the FBI's perspective, the problem was that  
11 even though the government had physical possession of that  
12 server it couldn't identify the users, the people who were  
13 logging on to the Playpen site. Fair?

14 A. That is correct.

15 Q. And that problem existed because Playpen users navigated  
16 to the Playpen site through the Tor network, right?

17 A. That is correct.

18 Q. And Tor software protects users' privacy online by  
19 bouncing communications off different computers all around  
20 the world before the signal goes to the eventual destination,  
21 right?

22 A. That is accurate.

23 Q. Tor prevents someone attempting to monitor an Internet  
24 connection from learning what sites a user visits, correct?

25 A. That is correct.

—D. Alfin - Direct—

1 Q. And it prevents the Web sites the user visits by learning  
2 the user's physical location.

3 A. That is correct.

4 Q. So even though you had the Playpen host server, you still  
5 could not tell the physical location of the users accessing  
6 the Playpen site.

7 A. That is correct.

8 Q. That's where the NIT comes in, right?

9 A. That is correct.

10 Q. So the NIT, the N-I-T --

11 THE COURT: Excuse me a minute.

12 You could determine their IP number, but you  
13 couldn't determine the physical location of the computer just  
14 from the IP number. Is that right?

15 THE WITNESS: No, Your Honor. The Tor software  
16 allows an individual to host a Web site within the Tor  
17 network, and when you do that that Web site is referred to as  
18 a hidden service.

19 With a traditional Web site when a user accesses it  
20 the Web site would maintain log files showing dates, times,  
21 and IP addresses. When a user accesses one of these hidden  
22 services on the Tor network their true IP address is  
23 concealed. The actual Web site never sees their true IP  
24 address, and the user also never sees the true IP address of  
25 the server.

—D. Alfin - Direct—

1 THE COURT: The IP address, is that different than  
2 the IP identification number?

3 THE WITNESS: No, Your Honor, those would reference  
4 the same thing.

5 THE COURT: All right. Go ahead.

6 BY MR. GRINDROD:

7 Q. So let's break this down a little.

8 So you're operating the Playpen site, the FBI,  
9 correct?

10 A. Correct.

11 Q. Someone logs on to the Playpen site. You can tell  
12 without the NIT that someone has logged on, correct?

13 A. That is correct.

14 Q. But you don't know the IP address of the person who just  
15 logged on, right?

16 A. That is correct.

17 Q. And you don't have any other identifying information,  
18 like what software that computer is running or what the  
19 person's logon name for their own operating system is. You  
20 don't have any of that information, right?

21 A. We don't have that information.

22 Q. So before you deploy the NIT, when someone logs on to the  
23 Playpen site you don't know their IP address, any identifying  
24 information, or the physical location of the computer that  
25 just logged on, right?



—D. Alfin - Direct—

1 A. We do not know any of the specific items that you listed.

2 Q. And when we say you don't know the location of the  
3 computer, because you don't have the IP address or any other  
4 information you don't know -- you have no idea where that  
5 computer is located, right? In other words, let me say it  
6 this way:

7 It's not as if you know that it's in some city but  
8 you can't get the street address, correct? That computer  
9 could be located anywhere in the world.

10 A. That is correct.

11 Q. Okay. And before you deploy the NIT there's no way that  
12 you can tell where in the world that computer logging on  
13 might be located.

14 A. In general, that is correct.

15 Q. So the NIT is computer code, right?

16 A. It is a set of computer instructions or computer code,  
17 yes.

18 Q. Is it fair to say we can kind of think of this like a  
19 package of data or code?

20 A. The NIT is a set of very simple computer instructions  
21 that, when executed, instruct a computer to send to the  
22 government, in this investigation to a computer under the  
23 government's control within the Eastern District of Virginia,  
24 several pieces of identifying information.

25 Q. Thanks. Let me try to break that down step-wise a little

—D. Alfin - Direct—

1 bit.

2 So someone logs on to, in this case, the Playpen  
3 site. When you deploy the NIT, the FBI is sending to the  
4 person's computer who just logged on some set of code or  
5 data, correct?

6 A. The way that you've described it is not technically  
7 accurate and is not reflected in the NIT warrant.

8 The way that the NIT works is the software is  
9 installed on the server in the Eastern District of Virginia.  
10 After a user of the Playpen Web site takes certain actions,  
11 including downloading information from the server in the  
12 Eastern District of Virginia, that information is  
13 supplemented with the NIT instructions. So the user  
14 downloads the NIT to their computer and takes it to their  
15 computer, wherever it may be located.

16 Q. Now, you say that the user downloads this information.  
17 They don't know that they're downloading this information,  
18 right?

19 A. That's correct.

20 Q. The whole point of the NIT is that this extra package of  
21 data that you're sending to the activating computer is  
22 invisible, right?

23 A. The data that the activating computer is downloading is  
24 intended not to be observed by the user, that's correct.

25 Q. And when you talk about the information that the user's

—D. Alfin - Direct—

1 computer is downloading, you're talking about after you click  
2 through the home page the next screen would appear, correct?  
3 Like it takes you to the table of contents, right?

4 A. After you log in to the Web site with a user name and  
5 password you would arrive at the table of contents.

6 Q. And, so, when you refer to the information that the user  
7 is downloading you mean the computer code that will make the  
8 table of contents appear on their screen, right?

9 A. No.

10 Q. Well, what do you mean by that?

11 A. The way that the NIT was deployed in this investigation,  
12 a user had to take several affirmative actions before they  
13 would download the NIT to their computer.

14 In the matter at hand the user logged in to the  
15 Playpen Web site with a user name and password, they arrived  
16 at the index site, they went to the bestiality section of  
17 Playpen. At that point they --

18 Q. But --

19 THE COURT: Well, wait a minute. If you ask him a  
20 question, let him answer it.

21 MR. GRINDROD: Sorry.

22 BY MR. GRINDROD:

23 Q. Okay. Go ahead.

24 A. After the user went to the bestiality section of Playpen,  
25 the section of the Web site that advertised prepubescent

—D. Alfin - Direct—

1 children engaged in sexual activities with animals, a user  
2 observed that one post was titled something to the effect of  
3 "Girl 11YO," meaning years old, "with dog." The user then  
4 clicked on that post to open it. At that point that user  
5 downloaded several images of child pornography and the NIT  
6 instructions to their computer.

7 Those are the steps that were taken for the NIT to  
8 be deployed in this investigation.

9 Q. Okay. So let's break this down, because I think we're  
10 talking about two different things.

11 I'm asking what the warrant authorized.

12 A. Okay. That's not what you asked me.

13 Q. So let me make that clear, because -- so the warrant  
14 mentioned that the FBI had the ability to narrow the  
15 situations in which they would deploy the NIT, right? That  
16 was in footnote 8 of the NIT affidavit.

17 A. I can't cite the specific paragraph, but the warrant did  
18 say that we may restrict how we deploy the NIT, yes.

19 Q. The way you deployed it is much narrower than what the  
20 warrant authorized, correct?

21 A. That is correct. The warrant authorized us to deploy the  
22 NIT against anyone who logged in to Playpen with a user name  
23 and password, because after doing so there is probable cause  
24 to believe that someone having done this is attempting to  
25 access, download, receive, or distribute child pornography.

—D. Alfin - Direct—

1 Q. Okay. So I'm going to ask you questions that contemplate  
2 that situation that is set out in the warrant, rather than  
3 any specific execution that you referenced in your earlier  
4 response, okay?

5 A. I will answer your questions.

6 Q. So someone logs on to the Playpen Web site by entering a  
7 user name and password, correct?

8 A. Yes.

9 Q. They have to click "Okay" or "Login." Is that correct?

10 A. I don't remember exactly what the button says, but they  
11 enter their user name, they enter their password, and then  
12 they log in to the Web site.

13 Q. And under the NIT warrant, at that point the FBI is  
14 authorized to deploy the NIT to search that logging-in  
15 computer.

16 A. Yes.

17 Q. And when you talk about the code going back to that  
18 logging-in computer, the activating computer or user's  
19 computer, it's a physical package of data, computer code,  
20 that travels to the activating computer, correct?

21 A. I would not refer to computer code as a physical item.  
22 It is computer code.

23 Q. And it's transmitted physically, right?

24 A. Digitally. I mean, it is computer code.

25 Q. Computer code. And, so, is it a fair analogy to say

—D. Alfin - Direct—

1 that, basically, this code is kind of like installed onto the  
2 activating computer?

3 A. No, the NIT is not installed onto the computer, nor does  
4 it make any permanent changes to the computer, nor are there  
5 any remnants of it left behind after it executes the limited  
6 set of instructions authorized by the NIT warrant.

7 Q. So a computer code works by telling a computer what to  
8 do, right, basically?

9 A. That's fair.

10 Q. And in this case the NIT code was sent to the activating  
11 computer, went onto that activating computer and told that  
12 computer what to do, right?

13 A. After the activating computer downloaded the NIT  
14 instructions, those instructions were run. The computer  
15 executed those instructions, and then there was nothing left  
16 behind, no pieces of the NIT or anything like that, on the  
17 computer.

18 Q. But -- I think you answered my question.

19 When we talk about the information being gathered by  
20 the NIT, this information included the IP address, correct?

21 A. After the NIT executed the instructions on the computer,  
22 it transmitted information to a government server in the  
23 Eastern District of Virginia. In transmitting that data, the  
24 IP address of the activating computer is observed and  
25 captured.

—D. Alfin - Direct—

1 Q. And the NIT also gathered other information that was  
2 stored on the activating computer, like the host's name and  
3 the logon name, correct?

4 A. That is correct.

5 Q. And it took this information that it gathered from the  
6 activating computer and sent it to the FBI.

7 A. That is fair.

8 Q. Okay. So I started this conversation about the NIT by  
9 talking about kind of problem and solution, right? The  
10 problem was, from the FBI's standpoint--

11 THE COURT: All right. Let me ask something.

12 So the NIT sent back to the FBI the IP address.

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: And what did that tell you?

15 THE WITNESS: It told us the true IP address of the  
16 user who accessed the Web site, which prior to execution of  
17 the NIT instructions, because of the way the Tor network  
18 functions, we were unable to see the true IP address of the  
19 user's computer.

20 THE COURT: All right. Well what does the IP  
21 address give you? Does it give you just the ID number of the  
22 computer, or does it give you the location of the computer?  
23 What does it give you?

24 THE WITNESS: With the IP address we are able to use  
25 the IP address and send a subpoena to an Internet service

—D. Alfin - Direct—

1 provider and ask them to identify the subscriber who had that  
2 IP address on that date and time.

3 THE COURT: So that allowed you to trace the  
4 location of that computer.

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: And you say it also included the host's  
7 name.

8 THE WITNESS: Yes, Your Honor, that's --

9 THE COURT: Is the host Playpen?

10 THE WITNESS: No, Your Honor, that would be the host  
11 name of the user's computer. When you install an operating  
12 system on your computer it will typically ask you what do you  
13 want your computer name to be, and that is the name.

14 THE COURT: So you mean the host of the computer  
15 whose IP address you had.

16 THE WITNESS: Yes.

17 THE COURT: And also the login name.

18 THE WITNESS: Yes, Your Honor, in this case it would  
19 be a Windows operating system user name.

20 THE COURT: Okay.

21 BY MR. GRINDROD:

22 Q. Let me direct you, Agent Alfin, to what's in your binder  
23 marked as Defense Exhibit 5.

24 MR. GRINDROD: Your Honor, this exhibit was part of  
25 information that was provided by the government and is



—D. Alfin - Direct—

1 covered by the protective order in this case, so I would ask  
2 that if the Court is going to admit this evidence that it be  
3 filed under seal.

4 THE COURT: Are you asking me to admit it?

5 MR. GRINDROD: Not at this point, Your Honor.

6 THE COURT: All right. Well, ask the question,  
7 then.

8 MR. GRINDROD: All right. Thank you, Your Honor.

9 BY MR. GRINDROD:

10 Q. Are you familiar with this kind of document, Agent Alfin?

11 A. I am.

12 Q. Can you tell the Court what it is?

13 A. This is a user report, or a page from a user report, that  
14 my unit generated at the conclusion of our investigation. It  
15 shows specific activities, specific actions, attributed to  
16 specific users of the Playpen Web site. It is called a  
17 Cygnus report, Your Honor.

18 THE COURT: It's called a what?

19 THE WITNESS: Cygnus report, Your Honor.

20 Cygnus, C-Y-G-N-U-S. It's not an acronym, it's just  
21 named after a constellation.

22 THE COURT: Okay.

23 BY MR. GRINDROD:

24 Q. So this is a document that's produced by law enforcement,  
25 correct?

—D. Alfin - Direct—

1 A. Correct.

2 Q. And basically what this is is a way of displaying the  
3 information that was gathered when the NIT was deployed  
4 against a user, correct?

5 A. This specific page of the report contains information  
6 that was identified by a NIT, yes.

7 Q. All right. And your clarification -- there are a number  
8 of tabs at the top, right?

9 A. There are.

10 Q. And so before I took this screenshot you would agree that  
11 it appears that I clicked on the tab that would display the  
12 NIT hits. Is that right?

13 A. Yes, that's correct.

14 Q. So the full Cygnus report contains more information than  
15 just this page, correct?

16 A. That is correct.

17 Q. So I want to direct your attention to a couple pieces of  
18 information that are displayed here.

19 First, all the way to the left it says, "Date/Time,"  
20 and it says, "2015-02-27." Does that indicate that this  
21 information is relating to the deployment of the NIT on that  
22 day?

23 A. Yes. This reflects information that was identified by a  
24 NIT on February 27th, 2015.

25 Q. And this was the NIT deployment against Mr. Matish's

—D. Alfin - Direct—

1 computer, correct?

2 A. That is correct.

3 Q. And some of the information on here was gathered from his  
4 computer by the NIT and sent back to the FBI, correct?

5 A. That is correct.

6 Q. That information includes the IP address?

7 A. I want to clarify. With the IP address, that was not  
8 actually resident on his computer. After the NIT collected  
9 information it sent it over the regular Internet to our  
10 server, and his IP address was observed at that time.

11 Q. Okay. And the MAC --

12 A. That is the MAC address of the computer.

13 MAC is an acronym for Media Address Control. It is  
14 a unique hardware identifier on an individual's network card.  
15 For example, if they're using a hard-wired Internet cable,  
16 that port on the computer where you plug it into will have a  
17 unique MAC address, or a wireless card will also have a  
18 unique MAC address.

19 Q. And, so, the purpose of gathering that information is  
20 because multiple computers can be logged on to the Internet  
21 through the same IP address, right?

22 A. That is correct.

23 Q. And, so, the reason the FBI collected that information  
24 and some other information we're going to talk about is  
25 because it would help the FBI narrow the possible computers

—D. Alfin - Direct—

1 who might have been logging on to the site from that IP  
2 address, correct?

3 A. You could use the MAC address to identify which computer  
4 in a residence was the one that logged on to the Web site.

5 Q. So if I have three laptops in my house and four cell  
6 phones that connect to Wi-Fi, just based on the IP address  
7 the FBI may not be able to tell which device actually logged  
8 on to Playpen, correct?

9 A. That's possible.

10 Q. But because the FBI gathered from the activating computer  
11 this additional information, it can help the FBI pinpoint  
12 which device actually logged on.

13 A. That would be one way of identifying the device.

14 Q. And another way of identifying the device would be based  
15 on the host name.

16 A. That's correct.

17 Q. That's other information that the NIT gathered from, in  
18 this case, Mr. Matish's computer and sent back to the FBI.

19 A. That is correct.

20 Q. The same with the login name. Here that says, "Eddie,"  
21 correct?

22 A. It does.

23 Q. And, so, a login name, at least with the Windows  
24 operating system, is created by whoever installs the Windows  
25 operator system on their computer, correct?

—D. Alfin - Direct—

1 A. Generally, yes.

2 Q. And sometimes different members of the family may have  
3 different login names for different people, correct?

4 A. That is generally correct.

5 Q. Different people who use that same computer, correct?

6 A. Yes.

7 Q. So that information helped the FBI identify not only the  
8 actual device that was logging on to Playpen but also perhaps  
9 helped the FBI identify the specific person who was using  
10 that device or specific account that was associated with that  
11 device that logged on to Playpen, correct?

12 A. This information could be used to identify a specific  
13 device.

14 Q. And that information, like the other information we're  
15 talking about, is gathered from Mr. Matish's computer, sent  
16 back to the FBI, and that's how it ended up in the Cygnus  
17 report.

18 A. That's correct.

19 Q. All this information gathered by the NIT pursuant to the  
20 NIT warrant.

21 A. Correct.

22 Q. And the last piece of information here that falls into  
23 that category is the entry under "OS," correct?

24 A. Correct.

25 Q. "OS" is operating system?

—D. Alfin - Direct —

1 A. Correct.

2 Q. And, so, this information indicates that the operating  
3 system that accessed the Playpen site -- or the operating  
4 system that was running on the computer that accessed the  
5 computer site was a Windows operating system.

6 A. That's correct.

7 Q. So, again, if there was a MAC, a Windows program,  
8 operating system, in somebody's house, this might help you  
9 say, we think it was the computer that's running Windows, not  
10 the MAC.

11 A. That is possible, yes.

12 MR. GRINDROD: Your Honor, I offer at this point  
13 Defense Exhibit 5, under seal.

14 THE COURT: All right. Why should it be under seal?

15 MR. GRINDROD: I have it no objection to it being --

16 THE COURT: Well, I'm asking the government.

17 MS. GRATTON: The Cygnus report was provided  
18 pursuant to the agreed discovery protective order. The  
19 report itself contains a wide amount of information related  
20 to the Playpen site, including information related to this  
21 defendant and several other targets. And, so, the report was  
22 provided, as the parties agreed, pursuant to the protective  
23 order, which would require any portion of its filing under  
24 seal.

25 THE COURT: All right. The Court will admit the

—D. Alfin - Direct —

1 exhibit with the proviso that it be placed under seal,  
2 meaning that it will not be a public document.

3 (The exhibit was admitted into evidence under seal.)

4 BY MR. GRINDROD:

5 Q. And, Agent Alfin, before we move away from that document,  
6 this is probably obvious, but the notation on the bottom of  
7 that page says, "Subject to protective order under seal."  
8 That's obviously, not something that would show up on the  
9 Cygnus report, correct? That was something added by the  
10 lawyers?

11 A. That is correct.

12 MR. GRINDROD: Your Honor, I also offer Defense  
13 Exhibits 2 and 3.

14 I would note that I believe Defense Exhibit 3 was  
15 attached to some of the motions and responses in this case.

16 THE COURT: All right. Exhibits 2, 3, and 5 will be  
17 admitted, with the sealed proviso as to Number 5.

18 (The exhibits were admitted into evidence.)

19 BY MR. GRINDROD:

20 Q. So, Agent Alfin, when we started talking about the NIT we  
21 talked about it in terms of a problem and a solution, the  
22 problem being that, from the FBI's standpoint, you couldn't  
23 identify the physical location or any identifying information  
24 about the computer that was logging in to the Playpen site,  
25 correct?

—D. Alfin - Direct—

1 A. Correct.

2 Q. And the NIT was a way of gathering that information.

3 A. Yes.

4 Q. So if the problem was that you didn't know the location  
5 of the activating computer -- this may be obvious, but before  
6 you search the user's computer with the NIT you don't know  
7 where that computer is located, right?

8 A. Correct.

9 THE COURT: We went through that before, didn't we,  
10 Counsel?

11 MR. GRINDROD: Okay.

12 BY MR. GRINDROD:

13 Q. So here in this case the NIT warrant authorized the FBI  
14 to search any user or administrator who logged on to the  
15 Playpen Web site, correct?

16 A. The warrant that was obtained here in the Eastern  
17 District of Virginia did authorize us to utilize the NIT  
18 against any user's computer after that user logged in to the  
19 Web site with a user name and a password.

20 Q. If you could, imagine for me that the NIT warrant instead  
21 said that you could only search the computer of a user if  
22 that computer was located in the Eastern District of  
23 Virginia.

24 A. I'm imagining it.

25 Q. Okay. With this technology that you used in this case



D. Alfin - Cross

1 you could not -- you couldn't do that, right?

2 A. As stated previously, the NIT was utilized because we did  
3 not know the physical location of a computer before the NIT  
4 was utilized.

5 MR. GRINDROD: I have no further questions -- may I  
6 consult with counsel for one moment, Your Honor?

7 (There was a pause in the proceedings.)

8 MR. GRINDROD: I have no further questions at this  
9 time.

10 CROSS-EXAMINATION

11 BY MS. GRATTON:

12 Q. Good afternoon.

13 A. Good afternoon.

14 Q. Can I have you look at what's marked in that binder as  
15 Defendant's Exhibit 4.

16 A. I have it in front of me.

17 Q. What does that depict?

18 A. This is the home page of the Playpen Web site prior to  
19 February 19th, 2015.

20 Q. Is there a date depicted anywhere on that exhibit?

21 A. In the bottom right-hand corner it indicates that this is  
22 how the Web site appeared on or about February 3rd, 2015.

23 Q. Are you familiar with the circumstances under which this  
24 image was captured?

25 A. I am. An undercover FBI agent operating from my office

D. Alfin - Cross

1 in the Linthicum, Maryland area accessed the Playpen Web site  
2 on February 3rd, 2015, and took several screenshots of the  
3 Web site. This was one of them.

4 Q. And can you describe what's been referred to as the logo  
5 located up in the left-hand corner?

6 A. The logo on the top left of this page has the word  
7 "Playpen," and on either side of the logo there are two  
8 prepubescent females, wearing what appear to be underwear or  
9 bathing suits, with their legs spread.

10 Under that is the text that says, "No cross-board  
11 reposts, 7Z preferred, encrypt file name, include preview,  
12 peace out."

13 Q. And if you could turn, then, back to Defendant's  
14 Exhibit 3, which has already been admitted.

15 Can you describe the difference and the similarities  
16 in that logo to the one in the other?

17 A. The old logo depicted two prepubescent females. The new  
18 logo depicts a single prepubescent female wearing fishnet  
19 stockings and posed in a sexually suggestive manner.

20 Q. In all other respects, the text you just described, is  
21 that the same?

22 A. Correct, with the addition of the words "welcomes you."

23 Q. Have you had the opportunity to review this login page,  
24 both with the former logo and the new logo?

25 A. Yes, I have.

D. Alfin - Cross

1 Q. Is the process for logging in the same?

2 A. It is.

3 Q. Does it take you to the same place?

4 A. It does.

5 Q. Is the content the same?

6 A. It is.

7 Q. In any other aspect beyond the photo, was the content of  
8 Playpen different after February 19th?

9 A. No, it was still the same Web site that it was prior to  
10 February 19th.

11 Q. And you discussed the photos of the administrator's  
12 laptop as they appeared during the execution of the search  
13 warrant at his home in Naples, Florida, beginning on  
14 February 19th?

15 A. Yes.

16 Q. When did that search conclude?

17 A. That search concluded the morning of February 20th, 2015.

18 Q. I believe you testified that you saw the laptop; that the  
19 logo was present on it but it went unobserved by you.

20 A. That is correct.

21 Q. Did you communicate with the warrant affiant concerning  
22 the appearance of the Web site before the NIT warrant was  
23 obtained?

24 A. No, I did not.

25 Q. There's been a number of references to passing through

D. Alfin - Cross

1 the home page or clicking through the home page. Can you  
2 describe in detail how one gets from this home page into the  
3 content of Playpen?

4 A. Prior to logging in to the Playpen Web site, a user would  
5 have to click on one of the -- excuse me -- click on the link  
6 in the middle of the page that says, "Register an account  
7 with Playpen."

8 After doing that they would be taken to a separate  
9 page with the instructions on creating an account on the  
10 Playpen Web site, including instructions such as entering  
11 fake e-mail addresses and making sure that you don't do  
12 anything that could be used to identify you.

13 At that point the user would select a user name and  
14 a password, and after that they would be redirected back into  
15 this login page, and they would have to enter that user name  
16 and password, and then they would be able to log in to the  
17 Web site.

18 Q. And that, you're describing, is the registration process  
19 for creating a Playpen account.

20 A. That's correct.

21 Q. What's the process once a person has an account?

22 A. After a person has an account, they just need to come to  
23 this front page, enter their user name and password, and then  
24 they can log in to the Web site.

25 Q. But in order to get there they have to have gone through

D. Alfin - Cross

1 the registration process, as you just testified.

2 A. Correct.

3 MS. GRATTON: One moment.

4 (There was a pause in the proceedings.)

5 MS. GRATTON: Before we move on, Your Honor, I would  
6 move to admit what's been marked as Defendant's Exhibit 4.

7 MR. GRINDROD: No objection.

8 THE COURT: All right. Exhibit 4 will be admitted.

9 (The exhibit was admitted in evidence.)

10 THE COURT: Would you give me the steps again for  
11 registering for the Web site?

12 THE WITNESS: After you come to the main page of the  
13 Web site, Your Honor, as it's depicted --

14 THE COURT: How do you get to the main page of the  
15 Web site?

16 THE WITNESS: The Playpen Web site existed on the  
17 Tor network, so you can't just use a normal Internet browser  
18 to get there. Commonly, on a user's computer you may have  
19 Internet Explorer or Firefox or something of that nature.  
20 Those web browsers will not be able to connect you to the  
21 Playpen Web site.

22 Similarly, you would not be able to go to Google and  
23 find the Playpen Web site. You would have to first download  
24 specialized software, generally the Tor browser, which is a  
25 special web browser that --

D. Alfin - Cross

1 THE COURT: The what browser?

2 THE WITNESS: Tor browser, Your Honor.

3 THE COURT: Tor? Okay.

4 THE WITNESS: It allows you to both connect to the  
5 regular Internet and hide where you're coming from. It also  
6 allows you to connect to Web sites, like Playpen, that exist  
7 only within the Tor network.

8 THE COURT: Well, how does one know about the Tor  
9 network?

10 THE WITNESS: The Tor network itself is freely  
11 available. It can be used for a variety of purposes. Not  
12 all of them are illegal. There is --

13 THE COURT: Well, is the Tor network advertised  
14 anywhere? How does anybody know that it exists?

15 THE WITNESS: It has a Web site on the regular  
16 Internet that advertises it. There are a number of  
17 organizations that advocate its use for various reasons.  
18 It's gotten a significant amount of press coverage in the  
19 past several years, so it would not be uncommon for someone  
20 to know about the Tor network in general.

21 THE COURT: All right. So once you know that there  
22 is a Tor network, what do you have to do to log on to that  
23 network?

24 THE WITNESS: First you would have to download the  
25 special software, the Web browser, that would allow you to

D. Alfin - Cross

1 connect to the Tor network.

2 THE COURT: Where would you get that?

3 THE WITNESS: From the Tor Project Web site. It's  
4 a --

5 THE COURT: So you would have to go to the Tor Web  
6 site?

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: That would be step one?

9 THE WITNESS: Yes, Your Honor.

10 THE COURT: And how do you do that? I mean, is that  
11 like going to any other Web site?

12 THE WITNESS: Yes, Your Honor. The Tor Web site  
13 exists on the regular Internet, as most other Web sites do.  
14 From there you can read information about the Tor network,  
15 and you can also download the Tor browser that will allow you  
16 to connect to the Tor network.

17 THE COURT: Once you connect to the network, then  
18 you have to register with Tor.

19 THE WITNESS: After you connect to the Tor network  
20 you're immediately on the Tor network. The network itself  
21 does not require any special registration. This particular  
22 Web site, Playpen, did require registration, but you wouldn't  
23 be able to find the Playpen Web site without taking several  
24 other steps as well.

25 BY MS. GRATTON:

D. Alfin - Cross

1 Q. Could you perhaps describe those steps for the Court?

2 THE COURT: Well, how would you know what steps to  
3 take?

4 THE WITNESS: So typically if you're looking for  
5 something on the regular Internet you could go to Google, you  
6 could type in that thing, and you would find a Web site on  
7 the topic that you're looking for.

8 With the Tor network there are various index Web  
9 sites that function in a somewhat similar manner, but they  
10 don't function like search Web sites on the regular Internet  
11 do. For example, there are a number of index Web sites that  
12 exist within the Tor network that show you links to various  
13 child pornography Web sites. In the case of Playpen, it was  
14 listed on at least two Web sites whose purpose was listing  
15 child porn Web sites within the Tor network.

16 So first you would go to one of these index Web  
17 sites, and then from there you would find the link to the  
18 child porn Web site, such as Playpen, and you would click on  
19 it from there, and then you would be brought to this front  
20 page of the Playpen Web site.

21 THE COURT: There seems to be some dispute between  
22 the government and the defense as to whether someone could  
23 accidentally stumble on Playpen or Tor.

24 THE WITNESS: It would be incredibly unlikely for  
25 someone to accidentally stumble upon the Playpen Web site,



D. Alfin - Cross

1 but the Tor network itself is not illegal. You can use the  
2 Tor network to do legal things. However, finding your way to  
3 a Web site like Playpen takes several affirmative steps by  
4 the user, and it is highly unlikely that someone who is not  
5 searching for child pornography would find their way to the  
6 Playpen Web site.

7 THE COURT: When you were investigating the content  
8 of the Web site did you ever determine the origin of the  
9 pornography that was on the Web site; that is, whether it  
10 became from overseas or --

11 THE WITNESS: I reviewed the content of the Web site  
12 on multiple occasions. Of the child pornography that we were  
13 able to recover and analyze from the Web site, there were  
14 hundreds of identified victims. Some of them were domestic,  
15 from previous law enforcement investigations within the  
16 United States; some of them were victims that were identified  
17 overseas by foreign law enforcement investigations.

18 THE COURT: Do you have any concept of whether most  
19 of it was foreign or domestic?

20 THE WITNESS: I don't know the answer to that, Your  
21 Honor.

22 THE COURT: It was a combination of the two?

23 THE WITNESS: Yes, Your Honor.

24 BY MS. GRATTON:

25 Q. If I may ask a follow-up point on that, were there

D. Alfin - Cross

1 specific forums within Playpen's content that specified  
2 content available in different languages?

3 A. Yes. There were foreign language sections of Playpen  
4 that advertised images and videos of children from foreign  
5 countries, as well as offered an opportunity for users who  
6 spoke those foreign languages to post child pornography and  
7 discuss said topic with other users who spoke the same  
8 language. The majority of users on the Playpen Web site who  
9 posted content posted it in English.

10 Q. Did your investigation identify anyone utilizing the  
11 Playpen network who had produced child pornography?

12 A. Yes, we identified a number of producers of child  
13 pornography through the investigation of Playpen.

14 Q. Suffice to say that the content on that Web site  
15 reflected a wide variety of child pornography from various  
16 sources.

17 A. That is correct.

18 THE COURT: Foreign and domestic?

19 THE WITNESS: Yes, Your Honor. We have identified a  
20 number of victims and hands-on offenders of children, both  
21 domestically and internationally.

22 THE COURT: And you say there was also a process for  
23 sharing?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: How did that work?

D. Alfin - Cross

1 THE WITNESS: The Web site was set up into various  
2 categories. For example, there was a video section, and  
3 within that video section there was a forum for preteen  
4 videos - girls, there was a section for preteen videos -  
5 boys. And, so, a user would go -- if they wanted to share  
6 videos of girls, they would go to the preteen videos - girls  
7 section, and within that section of the Web site they would  
8 create a new topic, and they would upload images or videos of  
9 child pornography that other users could then open that topic  
10 and download those images and videos.

11 THE COURT: All right.

12 THE WITNESS: And that was the primary purpose and  
13 use of the Web site.

14 BY MS. GRATTON:

15 Q. You mentioned in your testimony on direct a clarification  
16 that the IP address doesn't come from a user's computer.  
17 Where does it come from?

18 A. The IP address is generally assigned by the Internet  
19 service provider to a user's modem. While the NIT transmits  
20 its information to the government that IP address is  
21 transmitted along with that information, just in the course  
22 of how communications occur over the Internet.

23 Q. And the warrant authorized the government to retain that  
24 information --

25 A. Correct.

D. Alfin - Cross

1 Q. -- as part of that transmission.

2 A. Correct.

3 Q. And you testified that the Tor network operates to mask  
4 the IP address of a user. Can you explain that process?

5 A. The Tor network has two primary purposes. The first is  
6 to allow a user to access the regular Internet and do so in  
7 an anonymous fashion. So a user would go to the Tor Project  
8 Web site, they would download the Tor browser, and then they  
9 would use it to connect to normal Internet Web sites as they  
10 normally would.

11 They could go to Google, or they could go to  
12 cnn.com. They could access any Web site like they normally  
13 would. The difference is that their communication -- instead  
14 of going, essentially, directly from their computer to the  
15 Google Web site, their Internet traffic is instead routed  
16 across multiple computers around the world. And, so, you  
17 still access the Google Web site, but the Google Web site  
18 doesn't know where you are. It doesn't know if you're in  
19 Virginia or if you're in a foreign country. And that's how  
20 the majority of the users utilize the Tor network, just to  
21 access the normal Internet.

22 The second primary purpose of the Tor network is  
23 hidden services. Hidden services such as the Playpen Web  
24 site are Web sites that exist only within the Tor network.  
25 You cannot use your normal Internet browser to access them,

D. Alfin - Cross

1 you need to download special software. And, so, when you do  
2 that you are affording benefits to both those users of those  
3 Web sites and the people hosting those Web sites.

4 As a user of a Tor hidden service, when I connect to  
5 the Tor hidden service the operator of the Web site doesn't  
6 know where I am. They can't see my real IP address, and they  
7 cannot identify me. Additionally, my communications are  
8 encrypted, so law enforcement could not monitor my home  
9 Internet connection, if they knew who I was, and see what I  
10 was doing. They wouldn't be able to see what Web site I was  
11 going to. They wouldn't be able to tell that I was logging  
12 in to Playpen. So Tor hidden services protect the users in  
13 that you cannot identify who the users are.

14 The second benefit of using a Tor hidden service is  
15 that the person hosting the Web site is afforded similar  
16 protections. If I host a Tor hidden service anyone is free  
17 to connect to it, but even though they're connecting to my  
18 Web site, even though they're logging in to my Web site, they  
19 still don't know where my Web site is.

20 On the traditional Internet you can look up any Web  
21 site you want to, such as google.com, and you can see exactly  
22 where it's hosted, you can see its real IP address, you can  
23 see what state it's in or what country it's in. You cannot  
24 do that with a Tor hidden service. You cannot look up its  
25 true IP address, you cannot immediately tell what country

D. Alfin - Cross

1 it's in, what state it's in. None of that information is  
2 available to any third-party observers.

3 So Tor hidden services protect and offer anonymity  
4 to both its users and to the people hosting the Tor hidden  
5 services.

6 THE COURT: Well, now, what do you mean its user and  
7 the people hosting them? What's the difference between a  
8 user and the people hosting it?

9 THE WITNESS: So the individual in Naples, Florida  
10 is the person who created and hosted the Playpen Web site.  
11 He was the primary administrator; he created the Web site  
12 himself. So he was the individual who was responsible for  
13 creating these Web pages and making it available to users.

14 And then other individuals, such as the defendant in  
15 this investigation, was just a user of the Web site, so he  
16 would access it, log in to it, and consume the contents on  
17 the Web site.

18 THE COURT: Well, when you register with Tor you  
19 talked about going through a series of servers all over the  
20 world.

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: Do you have any idea how many servers  
23 there are?

24 THE WITNESS: There are over a thousand servers,  
25 Your Honor. They are actually publicly listed on the Tor Web

D. Alfin - Cross

1 site. You can see exactly where they are and what their IP  
2 addresses are.

3 THE COURT: Well, then, how are they secure? How do  
4 they secure the anonymity of the host and the users?

5 THE WITNESS: Because of the way a user connects to  
6 the Tor network, every time they connect to the network they  
7 establish a new circuit of those random servers around the  
8 world, and that circuit changes --

9 THE COURT: You say "random"?

10 THE WITNESS: Yes, Your Honor. So it picks from  
11 that list of over a thousand servers and says, for today I'm  
12 going to route my communications through these three random  
13 servers around the world. And those servers -- even though  
14 we know where they are, all of those communications are  
15 encrypted. So even if we were to monitor those servers, we  
16 still would not be able to tell what communications are  
17 passing through it, and we would not be able to identify who  
18 the users of the Tor network were at that time.

19 BY MS. GRATTON:

20 Q. As part of that process, the routing through either from  
21 the user to the Web site or the hidden service or the hidden  
22 service back to the user, are the real IP addresses disclosed  
23 to someone?

24 A. Yes. When a user connects to the Tor network they are  
25 disclosing their real IP address to the first Tor node or

—D. Alfin - Cross—

1 computer that they connect to.

2 Q. So that is information that is disclosed in the process.

3 A. Yes.

4 Q. Can they prevent that disclosure through using the Tor  
5 network?

6 A. No.

7 Q. I want to just briefly touch on the NIT in this case.  
8 There's been a lot of discussion about searches and  
9 deployments to user computers.

10 You described the NIT as computer instructions.

11 A. Yes.

12 Q. Where were those computer instructions installed after  
13 the NIT warrant issued?

14 A. They were installed on a government-controlled server in  
15 the Eastern District of Virginia.

16 Q. Did the FBI install them on any other computers or  
17 locations?

18 A. The FBI configured the server such that when users  
19 attempted to access the content of the Playpen Web site, in  
20 addition to downloading that content, the NIT instructions  
21 were added to that content. And, so, a user, by taking  
22 several affirmative actions, ended up downloading that code  
23 to their computer.

24 Q. So the code was included in the content that the user  
25 requested?



—D. Alfin - Redirect—

1 A. Correct.

2 Q. And through -- when content is requested from a Web site,  
3 how does it get to the user? Can you describe that process?

4 A. Generally, when a user connects to a Web site they will  
5 initiate a connection to the Web site, and there will be,  
6 essentially, a flow of communication going back and forth  
7 between the user's computer and the Web site. The user's  
8 computer will say, I want this piece of information, and the  
9 Web site will say, here you go, and that exchange will  
10 continue on and on until the user disconnects from the Web  
11 site.

12 Q. So the information sent is the information requested.

13 A. Correct.

14 Q. In this case, Playpen content, including the NIT.

15 A. Correct.

16 Q. If Playpen had received no logins, no user requests,  
17 would the NIT have left the server in the Eastern District of  
18 Virginia?

19 A. No.

20 MS. GRATTON: I don't have any further questions,  
21 unless -- no.

22 MR. GRINDROD: May I inquire, Your Honor?

23 THE COURT: You may.

24 REDIRECT EXAMINATION

25 BY MR. GRINDROD:

—D. Alfin - Redirect—

1 Q. I want to talk a little bit about the Tor network.

2 So the Tor network is not, for lack of a better word,  
3 a bad thing in this case, necessarily, right?

4 A. Well, in this case it's a terrible thing. It was used to  
5 host the world's largest child pornography Web site.

6 Q. Okay. People -- innocent -- there are a number of  
7 innocent uses of the Tor network, correct?

8 A. Yes. I stated previously that you can use the Tor  
9 network for legal purposes.

10 Q. In fact, the Tor Project is a nonprofit organization,  
11 correct?

12 A. That's correct.

13 Q. And it was initially started by the United States Naval  
14 Research Laboratory, right?

15 A. Tor Research was initially started by the United States  
16 Naval Research Laboratory.

17 Q. And then it became a nonprofit, and a number of civil  
18 liberties nonprofits provided funding to host the Tor  
19 network, correct?

20 A. The majority of the Tor Project's funding comes from the  
21 United States Government. Other funding comes from other  
22 areas.

23 Q. So the United States Government is a primary funder of  
24 Tor?

25 A. I believe that is still accurate, yes.

—D. Alfin - Redirect—

1 Q. And then a number of other nonprofit and philanthropic  
2 organizations provide additional funding, correct?

3 A. I don't know exactly who the other organizations are, but  
4 I do know that a number of other organizations fund it, yes.

5 Q. And one of the organizations that in the past has  
6 provided funding to Tor is the Electronic Frontier  
7 Foundation, an amicus in this case, correct?

8 A. I believe that's true.

9 Q. And people all over the world use Tor as a way of  
10 protecting their privacy, right?

11 A. That is what the Tor Project claims, and I believe that  
12 is correct.

13 Q. And as far as usage goes, some reports, as recently as  
14 2014, note that something like 11 percent of all Internet  
15 users use Tor for at least some of their browsing.

16 A. I'm not familiar with the specific report you're citing.

17 Q. Are you familiar with the general usership, at what  
18 percentage people generally use Tor, how many people use it?

19 A. My investigations solely focus on people who use Tor for  
20 illegal purposes, so I can tell you about those numbers. I  
21 don't generally collect or research other users of Tor. It's  
22 not relevant to my work.

23 Q. You're not really qualified to talk about what legal uses  
24 exist for Tor or how popular it is outside of the context --  
25 your experience with Tor is limited, really, to illegal uses

—D. Alfin - Redirect—

1 of Tor.

2 A. I can answer multiple questions about the Tor network, I  
3 just can't affirm the number that you quoted earlier because  
4 I'm not familiar with that specific study.

5 Q. We talked about how you can't find Tor-hosted sites  
6 through traditional Internet searches like on Google or Bing,  
7 right?

8 A. That is generally true, yes.

9 Q. There are search engines that work on the Tor network,  
10 correct.

11 A. Not in the same context that they work on the regular  
12 Internet. There are index Web sites of Tor hidden services  
13 that can be searched, but their functionality is different  
14 from, say, Google or Bing. But there are searchable index  
15 Web sites that you can use to find addresses to Tor hidden  
16 services.

17 Q. And I believe we talked a little while on direct about  
18 someone's ability to stumble upon the Playpen site, right?

19 A. Yes. It would be very unlikely for someone to innocently  
20 log in to Playpen without previously knowing what its content  
21 was.

22 Q. Okay. Well, a number of the entries in the Playpen table  
23 of contents could relate to adult pornography as easily as  
24 they could to child pornography. Is that fair to say?

25 A. No. Playpen was dedicated entirely to child pornography.

—D. Alfin - Redirect—

1 All the topics on Playpen related to child pornography.

2 Q. And you're familiar with terms that are associated with  
3 child pornography as part of your training, right?

4 A. I am.

5 Q. You're also familiar with terms that are associated or  
6 can be associated with legal pornography, correct?

7 A. I am.

8 Q. Because it's important for you to be able to distinguish  
9 between terms that may be specifically signalling child  
10 pornography versus those that are possibly including adult  
11 pornography or legal pornography, right?

12 A. That's fair to say.

13 Q. So the term "kinky fetish" can refer to adult  
14 pornography, correct?

15 A. It can.

16 Q. And that's a term that appeared on the Playpen table of  
17 contents.

18 A. And in the context of the Playpen Web site it is related  
19 to child pornography.

20 Q. My question is asking whether the term that appeared on  
21 the table of contents -- right? -- can be associated with  
22 adult legal pornography.

23 A. Within the context of the table of contents, no, because  
24 Playpen was a child pornography Web site. Outside of the  
25 context of the Playpen Web site, yes, it can.

1 Q. Okay. So the answer to my question is that the term  
2 "kinky fetish," in and of itself, can refer to legal adult  
3 pornography.

4 A. That is a different question, and the answer to that  
5 question is yes.

6 Q. Okay. The same question that I just asked you with  
7 respect to bondage. That term, in and of itself, can refer  
8 to legal adult pornography.

9 THE COURT: Well, there's no sense going through all  
10 that, Counsel. I get your point.

11 MR. GRINDROD: Thank you, Your Honor.

12 BY MR. GRINDROD:

13 Q. And, so, with respect to stumbling upon the Web site --

14 MR. GRINDROD: Well, I'll leave it at that, Your  
15 Honor.

16 BY MR. GRINDROD:

17 Q. Let me ask you one question about the NIT and the way the  
18 IP address is sent back to the FBI.

19 I believe on cross-examination you testified that the  
20 NIT gathered certain information from the activating  
21 computer, like the host name and MAC, some of that  
22 information we talked about, and then sent it back to the  
23 FBI, correct?

24 A. That is correct.

25 Q. And then the FBI looked at that transmission, and it got

1 the IP address from the transmission.

2 A. That is correct.

3 Q. Now, the NIT was downloaded without the user's knowledge  
4 or consent, correct?

5 A. They downloaded it without their knowledge, that is  
6 correct.

7 Q. Okay. And without the NIT no user, including Mr. Matish,  
8 would have been sending their host name or any other  
9 information from their personal computer to the FBI, right?

10 A. That is correct.

11 Q. And so without the NIT the government doesn't get the IP  
12 address, right?

13 A. That is correct.

14 MR. GRINDROD: I have no further questions, Your  
15 Honor.

16 MS. GRATTON: Nothing further, Your Honor.

17 THE COURT: You may step down.

18 THE WITNESS: Thank you, Your Honor.

19 MR. GRINDROD: Your Honor, if I could, before you  
20 pass the notebook back, if I could move to admit what's been  
21 marked as Defense Exhibit 1A and 1B, which is the search  
22 warrants and the application for the search warrant with  
23 respect to the network investigative technique.

24 MS. GRATTON: No objection.

25 THE COURT: All right. Exhibits 1A and 1B will be

1 admitted.

2 (The exhibits were admitted into evidence.)

3 MR. GRINDROD: Thank you, Your Honor. And I would  
4 also move to admit Defense Exhibit 6, which is the  
5 application for the search warrant of Mr. Matish's home.

6 THE COURT: All right. Exhibit 6 will also be  
7 admitted.

8 (The exhibit was admitted into evidence.)

9 MR. GRINDROD: Thank you, Your Honor.

10 With respect to evidence, Your Honor, I know the  
11 Court has already ruled, at least preliminarily, on our  
12 request to provide expert testimony. To the extent I need  
13 to, for the record I would renew the request to be allowed to  
14 supplement the record with our own expert's testimony.

15 And I would also note that the motion that we  
16 unfortunately filed just before court today requests the  
17 testimony of an additional Special Agent of the FBI, Special  
18 Agent McFarlane, and that is testimony that would be relevant  
19 to Defense Motions to Suppress 1 and 3.

20 THE COURT: Well, how are we supposed to do that  
21 when you filed it moments before the hearing, Counsel?

22 MR. GRINDROD: Well, Your Honor, I didn't receive  
23 notice of the fact that the government was not going to make  
24 Agent McFarlane available until 4:45 last night, when the  
25 e-mail came through. I was in court this morning, Your



1 Honor, and --

2 THE COURT: Did you subpoena him?

3 MR. GRINDROD: Your Honor, we subpoenaed him, and we  
4 complied with the *Touhy* regulations. I don't believe that  
5 the government is asserting there was a failure to comply  
6 with the regulations or a defect in the subpoena, they're  
7 just asserting that his testimony, I guess, is not material.  
8 I guess I should let the government speak for themselves, but  
9 I believe that's the position, from their letter.

10 THE COURT: All right.

11 MR. GRINDROD: But absent the availability of that  
12 witness, Your Honor, which we do request, we have no further  
13 evidence on Motions to Suppress 1 and 3.

14 THE COURT: Was that witness subpoenaed?

15 MR. HURT: Your Honor, Special Agent McFarlane was  
16 subpoenaed. He is in the courthouse, so he did comply with  
17 the subpoena. The issue became the purpose of his being  
18 called by the defense.

19 Under the *Touhy* regulations, the defense has to put  
20 forth reasons why they want to call a government agent, and  
21 the United States has the ability, in consultation with  
22 higher-ups in the Department of Justice, to look at the  
23 requested testimony and determine whether or not that is  
24 violative of any number of factors which are set forth in the  
25 Code of Federal Regulations.

1           The defendant in this case requested Special Agent  
2 McFarlane, who -- as the Court has before it, he was the  
3 affiant on the search warrant which originally authorized the  
4 NIT, or the investigative technique. So when they requested  
5 his testimony, they requested, in their representation to the  
6 United States, that he be allowed to testify about, really,  
7 what he was thinking when he got the search warrant and  
8 whether he purposely got the search warrant in anticipation  
9 of violating the law and how it was executed, how the search  
10 warrant was executed.

11           In consultation with the Federal Bureau of  
12 Investigation, who is his responsible component under the  
13 *Touhy* regulations, the Federal Bureau of Investigations  
14 looked at the request, they looked at the factors which are  
15 cited in 28 Code of Federal Regulation 16.26, and they  
16 determined, based on their evaluation, that the defense was  
17 requesting, really, information which, one, went to the  
18 deliberative process, and, two, also went to investigative  
19 techniques.

20           With that being said, this Court has previously  
21 ruled that the defendant is not entitled to a *Franks* hearing.

22           THE COURT: To what?

23           MR. HURT: A *Franks* hearing on the issue of the  
24 search warrant. The Court denied that motion --

25           THE COURT: Well, I said that this was not going to

1 be a *Franks* hearing.

2 MR. HURT: Yes, sir.

3 THE COURT: I didn't say that they couldn't ever get  
4 one.

5 MR. HURT: Yes, sir. And in this case the evidence  
6 which they are calling upon Special Agent McFarlane to  
7 conceivably produce before this Court could conceivably be  
8 relevant at a *Franks* hearing but not at any issue currently  
9 before this Court.

10 THE COURT: Well, I disagree. We'll take a recess,  
11 and you get him here.

12 MR. HURT: Judge, he's right upstairs. We can have  
13 the agent --

14 THE COURT: We'll take a ten-minute recess.

15 MR. HURT: Yes, sir.

16 (A recess was taken.)

17 MR. HURT: Your Honor, the witness the Court  
18 requested is in the courtroom, and the United States is ready  
19 to proceed.

20 THE COURT: All right.

21 MR. GRINDROD: I apologize, Your Honor.

22 THE COURT: Well, I think we were only out nine  
23 minutes.

24 There's been no *prima facie* showing that there  
25 should be a *Franks* hearing, so your examination of the

—D. McFarlane - Direct—

1 witness will not be as if it was a *Franks* hearing, it will  
2 simply be on the facts surrounding the issuance of the  
3 warrant.

4 MR. GRINDROD: Understood, Your Honor.

5 THE COURT: I assume you want to call Agent  
6 McFarlane.

7 MR. GRINDROD: Yes, Your Honor, the defense calls  
8 Special Agent Douglas McFarlane.

9 (The clerk administered the oath.)

10 DOUGLAS MCFARLANE, called as a witness, having been  
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. GRINDROD:

14 Q. Good afternoon, sir. Could you please introduce yourself  
15 to the Court.

16 A. My name is Douglas McFarlane, Special Agent with the FBI.

17 Q. And, Mr. McFarlane, you were involved in the obtaining of  
18 the NIT warrant that was used in support of the searches that  
19 were carried out in this case, correct?

20 A. Yes, I was.

21 Q. That warrant -- you applied for that warrant on  
22 February 20th, 2015?

23 A. That's correct.

24 Q. And you were the person who drafted and signed the  
25 affidavit in support of the warrant, correct?

—D. McFarlane - Direct —

1 A. The affidavit was written as a joint effort between  
2 multiple agents, but I was the affiant who swore it out, yes.

3 Q. Okay. So you swore that everything in there was true.

4 A. Yes.

5 Q. And you were obviously familiar with the searches that  
6 you were requesting authority to conduct, correct?

7 A. Yes.

8 Q. So you're familiar with the Network Investigative  
9 Technique or NIT?

10 A. Yes.

11 Q. I want to talk to you about the places that were to be  
12 searched pursuant to this warrant.

13 Now, you stated in your affidavit that the search you  
14 were requesting was to gather information from an activating  
15 computer, wherever located, correct?

16 A. That's correct.

17 Q. So, the activating computer was the place to be searched.

18 A. Yes.

19 Q. And, to be clear, the activating computer -- and this is  
20 defined in the attachment to the warrant affidavit. The  
21 activating computer is the computer of any user or  
22 administrator who logs in to the target Web site by entering  
23 a user name and password, correct?

24 A. Yes.

25 Q. And the target Web site is the site that we all now are

—D. McFarlane - Direct—

1 referring to as "Playpen," correct?

2 A. Yes.

3 Q. Now, you submitted a cover sheet with your application  
4 for a search warrant, correct?

5 A. Yes.

6 Q. And that cover sheet -- let me provide you with an  
7 exhibit binder, sir.

8 If you could, turn to the first tab. I'm going to  
9 direct you to what's been marked as Defense Exhibit 1B. I  
10 think it's two or three pages past 1A, sir.

11 Are you there?

12 A. I see 1B.

13 Q. The first page of 1B is the cover sheet to your  
14 application for a search warrant in this case, correct?

15 A. Yes.

16 Q. And that's your signature in the bottom right-hand  
17 corner?

18 A. Yes, it is.

19 Q. Now, you knew at the time that you requested this search  
20 warrant that you were requesting authorities to search  
21 computers wherever located, correct?

22 A. Yes, that's what's listed in the affidavit.

23 Q. And you knew that that meant that you would be requesting  
24 authority to search computers that were located outside the  
25 Eastern District of Virginia, correct?

—D. McFarlane - Direct —

1 A. Yes.

2 Q. I want to direct you to the first paragraph of 1B.

3 You'll see the header that says "Application For  
4 Search Warrant," correct? And then the paragraph says, "I, a  
5 federal law enforcement officer or attorney for the  
6 government, request a search warrant and state under penalty  
7 of perjury that I have reason to believe that on the  
8 following person or property..." -- and then it says "see  
9 Attachment A" -- "located in the Eastern District of Virginia  
10 there is now concealed" -- "see Attachment B." Correct?

11 A. Yes, that's what it says.

12 Q. And the words "Eastern District of Virginia" are blank,  
13 so you have to fill in for that, right?

14 A. Yes.

15 Q. Let me turn your attention to Defendant's Exhibit 1A,  
16 which is, I think, a couple pages back.

17 Did you also draft this sheet?

18 A. Technically, this sheet, I think, was prepared by the  
19 U.S. Attorney, but it was as a part of my affidavit.

20 Q. And this sheet --

21 THE COURT: What are we looking at here?

22 MR. GRINDROD: This is the warrant, Your Honor.

23 THE COURT: The warrant itself?

24 MR. GRINDROD: Yes, Your Honor.

25 BY MR. GRINDROD:

—D. McFarlane - Direct—

1 Q. You, in consultation with the United States Attorney's  
2 Office, drafted this as a proposed warrant, correct?

3 A. Yes, this is a part of Exhibit 1A.

4 Q. And you filled in the part that says that the place to be  
5 searched was the property located in the Eastern District of  
6 Virginia, correct?

7 A. I personally didn't fill that in, but that was a part of  
8 the affidavit that I was swearing out, yes.

9 Q. Part of the affidavit, so you were swearing out as part  
10 of this that the property that you were searching, that you  
11 were requesting authority to search pursuant to this warrant,  
12 was located in the Eastern District of Virginia.

13 A. That's what this says, yes. My understanding of how this  
14 warrant works could be explained, if you give me a moment.

15 Q. Well, it could be explained because, in truth, you were  
16 requesting authority to search property that was located  
17 anywhere in the world, right?

18 A. Yes, and that's what is stated in the affidavit as well  
19 for the Judge to consider.

20 Q. But it's not what the cover sheet says, correct?

21 THE COURT: Well, he said he could explain what he  
22 meant, so let's hear what his explanation is of what he  
23 meant.

24 THE WITNESS: All right. My understanding of how  
25 this affidavit would work is that the Web site was located in



—D. McFarlane - Direct—

1 the Eastern District of Virginia. The NIT would be located  
2 in the Eastern District of Virginia. A subject, using his  
3 computer, his computer signal, would travel, essentially, to  
4 the Eastern District of Virginia, access the Web site, and  
5 acquire the NIT.

6 The government did not send the NIT to anyone who  
7 didn't come to the Web site. It was only those people who  
8 used their computer and accessed the Web site that was  
9 located in the Eastern District of Virginia. Once that  
10 person did that, it acquired the NIT. And then my  
11 understanding of how it worked under Rule 41 is that it's  
12 similar to a tracking device, let's say, where once the  
13 property acquires the NIT or the tracking device in the  
14 Eastern District of Virginia it can travel to other places,  
15 and this warrant gives us authority to track that signal.

16 That's my understanding of how this warrant worked,  
17 in consultation with multiple government attorneys and  
18 providing this information clearly that the computers would  
19 be outside of the district that's in the affidavit for the  
20 Magistrate Judge to consider.

21 BY MR. GRINDROD:

22 Q. So you agree that the activating computers were the place  
23 to be searched, correct?

24 A. Yes.

25 Q. And the activating computers were property, correct?

D. McFarlane - Cross

1 A. Yes.

2 Q. In this case we're talking about Mr. Matish's home  
3 computer, correct?

4 A. Yes.

5 Q. And the home computers of anyone who logged on to the  
6 Playpen Web site, correct?

7 A. Right, but that precipitated him accessing the site in  
8 the Eastern District of Virginia and acquiring the NIT and  
9 bringing it back to him.

10 Q. But his property was never located in the Eastern  
11 District of Virginia, was it? Was the activating computer  
12 ever --

13 MR. HURT: Objection; argumentative.

14 THE COURT: Sustained. I think we know what he  
15 means.

16 MR. GRINDROD: All right, Your Honor. Thank you.

17 CROSS-EXAMINATION

18 BY MR. HURT:

19 Q. Special Agent McFarlane, at the top of that search and  
20 seizure warrant which has at the bottom "Defendant's  
21 Exhibit 1A" -- do you have that before you? It's the very  
22 first page after tab 1.

23 A. Yes, I see it, 1A.

24 Q. It says, "In the Matter of the Search..." -- it  
25 indicates, "of computers that access," and then that line of

1 text below it, that's the address of the server which hosted  
2 the Playpen site under government control in the Eastern  
3 District of Virginia. Is that correct?

4 A. That is correct.

5 Q. So nobody would have the NIT deployed against them -- or  
6 I should say the only people who would have the NIT deployed  
7 against them were those individuals who, in effect, came to  
8 the Eastern District of Virginia and picked it up.

9 A. That's correct.

10 Q. Thank you.

11 MR. HURT: Nothing further.

12 MR. GRINDROD: Nothing further, Your Honor.

13 THE COURT: All right, agent McFarlane, you may  
14 stand down.

15 Is the witness excused?

16 MR. HURT: Your Honor, may he be excused? He has a  
17 plane to catch.

18 MR. GRINDROD: I have no objection.

19 THE COURT: All right. You may be excused.

20 Do you have any further evidence?

21 MR. GRINDROD: No, Your Honor, other than we would  
22 ask to have the opportunity to provide expert testimony at  
23 some later date.

24 THE COURT: Does the government have any evidence?

25 MS. GRATTON: The government has no evidence, Your

1 Honor.

2 THE COURT: All right. Well, there was an amicus  
3 brief filed in this case, and at this stage I don't think it  
4 would be appropriate to have general argument based on the  
5 amicus brief, but there are two questions I'd like to ask the  
6 author of the brief.

7 MR. THEUER: Good afternoon, Your Honor.

8 THE COURT: Good afternoon. It said at the  
9 beginning of the brief that this issue raised an important  
10 unresolved issue under the Fourth Amendment. What is that  
11 unresolved issue?

12 MR. THEUER: Your Honor, I believe the unresolved  
13 issue is the function of the NIT in conducting a search of  
14 the computer to which it deployed and a seizure of the IP  
15 address and other information from the computer to which it's  
16 deployed.

17 So the issue is that by deploying the NIT the  
18 government is effectively searching a computer outside of the  
19 physical location identified in the warrant. It's searching  
20 and seizing information from that location outside the  
21 location in the warrant, and in the brief we compare that to  
22 a type of roving warrant or an anticipatory warrant which are  
23 constitutionally suspect in this context.

24 THE COURT: At the end of the brief it says that  
25 they could have obtained a valid warrant to perform the

1 search.

2 MR. THEUER: That's right, Your Honor. In other  
3 words, once the government had --

4 THE COURT: Would you tell me what the valid warrant  
5 would have said?

6 MR. THEUER: Well, Your Honor, once the government  
7 had taken over the Playpen Web site and were administering it  
8 themselves, they could have sought to obtain a warrant as to  
9 a specific user who accessed their server.

10 THE COURT: Well, how could they find the user?

11 MR. THEUER: Well, Your Honor, at that point they  
12 could have asked for a judicial officer to approve deploying  
13 a NIT as to a specific user that had access to the Playpen  
14 warrant, as opposed to here, where they simply asked for a  
15 warrant to deploy the NIT to anyone, anywhere.

16 THE COURT: Well, how would they identify a specific  
17 person without the use of the NIT?

18 MR. THEUER: Well, Your Honor, because, as the  
19 witness testified, when the government had the server and  
20 they had the NIT prepared to deploy from that server they  
21 waited for someone to log in using a unique user name and  
22 password.

23 Once that person logs in using a unique user name  
24 and a password, at that point the government has the ability  
25 to go before a judicial officer and say, we want the

1 authority to deploy the NIT as to this particular user name  
2 and password, and then, when that person returns to the cite,  
3 a judicial officer would have authorized them to deploy the  
4 NIT for that user.

5           Instead, in this case they simply got a general  
6 anticipatory warrant that would permit them to deploy the NIT  
7 to anybody who came to the site without any approval of a  
8 judicial officer.

9           THE COURT: Well, why don't you draft what you think  
10 would have been a valid warrant, and you can supplement your  
11 brief, your amicus brief, with that language.

12           MR. THEUER: Yes, sir. And, Your Honor, when would  
13 you like that?

14           THE COURT: How long would it take you to do it?

15           MR. THEUER: Could I have one week from today?

16           THE COURT: All right.

17           MR. THEUER: Thank you, Your Honor.

18           THE COURT: All right. Do you have any argument at  
19 this time?

20           MR. GRINDROD: I do, Your Honor. Would you like to  
21 hear argument on both 1 and 3, Your Honor, both motions that  
22 relate to the network investigative technique?

23           THE COURT: Well, neither you nor the government  
24 have any further evidence on motions 1 or 3. Is that  
25 accurate?

1 MS. GRATTON: That's correct, Your Honor.

2 THE COURT: All right. Then you can argue both of  
3 them.

4 MR. GRINDROD: Thank you, Your Honor.

5 Your Honor, with respect to the first motion to  
6 suppress, obviously it's our position that the information  
7 contained in the warrant affidavit did not create probable  
8 cause for the warrant to issue in the first place; that is,  
9 that even if, as in footnote 8 of the warrant application,  
10 the government could have shown probable cause to search the  
11 computer of someone who perhaps clicked on a particular link  
12 that said "child hard core" or clicked on a video where the  
13 thumbnail clearly showed that they were going to be accessing  
14 child pornography, that's a much narrower request than what  
15 the government actually made and what the Judge actually  
16 authorized.

17 And under *Gourde* and *Martin* and other cases that  
18 have dealt with the authority to search being based on  
19 initial access of or logging on to or membership in a site,  
20 we think that the showing in the warrant affidavit was  
21 insufficient in that respect; that is, the probable cause may  
22 have existed for some warrant to issue but not the warrant  
23 that issued here, Your Honor.

24 But I think I'd like to spend more of my time  
25 talking about the triggering event, Your Honor, because I

1 think that's really a critical topic that we haven't spent a  
2 lot of time talking about.

3           So the NIT warrant, the NIT warrant in this case,  
4 was an anticipatory warrant; that is, the neutral and  
5 detached magistrate's probable cause determination was  
6 contingent on the happening of some future event. The NIT  
7 warrant did not say that there is probable cause to search,  
8 the warrant said that there will be probable cause to search  
9 if X occurs. And X here is a user logging on to the Playpen  
10 home page that was described in the warrant affidavit.

11           So by signing the warrant the magistrate says, if  
12 someone navigates to the Playpen home page, as described in  
13 the affidavit, they enter a user name and password and they  
14 click through, then there's probable cause to search. But  
15 that was specific to a Playpen home page that was described  
16 in the warrant, one that displayed two images of prepubescent  
17 minors partially clothed with their legs spread apart. And  
18 it's undisputed in this case that here that never happened.  
19 The NIT was never deployed against someone that entered that  
20 home page.

21           The NIT was deployed against people who entered a  
22 different Playpen home page, one that did not display two  
23 images of any individuals, did not display any partially  
24 clothed individuals, did not display any individuals with  
25 their legs spread apart.



1           The difference is --

2           THE COURT: Well, that's debatable.

3           MR. GRINDROD: Well, Your Honor, I believe in the  
4 updated version the image is of an individual sitting in a  
5 chair with her legs crossed. It couldn't be further from  
6 legs apart.

7           But, in any event, the government's position is  
8 essentially, so what? So what? There's still probable  
9 cause. Well, there are two problems with that answer, Your  
10 Honor. First is our disagreement with the assertion itself,  
11 right? We say that the change to the Web site's home page  
12 changed the probable cause determination. If there was  
13 probable cause before the change from two individuals  
14 partially clothed with their legs spread apart to one  
15 individual fully clothed sitting in a chair with her legs --

16           THE COURT: What does the term "Playpen" mean to  
17 you?

18           MR. GRINDROD: Well, the term "Playpen," Your  
19 Honor -- and we've submitted this in our brief -- is  
20 associated primarily with a knockoff of Playboy, which is  
21 legal pornography.

22           THE COURT: Well, if that's what it suggests to you,  
23 your mind works a lot different than mine.

24           MR. GRINDROD: Well, Your Honor, I think --

25           THE COURT: I don't think of Playboy magazine when I

1 hear the word "playpen." I think of children.

2 MR. GRINDROD: I understand that that's a possible  
3 interpretation, Your Honor, but --

4 THE COURT: Possible? I think yours is pretty far  
5 out, Counsel.

6 MR. GRINDROD: So let's assume, then, Your Honor  
7 were to find that even with the change -- right? -- there's  
8 still probable cause to search. Critically, the government  
9 still loses in that case, Your Honor. The government still  
10 loses because the question is not whether probable cause  
11 exists, it's whether the triggering event contemplated by the  
12 warrant actually occurred. And here it's undisputed that the  
13 triggering event contemplated by the warrant did not occur;  
14 some different event occurred.

15 And Special Agent Alfin testified that to him the  
16 change between the two was immaterial. That's precisely the  
17 decision that the Fourth Amendment takes out of the hands of  
18 the Executive Branch and places into the hands of a neutral  
19 and detached magistrate.

20 So if there was a change, if the triggering event  
21 contemplated by the warrant was not going to happen, then  
22 there may still have been probable cause. Maybe the  
23 government could have gone back and gotten a different  
24 warrant that authorized a search with the new changed Web  
25 site, but the Fourth Amendment demands that that probable

1 cause determination be made by a neutral and detached  
2 magistrate.

3           And the government exercised executive discretion to  
4 determine that the change was not important enough to change  
5 the probable cause determination in the Executive Branch's  
6 mind. That's not how the Fourth Amendment operates. The  
7 whole point of the Fourth Amendment is to take that  
8 discretion away from the Executive and have it be by a  
9 neutral and detached magistrate. There's no adversarial  
10 process when the government is obtaining a warrant. That's  
11 why the role of the Judiciary is particularly important, and  
12 here the government executed a search without going through  
13 the constitutionally required procedure.

14           In that respect, Your Honor, they converted what  
15 could have been an anticipatory warrant into a general  
16 warrant. If the anticipatory warrant contemplates the  
17 happening of some event, then that event has to happen before  
18 the judicial determination of probable cause is triggered.  
19 If the Executive Branch is the person who gets to determine  
20 whether probable cause exists under some different set of  
21 circumstances, that's just a general warrant. And that's the  
22 problem here, Your Honor.

23           So it's not important, necessarily, it's not  
24 critical for us, that the Court find that the probable cause  
25 did not exist under the new warrant. The point is that it

1 was a judge that needed to make that determination, and when  
2 the Executive made an end run around the Fourth Amendment,  
3 then we have a constitutional problem.

4           If the Court agrees with us that the triggering  
5 event contemplated by the warrant did not occur, then  
6 suppression is appropriate, Your Honor, and that's because  
7 *Leon's* good faith exception does not apply when the  
8 triggering event of an anticipatory warrant doesn't occur and  
9 the Executive executes the warrant, anyway. We've cited  
10 cases in our brief, one out of the First Circuit and one out  
11 of the Second, a District Court opinion in the Second that  
12 sites a Second Circuit case, Your Honor, and both note that  
13 an anticipatory warrant, where the triggering event hasn't  
14 occurred, is invalid and *Leon's* good faith exception does not  
15 encompass that circumstance.

16           The government argues that good faith applies here,  
17 that the good faith exception applies, but they cite no cases  
18 to support that proposition.

19           THE COURT: What about the case in Washington State?

20           MR. GRINDROD: Well, Your Honor, the case in  
21 Washington State found that Rule 41 had been violated. It  
22 was decided on different grounds than the triggering event  
23 that we're arguing here, Your Honor.

24           THE COURT: Somebody handed me a memorandum opinion  
25 from a court in Pennsylvania as we were walking into the

1 courtroom. What did that one say; do you know?

2 MR. GRINDROD: I don't -- if it's from Pennsylvania,  
3 I don't know that I --

4 THE COURT: I think it was from Pennsylvania.

5 MR. GRINDROD: I don't know that I've seen it, Your  
6 Honor.

7 THE COURT: Where was that from?

8 THE LAW CLERK: It was from Pennsylvania. It was  
9 also under Rule 41 grounds.

10 MR. GRINDROD: So, Your Honor, I think with respect  
11 to this NIT and the Playpen searches, most of the courts that  
12 have found a violation and applied the good faith exception  
13 or found no prejudice have done so under a Rule 41 ground  
14 that was not constitutional, was not deemed to be  
15 constitutional. And in this case whether the government and  
16 the defense agree about whether the violation occurred,  
17 clearly if the government executed a search warrant, an  
18 anticipatory warrant, without the triggering event occurring  
19 that's a constitutional issue. And, so, analysis as to  
20 whether a Rule 41 violation is ministerial or not is really a  
21 separate question. This is a constitutional problem. It's  
22 an invalid warrant on more traditional grounds than the Rule  
23 41 issue, and good faith does not apply in that context.

24 With respect to the Rule 41 issue, though, Your  
25 Honor, I'll move on to that. Clearly, I believe the

1 testimony of both Special Agent Alfin and Special Agent  
2 McFarlane made clear that the place to be searched, pursuant  
3 to the NIT warrant, was outside of the Eastern District of  
4 Virginia. It was anywhere in the world. Anywhere a computer  
5 was located and someone logged on to the Playpen Web site the  
6 government could deploy the NIT, gather information off that  
7 computer, and send it back to the FBI.

8 And Rule 41(b) and the Federal Magistrates Act sets  
9 territorial limitations on the places that can be searched  
10 pursuant to a warrant issued by a Magistrate Judge. The  
11 authorization of a warrant in this case --

12 THE COURT: Is the good faith exception impacted by  
13 the extent of the right of privacy enjoyed by the -- or  
14 claimed by the user?

15 MR. GRINDROD: Your Honor, I don't believe that -- I  
16 don't believe that the Court can look at the information  
17 gathered. I mean, the privacy interest here -- right? -- is  
18 in the place to be searched. So someone's personal computer  
19 was searched in this case. The fact that the government  
20 chose to gather certain information off of that computer  
21 doesn't affect the propriety of the search.

22 If you search someone's bedroom and you take a pair  
23 of socks, that doesn't present any different constitutional  
24 issue than if you take their diary. The bedroom is a private  
25 place. Just the same is true with personal computers.

1 THE COURT: Is the Internet a private place?

2 MR. GRINDROD: Well, Your Honor, the Tor network I  
3 think affects someone's reasonable expectation of privacy in  
4 certain online activities.

5 The testimony was that the Tor network allows a user  
6 of the Internet to keep private certain information that  
7 might otherwise be shared publicly or shared with, for  
8 example, the site that is visited. So if someone accesses,  
9 you know, espn.com and they're not operating with the Tor  
10 software, then perhaps they don't have a reasonable  
11 expectation of privacy in information that is conveyed from  
12 their computer to espn.com.

13 But if they've taken steps to protect the  
14 information so that espn.com cannot tell that it's them  
15 that's accessing the site, then that changes the dynamic. I  
16 don't think, however, Your Honor, that the Court needs to  
17 determine that, for example, the reasonable expectation of  
18 privacy dynamic is dependent on Tor in this case, because the  
19 place that was searched is necessarily a private place.

20 The government recognized that when they sought a  
21 search warrant in this case to search people's personal  
22 computers and to get information that was not shared publicly  
23 but was only gathered from the person's computer that was  
24 remotely searched. And so that's, I think, the easier way to  
25 resolve the question of whether Mr. Matish had a reasonable

1 expectation of privacy in the information that the government  
2 took off his computer. He certainly had a reasonable  
3 expectation of privacy in place, and that's the Fourth  
4 Amendment inquiry.

5           With respect to the Rule 41 issue, though, Your  
6 Honor --

7           THE COURT: Well, it seems to me that what you're  
8 saying is that the defendant can use the most advanced  
9 technology available to him, if we assume the allegations are  
10 correct, to view child pornography secretly, privately, but  
11 somehow the government's ability to use advanced technology  
12 has to be frozen in time and can't keep up with Tor.

13           Isn't the government entitled to use advanced  
14 technology to overcome criminal activity that's conducted in  
15 secret?

16           MR. GRINDROD: Absolutely, Your Honor. They just  
17 have to do that in a way that complies with the Fourth  
18 Amendment. And that was the problem here. The government  
19 deployed technology in a way that conducted searches that did  
20 not comply with the Fourth Amendment, in a way that could not  
21 be authorized by the Judge from whom the government sought  
22 authorization --

23           THE COURT: Well, they didn't actually deploy it  
24 against your client, in a way, but what you're saying is that  
25 the search warrant was invalid, not that the way they did it



1 was invalid. Because the way he actually got the information  
2 or deployed the NIT was after your client had allegedly  
3 entered the child pornography site. That's when they got the  
4 information. But you're saying that the warrant entitled  
5 them to do more than what they actually did and, therefore,  
6 the warrant isn't valid.

7           So what they actually did you're not saying was  
8 invalid, but you're saying the warrant authorized them to do  
9 more than they actually did; therefore, the warrant was  
10 invalid.

11           MR. GRINDROD: Well, Your Honor, I think you're  
12 touching on a couple of our different arguments.

13           So yes with respect to the overbreadth argument.  
14 Our argument is that even if the government could have  
15 deployed the NIT in a way that they had probable cause to  
16 deploy it against a specific person who perhaps clicked on --

17           THE COURT: Well, they definitely did --

18           MR. GRINDROD: Right.

19           THE COURT: -- because the NIT software didn't  
20 deploy until they went on the child pornography Web site. So  
21 they certainly had probable cause at that time for NIT to be  
22 deployed, but you're saying that since the warrant authorized  
23 them to do more than what they actually did that that means  
24 the warrant was void; the fact that they took special  
25 precautions not to deploy it except against child pornography

1 users doesn't save the warrant.

2 MR. GRINDROD: It certainly doesn't save it from the  
3 Rule 41 issue, Your Honor.

4 The fact that the government -- I mean, it's our  
5 contention that the government deployed the warrant -- the  
6 way the government deployed the warrant doesn't solve the  
7 overbreadth issue. If the Court determines that the searches  
8 authorized by the warrant was not supported by probable  
9 cause, then the question with respect to the remedy is to  
10 excise the portions of the warrant that are overly broad and  
11 see what's left. Here that means nothing, and so even though  
12 the government may have deployed the warrant in a way that  
13 arguably could have been justified had they sought narrower  
14 authorization, the warrant cannot be cured -- the overbreadth  
15 of the warrant cannot be cured in a way that doesn't result  
16 in suppression.

17 With respect to Rule 41, Your Honor --

18 THE COURT: Well, if the Court suppresses the  
19 warrant, then there's no reason to have -- do you claim that  
20 the confession is the fruit of the poisonous tree and,  
21 therefore, they can't use the confession?

22 MR. GRINDROD: That's correct, Your Honor.

23 THE COURT: So if you went on the warrant or the  
24 search -- if the search was invalid, then --

25 MR. GRINDROD: Then our second motion is moot, Your

1 Honor. I would agree with that.

2 THE COURT: All right.

3 MR. GRINDROD: I'm happy to address further the  
4 Rule 41 issue, if it's helpful, but I also know that it's  
5 getting later, Your Honor. So if the Court is satisfied on  
6 that, then I can submit it.

7 THE COURT: Well, this a very important issue.

8 MR. GRINDROD: All right. Then, if I could, Your  
9 Honor, I'll briefly address that.

10 So Rule 41(b) in the Federal Magistrates Act only  
11 authorizes a Magistrate Judge to authorize searches of  
12 property located within the district in which they have  
13 authority, with possible exceptions that the defense  
14 contends --

15 THE COURT: Well, as far as this case was concerned,  
16 they only conducted a search within the district. But,  
17 again, you're saying that since the warrant authorized them  
18 to conduct a search outside of the district that the warrant  
19 is invalid. But the search of your client occurred within  
20 the district.

21 MR. GRINDROD: That's correct, Your Honor. And the  
22 reason for that is because the government, first of all, has  
23 admitted that the whole reason that they got this warrant in  
24 the first place, the whole reason they used the NIT, was  
25 because they had no idea, before they searched my client's

1 computer, where that computer was located. And, so, the  
2 government, by using this technology, this particular NIT, in  
3 the way that they used it or that they were attempting to use  
4 it in this case, the government necessarily was going to  
5 search around the world.

6 THE COURT: Well, suppose, based on the search that  
7 was conducted here, they had located a computer in North  
8 Carolina or West Virginia or someplace and then they got the  
9 same warrant to then search the premises of somebody in North  
10 Carolina. Would that case be any different, since he was in  
11 North Carolina?

12 MR. GRINDROD: No, Your Honor, because the  
13 fundamental flaw is that the warrant authorized worldwide  
14 searches, and the government didn't know where they were  
15 searching until after they already searched.

16 THE COURT: Is there any way the government could  
17 have determined where to search without the broad search that  
18 they were authorized to conduct?

19 MR. GRINDROD: Perhaps, Your Honor. I think EFF  
20 developed that argument in --

21 THE COURT: Well, maybe Mr. Theuer is going to  
22 explain how they could have done that.

23 But I don't know how -- I mean, after hearing the  
24 explanation of the search that they actually did, not talking  
25 about the warrant but the actual search that they actually

1 did, it was much narrower than the warrant.

2 MR. GRINDROD: Not in a territorial sense, Your  
3 Honor.

4 THE COURT: Well, it was in Virginia.

5 MR. GRINDROD: But it was -- I mean, it was -- it  
6 happened -- they happened to have found that my client was  
7 located in Virginia, but they didn't know that until after  
8 they searched.

9 THE COURT: Well, could they have -- well, how could  
10 they have found anybody in Virginia without conducting a  
11 general search?

12 MR. GRINDROD: Well, I don't think they could have  
13 used this technology.

14 THE COURT: Is there any other technology they could  
15 have used?

16 MR. GRINDROD: I don't know. The government has to  
17 follow the law, even if that means that it's some sort of  
18 inconvenience to their investigation.

19 THE COURT: Well, that's what I was touching on when  
20 I asked you if the government is frozen in time with the  
21 technology that they can use. If the only available  
22 technology requires a search that originates in Virginia but  
23 then extends outside of the state, that's the only technology  
24 available to them, how would they ever locate anybody?

25 MR. GRINDROD: Well, Your Honor, that's why we have

1 a rule of law. If the law says that they can't conduct this  
2 search, then perhaps the law needs to change. But the  
3 government still has to follow the law, unless it changes,  
4 and the government is seeking --

5 THE COURT: Well, you're contending the warrant  
6 enabled them to do something it shouldn't have enabled them  
7 to do, which is search outside of the state. That's your  
8 argument.

9 MR. GRINDROD: Well, only because of the positive  
10 law's restriction on the jurisdiction of the magistrate.

11 THE COURT: So that point relies on the fact that  
12 the warrant authorized them to search outside of the  
13 district.

14 MR. GRINDROD: Yes, Your Honor.

15 THE COURT: Okay. If a District Judge had signed  
16 the warrant, then you wouldn't have that argument, right?

17 MR. GRINDROD: Perhaps not, Your Honor, and that's  
18 what Judge Young pointed out in his decision in the District  
19 of Massachusetts.

20 THE COURT: All right.

21 MR. GRINDROD: But the government went to a judge  
22 who didn't have authority to issue --

23 THE COURT: So it wasn't the search, it was the  
24 warrant that was defective.

25 MR. GRINDROD: The warrant was invalid from the time

1 it was issued because it was issued without any  
2 jurisdictional authority by the magistrate.

3 The law sets certain rules governing the  
4 jurisdiction of a Magistrate Judge, what kind of warrants the  
5 magistrate can issue, and where those warrants --

6 THE COURT: Well, I'm familiar with that. I  
7 understand your argument on that point.

8 MR. GRINDROD: Okay. So it's our --

9 THE COURT: It is the same ground upon which the  
10 warrant was invalidated in Massachusetts.

11 MR. GRINDROD: That's correct, Your Honor.

12 And the government's suggestion that the fact that  
13 my client was located in Virginia somehow affects the  
14 validity of the warrant at the time it was issued makes no  
15 sense. Because the validity of the warrant has to be  
16 measured at the time it's issued. The warrant is either  
17 valid or invalid. A particular execution of the warrant  
18 cannot either validate or invalidate the warrant. There may  
19 be a problem with execution, but if the warrant is invalid  
20 from the time it's issued, then any search pursuant to that  
21 warrant is invalid and is unconstitutional.

22 THE COURT: All right.

23 MR. GRINDROD: Thank you, Your Honor.

24 MS. GRATTON: Thank you, Your Honor.

25 The government relies primarily on the arguments in

1 the briefing that's been set out extensively before the  
2 Court's consideration. I would briefly address some of the  
3 points that have been raised in oral argument here today.

4 The government did provide the citation. The Court  
5 mentioned a Pennsylvania opinion. That opinion was docketed  
6 this afternoon in the Eastern District of Pennsylvania. The  
7 District Court Judge there rejected all of the arguments that  
8 are before the Court and deeply considered the 11th Circuit  
9 District Court's analysis and rejected the conclusion that  
10 the warrant was void ab initio and said that, even if it  
11 were, that Court conducted an insufficient analysis of the  
12 good faith exception to any suppression and considered that  
13 quite at length. So we did provide that citation for the  
14 Court's consideration.

15 THE COURT: Well, you did, but you didn't provide it  
16 in time for me to read it before the hearing.

17 MS. GRATTON: With our apologies. The government  
18 only became aware of the opinion --

19 THE COURT: Well, I understand why you couldn't.

20 MS. GRATTON: -- this afternoon.

21 On the point with respect to probable cause and the  
22 triggering events and the overbreadth here, those issues have  
23 been thoroughly briefed. And at base the defendant's  
24 argument seeks to ignore the facts as they were presented to  
25 the Magistrate Judge. He makes a very big deal about the



1 images surrounding the Playpen logo, which, as noted in our  
2 brief and in the testimony here today, remained unchanged  
3 apart from two prepubescent girls in sexually suggestive  
4 positions to one prepubescent girl in a sexually suggestive  
5 position.

6 THE COURT: Well, there's no evidence before the  
7 Court that the affiants even knew of the change.

8 MS. GRATTON: That is correct.

9 THE COURT: There's no evidence before the Court  
10 that Special Agent Alfin conferred with Agent McFarlane. I  
11 was wondering --

12 MS. GRATTON: And I believe Special Agent Alfin  
13 testified that he did not confer with him prior to the  
14 issuance of the NIT warrant.

15 THE COURT: I don't remember if he said that or not,  
16 but there's certainly no evidence that he did, when you look  
17 at the timing of it, and that's why I say there's absolutely  
18 no evidence to support a *Franks* hearing.

19 All right. Go ahead.

20 MS. GRATTON: With respect to probable cause -- and  
21 I'll be brief on this issue -- the Magistrate Judge is  
22 supposed to look to the totality of the circumstances and  
23 make a practical, common-sense decision as to whether  
24 probable cause existed.

25 There are a number of facts -- and the Court has

1 heard testimony confirming those facts -- within the warrant  
2 today about the location of Playpen on the Tor network, the  
3 number of affirmative steps that would be required to find  
4 that Web site and log in, and the very, very small likelihood  
5 that anyone would end up there by mistake, and all of those  
6 facts preceded the description of the site itself.

7           And the only testimony on the question of  
8 overbreadth as to whether, you know, it should have been  
9 limited to particular users -- although the warrant did  
10 contemplate that in execution it might be executed more  
11 narrowly, the only evidence before the Court was that Playpen  
12 was a Web site dedicated to child pornography. And, so, in  
13 light of that fact and the number of affirmative steps  
14 required to reach that Web site, the very small, almost  
15 nonexistent likelihood that someone could find it without  
16 knowing its content and intending to access that content  
17 supports the probable cause finding and the authorization to  
18 deploy the NIT or include the NIT in any content downloaded  
19 from that Web site.

20           And, so, for those reasons the government believes  
21 that the Court should deny the motion to suppress on the  
22 basis of probable cause and overbreadth.

23           With respect to the triggering condition, you know,  
24 there's been a lot made about the application sheet and the  
25 warrant itself here today and what that says. Well, as

1 Mr. Hurt pointed out on cross-examination of Special Agent  
2 McFarlane, in the matter of the search of computers that  
3 access, and then there's the Web site address of the Playpen  
4 Web site, the testimony before the Court is that the only  
5 thing on that Web site that was different was a photo in the  
6 corner. The Web site was the same, the content was the same,  
7 the login process was the same, and the address specified on  
8 the face of the warrant itself was the same.

9           So if the Court is considering whether the  
10 triggering condition occurred, there's no dispute that people  
11 received the NIT who didn't log in to the Web site. The  
12 defendant hasn't said he didn't log in; he hasn't tried to  
13 say that anybody else didn't log in.

14           THE COURT: How does the tremendous increase in the  
15 traffic on the Web site after the FBI took it over affect  
16 that argument?

17           MS. GRATTON: I don't believe there's any evidence  
18 presented concerning --

19           THE COURT: It was somewhere in the briefs saying  
20 that they got a tremendous increase. Maybe it was just in  
21 the defendant's brief, but it was somewhere stated that there  
22 was a tremendous increase in the traffic on the site after  
23 the FBI took it over.

24           MS. GRATTON: I believe that was in the defendant's  
25 brief, Your Honor. Special Agent Alfin was on the stand;

1 there was no testimony presented about the increase.

2           The government would, I believe, acknowledge that  
3 there was some increase, but it would be speculative for the  
4 Court to attribute that to any specific action or conduct.  
5 The fact of the increase, the government would stipulate to  
6 that without having testimony or evidence before it; would  
7 not stipulate to the precise numbers offered by the  
8 defendant. But as to the cause or how that factors into the  
9 Court's determination, the government would submit that it  
10 shouldn't.

11           The defendant and EFF, in their briefs on the point  
12 of overbreadth in the general warrant, make much of the fact  
13 that this affected several people, thousands of people. And  
14 the government doesn't dispute that, but the Court has heard  
15 testimony this was the largest child pornography Web site  
16 available at that time. And, so, of course it's going to  
17 affect a lot of people. That doesn't mean that there wasn't  
18 probable cause to include the NIT in content that they  
19 affirmatively downloaded from that Web site.

20           There's no upper bound to the Fourth Amendment that  
21 says once you've particularly described the location to be  
22 searched and the very limited items to be seized you still  
23 need to then independently determine whether it's overbroad  
24 because a lot of people might have that place and there might  
25 be probable cause to find evidence of the crimes described in

1 that place in the items to be seized.

2 The warrant requirement in the Fourth Amendment --  
3 there's a warrant that's supported by probable cause that's  
4 signed by a neutral and detached magistrate that describes  
5 with great particularity the items to be searched. The focus  
6 here today has been a lot on the activating computer. The  
7 first paragraph --

8 THE COURT: Well, how about the fact that it  
9 authorized searches outside of the district by a Magistrate  
10 Judge?

11 MS. GRATTON: Well, on the first point, as briefed  
12 in the government's response to the defendant's third motion  
13 to suppress, the plain language of the Federal Magistrates  
14 Act says that the Magistrate Judge shall have, within the  
15 district, the powers that follow, and those powers include  
16 the Federal Rules of Criminal Procedure.

17 There's no dispute that the Magistrate Judge had the  
18 authority to issue a warrant in the Eastern District of  
19 Virginia. That's exactly what happened here. Judge Buchanan  
20 sits up in Alexandria. She signed a warrant in Alexandria  
21 and authorized a search that permitted the FBI to install  
22 computer instructions on a server located within that  
23 district.

24 THE COURT: Which would search worldwide.

25 MS. GRATTON: But that is consistent, for all the

1 reasons in the government's brief, with several provisions of  
2 Rule 41.

3           As a threshold matter, though, this defendant was in  
4 this district. So Rule 41(b) -- and every Court that has  
5 considered this when they reached Rule 41(b) has either  
6 resolved it on the question of where the defendant was  
7 located or considered the location of the particular  
8 defendant in deciding whether the issuance of this warrant  
9 complied with Rule 41(b). And in the opinion provided the  
10 Court today the District Court Judge said that, indeed, the  
11 only way in which the government could have procedurally  
12 complied with Rule 41 was either through sheer luck, if that  
13 defendant had happened to be in this district.

14           So in finding that defendant outside of the  
15 district, a search of his computer was not authorized under  
16 Rule 41. That Court said there's a small universe of people  
17 for whom it would be appropriate under Rule 41(b)(1), and  
18 those are defendants located within the Eastern District of  
19 Virginia. The government does not agree with that limitation  
20 on Rule 41(b), as outlined in our brief, and could not  
21 concede that point, but even the Courts that have said that  
22 provision of Rule 41 doesn't support the issuance of the  
23 warrants have relied on the actual location of the defendant,  
24 as determined through the execution of the NIT. Even the  
25 *Levin* opinion cites the *Michaud's* language concerning the

1 location of the defendant outside of the Eastern District of  
2 Virginia.

3           And there are a number of provisions that the  
4 government submits support the issuance of the warrant under  
5 Rule 41. And, most tellingly, the agent, Special Agent  
6 McFarlane, testified here today, when asked about what he  
7 thought he was doing, that he thought he was getting a  
8 warrant that authorized the installation of computer  
9 instructions on a server in the Eastern District of Virginia;  
10 that, like a tracking device, if someone came into this  
11 district and picked it up and took it home it could transmit  
12 information back to the government, wherever home is, that  
13 would allow the government to locate it.

14           And the language of Rule 41(b)(4) allows for the  
15 installation, even if the use of that necessarily travels  
16 outside of the district. And, as noted in our response, the  
17 installation undisputedly occurred in the Eastern District of  
18 Virginia. The FBI put the computer instructions on a server  
19 in this district and, absent affirmative action by a user,  
20 the instructions stayed on that server.

21           So the user comes and picks up contraband, and the  
22 contraband has something that they didn't bargain for in it.  
23 Well, there is Supreme Court case law that you can put  
24 beepers in chloroform barrels, and if someone comes and takes  
25 that barrel you can use that information to figure out where

1 they took it. And Rule 41 expressly authorizes the use of  
2 that even if it exceeds the territorial limits of the  
3 Magistrate Judge's jurisdiction under Rule 41(b).

4           Additionally, under any interpretation of Rule 41 or  
5 the Federal Magistrates Act, Judge Buchanan had authority to  
6 issue a warrant to search a computer within her district, and  
7 that is exactly what happened here.

8           With respect to the argument that there's some  
9 separate territorial limit imposed by the Federal Magistrates  
10 Act, as outlined at length in the government's response,  
11 that's nonsensical. The defendant is saying that the same  
12 provision of that act that gives the Magistrate Judges  
13 authority limits her ability to exercise the powers it gives,  
14 independently of what's described in those powers.

15           Rule 41 -- every provision except 41(b)(1)  
16 contemplate searches that have out-of-district effects;  
17 (b)(2) through (b)(5). And several of them cover, as we've  
18 argued, the search that occurred in this case. The notion  
19 that the Federal Magistrates Act would somehow have prevented  
20 this I think is completely dispelled by the fact that, in  
21 light of -- well, to make the authority explicit, the  
22 Department of Justice participated in seeking a rule change  
23 to Rule 41 that would expressly authorize the search that  
24 occurred here. In doing that, the defendant did not concede  
25 that the search was not authorized by the other provisions of



1 Rule 41(b); for instance, the tracking device provision under  
2 Rule 41(b)(4). That rule --

3 THE COURT: Well, I think I understand your argument  
4 on that.

5 MS. GRATTON: I would just note for the Court on  
6 that point that the Supreme Court transmitted that rule to  
7 Congress, and I don't believe the Court is in the business of  
8 approving rules that would otherwise violate the Constitution  
9 or territorial jurisdictional limits placed on Magistrate  
10 Judges outside the context of Rule 41.

11 THE COURT: Do you agree with the defendant that if  
12 the Court finds that the search and seizure conducted was  
13 invalid that it would also have to invalidate the confession?

14 MS. GRATTON: The government does not, because, as  
15 the Court has heard, even through the normal operation of any  
16 Internet -- the Internet at all, whether it be the regular  
17 Internet or the Tor browser, a user discloses their IP  
18 address to someone.

19 And, as noted in our brief, there are several cases,  
20 including cases out of this district, that recognize that a  
21 person does not have a reasonable expectation of privacy in  
22 their IP address, and specifically on pages 33 and 34 of our  
23 response have noted that several courts have determined that  
24 the calculus is not changed by a defendant's use of  
25 anonymizing technology such as the Tor network. Just because

1 he limits who it might ultimately go to, it's still disclosed  
2 in the process, and, as the Court has heard in testimony  
3 today, that's not something that could be affirmatively  
4 limited in any way.

5           And, so, to the extent the Court views the search as  
6 unreasonable or that the warrant is invalid and seeks to  
7 suppress evidence, the evidence at issue would be that  
8 evidence in which the defendant had a reasonable expectation  
9 of privacy and would not include his IP address, which was  
10 used to identify him and gave rise to the search of his home.

11           THE COURT: So you say the IP address -- there's no  
12 reasonable expectation of privacy in the IP address?

13           MS. GRATTON: No.

14           THE COURT: Well, doesn't the Tor network itself  
15 attempt to conceal the IP address?

16           MS. GRATTON: It does, but the defendant -- and he  
17 has done this throughout -- seeks to use it as both a sword  
18 and a shield. You know, "I am going to hide my location so  
19 the government is foreclosed from using any technique to  
20 identify me, and then when they use one I'm going to complain  
21 that they've contravened the bounds of the Fourth Amendment."

22           The courts have expressly considered -- several  
23 courts have -- the use of the Tor network. In *Michaud*, the  
24 Court there concluded that the user has no reasonable  
25 expectation of privacy in the most significant information

1 gathered by the deployment of this NIT, his assigned IP  
2 address. Because even though the IP addresses of users on  
3 the Tor network may not be known to Web sites like Playpen,  
4 the network doesn't strip users of all anonymity, because  
5 users accessing it must still send and receive information,  
6 including IP addresses, through another computer such as an  
7 Internet service provider at a specific location. And when  
8 you disclose information to a third party you no longer have  
9 a reasonable expectation of privacy in that information. And  
10 that concept has been applied concretely to the Tor network  
11 generally and to the operation that occurred in this case.

12 I would note for the Court on the point about the  
13 triggering condition that was argument that was heard in the  
14 Western District of Washington. And the Court, as noted in  
15 the government's response, ruled from the bench that none of  
16 the arguments related to the probable cause or the execution  
17 of the warrant warranted suppression of the evidence in that  
18 case.

19 THE COURT: Well, they got the information in a  
20 different manner. The government didn't actually have to go  
21 into the Tor network; they got it from some third party who  
22 had already --

23 MS. GRATTON: As Agent Alfin testified, when the  
24 defendant downloaded the NIT the computer instructions  
25 performed their function and transmitted information back to

1 a government-controlled computer within the Eastern District  
2 of Virginia. The transmission of that information occurred  
3 through the regular Internet, which he also testified when  
4 you use the regular Internet and you go to CNN, you go to  
5 another Web site, it discloses your location and, similarly,  
6 you can determine the location of the site you're visiting.  
7 And, so, when the information was transmitted back the IP  
8 address was disclosed as a part of that process. It was not  
9 information gathered from the defendant's computer; rather,  
10 it was standard and normal operation of any transmission over  
11 the Internet.

12 On the Court's question to the amicus in this case  
13 about what a valid warrant would look like, in reviewing the  
14 brief and then hearing the response here today, the amicus  
15 suggests that instead of getting one warrant that would allow  
16 this every time someone logged in to the Web site they should  
17 have gone and gotten what essentially sounds like the same  
18 warrant. There's been no -- even in the brief and then here  
19 today before the Court there's been no suggestion that there  
20 was another way to determine the location of these  
21 individuals.

22 THE COURT: Well, that's what troubled me. I don't  
23 know how -- they couldn't have identified the location of the  
24 person without using the NIT.

25 MS. GRATTON: And the references to the server

1 logs -- it's made clear in the testimony before the Court and  
2 in the affidavit supporting the warrant that those server  
3 logs did not contain identifying information. Because  
4 although the IP address was disclosed through using the Tor,  
5 by the time the requests got to the Web site itself that  
6 information was no longer a part of the request because of  
7 the operation of the Tor network.

8           And I think perhaps the most important thing for the  
9 Court to consider in all of these questions is the absence of  
10 any claim that the Magistrate Judge abandoned her neutral and  
11 detached function, the absence of any evidence that she was  
12 somehow misled. There has been much made of the fact that  
13 these computers -- we didn't know where they were. It was  
14 clear we didn't know where they were. That was a fact that  
15 was communicated to the Magistrate. And all of the testimony  
16 and the argument that the Court has heard here today about  
17 the inability to determine the location of these individuals  
18 absent the use of the NIT was something of which the  
19 Magistrate was aware and that she considered.

20           And on the good faith exception, you know, we don't  
21 want to live in a world where an agent goes before a neutral  
22 and detached judicial officer and seeks authorization to  
23 conduct a search or a seizure in accordance with the Fourth  
24 Amendment and that Magistrate Judge provides them, by word  
25 and deed, the authority that they seek, that they still have

1 to wonder if, nevertheless, perhaps this might not be  
2 appropriate. They're entitled to rely on the conduct and the  
3 judgments of the Magistrate Judges.

4 And the Fourth Circuit, in particular, has  
5 recognized that application of the good faith inquiry is not  
6 limited to just those specific circumstances that have been  
7 addressed by the Supreme Court. That was in the *United*  
8 *States v. Stephens* opinion, which is a published Fourth  
9 Circuit case in 2014, 764 F.3d 327.

10 And, so, here suppression is a last resort. It  
11 comes at a great cost to the system of allowing someone who  
12 is possibly dangerous to escape any prosecution, and  
13 suppression is not appropriate. It's not an appropriate  
14 remedy when you're trying to correct an error of a judicial  
15 officer, and that is, at best, what we have here. The  
16 defense disagrees with the Magistrate Judge's determination  
17 of probable cause and of her authority to issue the warrant.  
18 There are several provisions, as outlined and briefed at  
19 length, that support her exercise of that authority and her  
20 issuance of the warrant in this case, and particularly in  
21 light of the fact that the defendant was located within the  
22 same district. Under any reading of installing the NIT, it  
23 was installed within this district. It did search property  
24 within this district.

25 And the Magistrate Judge is entitled to rely on

1 well-trained officers, with their training, their experience,  
2 and she's allowed to consider all the facts presented to her  
3 and draw inferences from those facts. That the defendant  
4 disagrees with those inferences does not compel suppression,  
5 and even if there were some error, the blame that he lays is  
6 on the shoulders of the Magistrate Judge. He says that she  
7 shouldn't have issued the warrant. Well, even if that were  
8 true, the agents were entitled to rely on the authority that  
9 she gave them, and that's exactly what happened here.

10 And, so, for all of these reasons, it is the  
11 government's position, as outlined at length in the brief,  
12 that suppression is simply not appropriate.

13 And a final point on Rule 41: As noted in the  
14 government's paper, it is to be read flexibly. The case that  
15 we cited, the *New York Telephone* opinion of the Supreme  
16 Court, upheld a warrant that authorized a 20-day pin register  
17 for dialed phone numbers. And at that time Rule 41 allowed  
18 the seizure of property and not information, and the Supreme  
19 Court found that the rule needed to be flexible in the  
20 context of applying Rule 41, particularly in a case like  
21 this, where you have technology and changing times.

22 And, so, to the extent that -- and the government  
23 doesn't concede that anything done in this case violated the  
24 provisions of Rule 41 or the spirit of Rule 41. The Supreme  
25 Court has recognized the need for some flexibility here.

1 Otherwise, courts could never function. We would be amending  
2 the rule every day to try and keep up with advancing  
3 technology and the work that is needed, as the Court has  
4 noted in this case, to identify people who seek to hide their  
5 identities while committing criminal conduct.

6 Thank you.

7 MR. GRINDROD: May I briefly respond, Your Honor?

8 THE COURT: You may.

9 MR. GRINDROD: Your Honor, I'll just address a few  
10 of the points raised by the government.

11 First, the Court asked a question about the fruits  
12 implication of suppression, based on a finding that the  
13 warrant here was invalid.

14 First, with respect to the privacy interest in an IP  
15 address, the government is suggesting that someone sending  
16 information to the FBI is necessarily going to have their IP  
17 address associated with that. Well, the whole notion of  
18 expectations of privacy is based on a knowing exposure to the  
19 public. Here it's undisputed that Mr. Matish and any other  
20 user of the Playpen Web site would never have been sending  
21 anything to the FBI for the FBI to collect their IP address,  
22 were it not for the NIT.

23 Even though we maintain that there is a reasonable  
24 expectation of privacy in the IP address because of the Tor  
25 issue, the Court doesn't have to reach that issue. If the



1 warrant was invalid, then the NIT searches never occur and  
2 the government never identifies Mr. Matish, they don't get  
3 the residential warrant, they don't conduct the interview  
4 with the FBI, and, in essence, this investigation is never  
5 off the ground. The warrant, the NIT warrant that we say is  
6 invalid, was the spark that lit this investigation, and  
7 everything that flowed from it is a tainted fruit, Your  
8 Honor.

9           With respect to the Court's question about what else  
10 could the government have done -- and I think the EFF  
11 identifies this as an issue more in their briefing, and I  
12 know the Court has asked for their further input on that, but  
13 I think the EFF's point is essentially that the government  
14 has to comply with the law. But that doesn't necessarily  
15 mean they can't continue the investigation.

16           So in this case there are any number of other  
17 traditional or sophisticated law enforcement techniques that  
18 the government could have used to try to identify people.  
19 For example, the Web site required a user name.  
20 Cross-referencing the user name of somebody who is on the Web  
21 site with Google mail addresses --

22           THE COURT: Well, I don't see how they could have  
23 ever located anybody.

24           MR. GRINDROD: Well, again --

25           THE COURT: Not by name.

1           MR. GRINDROD: Well, again, Your Honor, it's our  
2 position that perhaps the government could have, perhaps they  
3 couldn't have, but in either event there's no necessity  
4 exception to the Fourth Amendment protections.

5           The government suggested that the Magistrate --  
6 there is no suggestion, I think, that the Magistrate was  
7 somehow misled with respect to the scope of this warrant. I  
8 would submit that that's just not true, Your Honor. The  
9 cover sheet of the warrant application, the proposed warrant  
10 itself clearly states, clearly contemplates, that the  
11 search --

12           THE COURT: You're just cherry picking there,  
13 Counsel.

14           MR. GRINDROD: Well, I think --

15           THE COURT: If you look at the attachments in  
16 conjunction with the warrant, it's clear what they're going  
17 after. You can't cherry pick one phrase out of it and say  
18 that that shows that there was an attempt to mislead the  
19 Magistrate Judge. I don't accept that argument at all.

20           MR. GRINDROD: Well, Your Honor, I would just note  
21 that --

22           THE COURT: You have to read the attachments and the  
23 warrant as one document, not try to find one phrase in one  
24 document that you object to.

25           MR. GRINDROD: Well, I -- Your Honor, I understand

1 the Court's position. I would note that even in Attachment A  
2 the only district listed is the Eastern District of Virginia.  
3 There's no mention of searches being conducted anywhere in  
4 the world. And I think had the government included, instead  
5 of the phrase "Eastern District of Virginia," "anywhere on  
6 the planet" perhaps Magistrate Judge Buchanan's interest  
7 would have been piqued. These warrant applications are  
8 obviously -- I mean, this one was turned over the same day it  
9 was submitted, and we've spent, what, probably a month  
10 briefing the legal implications?

11 So -- but I understand Your Honor's point. I would  
12 just note, Your Honor, with respect to the government's kind  
13 of rhetorical argument about the world in which we want to  
14 live, I would submit that a world in which the government can  
15 carry out searches that are not authorized by law, that flow  
16 from the authority of someone who is not vested with any  
17 legal authority under the rule of law, that we can't allow  
18 searches of people's houses, papers, and effects without  
19 compliance with the Fourth Amendment.

20 And, to be sure, the Constitution imposes costs,  
21 but, as the Supreme Court said in *Riley*, that the Fourth  
22 Amendment's warrant requirement imposes costs on the  
23 Executive does not mean that it shouldn't be followed. The  
24 Constitution is valuable enough to where it's worth the price  
25 we pay.

1 Thank you, Your Honor.

2 THE COURT: All right, counsel. This is obviously a  
3 very complex issue, and, for a variety of reasons, the Court  
4 does not believe it would be appropriate to rule from the  
5 bench on the motions before it at this time, which are 1 and  
6 3. We haven't gone into anything beyond that.

7 I, of course, want to read that most recent case, so  
8 the Court will take its decision under advisement. I hope  
9 the Court will be prepared to make a decision on these two  
10 motions -- well, I'll say hopefully next week.

11 When is the case set for trial?

12 MS. GRATTON: June 14, Your Honor.

13 THE COURT: Yes. All right. Other than what I  
14 asked from the parties filing the amicus brief, I don't think  
15 there's anything else to be submitted by the parties to the  
16 Court. I think we've heard all the evidence.

17 That expert witness that you wanted to call,  
18 Counsel, seems to me to be -- that his testimony would not  
19 affect the Court's rulings on this motion. It would be  
20 directed to a *Franks* motion, which is denied.

21 So I assume that there's no further evidence or  
22 briefing contemplated by either party.

23 MR. GRINDROD: Your Honor, the only possible  
24 exception to that is we are seeking discovery as to actual  
25 production of the NIT code, and to the extent that the

1 Court's determination is based on the way the process  
2 technically works -- obviously, we were able to cross Special  
3 Agent Alfin, but we don't have access to that information at  
4 this point. Only the government really knows how the NIT  
5 worked, and the government is -- obviously, part of the  
6 argument is the way the NIT worked, somehow the IP address  
7 was different. We can't verify any of that without  
8 discovery, Your Honor. And, so, to the extent we may need to  
9 supplement the record if we're able to get that discovery,  
10 obviously that's subject to a pending motion to compel. But  
11 I would just note that for the record.

12 MS. GRATTON: If I may just briefly respond to that,  
13 Your Honor, the defendant sought to move this hearing to  
14 resolve the motion to compel discovery. And, as explained in  
15 the government's response to that motion, the discovery does  
16 not bear on the question of whether the warrant was valid.  
17 As the defense just said, they want to see how the NIT was  
18 executed. Well, how it was executed really isn't a question  
19 before the Court with the pending motions.

20 And as the Court was getting into the nature of the  
21 execution, you know, that had been done in a more narrow  
22 fashion here, setting aside the --

23 THE COURT: Well, we heard evidence on how it was  
24 executed. What is the problem with producing what they've  
25 requested on how it was executed?

1 MS. GRATTON: The government has filed a lengthy  
2 response to the defense motion to compel discovery and in  
3 that response has offered to produce the computer  
4 instructions that comprise the NIT and are willing to provide  
5 that to establish that the instructions only gathered the  
6 information that was authorized in Attachment B.

7 To the extent the defense is seeking any additional  
8 information described in the declaration that they attached  
9 from the *Michaud* case, the government opposes that request on  
10 a number of grounds. First is untimely; second is because  
11 the materiality has not been established; and, third, because  
12 any additional information is subject to law enforcement  
13 privilege, as the government has asked for an opportunity to  
14 explain in greater detail, ex parte and in camera, as  
15 outlined in the response to the discovery request.

16 THE COURT: Well, why don't you give them what you  
17 agree that you can give them --

18 MS. GRATTON: We can make that available.

19 THE COURT: -- and then we'll take it from there.

20 MS. GRATTON: Yes. The government's position with  
21 the pending motions is that that information would not bear  
22 on the facial validity of the warrant, which the defendant  
23 has --

24 THE COURT: Well, that's all right. Just give it to  
25 them, anyway.

1 MS. GRATTON: Yes, Your Honor.

2 THE COURT: And when can you give it to them?

3 MS. GRATTON: Next week sometime, Your Honor.

4 THE COURT: That's a rather vague --

5 MS. GRATTON: The government can produce it next  
6 week. It requires coordination with --

7 THE COURT: When next week?

8 MS. GRATTON: I don't have that immediately  
9 available. It's not something that our office physically  
10 possesses. We have to obtain it and provide it.

11 THE COURT: Wednesday.

12 MS. GRATTON: Okay.

13 THE COURT: All right. Is there anything further?

14 MR. GRINDROD: Not on those motions, Your Honor.

15 THE COURT: All right.

16 (The hearing adjourned at 5:22 p.m.)

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CERTIFICATION

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

/s

Heidi L. Jeffreys

May 24, 2016

Date