

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN

3 -----
4 UNITED STATES OF AMERICA,
5 Plaintiff,

6 -vs-

CASE NO.: 16-CR-38

TRANSCRIPT FROM AUDIO RECORDING

7 MARCUS A. OWENS,
8 Defendant.

9 -----
10 MOTION hearing in the above-entitled matter, held
11 before the Magistrate Judge David E. Jones, on the 26th day of
12 October, 2016, commencing at 9:32 a.m. and concluding at 10:04
13 a.m.

14
15 A P P E A R A N C E S

16 United States Department of Justice
17 Office of the U.S. Attorney
18 Mr. Benjamin W. Proctor
19 517 East Wisconsin Avenue, Room 530
Milwaukee, Wisconsin 53202
Appeared on behalf of the Plaintiff.

20 Federal Defender Services of Wisconsin, Inc.
21 Mr. Anderson M. Gansner
22 517 East Wisconsin Avenue, Room 182
Milwaukee, Wisconsin 53202
Appeared on behalf of the Defendant, also present.

23 Ms. Katina Hubacz, Clerk.
24 Transcript prepared from Audio Recording by Ms. Sheryl L.
Stawski, Official Reporter.

25

T R A N S C R I P T O F P R O C E E D I N G S

1 THE CLERK: Court calls Case No. 16-CR-38, United
2 States versus Marcus A. Owens, here for a motion hearing.

3 May I have the appearances, please, first for the
4 Government.

5 MR. GANSNER: Good morning, Your Honor.

6 Benjamin Proctor appears for the United States.

7 THE COURT: Good morning, Mr. Proctor.

8 MR. GANSNER: Good morning, Your Honor.

9 Anderson Gansner of the Federal Defender Services here
10 for Mr. Owens whose now present.

11 THE COURT: Thank you. And good morning to you, Mr.
12 Gansner.

13 All right. We're here to try to move the case
14 forward. And I -- I did appreciate that Judge Stadtmueller has
15 removed your trial date so that he's going to have time to
16 review your objections to my report recommendations on the
17 various motions in the case. This -- I think this might be the
18 last one, though I don't -- I'm sure you might think of
19 something else, Mr. Gansner; but the motion to compel, I wanted
20 to kind of accelerate my disposition of it by having a hearing
21 on it instead of waiting for the full briefing. So I'm
22 prepared -- I'm prepared to kind of get the thing resolved
23 today so that you can -- and I'll probably do a short writing.
24 I'll figure out how to do it so that you guys have -- I want to
25

1 maximize your ability to have it decided by Judge Stadtmueller
2 because he's going to have the final word on this stuff; not
3 me. My job is to simply keep the paperwork moving but try to
4 develop the factual record as well.

5 So in that regard, let me -- I know the United States
6 hasn't had a chance to respond yet; but, frankly, Mr. Gansner,
7 I'm -- I'm not convinced on the motion to compel. And let me
8 just address a couple other things with you, and you can
9 respond and maybe help me see some things that I missed.

10 It seemed to me that in some respects your motion has
11 a *Franks* air about it, that is, that the United States when it
12 sought the warrant -- and my law clerk found this for me -- in
13 paragraph 34 of the affidavit, the United States says, the NIT
14 will only view; and then it specifies the things that the NIT
15 is only go to view.

16 And it seems to me the suggestion in the motion to
17 compel as well in fact, the United States was not honest, the
18 United States -- or the affiant, I should say, wasn't honest
19 about what the NIT would actually do; that, in fact, it was
20 going to go beyond the things it said it was going to look for
21 and do other things in the computer, in the target computer.

22 So is that, in fact, what your -- your argument is?

23 MR. GANSNER: Your Honor, I think that's one facet of
24 it. Part of it is just the ability to make sure that that was
25 correct.

1 THE COURT: Okay. Stop with me there for a second.

2 MR. GANSNER: Uh-huh.

3 THE COURT: Typically in a *Franks* type of setting, I
4 need a substantial showing before I really start entertaining
5 suppositions about, you know, that there was dishonesty on the
6 part of the affiant -- or recklessness -- let's call it that,
7 all right -- because maybe people get squeamish about the
8 suggestion of dishonesty -- recklessness in the affidavit.

9 Here, in this case, it's going anticipate your second
10 argument about, well, they may have created security
11 vulnerabilities. You've got -- You've got the target computer.
12 And you were able to access the operating system log files,
13 which should tell you, one, whether -- whether other parts of
14 the operating system were exploited; and, two, whether perhaps
15 the child pornography came from some outside source.

16 So I guess what I'm saying is, I think your motion
17 does a good job of asking interesting questions about what
18 might have happened; but it doesn't -- there's no hook to --
19 and see the computer itself, the log files suggest that these
20 interesting questions may, in fact, have occurred.

21 Am I missing something there?

22 MR. GANSNER: Your Honor, I think the point from our
23 perspective is that there's no way to know.

24 THE COURT: There is so, right, because the log files
25 should tell you. I think the operating system log files should

1 tell you everything that has occurred, that has affected or
2 transacted with that operating system. I think. You know,
3 maybe I am wrong about that, but I think that's typically what
4 happens with a computer.

5 MR. GANSNER: Your Honor, my understanding --

6 THE COURT: Yeah.

7 MR. GANSNER: -- from speaking with our expert is that
8 unless, you know, we get both -- I think the payload component
9 which the Government has provided partially and the Exploit
10 component, because the Exploit component itself could have
11 potentially extracted information from the computer, that we
12 don't know exactly what was -- what drawn back.

13 In addition, part of our request is to see kind of the
14 information on the Government's server to see how it was
15 stored, sort of like being able to walk into an evidence
16 locker; and be like, okay, here's how it's sorted, here's how
17 we're keeping it straight so it's not getting mixed up with
18 other people.

19 And unless we're able to go through all those steps,
20 we can't really be sure about the accuracy of it. And with
21 regard to your point about the *Franks* motion, certainly, you
22 know, I'm not going to come in here and make statements about,
23 you know, this was reckless; this was dishonest; they left this
24 out because I don't have a basis to do that.

25 THE COURT: Fair enough.

1 MR. GANSNER: And that's why I want to look at the
2 underlying thing so I can see, okay, you know, if it went
3 further then, yeah, then we do have a basis; but if it didn't
4 go further, then obviously we don't; so what we're trying to do
5 is just eliminate those possibilities.

6 THE COURT: Right. I understand that. You do have a
7 nice case from the State of Washington, Western District of
8 Washington -- Seattle, where the -- you know, the judge
9 certainly thought that all the source code was relevant; but
10 I -- and I can see why especially because -- when we're in an
11 area of computer forensics where, you know, most judges are --
12 including myself -- are on very thin ice in pretending that we
13 actually know the technology.

14 And so I think, you know, one way to deal with that
15 is, as a Western District of Wisconsin judge who's really
16 wicked smart as far as I can tell, one way to deal with that
17 uncertainty is default on the side of just producing it. And I
18 get that. But I'll hear now from the United States, why not
19 just produce it? What is the concern here? Why are you guys
20 making this hard on people?

21 MR. PROCTOR: Well, here, a couple of things, Your
22 Honor.

23 First, I want to kind of set the stage as to where
24 we're at --

25 THE COURT: Okay.

1 MR. PROCTOR: -- and compare it to the motion here.

2 I believe that the affidavit submitted by
3 Mr. Miller -- Professor Miller is inaccurate. The United
4 States has produced the payload, this payload component in its
5 entirety, the code; and we've -- I've explained that to Mr.
6 Gansner.

7 And my understanding is that Professor Miller was at a
8 recent hearing in, I believe, the Western District of Arkansas
9 where he heard Special Agent Alfin, who's been the Government's
10 point man in testifying on these cases, explain that you have
11 the code; we have produced the code to the payload for you.

12 THE COURT: Actually, just stop real quick. Let's
13 define our terms. When you say the "payload," what -- is that
14 something beyond the NIT? What are you describing when you use
15 the term "payload"?

16 MR. PROCTOR: Sure. I'm using the Defendant's terms.

17 THE COURT: Okay.

18 MR. PROCTOR: The Defendant in his motion and in the
19 affidavit refer to the code as consisting of four parts.

20 THE COURT: Right.

21 MR. PROCTOR: They talk about a payload --

22 THE COURT: You're right.

23 MR. PROCTOR: -- Exploit, the server and tracking
24 software.

25 THE COURT: Right.

1 MR. PROCTOR: From the Government's perspective, we've
2 produced pretty much everything that we consider to be, you
3 know, the main part of the code, that is instructions, the --

4 THE COURT: Let's actually go through it using the --
5 I think that's actually a useful exercise. So we're at
6 paragraph 2 of Mr. Miller's affidavit.

7 Do you have it in front of you, Mr. Proctor?

8 MR. PROCTOR: I do.

9 THE COURT: So let's go through these categories.
10 Tracking server software. Generate and track unique
11 identifiers. You know, that's obviously a big part of how you
12 folks were able to know that particular downloads came from a
13 particular computer.

14 Have you provided the code? And also be specific,
15 binary versus source code. Have you provided code of any type
16 in regard to the tracking server -- the tracking server
17 software capabilities of the Government exploit?

18 MR. PROCTOR: My understanding is that we've provided
19 everything they've asked for regarding tracking servers.

20 THE COURT: Do you know whether that's binary or
21 source code, if you know? If you don't, that's fine. Okay.

22 MR. PROCTOR: I don't know, Your Honor.

23 THE COURT: That's okay.

24 MR. PROCTOR: But I have submitted a letter recently
25 to Mr. Gansner that provided the instructions along those lines

1 as to how the Government went about it. Those were provided to
2 Mr. Gansner in my most recent letter of October 16, I believe.

3 MR. GANSNER: 19th.

4 MR. PROCTOR: 19th.

5 MR. GANSNER: Uh-huh.

6 MR. PROCTOR: So my understanding -- and I got -- I'm
7 relying on the FBI for that information. I forwarded that on.

8 THE COURT: Okay. The second category is the Exploit
9 software which takes advantage of a flaw in the software to run
10 the payload.

11 MR. PROCTOR: No, Your Honor, we will not be producing
12 that.

13 THE COURT: Okay.

14 MR. PROCTOR: But it is immaterial and covered by law
15 enforcement. I can discuss in greater detail.

16 THE COURT: Well, let's just -- I just want to -- part
17 of my job is I've got to set the factual table. So let's find
18 out what's really in dispute. Three, the payload software, the
19 NIT, right. That's -- That's the secret stuff. But you guys
20 have produced that?

21 MR. PROCTOR: Yes, Your Honor.

22 THE COURT: All right. Again, are you -- Do you know
23 whether you produced source code or binary code?

24 MR. PROCTOR: I believe we produced the -- I'm not
25 sure if -- on those two terms?

1 THE COURT: Yeah.

2 MR. PROCTOR: But my understanding is that we have
3 produced the code.

4 MR. GANSNER: Your Honor, just to clarify what -- you
5 know, none of us are computer scientists here.

6 THE COURT: Right.

7 MR. GANSNER: From speaking with my experts, my
8 understanding is the Government produced, you know, whatever --
9 whatever they produced was sort of the end product from the
10 assembled NIT. And what our experts were specifically
11 interested in is something called the human readable source
12 code.

13 THE COURT: Yeah, you get the binary code. So you
14 guys know this, right. Source code goes to an assembler, and
15 then the assembly makes the binary code. So you've got the
16 binary code.

17 MR. GANSNER: And the Government has informed us that
18 the source code, they don't have it.

19 MR. PROCTOR: No, no, that's incorrect, Your Honor.
20 What we've said is that there is no human readable
21 source code. This code was written in assembly language.

22 THE COURT: Seriously.

23 MR. PROCTOR: Seriously.

24 THE COURT: Wow. Okay. Wow.

25 MR. PROCTOR: They have.

1 THE COURT: Okay. All right. So let's just continue
2 setting the table here. We've got payload software. The
3 United States produced that and collection server software that
4 runs on a server to collect information sent by the payload.

5 MR. PROCTOR: My understanding, Your Honor, is that
6 this is -- they're essentially asking for the server that held
7 this type of information.

8 THE COURT: Okay.

9 MR. PROCTOR: And that's not going to be produced;
10 and, again, immaterial.

11 THE COURT: Yeah. I can kind of see that that --
12 you're running a bit afar field.

13 So the big thing that we're arguing about is the
14 Exploit software that takes advantage of a flaw. And I can
15 understand here why the Government would find that to be
16 particularly sensitive, right? I mean, that's this software
17 that allowed you to -- Exploit was a browser log, wasn't it?

18 MR. PROCTOR: It's -- My understanding, Your Honor --
19 and, again, I've been trying to read through transcripts --

20 THE COURT: Yeah.

21 MR. PROCTOR: -- in preparation for this hearing where
22 Special Agent Alfin has testified, is that there's a flaw in --
23 I can't --

24 THE COURT: Web browser talk.

25 MR. PROCTOR: -- browser. The way Special Agent Alfin

1 described it is like there is -- there's an open window; and
2 this finds that open window and allows the instructions to go
3 through and come back out.

4 THE COURT: Okay.

5 MR. PROCTOR: And they have the instructions that went
6 in. They have -- We've also produced the two-way data stream
7 of what went into the computer --

8 THE COURT: Right.

9 MR. PROCTOR: -- what went out of Mr. Owens' computer
10 so long as -- as well as the results of -- what the NIT results
11 were; so that their expert can take a look at that two-way data
12 stream, see what went in, see what came out, compare what came out
13 of that computer with the results that we've given; and my
14 understanding is that Professor Miller has done that, and they
15 match.

16 THE COURT: Okay. All right. So given that, Mr.
17 Gansner -- I mean, it doesn't seem to me, first of all, that
18 there has been a substantial showing that -- that there was
19 sort of some reckless statement to the judge -- the issuing
20 judge that would cause me to have doubt about the statement in
21 the affidavit that the United States -- that the NIT would only
22 view the items specified in the affidavit.

23 So the notion that there is this free-form search or
24 exploitation of the computer beyond what the warrant said,
25 there just doesn't seem to be any factual reason to believe

1 that that occurred unless you can point me to something that
2 I've missed.

3 MR. GANSNER: What that means is, Your Honor, is that
4 we simply don't know.

5 THE COURT: All right. That's fine.

6 MR. GANSNER: Unless we have the Exploit component
7 because the exploit component -- it did a lot of -- I think
8 it -- we don't know what it did. It certainly -- It allowed
9 them to cut through, you know, sort of the -- I like to think
10 of it as sort of James Bond where they're like the tracing a
11 phone call and going through, you know, Moscow and Brisbane,
12 and all these other parts of the world -- it allowed them to
13 cut through that, obviously; but we don't know what else it
14 did.

15 It certainly did something to Mr. Owens' computer to
16 allow the NIT software to enter it, to extract the information,
17 and to bring it all back surreptitiously, right, without any
18 warning to Mr. Owens whatsoever.

19 And the concern there is what state did it leave his
20 computer. And that's really, you know, I think the crux of
21 the -- the argument with regard to the Exploit is that we
22 simply don't know how it was left. And given, you know, what
23 we had, for example, just this past Friday where hackers using
24 malware, you know, assumed control of hundreds of thousands of
25 the internet-connected devices all over the county to shut down

1 a large portion of the internet, what that shows you is that
2 when there is a security lapse, when there is, you know,
3 some -- some way to access surreptitiously someone else's
4 device, that can be taken over without any knowledge by the
5 person who's controlling it.

6 THE COURT: Right.

7 MR. GANSNER: And I think this is relevant --
8 sometimes we're kind of jumping to relevant where the -- kind
9 of half-step is material, right, because it's just something
10 that could be relevant. I think this is material here because
11 the Government has charged Mr. Owens with possessing, and if
12 you look at the indictment, a particular video.

13 THE COURT: Right.

14 MR. GANSNER: So we're talking about a particular
15 image that was found on his hard drive a year after the
16 Government searched it and used Exploit to do something to the
17 security settings; and given that -- at least there's some
18 information that that computer was used to, you know, reach out
19 to the dark web, to go to different places on the internet, you
20 really don't have any idea what could happen to your computer
21 if there's some kind of unknown lingering security hole, right.

22 And that's why I cited the kind of different news
23 stories about people, you know, using someone's computer or
24 hard drive or -- you know, flash drive, or whatever it,
25 whatever device they have without that person's knowledge to do

1 things because all we want to do is be able to exclude that as
2 a potential defense. We want to take a look, was it even
3 possible for this to happen, right. Was there -- Could it
4 leave a lingering security gap. And I think that's -- that's
5 something that's material.

6 THE COURT: Call it what it is. I don't know if
7 you're looking to exclude a particular defense. What you're
8 looking to do is have a particular piece of the software, the
9 Exploit declared to be relevant; and, therefore, necessary for
10 your defense so that when the United States says it won't
11 produce it, then they'll have to dismiss.

12 I mean, you're not necessarily looking to exclude a
13 defense; you're looking to have the case thrown out because --
14 and I'm not -- that's fine. You're entitled to do that.

15 MR. GANSNER: Your Honor, I mean, I think what we are
16 entitled is to prepare a defense. I think -- I understand -- I
17 certainly can appreciate kind of looking back and be like, hey,
18 this sort of defense, you know --

19 THE COURT: That's not true. I think it's a
20 legitimate argument.

21 MR. GANSNER: And I'm not -- I mean, I'm not looking
22 for a golden ticket for Mr. Owens, Your Honor. What we're
23 trying to do is, first of all, simply raise all legitimate
24 issues that we have in this case; but, second, what we are
25 really trying to do is to see if there's a potential defense

1 out there.

2 If there is a potential defense, then I can go to Mr.
3 Owens and I can say, hey, maybe we have a potential defense
4 with regard to this particular image -- or excuse me -- video
5 that the Government has indicted.

6 Maybe we can go in there and argue, you know, his
7 computer was left either sort of like someone kicked in the
8 door of a house and leaving the door open for a year; you know,
9 maybe we've got an argument where we can go in there and say,
10 you know, somebody else might have put that on there and can we
11 make that with a straight face.

12 And I can advise him, listen, we have a potential
13 defense; and you can make an informed decision about whether
14 you want to go to trial or whether you want to plead guilty.
15 That's really what I'm trying to do.

16 THE COURT: Okay. And, please, Mr. Gansner, do not
17 take my -- my observations about end goals and things like that
18 as any sort of criticism. I mean, you have to put your --
19 You're supposed to do these types of things, and so that's -- I
20 applaud you. I don't criticize you.

21 Let me hear -- Mr. Proctor, I'm sure you've had some
22 things you wanted to say; but if -- if there is anything in
23 your observations that could include some response from
24 transcripts that you've read from the -- from the other
25 hearings about this notion of, well, the Exploit that allowed

1 you to find the open window possibly left open the -- the
2 target computer to exploit by some bad guy for reasons I can't
3 understand dumped child porn on this particular computer.

4 MR. PROCTOR: A couple things, Your Honor.

5 First, again, the Exploit has been testified to,
6 simply found that open window, allowed the NIT to go through.
7 They have all the materials they need to have in order to test
8 whether or not that NIT instructions did anything or gathered
9 anything that was not -- or different from what we have.

10 THE COURT: Right. Let me just be clear. The -- The
11 argument that the NIT or the United States went beyond the
12 warrant, I just -- that's not moving me at all because there
13 simply isn't an indication that the operating system had been
14 searched beyond the scope; certainly nothing that rises to a
15 substantial showing that I think that -- that I'm required to
16 review.

17 I think the more interesting -- and I'm not saying
18 persuasive at this point -- but the more interesting thing to
19 the extent you can focus on it, is this notion that the Exploit
20 software somehow left the door ajar -- left the door of Mr.
21 Owens' computer ajar so that it could be exploited by some
22 other entity to download the child pornography in question in
23 this case.

24 Have you read anything? Do you have anything to offer
25 in regard to that suggestion or allegation?

1 MR. PROCTOR: Well, my -- my initial response, Your
2 Honor, is that there's no evidence to support --

3 THE COURT: Right.

4 MR. PROCTOR: -- that speculation. Defense has access
5 and can have access to Mr. Owens' seized items at any point if
6 they want to investigate that and determine whether or not
7 there's any evidence at all that anything was altered or
8 changed.

9 THE COURT: Yeah.

10 MR. PROCTOR: And I'll also note, in this particular
11 case, Your Honor, the evidence consists of a hard drive that
12 was disconnected from the computer that had 18,000 images and
13 videos of child pornography in addition to a laptop computer
14 that had 14,000 images and videos of child pornography along
15 with Mr. Owens' confession that he went on the PlayPen site and
16 he's been downloading child pornography for the last several
17 years, so --

18 THE COURT: Believe me, Mr. Proctor -- again, just
19 like any good prosecutor, when you -- you're making -- you're
20 making me aware of the overall big picture; but I think you
21 understand that from a pure motion to suppression -- suppress
22 context, the fact that the guy later confessed doesn't -- is
23 just like any other drug case where, yeah, he confessed later;
24 but I've still got to care about whether there was reasonable
25 suspicion to stop his car in the first place, right.

1 MR. PROCTOR: Of course, Your Honor. I'm just noting
2 that to the extent that the Defense is arguing that there may
3 be a legitimate defense --

4 THE COURT: Yeah.

5 MR. PROCTOR: -- based on -- that this Exploit --
6 speculation that the Exploit has allowed other people to fill
7 Mr. Owens' computer and disconnected hard drive with child
8 pornography. I'm simply responding to those -- the basis for
9 the materiality argument.

10 THE COURT: Have you seen this particular argument
11 made and any other things about -- where Special Agent Alvin
12 (phonetic), is it?

13 MR. PROCTOR: Alfin, A-L-F-I-N.

14 THE COURT: This particular argument about, well, the
15 Exploit left the door open kind of thing --

16 MR. PROCTOR: Yeah.

17 THE COURT: -- or left a window open; and how has that
18 been addressed in these other hearings?

19 MR. PROCTOR: In my initial review --

20 THE COURT: Sure.

21 MR. PROCTOR: -- of these things, there's just
22 simply -- Special Agent Alfin has stated there's just
23 absolutely no evidence --

24 THE COURT: No evidence --

25 MR. PROCTOR: -- to indicate that that's ever

1 happened.

2 THE COURT: Yeah. And I may be wrong, but I do -- It
3 is my understanding that log files would tend to show -- well,
4 the log files log basically everything that the operating
5 system is told to do, it is directed to do or that occurs to
6 it.

7 And so if these -- if these intrusions occurred, there
8 would be some evidence of it, I should think, or at least an
9 expert would be able to say this looks irregular to me. I'm
10 not sure what this is. That's why I have some concerns. But
11 just there hasn't been any suggestion that Mr. Owens' operating
12 system has been exploited in that way.

13 Again, that's not -- it's not a criticism of the
14 Defense. I think it's just the stated -- the fact is the fact,
15 you know. There just doesn't seem to be that exploit there.

16 All right, Mr. Gansner, let give you the last word.
17 It's your motion, whatever you want me to think about.

18 MR. GANSNER: Your Honor, can you -- again --

19 THE COURT: Sure.

20 MR. GANSNER: -- can you explain to me what you mean
21 by log files when talking about those?

22 THE COURT: Sure. Yeah. Operating system log files.
23 So a computer -- An operating system, in particular, but even
24 software applications like Word -- like a word processing
25 documents will contemporaneously create a file that explains

1 everything that the computer operating system or the software
2 program is being asked to do or that's happening to it. So
3 that -- that's how folks can tell what has happened to your
4 computer.

5 They will review the log file and see what is -- what
6 has been asked of the operating system, what the operating
7 system has done, the instructions that the operating system has
8 responded to, things like that.

9 And so those are cached and maintained and should be
10 available for a forensics expert; so that's -- and that's where
11 you would see either evidence that the United States -- that
12 the search went outside the scope of the search warrant or
13 that -- the possibility of intrusions occurring from other --
14 from other entities besides the United States.

15 MR. GANSNER: And those would be maintained on, like,
16 the actual hardware? Is that what you're suggesting?

17 THE COURT: It should be -- It would be within the
18 firmware of the operating system, the software, yes.

19 MR. GANSNER: I don't mean to pull you in.

20 THE COURT: Yeah, I'm not going to be expert. That
21 would be like the worst thing in the world, to be honest with
22 you. But, yes, that's basically what would happen.

23 MR. GANSNER: Okay. Your Honor, again, our position
24 is, is that we simply don't know what the Exploit did to Mr.
25 Owens' computer.

1 THE COURT: Sure. Fair enough.

2 MR. GANSNER: I think the comparison I put out in my
3 motion is I think is accurate. It's -- You know, it's the
4 equivalent of the Government using some sort of special
5 locksmith tool to enter someone's home and doing that and then
6 leaving and then a year later coming back and finding
7 incriminating material.

8 I think in any case like that we would be able to
9 examine the tool used by the Government to determine what it
10 actually did and if it left a vulnerability. I think this case
11 is really no different.

12 Again, I think it's similar to any case where the
13 Government uses kind of new investigative tool. The Defense in
14 those situations is able to take a look at the tool to see how
15 it works, to see if there's any potential materiality there, if
16 there's any argument to be made that it influenced the evidence
17 that was later found in this case or, you know, it even
18 influenced potentially a pretrial motion or, in this case, it
19 influenced -- it influences potential punishment if Mr. Owens
20 is found guilty.

21 That's one thing I wanted to stress is we're not
22 talking just about materiality with regard to guilt or
23 innocence.

24 THE COURT: No.

25 MR. GANSNER: We're talking about materiality with

1 regard to sentencing. And as the Government stressed, when
2 they're talking about thousands of images, these were images
3 that are going to be held against Mr. Owens, specifically,
4 under the sentencing guidelines --

5 THE COURT: No, I know --

6 MR. GANSNER: -- so if I can make an argument that,
7 hey, maybe some of these came from somewhere else, I want to be
8 able to make it.

9 THE COURT: And I know we can play the analogy game
10 all day, just -- and all analogies are imperfect, but it did
11 seem to me that the lock analogy -- where it may break down a
12 little bit for you is that if the intrusion tool had left some
13 vulnerability in the lock, a forensic examination of the lock
14 will probably indicate there's a problem. That's what I'm
15 looking for here is that evidence on the target computer, that
16 there had been some kind of vulnerability at this point.

17 But I understand that. And it does make the point
18 graphically, Mr. Gansner, that -- you know, if this is what
19 wanted, the United States did use a tool that allowed access in
20 a way -- and I understand your question. And we just don't
21 know the implications of that.

22 All right. Anything else from the United States on
23 this?

24 MR. PROCTOR: No, Your Honor.

25 THE COURT: Anything that you in particular want me to

1 read or review from another because I know --

2 MR. PROCTOR: Yes.

3 THE COURT: -- didn't get a chance to file -- tell me
4 --

5 MR. PROCTOR: Certainly.

6 THE COURT: -- you might want to supplement the
7 record.

8 MR. PROCTOR: Certainly, Your Honor, I can direct the
9 Court to decisions -- comprehensive decisions issued in the
10 *Matish* case.

11 THE COURT: Okay. Do you know about that?

12 MR. PROCTOR: That's Eastern District of Virginia, I
13 believe; and *Darby*, also Eastern District of Wisconsin of
14 Virginia. I believe in both of those cases, Special Agent
15 Alfin testified. I believe in one of these cases, Dr.
16 Soghoian, one of the people mentioned by Mr. Gansner in
17 previous things as a possible defense expert in this case has
18 also testified.

19 In both cases, the judge heard testimony and denied
20 requests for further production. I'm waiting on a transcript
21 for a more recent hearing in Arkansas, which I understand
22 occurred within the last couple of weeks. And I'm happy to
23 forward any of those materials to the Court for the Court's
24 consideration if --

25 THE COURT: Yeah, you're welcome to do that. Mr.

1 Gansner, if you wanted to respond to any of those materials,
2 that's fine, too. I really believe my job is to make as
3 complete a record as I can, and then other folks can think
4 about the legal implications of that.

5 MR. GANSNER: Your Honor, the one thing I was thinking
6 about doing was consulting with Professor Miller about your
7 mention with regard to the log files --

8 THE COURT: Yeah.

9 MR. GANSNER: -- hey, would you be able to find
10 evidence of this if you examined the hardware or would it
11 essentially not --

12 THE COURT: Not the hardware so much, but you should
13 be able to it with the software.

14 MR. GANSNER: When I say hardware, I mean on
15 Mr. Owens' --

16 THE COURT: Yeah. I'm sure he'll come back, Mr.
17 Gansner, and tell you that -- that guy didn't know what he was
18 talking about. I have no doubt having worked with plenty of
19 computer science experts in my day.

20 All right. Thank you very much. Good presentations.
21 Good briefing. Interesting issue. Appreciate you bringing it
22 to my attention. You're doing your client a good service to
23 make -- make the courts think about these things, and I
24 appreciate your responses.

25 Mr. Proctor, give me anything you want; and I'll take

1 a look at it; but make sure Mr. Gansner gets it -- of course
2 you will -- and anything you want to tell me in response is
3 fine.

4 Did you want anything else? Oh, yeah, tell me how
5 soon you can get this stuff to me, Mr. Proctor.

6 MR. PROCTOR: Well, Your Honor, I'm in the process of
7 responding to three objections in this case that are due soon.
8 I can try to -- If I can get a little time, I appreciate -- I
9 can send you cases and transcripts immediately.

10 THE COURT: That's all I need.

11 MR. PROCTOR: Are you sure?

12 THE COURT: I don't need your argument. Just give me
13 your cases and your transcripts. And if there's other cases or
14 transcripts you want me to see -- but you guys -- your
15 arguments are set out fine, and I understand what your position
16 is; and I'm sure I'll see arguments of the United States in
17 those cases that you're citing.

18 Yeah. Yeah. Right. Jeremy -- Mr. Heacox is just
19 explaining the decision -- we can find those; but the
20 transcripts are the things that are the real, and you can just
21 have your assistant flip those over to us; and we'll be glad to
22 take a look at those.

23 MR. PROCTOR: Yes, Your Honor.

24 THE COURT: That's the key stuff. Anything else? I
25 have to check with Jeremy. Anything else you want from me?

1 Let me check with Ms. Hubacz. Anything else we need?

2 MS. HUBACZ: Not right now.

3 THE COURT: Just for your planning purposes, your
4 motion is tentatively denied; but I will be issuing a brief
5 decision for you guys then to have objections to in front of
6 Judge Stadtmueller.

7 MR. GANSNER: Your Honor, a complete side issue.

8 THE COURT: Sure, I can do that.

9 MR. GANSNER: So since the Court has issued decisions
10 on the other motions I filed, I've been contacted -- and I know
11 there was some e-mail discussion, which I appreciate from the
12 Court, about what exhibits and such to unseal.

13 I've just been contacted by other federal defender
14 offices. They're been like, hey, can I look at this exhibit or
15 not? And I think that some of it is subject -- it's under
16 seal, and I think some of it may be subjected to a protective
17 order, and I just wanted to broach this issue now in particular
18 because some of the facts I noted with regard to the *Franks*
19 argument I made haven't really been litigated in other
20 districts.

21 Some other attorneys were contacting me and asking,
22 hey, can I take a look at the Government's discovery response
23 in that case. You know, I'm pretty sure the Government labeled
24 it as subject to a protective order when they gave it to me; so
25 I just -- I wanted to raise the issue here now just to see if,

1 you know, maybe the parties would agree to, you know, unsealing
2 the exhibits. I mentioned in our email -- kind of
3 correspondence prior to that, the real stickler seemed to be
4 the, you know, the unredacted NIT warrant because there was
5 some parts of that, you know, that was -- the Government noted
6 were -- was either full unredacted or was still under seal in
7 the Eastern District of Virginia. We didn't want to step on
8 the toes of any other court.

9 These other exhibits, I was just -- I was going to put
10 it out there to see if the judge and the court and the parties
11 might be willing to unseal it generally. I think that's
12 document number 39 on the docket before I file those under
13 seal.

14 THE COURT: I'll let you take a look at it, Mr.
15 Proctor, and talk with your people. You know that -- I'm sure
16 you're fully aware of everybody's interest in transparency and
17 to the extent we can; but I'm going to respect -- if you guys
18 have reason to keep it secret, then you can have reasons to
19 keep it secret. You don't have to respond at this point.

20 MR. GANSNER: Go ahead.

21 MR. PROCTOR: Just clarification, Your Honor, their
22 document 39 had seven exhibits. Which ones?

23 MR. GANSNER: So there are several that still remain
24 sealed. The ones that people had asked me about specifically
25 were some of screenshots of the website itself.

1 THE COURT: Okay.

2 MR. GANSNER: And then some of the Government's
3 discovery responses, which I think I filed which were
4 essentially, you know, just the Government saying, hey, you
5 know, we won't don't have any information responsive to your
6 request when I was asking for information about how they found
7 the website and what research they did about finding the
8 website.

9 THE COURT: Right. I'll let you think about it and
10 get back to them on it. Okay.

11 MR. PROCTOR: Thank you, Your Honor.

12 THE COURT: To be honest with you, Mr. Gansner, as
13 much as I'd like to help you, I'm not going to get involved in
14 that kind of fight. I've got enough fights at this point;
15 so -- but you do -- I'm sure Mr. Proctor understands the
16 importance to the extent he can of ensuring transparency.

17 MR. GANSNER: And I honestly think it would save the
18 Department of Justice work in the long term because when I have
19 tell people, hey, you've to ask your own prosecutor to see if
20 you they'll give you the same answer.

21 THE COURT: Right. Gives the Department of Justice
22 maybe an opportunity to rethink its position and be more
23 forthcoming. All right.

24 Anything else from the United States?

25 MR. PROCTOR: No, Your Honor.

1 THE COURT: Anything else from you, Mr. Gansner?

2 MR. GANSNER: No, Your Honor.

3 THE COURT: All right. Thanks very much, fellows.

4 We're done. Good job.

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1 STATE OF WISCONSIN)
) SS:
 2 MILWAUKEE COUNTY)

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 5 I, SHERYL L. STAWSKI, an Official Court
 6 Reporter for the United States District Court, Eastern District
 7 of Wisconsin, do hereby certify that the above proceedings are
 8 a true and accurate transcription of the audio file provided in
 9 the aforementioned matter to the best of my ability.

10
 11 Dated at Milwaukee, Wisconsin, this 28th
 12 day of October, 2016.

13 s/ Sheryl L. Stawski

14 Sheryl L. Stawski
 15 Official Court Reporter
 16 United States District Court

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