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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CASE NO. 3:17-cr-00095-SLG
)
MATTHEW WILLIAM SCHWIER,)
)
Defendant.)
-----)

PARTIAL TRANSCRIPT OF HEARING ON MOTIONS FOR
RECONSIDERATION (1:36 p.m. - 1:47 p.m.)
BEFORE THE HONORABLE SHARON L. GLEASON, DISTRICT JUDGE
November 26, 2019; 1:09 p.m.
Anchorage, Alaska

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Transcript Produced from the Stenographic Record

1 (Call to Order of the Court at 1:09 p.m.)

2 (Proceedings took place that are not included
3 in this Partial Transcript, after which, proceedings
4 continued as follows:)

5 THE COURT: I understand that perspective. All
6 right. Thank you.

7 Mr. Herz, go ahead, please.

8 MR. HERZ: Thank you, Your Honor. And I can
9 put Mr. Fischbach on if necessary, but I think I can
10 summarize our position. If the Court needs
11 clarification from Mr. Fischbach, we can offer it.

12 A couple of things. I think the Government's
13 issue regarding the Wireshark they have indicated is
14 moot, and I think our point, or the point Mr. Fischbach
15 was making about, quote-unquote, being able to take
16 Torrential Downpour while Wireshark is running wasn't a
17 threat, it was an illustration that the Government's
18 proposed prophylactic using Wireshark just to determine
19 if a copy was made is really ineffective.

20 So their goal in using Wireshark would not be
21 met by using Wireshark. Essentially, unless Wireshark
22 was being run each and every day of the 21 days and only
23 if each day, after each day's testing the Wireshark
24 packets were examined, that would be the only way the
25 Government would know if a copy got made.

1 If after 21 days of testing it was never
2 examined, I mean the Wireshark packets were not
3 examined, then only two possibilities can occur. The
4 Government seeks to review the packet captures before
5 trial, in which case they have now discovered attorney
6 work product, protected information and have discovered
7 attorney-client information in advance of trial, which
8 they are not entitled to do. Or the alternative is they
9 wait until after the trial is complete and then they
10 want Court permission to examine the packets to see if
11 copying was made, at which point it's really after the
12 fact.

13 At that point, if there was copying done, we
14 didn't do anything to prevent public dissemination of
15 the software, it's really now being used as evidence to
16 see if some illegal conduct occurred. So as a
17 prophylactic measure, it really doesn't serve the
18 function that the Government states it would serve.

19 THE COURT: Mr. Herz, let me interrupt on that,
20 because I thought I addressed this in the order as well,
21 and that is that if there isn't Wireshark or another
22 type of capture device used, I don't see that
23 Mr. Fischbach would be able to testify because of the
24 Daubert issues. I thought I was fairly explicit on
25 that, maybe in a footnote, but to establish reliability

1 -- and Mr. Fischbach has acknowledged this repeatedly.

2 What I would truly hope to -- so if there is
3 going to be testimony, then I do intend to order full
4 discovery of the expert prior to trial, even if the
5 existing rule doesn't expressly contemplate that, it
6 will on December 1st I believe. There is going to be a
7 rule change to 16 that would make that clearer. So
8 that's my intent is if it's going to be used at trial,
9 it is fully discoverable, just as I would expect and I
10 understand the Government has made there.

11 So I wanted you to have that heads-up that
12 based on the evidence I have heard from both of the
13 experts, it is extremely improbable that a reliability
14 standard under Daubert could be established by
15 Mr. Fischbach without a capture of the work product. So
16 heads up on that.

17 MR. HERZ: Okay. I appreciate that, Your
18 Honor. And I guess we can take that up -- that issue up
19 when it arises, but just as a prefatory response, there
20 is no other area of science where the reliability of the
21 science is dependent on audio and video recording or
22 capturing of the actual testing.

23 Normally the reliability standard is addressed
24 simply by the expert testifying about the procedures,
25 the scientific procedures that were utilized in

1 conducting the tests. And that's true when an expert in
2 DNA testifies about what procedures they used in the
3 laboratory to produce their DNA results. That's typical
4 for hair and fibers.

5 Nobody's audio and video recording anything.
6 They are simply testifying to standard laboratory
7 procedures. And that's been the case historically even
8 in computer forensics. So I think there are a number of
9 valid and different ways to establish the reliability of
10 testing in computer forensics, not just using a packet
11 capture program.

12 THE COURT: Well, I'm relying on the testimony
13 of both experts that's been presented. Mr. Fischbach I
14 believe -- well, in any event, heads up on that. I was
15 quite persuaded by the benefits of Wireshark and I tried
16 to flag that issue in the order, footnote three, page
17 two of Docket 254.

18 All right. Go ahead, Mr. Herz.

19 MR. HERZ: And we did notice that.
20 Mr. Fischbach and I did speak -- talk to each other
21 about it, so we're well aware of the Court's leanings in
22 that direction.

23 Regarding computer specifications, the Court's
24 procedure that it outlined actually from the defense
25 perspective makes a lot of sense in that it would be

1 very helpful to know software specifications and
2 installation instructions, and then we can tailor a
3 defense request regarding specifications.

4 At this point, what the Government sounds like
5 they are doing is they are putting together a computer
6 based on what their knowledge of the software is and
7 basically saying that should be adequate. So it sounds
8 as though they know what the software specifications
9 are. The problem is they haven't yet shared that with
10 the defense, and we would like an opportunity to be able
11 to give specifications to the Government based on how
12 the software operates, including both versions, not just
13 version 1.23.

14 And if we don't have that information by
15 tomorrow, our obligation under the Court's order at 254
16 is that we have to give specifications, and in the
17 absence of knowing specifics about the software, we are
18 very likely going to specify pretty much something very
19 similar to what the Court saw in the e-mail chain and in
20 Mr. Fischbach's latest declaration, because we're unable
21 to specify anything else.

22 And as Mr. Fischbach did point out, some of the
23 specifications are not simply tailored to the software
24 specifications, but also to the needs of the software
25 and hardware Mr. Fischbach needs to run in order to

1 complete his tests.

2 So the specifications we're using take into
3 account two things: One, the software specifications,
4 and, two, the hardware and software Mr. Fischbach needs
5 to use in his testing.

6 So we're concerned if the Government has an
7 idea about what computer specifications it thinks it
8 would like to provide to us, we would like to know that
9 now so we can respond to that tomorrow by our deadline,
10 or perhaps the Court might want to consider a different
11 schedule for trading information regarding software
12 specifications and computer specifications.

13 But as it stands right now, we're probably
14 going to specify precisely what we have been talking
15 about in the absence of any additional information
16 coming from the Government.

17 And so I think the Government has pretty much
18 said that Wireshark is moot, so respectfully I would
19 suggest that that means the motion should be denied. On
20 the other hand, our motion for partial reconsideration
21 simply addresses the fact that the tests that were
22 proposed and that the Court has found to be material
23 cannot be completed with a single network connection and
24 a single port.

25 And I think Mr. Fischbach made that very clear

1 in his first declaration that was filed, and so the
2 proposed order we gave the Court eliminates those issues
3 and allows the testing that's been proposed to move
4 forward.

5 And then specifically regarding multiple
6 copies, perhaps we need to clarify that. The issue
7 involving copies is once Torrential Downpour is
8 downloaded onto the Government-provided computer, it
9 would stay there and any additional copies would stay
10 there, but it's standard computer forensic practice to
11 have a, quote-unquote, "original copy" on the computer
12 on which it's installed, and then to make a second copy
13 or a third copy that you can work on so that you can
14 always have a reference point to make sure that if there
15 are any changes they can be documented, because you
16 don't really want to create by accident any changes.

17 You need to be able to make sure that what
18 you're working with is in its original condition, so you
19 need an original copy and then you need a working copy
20 essentially. And I think Mr. Fischbach can explain that
21 in more detail if the Court would like, but he's not
22 talking about making multiple copies outside of the
23 Government-provided computer domain. All of it stays on
24 the Government computer, none of it goes anywhere else.
25 It's just simply creating working copies, which is

1 standard forensic practice.

2 (Requested excerpt concluded, proceedings
3 continued.)

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CERTIFICATE

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I, Sonja L. Reeves, Federal Official Court Reporter
in and for the United States District Court of the
District of Alaska, do hereby certify that the foregoing
transcript is a true and accurate transcript from the
original stenographic record in the above-entitled
matter and that the transcript page format is in
conformance with the regulations of the Judicial
Conference of the United States.

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Dated this 10th day of December, 2019.

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/s/ Sonja L. Reeves
SONJA L. REEVES, RMR-CRR
FEDERAL OFFICIAL COURT REPORTER