JUDGE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. JAY MICHAUD, Defendant.	No. CR15-5351RJB RESPONSE TO COURT'S ENUMERATED QUESTIONS (Dkt. 125) AND MOTION FOR MODIFICATION OF APPEARANCE BOND *[Hearing: January 22, 2016]* **NOTED: January 29, 2016**

I. Defense Response

In response to the questions directed to counsel in the Court's January 20, 2016, Order Regarding Hearings, Mr. Michaud respectfully responds as follows:

1. "Was the NIT a Search? If so, when and where?"

The Government does not dispute that its NITs searched for and seized data from the "activating" or target computers after the Government's malware was delivered to and loaded onto those computers. *See* Dkt. 69-A (Findings and Recommendations in *Cottom*, et al) at A-004 (where the Government agreed and stipulated that the NITs in that case "effected a Fourth Amendment search of an activating computer"); Dkt. 90 (Govt. Response to Second Motion to Suppress) at 14, ll. 12-16 ("Moreover, the [NIT] affidavit specifically requested authority for the NIT to 'cause an activating computer –

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wherever located – to send to a computer controlled by or known to the government…messages containing information that may assist in identifying the computer, its location, other information about the computer and the user of the computer,'" all of which was not otherwise transmitted to Virginia or stored in "Website A's" Virginia server); *id*. (Dkt 90) at 19, ll. 8-11 ("[W]hile the government may not have had probable cause *to search Michaud's computer* at the time the warrant was issued. . . that fact is of no moment as the NIT sufficed as a constitutional 'anticipatory warrant'") (emphasis added). Indeed, in one of its pleadings, the Government titled part of its argument, in bold, as "**The extent of information *seized from Michaud's computer*.**" Dkt. 74 (Govt. Response to Defendant's Motion to Compel) at 7, l. 8 (italics added).

Accordingly, there is no credible dispute at this juncture that the NIT deployed against Mr. Michaud's Washington computer effected a search on that computer, seized data stored on it, and then transmitted the data to the FBI. *See In re Warrant*, 958 F. Supp. 2d 753, 757 (S.D. Tex. 2013) ("Contrary to the current metaphor often used by Internet-based service providers, digital information is not actually stored in clouds; it resides on a computer or some other form of electronic media that has a physical location.").

As to when that search occurred, according to the application in support of a warrant to search Mr. Michaud's home, one or more NITs seized and transmitted data from his computer in Vancouver, Washington, sometime between February 21 and March 2, 2015. Dkt. 26, exh. A (July 9, 2015, residential search warrant) at A-023 (Bates 195) at ¶ 28). This was after the NIT warrant was issued and while the site was being operated by the FBI.

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2. "If the NIT authorizing warrant had been issued by a District Judge, what role, if any, would FRCrP 41 play?"

It would make no difference whether a Magistrate Judge or District Court Judge had issued the NIT warrant. Presumably, when Rule 41 was originally drafted, the Advisory Committee assumed search warrants would be handled exclusively by Magistrate Judges, rather than District Court judges. Alternatively, the references to "magistrate judges" in the Rule are simply used in the sense generally associated with the Fourth Amendment's requirement that warrants be issued by a "neutral and detached magistrate." In any event, it would be hard to argue that the requirements for issuing a valid warrant differed merely because a different type of "magistrate" was issuing it.

Consistent with this conclusion, defense counsel has been unable to locate any case law that distinguishes District Court Judges from "magistrate judges" for purposes of meeting the requirements of Rule 41 or otherwise issuing a valid warrant. Moreover, in this case, the NIT warrant was in fact issued by a Magistrate Judge. Dkt. 26, exh. C at C-002 (Bates 135).

3. "What is the relationship between 18 U.S.C. § 3103 and FRCrP 41 and 18 U.S.C. § 3103a, as applied to the facts here?"

18 U.S.C. § 3103 codifies Rule 41. *See* Dkt. 69 (Reply to Govt. Response to First Motion to Suppress) at 4 ("it is important to recognize that Rule 41 and its provisions have the force of law and are not, as the Government's response seems to suggest, merely advisory, procedural or susceptible to whatever interpretation suits its purposes"). Section 3103 was enacted in 1948, 62. Stat. 819. Like several other sections enacted at the same time, it does nothing but refer to Rule 41, in this case as establishing the "Grounds for issuing search warrant." *See* Exh. B (62 Stat. 819). It

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therefore has no impact on what is permissible under Rule 41 beyond the provisions of the Rule itself.

Section 3103A was enacted in 1968, 82 Stat. 238. *See* Exh. C. In its entirety, as originally enacted, it contained the language now set forth in § 3103a(a), namely:

> In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States.

Subsequently, Rule 41 was modified in 1972. Among the changes was one modifying Rule 41(b) to track the language in § 3103a(a) by authorizing the seizure of any "property that constitutes evidence of the commission of a criminal offense[.]" (There were also modifications to the language regarding what contraband could be seized). *Compare* Exh. D (Rule 41, 1973 version) *with* Exh. E **(**Rule 41, 1971 version).[1] As explained in *United States v. Rubio*, 727 F.2d 786, 792–93 (9th Cir. 1983):

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[1] Prior to the amendment, section (b) read:

> Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property (1) Stolen or embezzled in violation of the laws of the United States; or (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
> (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

Subsequent to amendment, section (b) read:

> Property Which May Be Seized With a Warrant: A warrant may be issued under this rule to search for and seize any (1) property *that constitutes evidence* of the commission of a criminal offense; or (2) contraband, the fruits of a crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(Emphasis added).

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> The Supreme Court overturned the mere evidence rule in *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L.Ed.2d 782 (1967). . . . After *Warden*, the Federal Rules of Criminal Procedure were modified to authorize the issuance of a warrant to search for items of solely evidential value. Fed. R. Crim. P. 41(b). See also 18 U.S.C. § 3103a (a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense).

In other words, § 3103a(a) was enacted to codify elimination of the "mere evidence" rule, and did not alter or expand the limitations otherwise imposed by Rule 41, which was itself subsequently amended to recognize the holding in *Warden.*

The Notes of the 1972 Advisory Committee on Rules confirm that this was the purpose of the amendment:

> Subdivision (b) is also changed to modernize the language used to describe the property which may be seized with a lawfully issued search warrant and to take account of a recent Supreme Court decision (*Warden v. Haden*, 387 U.S. 294 (1967)) and recent congressional action (18 U.S.C. §3103a) which authorize the issuance of a search warrant to search for items of solely evidential value. 18 U.S.C. §3103a provides that "a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense. . . ."

Given this record, § 3103A was presumably enacted in light of *Warden* because that could occur more quickly than an amendment to the Rule, although the defense has located no authority explicitly stating so. In any event, the import of the enactment of § 3103(a), and the subsequent comparable modification to Rule 41, served to effect only one change; it broadened the category of items for which a warrant could issue, so that "mere evidence" could now be seized, just as the Supreme Court had authorized in *Warden*. The defense has never questioned the Government's authority to seize "mere evidence," assuming that other requirements of Rule 41 and the Constitution are

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complied with. Rather, this case involves the territorial limitations of Rule 41, a matter completely unaffected by the enactment of § 3103(a).[2]

Finally, it is important to note that the Government has not disputed that Rule 41 applies to the NIT warrant or argued that some other law alters or expands the Rule's requirement. Instead, the Government has argued that the Rule is "flexible," despite its plain language, and has proposed several novel and unpersuasive interpretations of the Rule that cannot be reconciled with that language. *See* Dkt. 47 (Govt. Response to First Motion to Suppress) at 9-16; Dkt. 69 at (Defendant's response to the Government's Rule 41 arguments) at 3-16.

In sum, nothing in either of these statutes in any way alters or undercuts the territorial limitations of Rule 41 and thus have no relevance when applied to the facts of this case.

4. "If FRCrP 41 was Violated, What is the Appropriate Remedy?"

Suppression is not only the appropriate remedy, it is required by Ninth Circuit precedent. *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005). In *Weiland*, the court stated:

> Suppression of evidence obtained through a search that violates Federal Rule of Criminal Procedure 41 is required only if: 1) the violation rises to a 'constitutional magnitude;' 2) the defendant was prejudiced, in the sense that the search would not have occurred or would not have been so abrasive if law enforcement had followed the Rule; or 3) officers acted in 'intentional and deliberate disregard' of a provision in the Rule.

United States v. Weiland, 420 F.3d 1062, 1071 (9th Cir. 2005). As discussed in detail in prior pleadings, running afoul of any one of these prongs requires suppression, and

[2] Subsequent to its enactment, § 3103a has been amended twice, adding subsections (b) – (d), regarding delays in notification and reports of those delays. Those subsections also have no bearing on this case.

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the Government in this case has achieved a trifecta: the Government deliberately violated the Rule; the violation is of constitutional magnitude; and Mr. Michaud was prejudiced because the search of his computer "would not have occurred" but for the Government's obtaining of an NIT warrant that violated the Rule's jurisdictional limits. *See* Dkt. 26 (Mr. Michaud's First Motion to Suppress) at 14-18; Dkt. 111 (Mr. Michaud's Consolidated Reply) at 15-17; *see also United States v. Glover*, 736 F.3d 509, 515 (D.C. Cir. 2014) (the language of Rule 41(b)(2) is "crystal clear" and a "jurisdictional flaw" in the warrant cannot be excused as a "technical defect").

Moreover, it bears repeating that, regardless of Rule 41, suppression is the appropriate remedy because the Government violated the NIT warrant's express limitation on the location of the searches it authorized to computers or other property in the Eastern District of Virginia; the Government ignored the "triggering conditions" for executing NIT searches pursuant to an anticipatory warrant; the Government intentionally or recklessly made false or misleading statements in the NIT warrant application; the Government engaged in illegal conduct by aiding and abetting the distribution of child pornography; and, considering the Fourth Amendment's core reasonableness requirements and the totality of the circumstances, it obtained an unprecedently overbroad general warrant. *See* Dkt. 111. 29-35 (citing the leading cases for these points and cross-referencing the pleadings where these arguments are laid out in detail for the Court).

II. Motion for Modification of the Conditions of Mr. Michaud's Bond

The Court has added Mr. Michaud's arraignment on the Superseding Indictment to the January 22 calendar. The defense requests that, at that time, the Court modify the terms and conditions of Mr. Michaud's pre-trial release to reduce the electronic home monitoring (EHM) restrictions to the minimum of passive GPS location monitoring,

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with no home detention or curfew. As set forth in the accompanying letter of Dr. C. Kirk Johnson, Mr. Michaud has voluntarily undertaken a psychological evaluation and polygraph testing. *See* exh. A (letter from Dr. Johnson and his *curriculum vitae*). While Dr. Johnson has not drafted a final report, he has concluded that Mr. Michaud is a "pro-social individual" and falls into the category of "low risk individuals" for purposes of assessing his potential risk to the community. In addition, Mr. Michaud has been on pre-trial release since July 16, 2015, and he has fully complied with the requirements of supervision.

III. Unsealing the Record

The defense has no objection to the Court unsealing the entire record. In fact, on January 6, 2016, the defense wrote to the Government and asked it to agree to unseal the record. On January 8, the Government notified the defense that it would not consider doing so until after the January 22 hearing.

DATED this 21st day of January, 2016.

Respectfully submitted,

s/ Colin Fieman
s/ Linda Sullivan
Attorneys for Jay Michaud

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CERTIFICATE OF SERVICAE

I hereby certify that on January 21, 2016 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

s/ Amy Strickling
Paralegal
Federal Public Defender

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