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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 548 (PAC)

5 JOSHUA ADAM SCHULTE,

6 Defendant.

7 -----x
8 January 8, 2018
9 3:30 p.m.

10 Before:

11 HON. PAUL A. CROTTY,

District Judge

12 APPEARANCES

13 GEOFFREY S. BERMAN
14 Interim United States Attorney for the
15 Southern District of New York

16 MATTHEW J. LAROCHE
SIDHARDHA KAMARAJU
Assistant United States Attorneys

17 BRAFMAN & ASSOCIATES
Attorneys for Defendant
18 JACOB KAPLAN

19
20 Also present: EVAN SCHLESSINGER, FBI
21 DAVID DONALDSON, FBI
JOHN MOSCATO, Pretrial Services

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1 (Case called)

2 THE DEPUTY CLERK: Counsel for the government, please
3 state your appearance.

4 MR. LAROCHE: Good afternoon, your Honor. Matt
5 Laroche and Sid Kamaraju for the government. With us at
6 counsel table is David Donaldson and Evan Schlessinger from the
7 FBI, and also John Moscato from pretrial services.

8 THE COURT: Thank you for coming.

9 MR. KAPLAN: Good afternoon, your Honor. Jacob Kaplan
10 for Mr. Schulte.

11 THE COURT: Mr. Kaplan.

12 Mr. Schulte, how are you?

13 I understand, Mr. Kaplan, you have an application.

14 MR. KAPLAN: Yes, your Honor.

15 THE COURT: Go ahead.

16 MR. KAPLAN: Judge, on the last court date, when we
17 left, the idea was that we had consented to detention with the
18 understanding that Mr. Schulte would be sent down to Virginia
19 to face charges based on a Virginia warrant. None of that
20 happened. Virginia never came to get him. Virginia just
21 didn't do anything in this case. But before I address the bail
22 issues, I think it's important that this Court hear the full
23 story of how we actually get here.

24 At one of the previous court appearances, I believe it
25 was the November 8th date, this Court asked why the defense

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1 attorney in this case would need security clearance. And the
2 answer that was given by one of the prosecutors, I believe, was
3 that there was some top secret government information that was
4 found in Mr. Schulte's apartment, and that out of an abundance
5 of caution it would be prudent that the defense attorney get
6 clearance. But I don't think that's entirely accurate.

7 While the current indictment charges Mr. Schulte with
8 child pornography, this case comes out of a much broader
9 perspective. In March of 2017, there was the WikiLeaks leak,
10 where 8,000 CIA documents were leaked on the Internet. The FBI
11 believed that Mr. Schulte was involved in that leak. As part
12 of their investigation, they obtained numerous search warrants
13 for Mr. Schulte's phone, for his computers, and other items, in
14 order to establish the connection between Mr. Schulte and the
15 WikiLeaks leak.

16 As we will discuss later in motion practice, we
17 believe that many of the facts relied on to get the search
18 warrants were just flat inaccurate and not true, and part of
19 our belief is because later on, in the third or fourth search
20 warrant applications, they said some of the facts that we
21 mentioned earlier were not accurate. So we will address this
22 in a Franks motion going forward, but what I think is important
23 for the Court is, in April or May of 2017, the government had
24 full access to his computers and his phone, and they found the
25 child pornography in this case, but what they didn't find was

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1 any connection to the WikiLeaks investigation.

2 Since that point, from May going forward, although
3 they later argued he was a danger to the community, they let
4 him out; they let him travel. There was no concern at all.
5 That changed when they arrested him in August on the child
6 pornography case.

7 At the initial bail conference, they argued as one of
8 the reasons to detain Mr. Schulte was that there were images on
9 his phone that showed a sexual assault. They were able to
10 determine that it was --

11 THE COURT: This is the application before Judge
12 Pitman.

13 MR. KAPLAN: Yes. In front of this Court as well on
14 the second bail hearing as well.

15 THE COURT: I don't recall that. I do recall seeing
16 it in the transcript from Judge Pitman.

17 MR. KAPLAN: That is correct. As part of that case,
18 Judge Pitman rejected that as a basis for detention, finding
19 that since the government conceded that the victim could not
20 identify Mr. Schulte, there was no basis for detention based on
21 that factor alone.

22 Not being deterred by that, it's my understanding that
23 the FBI then sent the photos that were the subject of that
24 issue to Virginia, and in November of 2015, Virginia itself
25 issued an arrest warrant for Mr. Schulte based on those facts.

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1 But nothing ever happened with that arrest warrant. November
2 15 they get the warrant, nothing happened.

3 That all changes in early December of 2017. On
4 December 5, I had a phone call with John Moscato from pretrial
5 services to discuss whether pretrial services would consent to
6 Mr. Schulte's supervision being transferred from the Southern
7 District of New York to Lubboch, Texas, where he can live with
8 his parents. Pretrial services tells me they have no objection
9 to that at all.

10 I then had a conversation with the prosecutors who
11 told me they would object, but we could address it with the
12 court. Two days later is when Virginia decides to do something
13 with that warrant. Two days after we try to move Mr. Schulte
14 to Lubboch, Texas, now suddenly Virginia decide that they want
15 to arrest Mr. Schulte based on this warrant. And, in fact,
16 when the NYPD officers came to arrest Mr. Schulte at 6 a.m. on
17 a Thursday, they told him that we came because the FBI told us
18 to come arrest you; not Virginia authorities, but the FBI came
19 and told us to arrest you.

20 What I think is important is the Virginia case is just
21 a means to keep Mr. Schulte detained. There is no new
22 information. The state prosecutor down in Virginia has spoken
23 with defense counsel down in Virginia and she told her,
24 candidly, that there is no new information; it's the same
25 pictures that the FBI had, that the FBI just gave to Virginia

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1 and asked them to make an arrest. She still cannot identify
2 Mr. Schulte. Nothing has changed on that basis that would
3 be --

4 THE COURT: By she can't identify, you mean?

5 MR. KAPLAN: She being the victim. And Mr. Laroche
6 candidly told that to Judge Pitman when he asked, that she
7 could not identify him as being the one who assaulted her.

8 What is kind of interesting is, while the government
9 in their detention letter had two bases, one was the Virginia
10 case, Virginia itself seems not to care. Virginia, they had
11 him detained on a state warrant, he was incarcerated, and they
12 were gunning to get him. They were scheduled to come December
13 20 to pick him up. The minute we consent to federal detention,
14 and now he is no longer out, suddenly they are hands off. They
15 didn't come to pick him up. They don't issue a writ to come
16 get him from federal custody. Instead, my understanding is
17 they simply have a detainer that, if this court lets him out on
18 bail, they are going to come pick him up. So this idea that he
19 is a danger to the community, that there is new information in
20 Virginia which ties him to this crime, is just not true.
21 Virginia is just sitting back and waiting to see what happens.
22 They have no interest in Mr. Schulte, and if they did, Mr.
23 Schulte would have been there already.

24 The second basis that the government had in its letter
25 for detaining Mr. Schulte was the usage of computers. In the

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1 government's letter, they note how, if you search the IP
2 address for Mr. Schulte's apartment, they found numerous
3 log-ons to his Gmail account, in clear violation of this
4 court's order. But what the government's letter doesn't
5 mention is that Mr. Schulte had a roommate, his cousin, Shane
6 Presnall, and this roommate, who the government and pretrial
7 services knew about, was allowed to have a computer.

8 And more than that, based on numerous conversations,
9 at least two conversations between pretrial services, John
10 Moscato, Josh Schulte and Shane Presnall, it was Shane's
11 understanding that pretrial services allowed him to check Mr.
12 Schulte's e-mail and to do searches for him on the Internet,
13 with the idea that Josh Schulte himself would not have access
14 to the computer.

15 And the government gave 14 pages of log-on information
16 to establish this point. And, Judge, we have gone through all
17 14 pages, and every single access and log-in corresponds to a
18 time that Shane Presnall is in the apartment. His computer has
19 facial recognition, it has an alphanumeric code, and there is
20 no point when Josh Schulte is left himself with the computer
21 without Shane being there, and that was their understanding.

22 Now, I spoke to John Moscato and he explained to me
23 that he never intended to give him such carte blanche to do
24 this, that that was a misunderstanding. Judge, a
25 misunderstanding is not an intentional violation of this

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1 court's bail conditions. It is a misunderstanding and --

2 THE COURT: It's a very convenient misunderstanding,
3 isn't it?

4 MR. KAPLAN: I understand that. But this is something
5 which, if you look at the court's original bail order, it says
6 that pretrial services has the discretion to allow them
7 computer usage, and they believed they were complying with
8 that; they believed they were complying with the judge's order
9 by discussing it with pretrial services. They didn't go behind
10 anyone's back.

11 The whole concept of not allowing Mr. Schulte access
12 to his computers is the child pornography case, what he may do,
13 those fears are allayed when you have someone else doing it for
14 him, and that's Mr. Presnall. And, Judge, I think it's really
15 important that in 14 pages of log-in information, every single
16 one corresponds to a time when Shane is in the apartment. This
17 is not him with unfettered access to the Internet.

18 More importantly, Judge, this is not him intentionally
19 violating this court's bail conditions. When you look at 18
20 U.S.C. 3148, which discusses revocation of bail, it talks about
21 either probable cause that the defendant committed a crime
22 while on release. Well, we don't have that here.

23 I will wait for your Honor.

24 THE COURT: Go ahead.

25 MR. KAPLAN: The other one is clear and convincing

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1 evidence that the defendant violated a bail condition.

2 THE COURT: Any other condition of release.

3 MR. KAPLAN: Yes. I don't see clear and convincing
4 evidence that he intentionally violated a bail condition. This
5 was at worst a misunderstanding between not just Joshua Schulte
6 and pretrial services, but there was a third party who was
7 there, a third party who had these conversations, and based on
8 those conversations, he believed that he was able to do this.

9 So, Judge, what I am asking you is to, one, completely
10 reject the Virginia case as a basis, because Virginia itself is
11 rejecting it; they don't care. And there is still no evidence.

12 THE COURT: Let me see if I have the sequence right,
13 Mr. Kaplan.

14 On December 7, the government moved for
15 reconsideration of the decision to remand Mr. Schulte, correct?

16 MR. KAPLAN: Correct.

17 THE COURT: Thereafter you consented to that.

18 MR. KAPLAN: Yes, on the 14th. I consented with the
19 idea that the government had two bases -- one Virginia, one
20 the log-on information on the computers. I wanted the Virginia
21 issue to be resolved, and we consented to detention to allow
22 Virginia to come to New York, like they were scheduled to do
23 when he was in state custody, pick him up, and bring him down
24 to Virginia to be arraigned. That never happened.

25 THE COURT: You agreed that we would meet today as a

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1 control on that.

2 MR. KAPLAN: The idea would be, if something happened
3 in Virginia, we would have a control date today forcing them to
4 send him back here to New York, but absolutely nothing has
5 happened. I think the government will agree that nothing has
6 happened on the Virginia front.

7 THE COURT: Anything else, Mr. Kaplan?

8 MR. KAPLAN: I would ask if you could just put him
9 back on the bail conditions where he was before, since there
10 was no willful violation, and if the Court wants to make clear
11 there is no computer access at all, even with a third party, we
12 will do that.

13 THE COURT: I think that was pretty clear before.

14 Mr. Laroche.

15 MR. LAROCHE: Thank you, your Honor. We still do
16 believe that detention is appropriate here, and if I could just
17 address specifically some of the points raised.

18 First, Virginia. In no way is Virginia's conduct over
19 the past few weeks an indication that they do not care about
20 Mr. Schulte. After the conference last time, I had
21 conversations with Virginia, in terms of how we would get him
22 down there. I told them the easiest way to do that is if they
23 would writ him from here down to Virginia. But I made clear to
24 them that, regardless of the outcome of their arraignment, that
25 our case would proceed first, in other words, we would be

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1 taking him back up here and this case would proceed first.
2 Under those circumstances, Virginia said, We are not going to
3 writ him just so that we can have a bail determination down
4 here and you take him back; you let your case go first, and we
5 will rely on the detainer that we have already put in place to
6 keep him in custody. So the idea that Virginia doesn't seem to
7 care about Mr. Schulte just does not pass muster.

8 I would also note, this idea that Virginia somehow
9 came up with these charges because we passed them photographs
10 also is not the case. What happened was at the time that he
11 was arrested for the CP charges, the FBI provided Loudoun
12 County law enforcement officials with the photographs. It's
13 our understanding that they conducted their own investigation,
14 which included interviewing the victim, the person who was on
15 those photographs, and through interviews with that person,
16 they were comfortable, through the development of that
17 evidence, that Mr. Schulte was the one whose hands are on the
18 pictures of that photograph. And that's based on a couple of
19 things. One, that the victim remembers the night in question.
20 It was one of the few nights that she passed out and didn't
21 remember what occurred. She could also, apparently, identify
22 the bathroom, which was the bathroom where she was staying as a
23 roommate of Mr. Schulte's.

24 So they have developed additional information which --

25 THE COURT: So from Virginia's standpoint, Virginia

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1 has now satisfied itself, at least as a preliminary matter,
2 that the victim has been identified.

3 MR. LAROCHE: They know the victim has been
4 identified, and they have also satisfied themselves to bring
5 felony charges against the defendant that the pictures are of
6 the defendant.

7 So this is something that we asked the court to
8 consider during the first bail arguments, and Judge Pitman
9 chose not to. But again, given there are additional state
10 sexual assault charges pending against the defendant, we do
11 think they are reliable and should be considered by the Court.

12 Second, with respect to this idea that Mr. Schulte
13 just thought he could use his roommate to conduct searches on
14 the Internet, I just do not think that is a persuasive
15 argument, your Honor. If you recall, during both bail
16 arguments, the government's principal concern was that this
17 defendant would have access to the Internet, and that's not
18 just because he is a child pornography defendant, it's because
19 the defendant has specific expertise with respect to computers.
20 For over six years the defendant was employed by the Central
21 Intelligence Agency and he held positions, including technical
22 development officer, and through that experience he gained
23 expertise in computers, computer networks and the Internet, and
24 the vulnerabilities of the same. So the idea that this
25 defendant was just somehow checking his e-mail during this time

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1 does not pass muster, and I would say is inconsistent with the
2 arguments and the court's ruling in terms of bail.

3 And even more troubling, which wasn't really addressed
4 by defense counsel, is that the defendant or someone in his
5 apartment was using TOR in his apartment during the time when
6 he was on pretrial release, and this is extremely troubling to
7 the government because TOR is a way to establish anonymous
8 connections to various Internet locations to hide the person
9 who is actually accessing those sites. It's used to access
10 child pornography. It's also used to access Web sites where
11 you don't want to leave a trail. And since the defendant
12 brought it up, I think it's particularly relevant given the
13 other investigation which continues to be ongoing with respect
14 to this defendant.

15 As defense counsel noted, in March of 2016, there was
16 a significant disclosure of classified material from the
17 Central Intelligence Agency. The material that was taken was
18 taken during a time when the defendant was working at the
19 agency. The government immediately had enough evidence to
20 establish that he was a target of that investigation. They
21 conducted a number of search warrants on the defendant's
22 residence. And I would disagree with defense counsel's
23 characterization that those search warrants haven't yielded
24 anything that is consistent with his involvement in that
25 disclosure. In fact, our investigation is ongoing. He remains

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1 a target of that investigation. And part of that investigation
2 is analyzing whether and to what extent TOR was used in
3 transmitting classified information. So the fact that the
4 defendant is now, while on pretrial release, using TOR from his
5 apartment, when he was explicitly told not to use the Internet,
6 is extremely troubling and suggests that he did willfully
7 violate his bail conditions.

8 So under those circumstances, your Honor, I do not
9 believe that there are a set of conditions that will ensure
10 that this defendant is not going to access the Internet and
11 pose a danger to the community.

12 THE COURT: Mr. Kaplan.

13 MR. KAPLAN: Judge, as to Virginia, this is part of
14 the issue. We have two attorneys in New York debating the
15 evidence in the case of Virginia, when he can just be arraigned
16 in Virginia and let the judge there assess the situation. I
17 understand Mr. Laroche is basing his comments on information he
18 has gotten from the state prosecutors, and so are we. I had
19 defense counsel who had a very candid conversation with the
20 state prosecutor. So I'm not sure why we are having this
21 debate in New York when there is a simple way of having it in
22 Virginia and see whether the judge in Virginia feels there is
23 any basis to remand him.

24 As for the Internet, just a couple of quick points.
25 The judge's bail order on September 14, in paragraph 11,

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1 specifically states, "Refrain from possessing or using a
2 computer, computer network and/or Internet access, unless
3 specifically approved by pretrial services." That was the
4 court's written order.

5 Judge, we have a pretrial services member here in
6 court. The Court can ask him about his conversations with the
7 defendant and with Mr. Presnall. This idea that he was simply
8 using his roommate to do this, they asked if they could do
9 this, and they asked because they didn't want to run afoul of
10 this court's bail conditions.

11 Just briefly about this notion of TOR. I understand
12 that the government's position is TOR is used by many, many bad
13 people. It's also used by many, many good people. The TOR is
14 simply a way of going online without having the government look
15 at everything you do. Now, I understand in a case like this,
16 the government puts a nefarious intent to that. In this case,
17 the reason why TOR was accessed was because Mr. Schulte is
18 writing articles, conducting research and writing articles
19 about the criminal justice system and what he has been through,
20 and he does not want the government looking over his shoulder
21 and seeing what exactly he is searching. That's all it is.

22 If there is a concern about his computer access, if
23 there is a concern about him checking his e-mail, there is a
24 simple solution, no computers at all, no third-party access,
25 nothing, and that's the combination of conditions which will

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1 ensure that he is not a danger. Besides for that, I don't see
2 what has necessarily changed intentionally on behalf of Mr.
3 Schulte since the court's bail order two months ago.

4 THE COURT: All right.

5 On December 14 I revoked Mr. Schulte's bail. It was
6 on consent and without prejudice to Mr. Kaplan renewing a
7 motion on January 4. In accordance with the proceeding that
8 day, we agreed that we would meet again on January 4.

9 Having studied 18 U.S.C. 3148, sanctions for violation
10 of release conditions, I find that there is a combination of
11 events here, including the fact that the victim has now been
12 identified in Virginia, there is a clear danger, and I find
13 that the defendant violated the terms of the release conditions
14 by engaging in having his roommate access the computers using
15 very sophisticated methodology. So bail continues to be
16 revoked and an order to that effect will be entered at the
17 conclusion of today's hearing.

18 Anything else to take up today, Mr. Laroche?

19 MR. LAROCHE: I think there is a matter of scheduling,
20 and we did want to alert the Court to a discovery issue. As
21 the Court will recall, there was a period of time where the
22 government had not been provided a computer and hard drive so
23 that the government could essentially reproduce the defendant's
24 desktop computer. As the Court might recall, the desktop
25 computer is the computer on which the government found over

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1 10,000 images of child pornography. It was set up in a way
2 that was sophisticated with several layers of encryption. We
3 were provided that computer when Mr. Kaplan became counsel, was
4 retained by Mr. Schulte.

5 The FBI and the government has made a number of
6 efforts to try to load that information on to the computer. An
7 issue has arose in connection with that that we wanted to tell
8 the Court about. Because there is a classified document that
9 is located on the defendant's computer, it is extremely
10 difficult, and we have determined not possible, to remove that
11 document forensically and still provide an accurate copy of the
12 desktop computer to the defendant.

13 So in those circumstances, defense counsel is going to
14 require a top secret clearance in order to view these
15 materials. It's my understanding that that process is ongoing,
16 and we have asked them to expedite it. As soon as the
17 defendant's application is in, we believe he will get an
18 interim classification to review this material within
19 approximately two to three weeks. Unfortunately, that hasn't
20 occurred yet. So the defendant still does not have access to
21 that particular aspect of discovery. So we are working through
22 that as quickly as we can.

23 THE COURT: So it will take two to three weeks for the
24 review after the top secret clearance is granted?

25 MR. LAROCHE: To get an interim clearance.

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1 THE COURT: What is the schedule for the interim
2 clearance?

3 MR. LAROCHE: Defense counsel has just been provided,
4 either early this week or last week, a document to essentially
5 get the application documents he needs to do the background
6 check for that clearance. Once he submits that application
7 request, two to three weeks from his submitting it we believe
8 we will have an interim clearance for him so that he will have
9 access at that point. He still will have to review the
10 materials at a location that we will make available at the FBI.
11 Unfortunately, as of right now, that is the only way we see
12 forward in terms of getting him access to be able to review it
13 in terms of discovery in this case.

14 THE COURT: So what is the time period we are talking
15 about? It sounds like five to six weeks.

16 MR. LAROCHE: I know from doing these applications
17 they are extensive. So it might take a bit of time for him to
18 get the materials together, but as soon as he gets it in, it
19 will take about two to three weeks. So, yes, I think five to
20 six weeks from now hopefully this issue is resolved.

21 MR. KAPLAN: Judge, if I may. So I got a one-page
22 application last week, which I filled out and returned hours
23 later. My understanding is, once they process that one-page
24 application, they are then going to give me access to a much
25 larger application, which will take me quite a while to answer.

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1 Then once that's completed, the two- to three-week process will
2 start. So I have not yet received the larger application. I
3 am not sure what the timetable is there.

4 THE COURT: I should have pointed out before, when I
5 referred to a January 4 meeting, January 4 was a snow day. So
6 we are meeting on the first day subsequent to the bail order,
7 January 8.

8 David, give me a schedule for the week of February 12.

9 THE DEPUTY CLERK: February 15 at 4:30 p.m.

10 THE COURT: That's a control date to see where we are
11 with regards to Mr. Kaplan's application.

12 Anything else, Mr. Kaplan?

13 MR. KAPLAN: Eventually we may have an issue with
14 speedy trial, when it comes to access to the application and
15 access to the discovery materials, but when that comes I will
16 mention it to the Court.

17 THE COURT: Fine.

18 MR. LAROCHE: Your Honor, the government moves to
19 exclude time until the February 15 control date in the
20 interests of justice so that the parties can complete
21 discovery, the defense counsel can begin reviewing it, and also
22 continue considering motion practice in this case.

23 THE COURT: Any objection, Mr. Kaplan?

24 MR. KAPLAN: I am fine as of now to this date.

25 THE COURT: For the reasons stated, the time between

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1 now and February 15 will be excluded. It's in the interest of
2 justice to do so. Those interests outweigh the interests of
3 the public and defendant in a speedy trial.

4 Thank you.

5 (Adjourned)

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