Case No. 8:13CR108

Kirk J Cottom
[redacted]

November 30, 2015

The Honorable Joseph F. Bataillon
Senior United States District Judge
111 South 18th Plaza, Suite 3259
Omaha, NE 68102

Your Honor:

I'm writing you to inform you that I intend to withdraw my conditional plea on December 17, 2015 because it was based on insufficient evidence and I believe one of the conditions of the plea withdrawal has been met as I have discovered that the NIT is inadmissible hearsay under Fed. R. Evid. 803(8). I will also beg you to dismiss the NYS indictment with prejudice via your discretion under Fed. R. Crim. P 48(b). But if you wish to hold this preceding over for trial I will ask you to modify my pre-trial release terms to more reasonable provisions.

I've sent this letter because I'm not confident that my CJA attorney has the ability or the desire to convey my requests to you because he doesn't appear to understand the legal arguments I'm making, even though they are supported by the appellate case law I have found and shared with him. I have included a sealed envelope containing the motion to withdraw and its lengthy memo in support that I composed. It includes references to the 10 appellate cases I've found. (I'll leave it to your discretion as to whether you should read it or not, thus why it's sealed in a

Section One

On July 30, 2015 I was persuaded into agreeing to take a conditional plea should I lose the Daubert hearing on August 3, 2015. Their argument was successful because I did not have the services of a competent expert like Rebecca Mercuri. Since I was distracted by my focus on winning the Daubert motion, I paid little attention to the actual evidence against me.

The transcript of the "Plea colloquy" will show that I specifically state that I was only taking the plea because I was told that the NIT was sufficient evidence to convict me of the Omaha indictment. I was told my best chance of winning was taking the conditional plea and then winning on appeal. I was also told by Joseph Gross Jr. that I had a very good chance to stay out on bail since I had an impeccable bail history and a very good chance of winning the appeal because the government has no "leon" protection for their Rule 41 violation.

So with the information I had on July 30, 2015 it appeared that winning on appeal was the best strategy because it had worked for "Weev" (UNITED STATES OF AMERICA v. ANDREW AUERNHEIMER). But, in the back of my mind, I was always suspicious of the government's evidence. That suspicion was confirmed about a week later when I found 10 appellate decisions that supported my contention that the government's evidence was insufficient to sustain a conviction on any of the counts in either indictment but especially the Omaha Indictment since SA Smith testified at the Daubert hearing that there was no evidence of a TB2 visit on Q-HQ-16_1.

I was also "tricked" into pleading to the receipt charge in the NY indictment instead of the Omaha indictment. When I pointed this out to Steven Slawinski (my NY public anything to help me on October 20, 2015, so I compose a different letter to you and inform Joseph Howard of my intentions to send it.

That prompts my trip to Omaha on November 18th where I view the reverse proffer that just emboldens my position to withdraw my plea.

Section Two

Your honor, **there is no doubt that you have the authority to dismiss the NY indictment with prejudice and rule that the NIT is inadmissible hearsay, so this section is just formulated to persuade you to do so.**

Again, I'm not a lawyer, but the caselaw suggests that in order for you to dismiss the NY indictment with prejudice I must show you that I have been prejudiced by the over 2 year delay in them obtaining it and that it was the result of unethical conduct. (UNITED STATES v. GOODSON Fourth Circuit 2000)

Clearly, obtaining an indictment solely for the purpose of gaining position in plea bargain negotiations is unethical conduct, especially since the indictment is allegedly supported by the 2013 DARC Reports. No new evidence was discovered or obtained and Keith Becker's note to Joseph Howard days after obtaining the NY indictment proves its true purpose. "*Now that Mr. Cottom has been indicted in the Western District of NY, we wanted to reach out about the possibility of a global resolution of all charges in both districts. Please let us know if that is of interest to your client. If so, we can discuss some options/specifics.*"

PHPBB3. The "technology" of PHPBB3 and Tinyboard are completely different. This is why I knew that first report done by "my experts" was completely wrong and that the NIT report was probably a forgery.

SA Smith testified at the Daubert hearing that the NIT was indeed hearsay, not per say but his admissions during his testimony made that conclusion evident. It also showed that the Government is desperate to hide the fact that while **PHPBB3 boards issue session ids to clients to track their activity, Tinyboard does not.** This fact changed the function of the NIT on the two "technologies". On PHPBB3 the NIT passively collected hearsay data while on Tinyboard the NIT actively created hearsay data. This distinction is paramount.

The NIT not only generates hearsay data on TB2, it also forges data it places into the Visitors table (also a part of the NIT and not Tinyboard) by using "query strings" (appended to the iframe calls) to populate most of the fields in that table. **That means it would be very easy to frame people for visiting TB2 with the NIT code used with the Tinyboard software.**

Couple that with the fact that the two page visit progression the NIT accuses me of couldn't happen because there is no link for the second page on the first page. That means the visit was scripted and not performed as the result of human interaction. The fact that the NIT client side flash app wouldn't work without Javascript being enabled means Javascript could have been used to fabricate this visit.

So now that you've ruled the NIT admissible on Daubert grounds, I'm asking you to rule it inadmissible hearsay in the specific instance of TB2 as it becomes forbidden by 803(8) because it falls out of the 803(6) exception. In other words the NIT is no longer collecting "business

Conclusion

You, as the Judge, are the only one I trust in this matter as I'm confident that you know the **vast** difference between **probable cause** and **beyond a reasonable doubt**. With that in mind I would like to draw your attention to the wise caution issued by the 11th Circuit in US v Pruitt:

Inadvertent receipt of child pornography is not a violation of the statute. We stress that Section 2252A(a)(2) criminalizes only "knowing[]" receipt. This element of scienter carries critical importance in the internet context given spam and the prevalence and sophistication of some computer viruses and hackers that can prey upon innocent computer users. For background, see Note, Child Pornography, the Internet, and the Challenge of Updating Statutory Terms, 122 Harv. L. Rev. 2206, 2211-14 (2009) (describing ways a person could unintentionally receive child pornography).

Under the statute, courts will address "knowing[] recei[pt]" mainly as issues of fact, not of law; and the specter of spam, viruses, and hackers must not prevent the conviction of the truly guilty. ***But prosecutors, judges, and juries have a duty to safeguard -- as best as they are able -- potential defendants when receipt of child pornography might well have been truly inadvertent. Given the stigma associated with even being accused of this kind of crime, the incentives as well as the opportunities for smears are readily present.***

Now, binding on this court are the precedents set forth in US v Stulock 2002 and US v Kain 2009. Specifically, Stulock states that cache alone is insufficient to support knowing possession/receipt and Kain set forth the requirements for the sufficiency of the evidence. In