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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	
)	
Plaintiff,)	CR 08-00814-PHX-DGC
)	
vs.)	Phoenix, Arizona
)	February 10, 2011
Daniel David Rigmaiden, and Ransom)	
Marion Carter, III,)	
)	
Defendants.)	
)	

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

STATUS CONFERENCE

(EX PARTE DISCUSSION NOT INCLUDED)

Official Court Reporter:
Patricia Lyons, RPR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc. 41
Phoenix, Arizona 85003-2150
(602) 322-7257

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

For the Government:

U.S. Attorney's Office
By: **FREDERICK A. BATTISTA**, ESQ.
40 North Central Ave., Ste 1200
Phoenix, AZ 85004

The Defendant, Pro Per:

Daniel David Rigmaiden
Central Arizona Detention Center - Florence
P.O. Box 6300
Florence, AZ 85132

Shadow Counsel for the Defendant:

Law Office of Philip A. Seplow
By: **PHILIP A. SEFLOW**, ESQ.
2000 N. 7th St.
Phoenix, AZ 85006

For Defendant Carter:

Taylor W. Fox, PC
By: **TAYLOR W. FOX**, ESQ.
2 N Central Ave, Ste 735
Phoenix, AZ 85004

14:26:44 1 P R O C E E D I N G S

2
3 THE COURTROOM DEPUTY: Criminal case 08-814, United
4 States of America versus Daniel David Rigmaiden and Ransom
15:06:08 5 Marion Carter, III. This is the time set for status hearing.

6 MR. BATTISTA: Good afternoon, Your Honor. Fred
7 Battista on behalf of the United States.

8 THE COURT: Good afternoon.

9 MR. SEFLOW: Good afternoon, Your Honor. Philip
15:06:15 10 Seplow, shadow counsel for Mr. Rigmaiden.

11 THE COURT: Good afternoon.

12 THE DEFENDANT: Good afternoon, Your Honor. Daniel
13 Rigmaiden on behalf of himself.

14 THE COURT: Good afternoon, Mr. Rigmaiden.

15:06:25 15 MR. FOX: Taylor Fox on behalf Mr. Carter, whose
16 presence has been waived.

17 THE COURT: All right. Good afternoon.

18 When we were here on January 6th, we agreed,
19 Mr. Battista, that the government would respond to the
15:06:38 20 extensive discovery letter that you had received by January
21 28th. Did that happen? And if so, would you describe the
22 response for me.

23 MR. BATTISTA: Yes, Your Honor. We provided the
24 defendant a point-by-point response to his request. One of the
15:06:57 25 most critical things that I believe he was looking for was what

15:07:00 1 is considered the raw data that the government received from
2 Verizon Wireless. That was obtained on disk and has been
3 furnished to him. And we did, to the best of our abilities,
4 either provide the information that had not been provided to
15:07:18 5 that date or formally advised him that we would not be
6 providing the information. And the only information that was
7 requested that we did not provide was the information regarding
8 the background information regarding the equipment used to
9 locate the air card in this case.

15:07:37 10 THE COURT: So the basis, I assume, for withholding
11 that was --

12 MR. BATTISTA: It's sensitive law enforcement
13 investigative equipment, Your Honor. And our concern -- the
14 basic concern, Your Honor, is that if the actual information
15:07:53 15 regarding how this equipment is disclosed, it can be subject to
16 being defeated or avoided or detected. So that's the primary
17 concern.

18 THE COURT: What can you tell me that is publicly
19 known about this equipment?

15:08:09 20 MR. BATTISTA: Well, Your Honor, it's kind of an
21 interesting issue in terms of what's publicly known because the
22 government is under constant -- is under a constant barrage of
23 requests of information from numerous sources. So there is
24 Freedom of information Act requests, there's people within the
15:08:31 25 government who are not aware of the sensitivity of this

15:08:35 1 equipment. So on occasion information possibly is released in
2 error or without detailed consideration. So in terms of this
3 day and age with the Internet, in terms of what's possibly
4 publicly out there in some format, it's hard for me to say.

15:08:58 5 But I can say that the FBI takes the position that
6 the actual equipment and how it's operated and the software
7 that's used to operate the equipment is law-enforcement
8 sensitive and that if the actual -- the nature of the
9 equipment, how it's operated, programs used to operate the
15:09:18 10 equipment, if that information is formally confirmed by the
11 government, then people could use that information, again, to
12 avoid detection or defeat the equipment.

13 THE COURT: So what, if anything, have you disclosed
14 to Mr. Rigmaiden about the equipment?

15:09:37 15 MR. BATTISTA: What we've disclosed, Your Honor, is
16 that we obtained the two court orders in California to
17 authorize us to use this equipment; that the equipment was used
18 to assist the investigation, the prosecution team. Several
19 members are present here in the courtroom. What the equipment
15:10:00 20 was used to do was to narrow down a possible location of where
21 the air card was.

22 The situation in the case, Your Honor -- if I may
23 have a couple minutes, I'll give the Court some background.

24 The Internal Revenue Service was -- had detected a
15:10:20 25 very sophisticated scheme to file income tax refunds

15:10:27 1 electronically requesting that the refunds then be
2 electronically deposited into different accounts. And the
3 returns were fraudulent. The bulk of the returns were filed
4 in names of people who were deceased. But some were filed in
15:10:49 5 names of people who were alive.

6 So what happens, then, is the IRS detects the fact
7 that it's receiving these fraudulent returns. So the question
8 is where are the fraudulent returns coming from? The
9 fraudulent returns are being electronically filed. The IP
15:11:10 10 addresses for the vast majority of the returns come back to
11 unsuspecting third parties. In other words, the vast majority
12 of the returns in the case, the actual computer that was
13 filing the returns is masking in a sense its number.

14 It's the equivalent of like -- an IP address, in very
15:11:36 15 poor analogy, would be IP address is in a sense the cell phone
16 number for the computer. The serial number for the computer.

17 In other words, so what is the source of these
18 returns? So in the course of the investigation, what was
19 determined is that systems called botnet proxies, botnet
15:11:57 20 proxies, were being used to mask the actual identity of the
21 computer that was being used to file the fraudulent returns.

22 So the initial investigation shows that the returns
23 are being filed all over the United States from different
24 computers, but in reality what's happening is that these
15:12:19 25 computers are -- have been taken control of by someone unknown

15:12:27 1 to the actual owners of the computers, and these returns are
2 going through these computers.

3 But in the course of the investigation, the
4 investigators were able to determine a certain IP address
15:12:38 5 slipped through the system several times. In other words,
6 thousands of fraudulent returns are filed and almost all of
7 the IP addresses are noise because they're not the real
8 computer that's filing the returns. But fortunately for the
9 investigators, the actual IP address slipped through several
10 times. Either the botnets failed or the operator of the
11 computer failed to properly activate the botnets or proxies,
12 so this particular IP address started to come through and that
13 became a red flag.

14 So the question was where's this coming from? We
15:13:19 15 have a particular IP address.

16 We were able to determine that this information was
17 being filed through the use of a particular Verizon Wireless
18 air card. This air card then would allow someone who's, let's
19 say, using a computer to plug the air card into the computer
15:13:37 20 and then connect to the Internet.

21 So if the botnets and proxies had worked all the
22 time, we may never have located this air card. But what
23 happened was, is we were able to locate the air card in terms
24 of an account for the air card.

15:13:55 25 The account had been obtained under a fraudulent

15:13:58 1 identity, so there was no billing -- accurate billing
2 information for the account.

3 One of the things we did was to try to determine how
4 was this account being paid for. It turned out that Verizon
15:14:15 5 has kiosks in some of their stores, similar to like an ATM
6 machine, where an account holder can actually go into a store
7 and pay and keep the account active. We were able to see
8 Verizon records and determine that this particular air card
9 that was what we believed was being used to file all these
10 fraudulent accounts was actually being paid for in person by
11 someone going to a Verizon store in San Francisco and keeping
12 the account active by either paying -- by paying -- I don't
13 recall off the top of my head if it was cash or how it was
14 being paid, but somehow the account was being paid through a
15:14:52 15 kiosk in a Verizon store.

16 So now we're looking for this air card because we
17 believe that when we find the air card it will be attached to
18 the computer which will have the records of all these
19 fraudulent tax returns.

15:15:07 20 So we get historical information regarding the use of
21 this air card from Verizon, and the historical information
22 shows us that the air card is primarily hitting off certain
23 towers in Northern California. So in other words, now we have
24 a particular area in Northern California where most likely
15:15:32 25 this is the first place to look for the air card. In other

15:15:34 1 words, because these particular towers are the ones the air
2 card is connecting to.

3 So once we get the two orders, court orders from
4 Northern California authorizing us to use the equipment to
15:15:48 5 locate the air card, a team goes out and uses the equipment.
6 And that equipment was used and was accurate enough to advise
7 the investigation team -- again, three of the members are
8 present here in the courtroom -- that the team that operated
9 the equipment was able to tell the investigators we believe
15:16:12 10 that the air card on July 16th of 2008 is transmitting from an
11 area the size of approximately three to four apartment units
12 within an apartment complex.

13 In other words, that's all the equipment could tell
14 the agents. No content of what the air card was transmitting
15:16:35 15 was examined or looked at. And the equipment was not used to
16 determine which of the three or four apartments the air card
17 was in or determine the exact location of the air card within
18 a particular apartment.

19 So now the agents have an area the size of three or
15:16:55 20 four apartments.

21 I think you can tell I've told this story once or
22 twice before.

23 So now the agents start to do the classic legwork of
24 investigators and contact the apartment management company to
15:17:15 25 try to find out who occupies these four -- three to four

15:17:20 1 units.

2 Grand jury subpoena's issued. We gained access to
3 the rental agreements and names of the different occupants of
4 the apartments.

15:17:32 5 I believe two of the apartments are vacant. One of
6 the apartments is occupied by an elderly gentleman, 50, 60, 70
7 years old, no criminal history.

8 The fourth apartment is occupied by a young, white
9 male, approximately in his twenties, who's obtained the
10 apartment using a false identity and in the course of
11 submitting the lease application for the apartment, has
12 provided a fraudulent tax return that comes back to a person
13 who I believe was deceased.

14 So in a sense, what had happened was by using the
15 false identity to obtain the apartment, in a sense unknowingly
16 Mr. Rigmaiden, we believe, in a sense painted a bull's eye on
17 the door to that particular unit. Because we were looking for
18 a person -- the air card had been obtained using a false
19 identity. The apartment had been obtained using a false
20 identity. So it was -- we were able then to, using these
21 different classic investigative techniques, zero in on this
22 one particular apartment.

23 We obtained a search warrant for that apartment and
24 then we surveilled the apartment. And we had a concern that
15:19:00 25 we didn't want to execute the search warrant without tipping

15:19:05 1 off the occupant to the apartment. At this time we had no
2 idea who the owner, the actual owner or, excuse me, the renter
3 of the apartment was.

4 At that time the apartment was rented under the name
15:19:17 5 of Brawner. So we were using that alias. But we didn't know
6 who was actually living in that apartment.

7 What we had was the information about the means used
8 to obtain the apartment and the advice that the air card was
9 transmitting within the area. We also had a photograph of
10 Mr. Brawner because when Mr. Rigmaiden, who we believed was
11 acting as Mr. Brawner, rented the apartment, a fraudulent
12 driver's license was used and a photocopy of that was
13 collected by the rental company. So we had a basic image of
14 who the occupant in the apartment was.

15:19:59 15 So what then happened is, through surveillance,
16 Mr. Rigmaiden was observed outside the apartment. There was a
17 chase. He was arrested. We had an outstanding warrant for
18 Mr. Brawner's arrest and he was arrested pursuant to the
19 warrant.

15:20:16 20 The keys to the apartment were found in
21 Mr. Rigmaiden's pocket. The apartment was entered pursuant to
22 the warrant. The air card was found in the apartment,
23 connected to a computer. The computer was running. The
24 computer was examined pursuant to the search warrant, and then
15:20:34 25 records that we expected to find were found on the computer

15:20:40 1 with respect to the fraudulent income tax filing scheme.

2 Also contained in the computer, leading up to the
3 arrest and the search, we were working with a confidential
4 informant who had been communicating via e-mail extensively
15:20:55 5 with the person who we initially called a hacker because we
6 didn't know what his name was, and then he was called
7 Mr. Brawner because that is who was renting the apartment, and
8 then when Mr. Rigmaiden was arrested and fingerprinted he was
9 arrested and identified.

15:21:11 10 The second -- one-half of all the e-mail
11 communications -- in other words, we have copies of the
12 e-mails that we sent through the informant to the person that
13 we called the hacker. All those e-mails were then found on
14 the computer that was attached to the air card.

15:21:31 15 So in a nutshell, that's how the case came together.
16 And the equipment was used only to assist us to get into the
17 general area of the apartment, but not a particular apartment
18 or not an exact location within the apartment of where the air
19 card was. And no content of the transmissions of the air card
15:21:57 20 were ever examined by the investigation team.

21 THE COURT: Out of all of what you just described to
22 me, what aspects of that investigation have not been disclosed
23 to defendant under the sensitive law enforcement techniques?

24 MR. BATTISTA: The only thing, Your Honor, that we've
15:22:18 25 not disclosed is the team that was called in to operate the

15:22:22 1 equipment to locate the air card. We have not disclosed any
2 information in terms of that team. In terms of who the people
3 were, what the equipment they used, what software.

4 The defendant in essence is requesting the names of
15:22:41 5 the people who operated the equipment. We have not disclosed
6 that. The exact make and model number of the equipment, we've
7 not disclosed that. The software to operate the equipment,
8 we've not disclosed that. And the manner and means of
9 operation of the equipment.

10 The FBI takes the position that all of this
11 information, if disclosed in detail in particular, would allow
12 other people to, once it becomes public, to allow other people
13 to, again, avoid detection or defeat the equipment.

14 Even the identities of the people who operate the
15:23:21 15 equipment, Your Honor, I mean once -- if their images are
16 posted -- obviously they to have physically go out into
17 neighborhoods and look for the equipments and the air cards.
18 If all of a sudden their faces are on the Internet, then they
19 end up on a watch list. Hey, if you see these guys in your
15:23:39 20 neighborhood -- I mean there's just many, many issues that we
21 can address.

22 But it's the government's position that this
23 equipment is highly sensitive and it was not used in a manner
24 that would have violated the defendant's expectations of
15:23:58 25 privacy in this case.

15:23:59 1 And the FBI is willing, as I said earlier, if the
2 Court has primary -- has additional concerns, the FBI is
3 willing to bring in people to testify in camera for the Court,
4 to explain to the Court their concerns and the sensitive
15:24:17 5 nature of the equipment.

6 And the sensitive nature of the equipment goes beyond
7 issues of law enforcement to matters of national security in
8 terms of obviously some of this equipment is not only used in
9 the law enforcement realm, it's used in the national security
15:24:32 10 realm.

11 THE COURT: Of the matters that were raised in
12 Mr. Rigmaiden's extensive discovery letter to you, have you
13 disclosed everything in the government's possession other than
14 what you consider to be sensitive law enforcement material? Or
15:24:54 15 is there other information you're still collecting?

16 MR. BATTISTA: Right now the primary focus of that
17 discovery request, Your Honor, is the air card. In all
18 sincerity, I believe that within the realm of information
19 that's available, that we have disclosed that. Now, I
15:25:14 20 cannot -- I'm not going to stand here and say that there isn't
21 an e-mail that we've missed or an agent's note or something
22 like that, but we have made a good faith effort in terms of all
23 the agents' reports, all the agents' e-mails, all the agents'
24 notes. In other words, the investigation team and myself.
15:25:33 25 Anything that remotely relates to the air card mission was

15:25:37 1 gathered, and I have personally reviewed it, reviewed it with
2 Agent Medrano, reviewed it with Agent Fleischmann, and we have
3 processed that and turned it over to the defendant.

4 Again, the only thing that we've been withholding is,
15:25:54 5 again, anything related to the operation or nature of the
6 equipment used to locate the air card.

7 THE COURT: What is the volume of material you turned
8 over with your January 28th response?

9 MR. BATTISTA: Your Honor, it was not a significant
15:26:10 10 amount of material. I think one of the things that was
11 important for the defendant was he wanted the data that was in
12 the format that we originally received it from Verizon.

13 In other words, the information comes to the
14 government from Verizon and then it's downloaded into a
15:26:28 15 spreadsheet or put through a program and then processed. We
16 had given him all the end use. You know, the end product. He
17 wanted to see the original information. So we've made a very
18 good effort then to locate the original information as it
19 was -- came from Verizon, and we attempted to give it to him
15:26:54 20 in a chronological order.

21 It generally came in through attachments to e-mails,
22 so we recreated all the e-mails, put them in order, loaded all
23 the information on a disk, and gave it to him.

24 So in terms of volume, it's not a great deal of
15:27:10 25 information, but it was very detailed and specific. The

15:27:13 1 defendant -- also, there were a number of either e-mails or
2 notes and things where there were redactions, and the
3 defendant had asked specific questions about specific
4 redactions. We redacted ten -- thousands and thousands of
15:27:31 5 pages. There were several pages where items were redacted but
6 we had not specifically identified for the defendant what was
7 being withheld.

8 We then -- everything that the defendant cited to us,
9 we went back and processed line by line and either disclosed
15:27:45 10 it or gave him a much more detailed explanation of what had
11 been redacted.

12 One of the issues, I think, that the parties have
13 been working through is the investigation team in the course
14 of -- obviously, we needed to find where the air card was and
15:28:07 15 we needed to use equipment to locate the air card. So the
16 agents in many, many e-mails and different things used generic
17 terms for this equipment because none of the agents here or on
18 the investigation team were trained on the equipment or
19 operate the equipment. So there was just a multitude of
15:28:25 20 generic names that were used.

21 What we've done is we've gone through and deleted all
22 the generic names or terms that generally fit into the
23 overview of this particular equipment. But none of the
24 redactions actually specifically name the actual make, model
15:28:42 25 number of the equipment that was used because none of us knew

15:28:46 1 what that was.

2 But, again, there were 70 pages of attachments to the
3 discovery request. And the defendant was very well organized.
4 He gave us copies of what he was looking for and we processed
15:29:03 5 all 70 pages and we responded point by point to all 70 pages.

6 So I think with respect to the air card mission, that
7 question, again, we made a good faith effort. I think we
8 disclosed almost all there is. Again, if there's something
9 out there, it's just because it's been inadvertently missed
10 and it would be a note or e-mail or something like that. But
11 we're down to the point now where the defendant is saying he
12 wants the information about everything there is to know about
13 that equipment and our response is we don't want to tell you
14 that information because we think it's law enforcement
15:29:43 15 sensitive. So that's I think where we are, Your Honor.

16 THE COURT: So I take it there's no additional follow
17 up you're planning to make on the January 28th letter?

18 MR. BATTISTA: I mean, again --

19 THE COURT: I know if he asks for more you may
15:29:58 20 respond. But there wasn't anyplace in the letter which said
21 "we'll get back to you on this"?

22 MR. BATTISTA: No, no, Your Honor. We responded point
23 by point and I sent it out on the 28th. I coordinated with the
24 FBI in Albuquerque and FBI on the east coast. They reviewed
15:30:14 25 the letter. I specifically told -- I specifically told the FBI

15:30:21 1 that if it can be given up, let's give it up. And if it's
2 something that you feel strongly about, then you have to feel
3 strongly about it now. This isn't a gradual process. This
4 isn't something, well, we'll give a little bit out and see how
15:30:40 5 it goes. This is an all or nothing. I specifically advised
6 them it's all or nothing, Your Honor.

7 If you can give it out under any circumstances, give
8 it out. If you're willing to look Judge Campbell in the eye
9 in camera and explain to him why you don't think it should be
15:30:58 10 released, that's fine. But if you're not willing to look
11 Judge Campbell in the eye in an ex parte hearing and explain
12 to him why it should be withheld, then give it up now. And
13 that's where we are, Your Honor.

14 THE COURT: Okay. Thanks.

15:31:11 15 Mr. Rigmaiden, you probably have a few thoughts.

16 THE DEFENDANT: Yes. One key point that Mr. Battista
17 leaves out is that they've actually already identified what the
18 device is. Postal Inspector Wilson identified it as a StingRay
19 and he indicated FBI used the device to locate the air card,
15:31:31 20 and I suspect those so called generic terms he's talking about
21 they redacted out of all these documents, I'm willing to bet
22 that most of these terms actually read "StingRay."

23 And I know from research that has been done by the
24 defense is that the StingRay's made by Harris Wireless
15:31:49 25 Products Group and it's a trademark term. There's only one

15:31:54 1 StingRay in existence, it's not generic, and that's the
2 device.

3 So for them to sit there and say they didn't know
4 that that's what they were using, I kind of find that hard to
15:32:03 5 believe. And I don't think that it's really sensitive.
6 Especially when I have pictures of a StingRay here, and other
7 Harris products that they manufacture. There's a StingRay,
8 StingRay 2, the KingFish and the AmberJack. And these are
9 pretty much the devices the government uses -- the FBI used to
15:32:23 10 locate cell phones.

11 And it's one thing if they don't want to tell me
12 exactly how these devices work, that's something I'll address
13 in my motion, I'll try to convince you to order them to do
14 that, but I think today at least what they should do is
15:32:36 15 confirm exactly which one of these devices were used to locate
16 the air card, whether it be the StingRay, or maybe a
17 combination of devices.

18 But if I have pictures of these devices and I have a
19 pretty good idea what they are, it's going to make it a lot
15:32:52 20 easier for me to ask for this information. I mean, I can do
21 one thing, I can lay out exactly how each one of these devices
22 work in my motion and ask them to point out which one they
23 used. I don't know why they want me to do that.

24 Or they can identify the devices they did use and I
15:33:07 25 can focus in on those. And not only would it make things a

15:33:10 1 lot easier for everybody involved in the case, but it will
2 also keep secret whatever it is they want to keep secret, even
3 though I don't think it's secret to begin with because if it
4 was I wouldn't have -- I wouldn't have some of the
15:33:22 5 information. I don't have all the information but I have a
6 good amount. I need them to fill in some of these blanks for
7 me so I can complete my arguments for the motion to suppress.

8 So I would appreciate if the government could at
9 least today look at the pictures and tell me which device they
10 actually used to locate the air card. Especially when they've
15:33:35 11 already told me it was a StingRay. So if that's the device, I
12 think it would be easier for them to point that out.

13 THE COURT: Well, Mr. Rigmaiden, do you agree with
14 Mr. Battista's assertion that they've given you everything
15:33:52 15 you've asked for other than the information they're withholding
16 as law enforcement sensitive?

17 THE DEFENDANT: Yes, I would say they have. As far as
18 what I've asked for. But I talked to my proposed expert. He
19 said he read the discovery request we were discussing and he
15:34:09 20 said there's a few other things I needed to request, but I
21 don't think it will be very much. I couldn't get into too many
22 details with him because he hasn't been officially appointed.
23 But other than a few other items that I haven't requested yet.
24 But as far as everything I've asked for, I think they've turned
15:34:25 25 over everything. It seems like they turned over everything

15:34:28 1 they have, as far as I'm concerned, other than the sensitive
2 evidence. So I would agree with the government on that.

3 THE COURT: All right. Well, it seems to me we may
4 reach a point where I need to rule on whether it's properly
15:34:39 5 withheld or not. I'm not going to do it today on the basis of
6 the information you have and that you've handed it to them. I
7 don't know whether it will require some sort of in camera
8 hearing or not.

9 What I do want to understand more fully,
15:34:55 10 Mr. Rigmaiden, both for purposes of deciding how we schedule
11 things in the case and for purposes of my addressing your
12 ex parte needs for resources to prepare your defense, is to
13 understand why the nature of the equipment and how it works is
14 important to your motion to suppress. Now, if that's defense
15:35:19 15 strategy that you don't want to share with the government, I'm
16 happy to have them step out and hear you ex parte.

17 But one of the things I need to conclude is that
18 there really is a reason that we ought to press to resolve
19 this issue, is it sensitive, and getting it to you because
15:35:38 20 knowing the nature of it is necessary for the motion to
21 suppress.

22 If the motion to suppress will turn not on the
23 specifics of the equipment but on the general idea of what it
24 does, that it pinpoints the location of an air card, it seems
15:35:51 25 to me the details might not be necessary for a Fourth

15:35:54 1 Amendment analysis.

2 So the question I want to ask you is whether you are
3 comfortable with the government personnel in the room
4 describing for me why you think the details are necessary for
15:36:06 5 your Fourth Amendment argument, or whether you want me to hear
6 that ex parte in connection with the resources issue I need to
7 decide.

8 THE DEFENDANT: I'd rather explain it ex parte.

9 THE COURT: Okay.

15:36:18 10 Mr. Battista, I take it from what you said that with
11 the exception of the sensitive information that has been
12 withheld, you believe the government has completed its
13 disclosure obligations?

14 MR. BATTISTA: Your Honor, with respect to the air
15:36:32 15 card, I've advised the defendant that all the formal reports
16 have been given to him.

17 With respect to his computer, we're working with the
18 defendant in terms of how he can get a copy of his computer so
19 that -- he has to acquire certain information. We've advised
15:36:53 20 him today what size of hard drives he'll need to have his
21 computer.

22 The only information that we have not released, Your
23 Honor, is we're still in the process of processing it, is just
24 e-mail traffic from the investigators in the course of the
15:37:11 25 investigation, the notes of the investigators, and matters

15:37:15 1 relating to possible impeachment of the confidential
2 informant. And we're still in the process of processing that.

3 But any -- obviously the trial issues we've been
4 trying to respond to the defendant's most significant request,
15:37:33 5 is the air card issue, so all the e-mail traffic with respect
6 to the air card issue has been examined and turned over. All
7 the notes, including my notes, with respect to the air card
8 issue have been examined and turned over. All the reports.
9 All the orders. All the material that we received from
10 Verizon Wireless. All of that has been turned over.

11 So in terms of the air card issue, Your Honor, I'm
12 comfortable in saying -- again with the caveat there may be
13 one or two small items out there that we've missed but nothing
14 significant that has crossed my desk.

15:38:08 15 THE COURT: So when it comes to, I assume what you're
16 talking about is proving merits of the case, in other words the
17 underlying investigation into the allegedly fraudulent tax
18 returns, there is still some additional disclosure you're going
19 to make on those issues?

15:38:23 20 MR. BATTISTA: Right. And, again, all the formal
21 reports have been disclosed, all the spreadsheets, all the
22 evidence that's gathered, all the tax returns, all of that
23 information has been disclosed.

24 But there were five agents and myself working around
15:38:39 25 the clock at times to locate the air card and ultimately

15:38:44 1 locate Mr. Rigmaiden. So there was a tremendous amount of
2 e-mail traffic that we still have to process. But the vast
3 majority of e-mail traffic may be what time are we going to
4 meet, just logistical things. Requests for approval for
15:39:01 5 travel, things like that. We have to process that.

6 But in terms of all formal reports, all the
7 significant evidence except information that would relate to
8 impeachability of the informants, that's been disclosed, Your
9 Honor.

15:39:21 10 THE COURT: If we were going to start this trial next
11 month, Mr. Battista, how long do you think it would last?

12 MR. BATTISTA: Your Honor, I think from the
13 government's side maybe three weeks. It would depend how -- I
14 don't know -- certain things -- Mr. Rigmaiden and the
15:39:46 15 government, we've been able to reach certain accommodations and
16 things have flowed smoothly. Obviously with respect to the air
17 card we're at loggerheads. I've never tried a case with
18 Mr. Rigmaiden so I don't know how the trial would go. I would
19 say at least three weeks.

15:40:03 20 THE COURT: Okay. Did you have other matters you
21 wanted to take up before I speak with Mr. Rigmaiden ex parte?
22 I'll have you wait outside so we can talk after that, but were
23 there other general matters you wanted to raise?

24 MR. BATTISTA: Just, Your Honor, I think one thing for
15:40:17 25 the Court to consider is -- which I think is the Court is

15:40:21 1 heading down the right road. The question is looking at the
2 issue of the air card in a multi-step approach in terms of what
3 is the Fourth Amendment issue being raised.

4 In this particular case, if the air card -- if the
15:40:39 5 equipment used to locate the air card only put the agents in
6 the general vicinity of an area the size of three or four
7 apartment units, in other words that's as close as we got,
8 where is the violation of -- potential violation of Fourth
9 Amendment rights in this particular case?

10 So if we can address it in terms of a step-by-step
11 process, in other words without going to the exact make, model
12 number of the equipment, I think that that's a good idea. And
13 that's the only thing I would like to concur or propose, that
14 the Court be open to that. And, again, the FBI is willing to
15:41:02 15 bring the team out to testify ex parte with the Court.

16 And another thing I have said before on the record is
17 that if the defendant has specific concerns about potential
18 Fourth Amendment issues or rights having been violated, the
19 team would be willing to respond ex parte to the Court's
15:41:27 20 asking those questions.

21 In other words, if the defendant is aware of what he
22 believes is a potential Fourth Amendment violation and it
23 relates to the operation of the particular equipment, I would
24 again propose at least attempting to address it ex parte
15:42:14 25 instead of having to go on the record. I just put that out as

15:42:20 1 a possibility.

2 We'll step outside, Your Honor.

3 THE COURT: Okay. Please do.

4 * * *

15:42:24 5 (The sealed ex parte discussion was reported but not
6 transcribed herein.)

7 * * *

8 THE COURT: All right. Thanks for your patience,
9 folks.

16:16:21 10 Mr. Battista, a few questions that I assume is all
11 public and not sensitive information since you've been making
12 disclosures. Were there warrants obtained in connection with
13 the use of this device?

14 MR. BATTISTA: Your Honor, there was -- it wasn't --
16:16:40 15 it's an -- it's a court order that satisfied Rule 41 language.
16 There were two -- there was two orders that were obtained in
17 the Northern District of California. They've been disclosed to
18 the defense.

19 THE COURT: Yeah, Mr. Rigmaiden made mention of those
16:16:55 20 to me.

21 MR. BATTISTA: Yes.

22 THE COURT: And how was it that the government was
23 able to get an order from a court authorizing the use of this
24 technology without disclosing the technology to the court?

16:17:09 25 MR. BATTISTA: It's -- it was a standard practice,

16:17:11 1 Your Honor. The magistrates were familiar with the warrant.
2 This wasn't a unique scenario. This particular style of order
3 had been sought before, before the magistrates. I can file a
4 copy with the court. The Court can see it. It lays out a
16:17:30 5 certain amount of information, but it obviously doesn't
6 disclose the exact nature of the equipment.

7 THE COURT: Well, how precise is the order in
8 identifying the equipment that can be used?

9 MR. BATTISTA: I don't think it specifically names the
16:17:47 10 equipment, Your Honor.

11 THE COURT: So what is the judge -- I mean, the reason
12 I'm asking this is a search warrant, as you know, is very
13 specific. It says you can search during daylight hours at this
14 location and these are pertinent buildings for the following
16:18:03 15 items. How did this order authorize the use of this equipment
16 without saying specifically what it was?

17 MR. BATTISTA: It puts certain limitations on the
18 equipment in terms of what it can be used to do. So obviously
19 I believe -- and, again, it's been a while since I've read the
16:18:23 20 order. I don't want to misstate to the Court exactly what it
21 authorized to do because I have not read the particular order
22 in quite some time.

23 So the best thing for me to do, Your Honor, would be
24 to file a copy with the court or to reread it and give it to
16:18:41 25 you in detail. Because I just don't want to misstate exactly

16:18:45 1 what we were authorized to do.

2 THE COURT: All right. Well, and that's obviously
3 public and that can be litigated whether those orders were
4 appropriate.

16:18:54 5 MR. BATTISTA: Absolutely.

6 THE COURT: Let me ask you this question: I can't
7 claim to be current on them, but I know there are an evolving
8 line of cases about when technology does or does not implicate
9 Fourth Amendment concerns. And there's the thermal imaging
16:19:17 10 case that I think Justice Scalia wrote the opinion on, I can't
11 remember the name of the case.

12 MR. BATTISTA: I'm familiar with the case, Your Honor.

13 THE COURT: There had been a decision going that way
14 out of the Tenth Circuit; there'd been a decision going the
16:19:32 15 opposite way out of Ninth Circuit, and others. The Supreme
16 Court, as I recall, said it was a violation of the Fourth
17 Amendment to use thermal imaging equipment that can effectively
18 look inside of the home and see where people are moving in the
19 home and to some degree what they're doing. Am I remembering
16:19:48 20 that right?

21 MR. BATTISTA: That's correct, Your Honor. And that's
22 one of the reasons why I stressed several times in discussing
23 the efforts in this case in that we were -- the equipment only
24 was able to advise the agents of an area the size of three to
16:20:02 25 four apartment units.

16:20:04 1 So, in other words, we didn't know -- the agents --
2 the investigators believed the air card was in the vicinity,
3 but we didn't know which apartment or we didn't know if it
4 was -- where it was in a particular apartment.

16:20:18 5 THE COURT: Well, I understand that point you made
6 before. Here's the question I have: The litigation about the
7 thermal imaging device that occurred in the circuit courts and
8 ultimately in the Supreme Court turned heavily on the precise
9 nature of the equipment and what it could do.

16:20:37 10 MR. BATTISTA: Right.

11 THE COURT: How can we litigate in this case whether
12 this technology that was used in this case violates the Fourth
13 Amendment without knowing precisely what it can do?

14 MR. BATTISTA: Your Honor, I think the position of the
16:20:50 15 government is that regardless of what the equipment is capable
16 of, in this particular case even if it was capable of that, it
17 wasn't used in this case, and I think the issue in the Supreme
18 Court case was that imaging equipment was used to zero in on a
19 very specific location and violate that particular person's
16:21:12 20 expectation of privacy. Whereas in this case it just led us to
21 a general vicinity.

22 THE COURT: Well, I understand that. But how does the
23 defendant know that? I mean does the defendant just have to
24 take the government's word that that's how it was used?

16:21:28 25 The defendant might, looking at the same facts you're

16:21:31 1 looking at, disagree and say, no, this did get much more
2 specific than a three or four apartment area and I disagree
3 with the government's claim that it didn't, and that would be
4 one of the issues to be resolved in litigating the Fourth
16:21:43 5 Amendment issue.

6 MR. BATTISTA: And that's why, Your Honor, before we
7 reach that point the FBI is strongly requesting that we have an
8 ex parte hearing for them to explain to the Court. In other
9 words, there has to be a balancing here in terms of the Court
16:21:58 10 would have to do a balancing in terms of on the one hand the
11 defendant forcing the government to prove a negative versus on
12 the other hand the defendant being given access to information
13 that the FBI strongly believes is law enforcement sensitive and
14 could also have implications with respect to national security.

16:22:18 15 THE COURT: Well, so if we went down that road and I
16 were to rule that this is law enforcement sensitive and it
17 can't be disclosed, then is the consequence of that that
18 Mr. Rigmaiden just has to give up what might be a very potent
19 Fourth Amendment argument if the true technology were revealed?
16:22:37 20 Is that the balancing you're talking about?

21 MR. BATTISTA: Yes, Your Honor. But --

22 THE COURT: So I'm going to be balancing law
23 enforcement sensitivity issues against his Fourth Amendment
24 rights?

16:22:48 25 MR. BATTISTA: A Fourth Amendment right, Your Honor,

16:22:52 1 to whether or not the defendant has an expectation of privacy
2 for the government being able to locate the general vicinity of
3 an air card which he obtained using a false identity, using it
4 in an apartment he obtained using a false identity, which an
16:23:09 5 air card which transmits regularly to Verizon Wireless which he
6 has no expectation of privacy in the air card transmitting
7 regularly to Verizon Wireless. Verizon Wireless has its own
8 records in terms of the fact that this air card was regularly
9 transmitting in this area and regularly transmitting and
16:23:30 10 hitting certain cell towers.

11 So the expectation of privacy in this particular
12 case, Your Honor, I see as being very small or nil. Assuming
13 the facts as the government sees them.

14 In other words, we're not entering his apartment, we
16:23:49 15 have no idea which apartment it is, we don't know what's going
16 on inside the particular apartment. This is a device that is
17 regularly communicating with Verizon Wireless. Everyone who
18 has a cell phone gets a bill --

19 THE COURT: Well, I understand what you're saying on
16:24:05 20 that. The problem I'm having, Mr. Battista, is, and I haven't
21 read this thermal imaging case recently, but --

22 MR. BATTISTA: Sure.

23 THE COURT: -- my memory is the argument against a
24 Fourth Amendment violation in this case was that this device
16:24:20 25 does nothing more than pick up heatwaves external to the house.

16:24:25 1 It doesn't drill a hole and look in the house. It doesn't send
2 a camera in the house. It's doing nothing more than picking
3 up, sensing things in the environment outside of the house and
4 by extrapolating from those it can pinpoint what's going on in
16:24:42 5 the house. And Supreme Court said, no, it's looking in the
6 house. It maybe doing it with external heatwaves, but it's
7 looking in the house.

8 But if you're going to be arguing on this motion the
9 only thing this secret device picks up are cell card
16:25:00 10 transmissions, or air card transmissions, there's no
11 expectation of privacy in those transmissions, they're sent
12 all the time to a third party like Verizon, it seems to me
13 that for Mr. Rigmaiden to litigate that issue he's got to be
14 able to say, no, it's more than that because this is the way
16:25:21 15 it interprets or this is the way it intercepts what the air
16 card is sending. This is what it causes to happen in my
17 house, or in a house, on a computer, without a search warrant,
18 in order to make it work.

19 I mean, guess I'm saying it seems to me we'd get into
16:25:38 20 the same sort of technological issues that were discussed in
21 the thermal imaging case except he couldn't make the argument
22 because he wouldn't know how it's working and what it's doing.

23 So I'm wrestling with how we really litigate this
24 issue if he doesn't know it.

16:25:55 25 And if what you're saying is, yeah, that's true, but

16:25:57 1 balanced against national security and law enforcement
2 interest, that's just the price we have to pay, then I can
3 decide that issue. Is that what you're saying in effect?

4 MR. BATTISTA: Yes, Your Honor. In other words, I've
16:26:10 5 asked the FBI, this -- how -- where's this going and -- because
6 the defendant obviously is making very strenuous arguments he
7 wants this information. And I've explained to them that
8 they're going to have to be -- because I think where this is
9 going, I hope where it will be going is at least we'll have the
16:26:38 10 opportunity to address the Court ex parte.

11 I understand that the Court is very concerned about
12 the defendant's Fourth Amendment rights and wants to give the
13 defendant every opportunity to protect those rights. But I
14 think the FBI -- I'm asking on behalf of the FBI that they are
16:26:58 15 requesting the opportunity to address this matter in camera so
16 the Court can be educated with respect to what the issues are
17 with respect to the operation of this equipment.

18 THE COURT: I understand that request. Obviously, as
19 you can appreciate, I'm very uncomfortable with ex parte --
16:27:15 20 with those kinds of ex parte communications where I will be
21 hearing, presumably, facts about this device and why it's
22 sensitive that will never be revealed to the defendant and then
23 I've got to make decisions without him knowing what I know.

24 It may be that we do that. Maybe what I need is case
16:27:35 25 law which lays out the parameters for when a judge can do that

16:27:39 1 kind of ex parte hearing. I assume you have some.

2 But let me ask this question: Would it be possible,
3 and I have no idea if this works, but would it be possible to
4 litigate this Fourth Amendment motion on the basis of assumed
16:27:58 5 or stipulated facts? Where the FBI is not acknowledging the
6 workings of the device, but there's some assumptions I can
7 make about how it works, assumptions that the defendant is
8 aware of for purposes of the Fourth Amendment analysis.

9 MR. BATTISTA: I'm open to considering it, Your Honor.
16:28:20 10 Again, I would have to consult. But I'm willing to consider it
11 and propose it. If the defendant has a particular scenario,
12 I'm willing to run it by FBI.

13 THE COURT: Are you aware of law that describes when
14 it's appropriate for a court to hold ex parte hearings with the
16:28:44 15 government on law enforcement sensitive information?

16 MR. BATTISTA: The FBI staff, the attorney that I'm
17 dealing with in Virginia, Your Honor, have said they have in
18 other jurisdictions actually participated in ex parte hearings.
19 So there's precedent for these hearings being conducted. I
16:29:02 20 haven't drilled down to particular citations. But if the Court
21 requests it, obviously -- I mean obviously we would provide you
22 with briefing on that.

23 THE COURT: Well, certainly before I'm going to order
24 that kind of hearing I want to be sure I'm authorized to do it
16:29:26 25 by the law. I think -- and it sounds like we're at the point

16:29:29 1 on this discovery issue where you basically have given
2 Mr. Rigmaiden all of the information related to the motion to
3 suppress that's not being withheld under this concern of law
4 enforcement sensitive information.

16:29:46 5 So I think what we've got to do in order to get the
6 motion to suppress decided is decide the issue of whether you
7 can continue to withhold that information or not, and I think
8 to do that I need to see your explanation for why it's
9 appropriate in a -- really on two things. One is why it's
16:30:07 10 appropriate to do something like this ex parte, and, number
11 two, where does the ex parte hearing lead to? Does it lead to
12 me saying, yeah, this is really important law enforcement
13 information and therefore he loses some of his Fourth
14 Amendment argument? Is that the balance that I'm to strike?
16:30:25 15 And does the case law say that that balance can be struck?

16 So I think what I'm going to ask you to do,
17 Mr. Battista, is to prepare and file a memorandum on those two
18 subjects: When and under what circumstances an ex parte
19 hearing is appropriate, number one; and, number two, what is
16:30:47 20 the balancing exactly that I'm to do with the information I
21 hear at that hearing. And then obviously Mr. Rigmaiden should
22 have an opportunity to respond to that.

23 And I want to do that before I decide that I'm going
24 to hold the ex parte hearing.

16:31:01 25 In the meantime, I would encourage you to talk to

16:31:08 1 folks at the FBI about whether there are sort of assumed or
2 stipulated facts that allows them to avoid saying this is the
3 technology, but gives me an array of facts from which
4 Mr. Rigmaiden -- assume to be true from which Mr. Rigmaiden
16:31:25 5 could argue, and that you'd to have live with in my ruling.

6 It may be impossible.

7 But just as an example, when you say that this
8 technology got down to a three or four apartment area, that
9 sounds surprising to me only because in other cases I have
16:31:44 10 seen the triangulation of cell phones that have allowed the
11 government to say there's somebody in that house using the
12 cell phone.

13 I had another case where a wiretap application was
14 obtained on the basis of agents triangulating a cell phone and
16:32:02 15 saying there's a cell phone in that house being used.

16 GPS technology allows you to pinpoint yourself within
17 a foot or two. It just seems modern technology, whatever this
18 device is, would have the capability of being more precise
19 than three or four apartments.

16:32:18 20 MR. BATTISTA: Several things, Your Honor. And,
21 again, this is a learning process. The air card, unlike a cell
22 phone, didn't have GPS technology in it. In other words,
23 obviously my Blackberry I'm wearing right now has GPS
24 technology. The GPS technology in the phone is placing me
16:32:36 25 where I'm standing. But the air card did not have GPS

16:32:44 1 technology. Because the air card only transmits data, it's not
2 like a cell phone, it didn't have cell phone capabilities.

3 In order for triangulation, which we've advised the
4 defendant, if you use more equipment, in other words if you
16:33:01 5 have multiple pieces of equipment, let's say, in a sense --
6 you have equipment that detects the air card. But if you then
7 use three pieces of the equipment, the same equipment, and
8 you're all moving and then you can, quote, triangulate or zero
9 in. In other words, you can get down to that point. But that
16:33:27 10 was not done in this case, Your Honor. In other words, the
11 government only used equipment of a limited capability to only
12 get to this area.

13 THE COURT: So you're saying, if I understand you,
14 that the government consciously said "we could be more precise
16:33:45 15 with this equipment, but we're not going to be."

16 MR. BATTISTA: My understanding is -- I mean in this
17 day and age in technology, Your Honor, I'm not going to stand
18 here and say the government doesn't have abilities beyond what
19 was done in this case. But I have spoken to the team and we
16:34:07 20 have addressed this because we've tried to, you know, where is
21 the line.

22 THE COURT: So this was Fourth Amendment consideration
23 by the government? Right?

24 MR. BATTISTA: Yes, Your Honor.

16:34:20 25 THE COURT: Okay. I think what we ought to do so that

16:34:21 1 we can decide what is the next step in this courtroom in terms
2 of either getting the information or saying that it can't be
3 had, is to have you file that memorandum addressing those two
4 issues, if you would.

16:34:34 5 MR. BATTISTA: Yes.

6 THE COURT: When in your schedule is it feasible to do
7 that?

8 MR. BATTISTA: Your Honor, unfortunately starting next
9 week I'm not going to be in the office for the next two weeks.
16:34:44 10 So that's my one consideration. I don't -- so I'm physically
11 not in the office for two weeks.

12 THE COURT: So when's it reasonable for you to file
13 it?

14 MR. BATTISTA: What I'm thinking is I would like two
16:35:06 15 weeks after I return, if possible. So that would be the end of
16 the second week in March. That would give me two weeks. In a
17 sense I would have two weeks, then. And I'll obviously put the
18 FBI and my office on -- to start working on it while I'm not in
19 the office.

16:35:22 20 THE COURT: Is that March 11?

21 MR. BATTISTA: I don't have a calendar in front of me.

22 THE COURT: March 1 is a Tuesday. Friday of that week
23 is March 4. Friday of the next week is March 11.

24 MR. BATTISTA: 11, yes, Your Honor.

16:35:37 25 THE COURT: Mr. Rigmaiden, assuming you get that memo

16:35:40 1 that's filed on March 11, what do you think? You know the
2 issues we're talking about, but you'll obviously need to see it
3 to respond. What do you think is the time you'll need to
4 respond?

16:35:51 5 THE DEFENDANT: Probably two weeks if I'm getting
6 legal visits. Probably a lot quicker if other ex parte motions
7 go through.

8 THE COURT: All right. So we'll say March 25th for
9 your response.

16:36:05 10 I think we ought to do that briefing. I'll look at
11 it and see if I need a reply. I don't want this to drag out
12 too long.

13 But I want to look at that information to decide
14 whether we should hold an ex parte hearing, and if I am to
16:36:18 15 hold it, what is the balancing I'm being asked to do, just so
16 that we can decide going forward.

17 And in the meantime, perhaps Mr. Rigmaiden --
18 Mr. Rigmaiden. Mr. Battista you could ask the FBI about
19 whether there's some stipulated facts or assumptions we could
16:36:33 20 make that allow Mr. Rigmaiden to make as strong an argument as
21 he could if he had the information.

22 Stated differently, if you really are of the view
23 that sending out signals from an air card do not have any
24 expectation of privacy and therefore do not create a Fourth
16:36:58 25 Amendment issue, then what's the problem with the device

16:37:01 1 pinpointing the air card in a particular house? It's doing it
2 on the basis of signals in which the person has no expectation
3 of privacy.

4 Think about it. Whether there's -- I guess what I'm
16:37:18 5 saying is would the FBI be willing to stipulate that this
6 equipment does have the ability to pinpoint it in a particular
7 house and litigate whether that is a Fourth Amendment
8 violation?

9 Or here's another way to look at it. If what you're
16:37:34 10 saying is that the government in this case consciously did not
11 do that because of Fourth Amendment concerns and consciously
12 drew a larger circle, is there discovery you can give
13 Mr. Rigmaiden that establishes that fact? Communications or
14 other things that happened that doesn't disclose the sensitive
16:37:54 15 security information?

16 MR. BATTISTA: We've tried to do that as best we can
17 in terms of the e-mails and the information documenting the
18 fact that the information that the team that operated the
19 equipment provided to the investigation team only pointed to an
16:38:14 20 area of three to four apartments.

21 What I'll do, Your Honor, I'll ask the paralegal to
22 order the transcript from this proceeding so we can get an
23 accurate summary of what you're asking us to address.

24 And I would ask the defendant if the defendant has a
16:38:30 25 particular scenario or particular facts that he thinks that

16:38:38 1 should be included in a potential stipulation, that could
2 assist me in dealing with the FBI.

3 THE COURT: If you can think of possible stipulations
4 you want to propose, Mr. Rigmaiden, then feel free to do that.

16:38:51 5 THE DEFENDANT: It might take me a while to put those
6 together. I'd have to -- I'd probably have to do a lot of work
7 for that, but I'll try.

8 Could I make a brief comment --

9 THE COURT: Sure.

16:39:02 10 THE DEFENDANT: -- on what the government said about
11 GPS and triangulation?

12 I have looked up the air card and there isn't a GPS
13 chip in the air card, but in the StingRay there's a GPS. And
14 even though you can't -- you can do triangulation with
16:39:16 15 multiple devices, you can also do it with one device by moving
16 the device, take a reading in one spot, move it to another
17 spot, take another reading. You can keep doing that.

18 In fact, if you look at a picture of the StingRay,
19 too, there's actually a connector that's a GPS antenna, so I
16:39:32 20 know these devices have GPS. If they were moving with the
21 device, it could do a new triangulation calculation every, you
22 know, ten milliseconds. They could do multilateration timing.
23 What these devices do is far more complex, far more advanced
24 than simple basic triangulation that when you look at basic
16:39:51 25 geometry. So I think the government really needs to look into

16:39:55 1 the details of these devices in order for them to really
2 determine where the Fourth Amendment issues lie and what
3 evidence they think that they may need to generalize and
4 provide if that's what they're going to do.

16:40:09 5 THE COURT: One other thought that this prompted that
6 I had before, which is this, just to think about: If we were
7 to go down the road of my holding an ex parte hearing and if we
8 were to -- if I were to agree with the government and say this
9 is law enforcement sensitive, Mr. Rigmaiden doesn't get it, and
16:40:28 10 if he was then to file a Fourth Amendment motion with an expert
11 attached, an expert affidavit attached, or bring somebody in to
12 testify that the kind of device the government used had the
13 capability of pinpointing in the apartment the location of this
14 computer and that I ought to assume that for purposes of the
16:40:50 15 motion, if I get that evidence from him, how does the
16 government rebut that if you're not going to be disclosing the
17 nature of this information?

18 MR. BATTISTA: I don't know, Your Honor. I'd have to
19 address that, but --

16:41:04 20 THE COURT: I'm not asking you to address it now. But
21 that's one of the problems I see is it's going to be really
22 hard to litigate this issue with the kind of specificity that
23 the thermal imaging cases have if we've got no information from
24 this side but we've got expert assertions coming from this
16:41:21 25 side.

16:41:22 1 And I don't think what I can do is say, well, I hear
2 what the expert's saying but it's factually wrong because of
3 what I heard in the ex parte hearing. I don't think I can --
4 I may be able to use the ex parte hearing to say it's
16:41:36 5 privileged, but I don't think I can use the ex parte hearing
6 to make factual findings against Mr. Rigmaiden. If I'm going
7 to do that, he should see the evidence that I'm using to make
8 findings against him. That's one of the problems I see as we
9 go down this road that I would encourage you to think about.

16:41:54 10 MR. BATTISTA: One of the problems of the flip side of
11 that is the defendant is saying -- in a sense accusing the
12 government of doing something that it didn't do. And if it
13 didn't do it, then why would we then be required to disclose
14 law enforcement sensitive techniques that the government may or
16:42:12 15 may not be capable of doing in a situation that they didn't do
16 it.

17 THE COURT: Well, if he -- I don't know if he will,
18 and he didn't tell me this, I'm not repeating what I heard
19 ex parte, but if he had an expert who came in and said the only
16:42:25 20 way it could have happened with this technology was to pinpoint
21 it in the house, do I accept that as true or do you rebut it?
22 And if you rebut it, how do you rebut it without putting on the
23 record the very stuff you're trying to keep confidential?

24 It just creates a real problem for traditional fact
16:42:43 25 finding in a court if some of the information is out of

16:42:48 1 bounds. So I think, among other things, that's what we need
2 to think about.

3 Okay. I'll look for another memoranda from both of
4 you. I will set another status hearing after we get the
16:43:01 5 briefing done, so probably early April.

6 I'll work on the ex parte matters we talked about,
7 Mr. Rigmaiden.

8 Anything else we need to address?

9 THE DEFENDANT: No, Your Honor.

16:43:10 10 MR. BATTISTA: One thing. The defendant had sent --
11 Defendant Rigmaiden had sent a request regarding the handling
12 of the physical discovery that's located at CCA, and I spoke
13 with my contact in CCA and I've given him a written offer of
14 how we could possibly handle the physical discovery, and if the
16:43:32 15 defendant had an opportunity to read it, if he had a response
16 so we can go forward on that.

17 THE COURT: What is the basics of your proposal?

18 MR. BATTISTA: The defendant is in a particular unit
19 now at CCA. And what CCA's willing to do is allow the
16:43:49 20 defendant the opportunity to physically -- my understanding is
21 it's approximately eight boxes of physical discovery. What CCA
22 will do is allow the defendant to personally move the discovery
23 from a storage unit in the 600 unit to the 500 unit. It will
24 be stored in I believe it's like a storage closet in the 500
16:44:12 25 unit. The defendant would have the -- be allowed to have one

16:44:16 1 box of the discovery in his cell at a time so he can continue
2 to go through the discovery.

3 Once the defendant has advised the government that he
4 needs to analyze the discovery one last time and then he'll
16:44:28 5 work from -- my understanding is he'll then work from digital
6 discovery. So that once he finally analyzes the physical
7 discovery, he would like it to be removed from CCA and
8 destroyed.

9 Two options for destruction. One, defense team goes
16:44:49 10 to CCA, collects it, and then has it shredded. The other
11 option is, is that Mr. Rigmaiden boxes up the discovery, I
12 send the agents out, the agents collect the boxed material,
13 the agents turn it over to administrative people in my office
14 who are not members of the team and they put it in secured
16:45:11 15 bins that all sensitive material in the U.S. Attorney's Office
16 are placed in. We have a contractor that handles all the
17 secured sensitive -- not classified, but the sensitive
18 materials, and then that will be shredded pursuant to the
19 government contract.

16:45:27 20 So the government's investigation team would not
21 examine the materials.

22 That way it saves the defense team having to
23 transport and shred it. We're willing to do that. Whichever
24 the defendant -- however he wants to do it we'll do that.
16:45:46 25 Whatever he'd like to do.

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THE COURT: Any thoughts on that, Mr. Rigmaiden?

THE DEFENDANT: Their proposal's fine with me about moving discovery over as long as -- my main concern is that I wouldn't get moved to where the discovery is. So as long as the discovery gets moved to where I'm at, that's fine.

As far as getting it out of the facility, I'll have to decide which way to have it shredded. I'll let the government know what my decision is.

MR. BATTISTA: That's fine.

THE COURT: Okay.

MR. BATTISTA: And CCA advised me that they would allow Mr. Rigmaiden to package the material. He can seal it. But obviously he can't then give it to the defense team but he could seal it and then in a sealed condition the staff at CCA would then turn it over to the defense team so they could take it out of CCA and then destroy it.

THE COURT: All right.

Okay. Thanks very much.

(End of partial transcript.)

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C E R T I F I C A T E

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3 I, PATRICIA LYONS, do hereby certify that I am duly
4 appointed and qualified to act as Official Court Reporter for
5 the United States District Court for the District of Arizona.

6
7 I FURTHER CERTIFY that the foregoing pages constitute
8 a full, true, and accurate transcript of all of that portion
9 of the proceedings contained herein, had in the above-entitled
10 cause on the date specified therein, and that said transcript
11 was prepared under my direction and control, and to the best
12 of my ability.

13
14 DATED at Phoenix, Arizona, this 23rd day of February,
15 2011.

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20 s/ Patricia Lyons, RMR, CRR
21 Official Court Reporter
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