

1 IN THE UNITED STATES DISTRICT COURT

APR 13 2004

2 FOR THE DISTRICT OF HAWAII

at 2 o'clock and 7 min. M.
WALTER A.Y.H. CHINN, CLERK

3
4 UNITED STATES OF AMERICA,

) CRIMINAL NO. 02-00062HG

5 Plaintiff,

6 vs.

7 THOMAS MITCHELL SCHNEPPER,

8 Defendant.

9
10 TRANSCRIPT OF PROCEEDINGS

11 The above-entitled matter came on for hearing on
12 Thursday, November 14, 2002, at 2:07 p.m., at Honolulu, HI,

13 BEFORE: THE HONORABLE HELEN GILLMOR
United States District Judge

14 REPORTED BY: STEPHEN B. PLATT, RMR, CRR
15 Official U.S. District Court Reporter

16 APPEARANCES: LAWRENCE L. TONG, ESQ.
17 U.S. Attorney's Office
300 Ala Moana Boulevard, Suite 6100
18 Honolulu, Hawaii 96813

Attorney for the Government

19 RICHARD S. KAWANA, ESQ.
20 810 Richards Street
Suite 851
21 Honolulu, Hawaii 96813

22 Attorney for the Defendant

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1 THURSDAY, NOVEMBER 14, 2002

2:07 P.M.

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3 THE CLERK: Criminal Number 02-62, United States of
4 America versus Thomas Mitchell Schnepfer.

5 This case is called for hearing on defendant's
6 motion to compel discovery, and approve the transmission of
7 copies of computer drives and disks.

8 MR. TONG: Good afternoon, Your Honor.

9 Larry Tong for the United States. To my immediate
10 left is Special Agent James Tamura-Wagman of the FBI, and at
11 the end of counsel table is Special Agent Lawrence Futa, also
12 of the FBI.

13 THE COURT: Good afternoon.

14 MR. KAWANA: Good afternoon, Your Honor.

15 Richard Kawana appearing on behalf of Thomas
16 Schnepfer. Mr. Schnepfer is present.

17 THE COURT: Good afternoon.

18 THE DEFENDANT: Good afternoon.

19 THE COURT: You can be seated, Mr. Schnepfer.

20 You've made the motion, Mr. Kawana. Is there
21 anything that you want to add?

22 MR. KAWANA: Your Honor, just a couple of points. I
23 think -- and I apologize for submitting the supplemental
24 exhibit --

25 THE COURT: I had an opportunity to read it.

1 MR. KAWANA: I think the key issue here, Your Honor,
2 is that there really is no reason why the court cannot order
3 the making of the mirror image of the hard disk drives, and
4 the copies of any other disks that were seized from the
5 defendant, or his property. All of the points that the
6 government raises simply ignores the fact that, essentially,
7 what's good for the goose is good for the gander. They have
8 the right to essentially have those same computer disks,
9 files, images, and use their own laboratory; whereas, the
10 defense should also have those same opportunities.

11 I did have a brief opportunity to talk to Mr. Lawson
12 prior to the hearing, and that's the reason why I submitted
13 the declaration, which is really not for this case, but it
14 addresses the same issues. And he clarified some of the
15 points, also, for me, in terms of the problems.

16 What the FBI is basically asking the defense expert
17 to do is to essentially go into their offices, some place that
18 he is totally unfamiliar with, and use one of their machines,
19 which he knows very little about, and essentially set up a
20 forensic computer tool in which he would put his basic
21 computer programs, and all of the utilities that he uses, and
22 all of the checkers and other things that he uses, to -- to be
23 able to perform his work. And he says that just that in
24 itself -- assuming that he could even get the machine to run,
25 because every machine is different, and every machine has a

1 different operating system, every machine has different
2 security-type things involved with it -- assuming that he
3 could even get it to run, it would probably take at least a
4 day, or longer, just simply to do that, and then there's no
5 guarantee that it could actually run.

6 Furthermore, after he is finished using the
7 equipment, the FBI would get it back. They would be able to
8 see exactly what he did. They would be able to use whatever
9 analytic tools that they had. I suppose they could say that
10 we won't really look at it, but why even go to that point, in
11 terms of letting them have an opportunity, when the defense
12 should be able to simply use its own equipment?

13 Secondly, he also pointed out that, in terms of
14 using the computer equipment in his own laboratory, he often
15 uses several different machines because they have different
16 capabilities, and, depending upon the circumstances, he has to
17 sort of find an appropriate software. So, if he has to go to
18 the FBI office, that means that if he finds something that he
19 needs to further track down, does that mean that he has to go
20 find the appropriate software at his office and then come back
21 and reset up the machine, and do it all over again? Again,
22 very impractical and very difficult.

23 Finally, and I think the thing that he felt was most
24 important -- well, not most important but certainly
25 significant was the fact that all of this analysis -- and he

1 told me that in all of the cases that he has, all of this
2 analysis really goes up to the very eve of trial, because
3 things -- and during the trial itself, because things come up
4 at trial. Things come up before trial. Motions are heard,
5 maybe new theories of evidence occur. And so, if he doesn't
6 have access to the equipment that he has on a continuous
7 basis, then, when he gets on the stand and the prosecutor asks
8 him, well, didn't you look into this? Didn't you look into
9 that? Didn't you look into this bit of evidence? And he
10 can't really say that he has simply because he hasn't had
11 access continuously during the course of the pretrial and the
12 trial to be able to respond to any issues that come up during
13 this period of time that is crucial, in terms of preparing the
14 defense.

15 When the prosecution presents its case, does that
16 mean that he has to go back to the FBI laboratory, reset up
17 the equipment to try to recover information that may assist
18 the defense in presenting its own case or any type of rebuttal
19 evidence? Well, that, again, is impractical.

20 So, for all of these reasons, Your Honor, as well as
21 the requirements for Rule 16, the defendant's constitutional
22 rights, in terms of assistance of counsel, due process of law,
23 we submit that the court -- and the exhibits that we have
24 submitted have shown that other trial courts have fashioned
25 orders that will, in fact, protect the interests of both the

1 government and the defense; and, as an officer of the court,
2 as I pointed out in my memorandum, certainly, we would follow
3 whatever orders that the court imposed scrupulously.

4 And, finally, Your Honor, with respect to the cases
5 cited by the prosecution, we would submit, as stated in our
6 memo, that the case -- the first case cited by the -- the
7 validity of the first case cited by the government is under-
8 cut by the Katz case, which was, I think, three years later,
9 in 1999. It would appear that even in the case in which the
10 government argues that the court made a ruling, essentially
11 stating that the matters were contraband, that there was
12 a bow, if you will, or a deference to the fact that the court,
13 in an appropriate case where prejudice can be shown for other
14 grounds, not just a mere statement that we're prejudiced, that
15 there might be a situation in which the court would issue a
16 discovery order.

17 And, of course, Katz presupposes that the court did,
18 in fact, issue a discovery order. In the Horne case, again,
19 the court recognized that, given the right circumstances, that
20 a discovery order should issue, such as the circumstances in
21 this particular case.

22 So we would submit that these cases really, when you
23 get down to it, support our position that there is a right for
24 the defendant, on both Rule 16 and constitutional grounds, to
25 have the discovery that has been requested. And that there is

1 really no real or substantial reason why the government should
2 not provide that information, especially as it appears that
3 other courts have done so without any problems. And I think a
4 couple of the orders actually deal with Mr. Lawson's company
5 also. And, as far as I know, there has been no repercussions
6 or claims that there was any problem, in terms of providing
7 that information to Mr. Lawson.

8 So, with those points, Your Honor, we would submit
9 that the motion should be granted.

10 THE COURT: Thank you, Mr. Kawana.

11 Mr. Tong?

12 MR. TONG: Your Honor, may I?

13 THE COURT: Yes, please.

14 MR. TONG: Thank you (approaching lectern).

15 I think it's interesting the way Mr. Kawana
16 approaches it, because he turns to the law at the very end.
17 And I think I want to start with the law. First, we, of
18 course, abide by all court orders, and we actually, as
19 officers of the court, and prosecutors, and agents, try to
20 abide by the federal criminal code, which basically treats
21 child pornography as contraband. And that's the source of our
22 opposition. It's not just an idle exercise for the sake of
23 raising this interesting issue.

24 It's an interesting read for Mr. Kawana to say that
25 the Kimbrough case, which is a case that deals directly with

1 this point, supports his position. On Page 4 of our
2 memorandum, I cited the passage that I think is directly
3 contrary to what he says. The Kimbrough case says, child
4 pornography is illegal contraband. We decline to find that
5 Rule 16 provides such contraband can be distributed to or
6 copied by the defense.

7 That case, as well as the Horne case, as well as the
8 state court case of Ross, illustrate that the appellate courts
9 have basically treated this as contraband. And if we were
10 standing before Your Honor in a drug case, you would not, in
11 your wildest dreams -- I don't think -- require that we turn
12 over kilograms of cocaine to the defense so that they can look
13 at them in the convenience of their expert's laboratory. Nor
14 do I think Your Honor would contemplate turning over a
15 sawed-off shotgun, or any other kind of thing the possession
16 of which is illegal, per se, under federal criminal law, to
17 the defense so that they can handle it in anything other than
18 a controlled circumstance.

19 I don't know if Your Honor was about to ask a
20 question or --

21 THE COURT: No, go ahead.

22 MR. TONG: I am very happy to hear your thoughts and
23 respond to them. I don't really have a set presentation here,
24 Your Honor, so if there is a concern, I would be delighted to
25 respond to it.

1 THE COURT: Well, I can certainly understand
2 portions of the drugs being given to an expert chosen by the
3 defense to be examined and tested -- which happens all the
4 time. I can understand the sawed-off shotgun being given it a
5 ballistics expert to be tested by the defense. And it seems
6 very similar here --

7 MR. TONG: There is a distinction, Your Honor. With
8 regard to the testing of drugs, all laboratories that are
9 authorized by law to do that testing are regulated by the DEA,
10 which has not only the enforcement capabilities and authority
11 that we are all familiar with but also the regulatory
12 function, which deals with pharmacies and the like. So
13 there's, like, a preliminary licensing step that is required
14 before those drugs are in any way released or tested. And
15 they are done under controlled, regulated circumstances.

16 With regard to the ballistics, I believe the same to
17 be true: It's always done under the control of law
18 enforcement because this is considered, A, contraband, and, B,
19 evidence in a case that needs to be retained in the custody of
20 those who are prosecuting the case and supporting the
21 prosecution. So I think there's a fundamental distinction
22 between just saying, let the defense pick someone, no matter
23 how competent, in an unregulated environment and require the
24 government to do the very thing that we prosecute others for,
25 namely, distributing child pornography to others.

1 THE COURT: But it isn't your position, Mr. Tong,
2 that other courts have never allowed this to happen. I mean,
3 what we are really talking about here is a discretionary
4 issue: Whether or not the court feels that an order can be
5 fashioned with sufficient limitations to allow the defense to
6 examine these materials with the idea that the disk be
7 returned to the government at the end of the examination, etc.

8 This isn't as if this is a case where there was a
9 bright line that has been drawn. There are courts on either
10 side, right?

11 MR. TONG: I have not seen a court on the other
12 side.

13 THE COURT: You don't believe Mr. Kawana's
14 references in his motion deal with the same issue?

15 MR. TONG: Well, wait; there's two issues here. If
16 you are talking about a protective order, I would agree that
17 he's given to the court different protective orders where the
18 court has, apparently, exercised its discretion and required
19 to turnover of material subject to certain conditions.

20 I go back a step further. Those are individual
21 cases litigated under circumstances that may not be the same
22 as here, and the judge has saw fit to exercise that
23 discretion. If you do it in this case, we will abide by it.
24 I'm not saying we won't; but where --

25 THE COURT: The point is, there are other

1 pornography cases where this has happened.

2 MR. TONG: And there are many, many more where the
3 courts declined to exercise it. And what I am saying is that
4 the cases that provide authoritative case law from the
5 appellate courts -- granted, not the Ninth Circuit -- the only
6 two that I see say that Rule 16 does not require this. And
7 that the court, if you so chose, would be well within
8 Your Honor's discretion to say, I will allow you unlimited,
9 unfettered access to the materials; you can do whatever you
10 want with them. You can fashion a defense, but you may not
11 have the contraband -- except under the eyes -- or, under the
12 control of law enforcement.

13 And, in response to his comments about due process,
14 constitutional rights, Rule 16, those are the very bases for
15 the requests that were rejected by Kimbrough and rejected by
16 Horne. And Kimbrough makes a very valid point in response to
17 his argument that what is good for the goose is good for the
18 gander. Kimbrough says there's a difference between law
19 enforcement, which has to examine things with an eye towards
20 carrying a very heavy and very real burden of proof at trial
21 versus the needs of a defense, which is just to poke holes in
22 it.

23 And, so what if we have had it? We have made it
24 available to them since March the 12th, as my letter appended
25 to the memorandum has. Here we are eight months later saying,

1 you know, we need unfettered access... let 'em have unfettered
2 access. I am suggesting we will meet Your Honor and them
3 wherever you want us to meet them. We will make it available
4 in Spokane. We will make it available in Seattle. The offer
5 of the FBI computer was intended to help, not hinder them. If
6 he wants to bring his own computer, let him bring his own
7 computer and then walk out with his computer so that the
8 electronic footprints aren't there for us to trace.

9 We don't have problems with working with their
10 expert in any environment he chooses, so long as we're not
11 required to turn over the contraband.

12 If you look at the expert's resume, or CV, it's very
13 apparent that he has a law enforcement background. I'm
14 certain he's not intimidated by dealing with law enforcement.
15 I'm certain that he knows how to work with law enforcement.
16 And if he's any kind of expert, as he says, I am sure he knows
17 how to use computers and forensic tools. I am just trying to
18 find a reasonable compromise.

19 I repeat, if Your Honor is not inclined to go with
20 us, we'll live with your order, but this is an important issue
21 to us, and I just hope that I can emphasize that to you.

22 I know Your Honor has seen me for -- I don't know --
23 six, seven years --

24 THE COURT: Eight.

25 MR. TONG: -- in this type of case -- eight years, I

1 guess. I was just thinking I have only been doing these cases
2 maybe six or seven years --

3 THE COURT: Oh, okay.

4 MR. TONG: -- but I try very hard as best I can to
5 emphasize how strongly the government really feels about child
6 pornography. And I think the harm is well-documented, not
7 only in the social literature and the psychological studies,
8 but even in the words of the Ninth Circuit and the Supreme
9 Court, which talk about how each picture is a permanent record
10 of the molestation of a child who has documented socially to
11 suffer all kinds of psychological, physiological and other
12 harm as a result of that abuse. And each time that picture is
13 replicated and given to someone else, it magnifies that harm.
14 And all we are trying to avoid is being put in a position of
15 basically creating the very harm that we are trying to fight.

16 It's a very frustrating position to be in, to look
17 at these pictures, to be repulsed by them, and then basically
18 to say, we are now being required to make extra copies of it.
19 Even though we are going to get 'em back, just to know that we
20 are putting into circulation the very thing these gentlemen
21 and I am trying to get rid of. And that's very, very bother-
22 some. I can't suggest to the court how strongly we feel about
23 that. I can't overemphasize how much we urge you to exercise
24 your discretion -- which is authorized -- to basically allow
25 us to make the discovery in a way that does not require the

1 production of child pornography.

2 THE COURT: But, Mr. Tong, you have to make another
3 copy to send it over to Seattle anyway.

4 MR. TONG: But then it will stay in the hands of law
5 enforcement, Your Honor. It will stay in the hands of law
6 enforcement. I mean, law enforcement has the task of
7 obtaining this evidence so that we can prove our cases in
8 court. Mr. Lawson may be the finest expert in the world; we
9 don't know him from Adam. I'm not saying that he is going to
10 do anything with it, but why -- from my standpoint, why would
11 we be in a position of even wanting to run the risk? That's
12 our viewpoint. We are willing to meet him halfway, meet him
13 3/4 of the way, do anything Your Honor wants us to do.

14 I notice, also, that the affidavit's very vague. I
15 acknowledge that they don't have to give us their theory of
16 defense, but the only hard -- I don't even want to call it
17 evidence. The only hard information that Mr. Kawana offers to
18 Your Honor about what the expert needs to do seems to focus on
19 the file creation dates, the dates on which files may have
20 been received by Mr. Schnepfer; the dates on which those files
21 would have been sent to others.

22 Now, if his defense -- I am sort of surmising -- is
23 that somebody planted this, or that he went out and got these
24 images only after he started talking to the undercover agent,
25 if his defense focuses on the dates on which images were

1 brought in or sent out or created, he's going to have all that
2 when he looks at these images. He's going to have those
3 electronic footprints. The only thing he's not going to have
4 are the pictures, themselves. He is not saying he has to go
5 pixel by pixel to see whether they are digitally altered.
6 It's my understanding he is not saying that because he is not
7 charged with child pornography in this case.

8 The images, instead, were incidental to the
9 enticement. So I don't see why he can't do everything that he
10 needs to do short of -- and access to everything short of
11 physically having possession of the images. He can have the
12 file title and do all of the searches he needs to do
13 electronically to see what happened to that file; we can
14 maintain copies of the images; Mr. Kawana can see them at any
15 time. We've made that offer for eight months now. They can
16 see them any time by contacting one of these agents or myself.
17 And it seems to balance the needs -- the competing needs that
18 I ask Your Honor to weigh very carefully. Between letting
19 them have the defense -- which we would never seek to deny
20 him -- but not putting us in a position that we think it is
21 not really emotional, but it's contrary to our entire mission.
22 And we ask that the court very carefully consider that. We
23 will be back time and time again on cases like this again, I
24 think, and -- is very important; I just can't overemphasize
25 that. And I just implore the court to see whether we can work

1 something short of requiring us to turn over contraband --
2 just as the two reported cases say you have the authority to
3 do.

4 THE COURT: Is it your position that there's no
5 reported case that allows this?

6 MR. TONG: I don't believe there is. Can Mr. Kawana
7 direct me to one? He filed a reply memorandum, but I haven't
8 read it yet because I think it was filed an hour ago, and I
9 came straight to court from another location. I don't believe
10 there is a reported case where -- oh, excuse me, the one
11 reported case I know actually is the flip side: State vs.
12 Ross. There the trial court required that the pornography be
13 produced, and the appellate court did a mandamus saying, no,
14 and vacated the order. That's cited on Page 4 of our
15 memorandum.

16 The only two federal cases I have seen -- you're
17 making me worried when you ask me that question, I'll admit,
18 because I just got back from being gone for a week. I did
19 this in one day. But the only two appellate court cases I saw
20 were Kimbrough and Horne, out of the Fifth and Eighth
21 circuits. I have shepardized or Westlaw checked, or whatever
22 our new software is, and everywhere that those cases were
23 cited, I looked. I didn't see district court cases dealing
24 with this issue. I found that Ross case in Florida, where,
25 again, it's the flip side: The court exercised its discretion

1 the other way and got reversed. But, in Kimbrough and Horne,
2 it couldn't be more plain: Rule 16 doesn't require it. They
3 are entitled to discovery, to reviewing it, to reasonable
4 access to it, but not the contraband, itself. That is my
5 position.

6 If I'm wrong, I'm sure the court can correct me, and
7 I will stand corrected, but I believe that to be the case.

8 THE COURT: Okay, let's hear from Mr. Kawana about
9 that issue.

10 MR. KAWANA: Thank you, Your Honor.

11 And, with respect to the issue of child pornography,
12 Your Honor --

13 THE COURT: No, the issue I want to hear about,
14 Mr. Kawana -- you have already had your bite at the apple --

15 MR. KAWANA: Okay.

16 THE COURT: -- what I want to hear about is, are
17 there any reported cases? You have given me copies of
18 orders --

19 MR. KAWANA: That's correct, Your Honor. And if
20 Your Honor wants me to try to follow up on that, I got them,
21 and I would submit in good faith, that, as far as I know,
22 those are legitimate orders that were submitted as exhibits in
23 other cases that were -- for example, I think that these
24 orders were submitted in the Tashbook (phonetic) case,
25 according to the person I got that --

1 THE COURT: Is it a reported case?

2 MR. KAWANA: I'm not sure --

3 THE COURT: Because what we are dealing here with
4 here, Mr. Kawana, is orders that your expert has had issued in
5 other cases that you have access to, but we have no reported
6 case that goes in your favor?

7 MR. KAWANA: Well, with respect to the Tashbook
8 case, I believe that the expert was involved in that
9 particular case. As to some of those other cases, I don't
10 know, because, as Your Honor can see, they span a number of
11 jurisdictions, including the district of Colorado, a couple
12 Montana cases --

13 THE COURT: But they are just orders --

14 MR. KAWANA: That's correct, so, in terms --

15 THE COURT: You have no appellate cases?

16 MR. KAWANA: In terms of appellate cases,
17 Your Honor, I would submit that Mr. Tong -- Mr. Tong was
18 making a big deal about Kimbrough, and yet the same circuit in
19 the Katz case essentially said that under Rule 16, you can
20 turn over these items. And not only can you turn over child
21 pornography, you can also hold the government liable to
22 sanctions because it hasn't fulfilled the requirements of
23 Rule 16. So that would be a reported case, we would submit,
24 in terms of the very issue here, where an appellate court had
25 said that, hey, this is okay, courts can exercise their

1 discretion to order these documents be turned over.

2 And I might also point out that, true, the exhibits
3 that we have submitted have been of trial court cases, and I
4 would submit that if the government had wanted to, they could
5 have appealed any of those. And, why did they not? Or why
6 are there not any appellate court cases? Because it is
7 something that these courts -- and, I would submit the
8 appellate courts that would review these particular cases --
9 would find very persuasive on behalf of the defendant, because
10 it goes to the issue of the defendant's rights, and whether or
11 not there is really any harm that is imposed upon the
12 government.

13 Now, Mr. Tong made a big deal about regulated drugs
14 and regulated shotguns. Well, we do have regulations in this
15 one: It's the court's protective order. The court, as part
16 of its judicial functions, where you have evidence that's
17 going to be published not only to the government and its
18 experts but also to the court, they present it in evidence, to
19 the jury, to other members of the -- or other people who
20 participate in the trial, to the experts, all of these people
21 will have access to this child pornography, which the
22 government says is their big problem.

23 And yet, even the child pornography, itself, I think
24 the government recognizes, may just be simply an incidental
25 part of the entire computer disk. And yet they are using that

1 incidental part to try to deny the defendant his right to have
2 an expert of his choice examine the entire disk and to assist
3 the defense in preparing an adequate defense.

4 THE COURT: Would you be satisfied with the disk
5 minus the pornography --

6 MR. KAWANA: Well, Your Honor --

7 THE COURT: -- and checking the pornography at the
8 FBI office?

9 MR. KAWANA: Well, Your Honor, I think that would be
10 a problem, Your Honor, in this sense:

11 First of all, there is an issue as to what
12 constitutes child pornography. For example --

13 THE COURT: Well, and pictures --

14 MR. KAWANA: And that's the other point that I'm
15 trying to make: Pictures can be child pornography, but I
16 think the term "child pornography" is really a term of art.
17 And many things that may appear to be child pornography may
18 not, in fact, be child pornography --

19 THE COURT: Well, let's go from another point of
20 view: What if everything was turned over except picture
21 files?

22 MR. KAWANA: Well, Your Honor, I think that -- and
23 the government is not going to use any of those picture files?
24 I don't know how they can do it.

25 THE COURT: Well, that's not the issue. The issue

1 is, your expert could go to the FBI office and look at the
2 picture files but would have the ability to look at -- I am
3 taking both of you at your word. The government says they
4 only want to protect the pornography. You say you want to be
5 able to go through the whole thing and have access to it from
6 the point of view of anything that's on there because there
7 might be some mitigation, etc.

8 MR. KAWANA: That's correct, Your Honor.

9 THE COURT: So, if that's the case, can't the
10 government give you --

11 MR. KAWANA: And, in terms of doing a computer
12 forensic analysis, what Your Honor is saying is that the
13 government is somehow going to tamper with the files --

14 THE COURT: Just not -- a picture file is a picture
15 file.

16 MR. KAWANA: Your Honor, all we are asking for --

17 THE COURT: No, Mr. Kawana, answer my question.

18 MR. KAWANA: Well, I don't think that would be
19 appropriate. I'm sure that -- number one, if Your Honor is
20 going to turn over most of the disk, then, given the very
21 structured protective order that Your Honor could make, I
22 don't see that there is any reason -- if the government can
23 have access to those photographs, why can't the defense? I
24 mean, we are officers of the court.

25 THE COURT: I understand your argument, and I think

1 you have a strong argument, Mr. Kawana --

2 MR. KAWANA: That's correct, Your Honor.

3 THE COURT: -- but I am trying to understand the
4 government's argument, as well, and -- a file that has a
5 picture in it, presumably, is a fairly easily distinguished
6 file.

7 MR. KAWANA: Well, Your Honor, first of all, does
8 that mean that the government is going down all of the list of
9 the pictures and other images on the computer, the hard drive,
10 and all of its other --

11 THE COURT: Well, I don't know how many there are.

12 MR. KAWANA: Well, I don't know, either. That's the
13 point. They are saying that there hardly is any, but we don't
14 want to turn it over; it's an incidental part of our case.
15 And yet they are using that incidental part of their case to
16 try to deprive us of having full access.

17 THE COURT: That's what I am trying to work with
18 here, Mr. Kawana. I am trying to figure out whether this is a
19 solution that would give you access to all of the things the
20 government says they have no objection to but give controlled
21 access to the things they do have an objection to.

22 So let's hear from the government and see whether
23 their computer expert believes that's possible.

24 MR. KAWANA: Well, Your Honor, may I suggest -- if
25 that becomes an issue, then I would like to have our expert

1 testify either by phone or in person on that particular issue,
2 because I think that, although I thought I understood -- or, I
3 think I understand some of the rudiments of using forensic
4 computer analysis, I think that it would probably assist the
5 court if the expert were to testify about that particular
6 issue.

7 THE COURT: Well, let me put it this way,
8 Mr. Kawana. I mean, I don't know what the government is going
9 to say, but a disk that has everything but the picture files
10 is something that you would be able to possess, because that
11 would not contain, presumably, the pornography. And then your
12 expert could go and see the actual computer -- mirror image
13 that has everything, and he would see the relation of it. So
14 it seems to me, then, he's got 95 percent of what he wants.

15 MR. KAWANA: Well --

16 THE COURT: Let's hear from Mr. Tong, in terms of
17 the government's position, whether that's even possible.

18 MR. TONG: I wish I could be the bearer of better
19 news. I just talked to Agent Futa, who is the Honolulu
20 resident CART examiner -- C-A-R-T -- which I think is computer
21 assisted recovery team --

22 MR. FUTA: Computer analysis -- (inaudible) --

23 MR. TONG: 15 years with the government, and I can't
24 get the acronym, still. But he does the forensic
25 examinations. And Agent Futa advises me that while he could

1 attempt to do that, there's no guarantee they would find every
2 graphics file, because any computer that's hooked up to an
3 internet is going to bring down a lot of files -- I think
4 every time you access something. There are many, many, many
5 files, I think, on the defendant's computer, a small portion
6 of which are child pornography, and which are the ones that we
7 are concerned about. I think there was some 50 or 60 that
8 were identified by Agent Tamura-Wagman when he reviewed it.

9 So I am afraid that if we were to try to do what the
10 court is suggesting, we might not succeed, and that might
11 create problems for us.

12 THE COURT: Well, you have 50 or 60 images you
13 consider are child pornography. What if you hand over a
14 mirror image without those 50 or 60 images that you have
15 identified, and then the expert can go and look at those in
16 your FBI secure location? What's wrong with that?

17 MR. TONG: As a lawyer, there's nothing. It's just
18 a technical question, and I'm just not sure how feasible it
19 is --

20 THE COURT: Well, that's the question.

21 MR. TONG: Yeah.

22 Agent Futa mentioned that one thing is that if you
23 were to remove those particularly -- well, those images that
24 we find to be actionable from a legal standpoint, you also
25 would eliminate some of the file creation data, so it's

1 actually more effective, I think, for the examiner to see the
2 hard drive with the images present, to record and capture the
3 file creation data but not to turn it over to them; is that
4 correct?

5 May Agent Futa address it?

6 THE COURT: Yes.

7 MR. FUTTA: Another issue, Your Honor, is, we're not
8 really set up for the selective elimination of evidence, to
9 guarantee that that evidence has been totally deleted from the
10 hard drive.

11 THE COURT: Well, I am not suggesting that you
12 delete it from the hard drive. I am talking about a mirror
13 image where you make the mirror image and then you delete the
14 things that you are objecting to and then let the expert go
15 and see these things you are objecting to in the controlled
16 atmosphere, and he gets to see the rest -- in his own office.

17 MR. FUTTA: We are not really set up, Your Honor,
18 though, to delete specific files -- everything associated with
19 that file from evidence. That's just something that we are
20 not set up to do. I cannot guarantee that I am not affecting
21 something else.

22 THE COURT: Well, we are talking about a mirror
23 image.

24 MR. FUTTA: Yes.

25 THE COURT: We are not talking about you doing it on

1 the hard drive. We are talking about you make an image, and
2 then you cleanse it.

3 MR. KAWANA: Your Honor, if I may be heard just
4 briefly?

5 THE COURT: Yes.

6 MR. KAWANA: On the mirror image issue, Your Honor,
7 first of all, Mr. Tong, as late as our pretrial conference, he
8 was talking about giving me a copy. And so when he says that
9 they had this position eight months ago, that's not really
10 correct. It was only after he talked to his agent that he
11 found out that this was an issue. Prior to that he had no
12 objection to our getting a copy.

13 Secondly, with respect to the mirror image, what is
14 required is this, as I understand it:

15 What happens is that Mr. Lawson, the expert, would
16 find out what type of hard disk drive the government has all
17 of its files and images, etc., etc., and he would get a drive
18 that's comparable, or exactly alike to that drive, send it to
19 the government; the government would then copy its hard drive
20 onto his hard drive so that it would be an exact mirror image
21 on a hard drive, so that all of the same characteristics would
22 be available. He would then get the hard drive back, and then
23 he would be able to do his computer forensic analysis on the
24 issues that we raised.

25 So that's what we're talking about, as far as a

1 mirror image. It would be a mirror in the sense that it would
2 be an exact -- same or similar hard drive, in which all of the
3 information on the subject hard drive would be transferred,
4 like a mirror, onto the hard drive that the expert would use.
5 And Mr. Lawson also advised me that that's usually what the
6 government does, anyway: They make a mirror image anyway,
7 because they have to conduct their own forensic examination,
8 so they don't want to affect the actual original drive. I
9 could be wrong on that, but that's my understanding about how
10 it goes. Because, as the agent has pointed out, if you
11 start -- during analysis on it, you may alter, somehow, some
12 of the information on the drive if you try to delete a file or
13 something.

14 THE COURT: So, basically, nobody likes my idea...

15 MR. KAWANA: Well, Your Honor, I think Your Honor's
16 trying to reach a solution, but I think that the solution is
17 to allow us, as other courts have, to get the mirror image. I
18 mean, the government may not like it, but, as Mr. Tong has
19 stated, you know, that they will live by it, and they will
20 honor the order of the court, just as the defense and the
21 defendant's expert would. So I think that it would be in the
22 interests of justice, certainly, to allow us, in order to
23 prepare an adequate defense, to go ahead and do the image,
24 mirror image, and let our defense expert take a look at it and
25 analyze it.

1 And, again, there would be regulation, because the
2 court would impose conditions, requirements upon him --

3 THE COURT: Okay, thank you, Mr. Kawana.

4 Anything further, Mr. Tong?

5 MR. TONG: Very briefly, Your Honor, in case your
6 mind isn't made up.

7 First up, I don't want to sound like a school boy in
8 a yard arguing with my friend over here, but if you look --

9 THE COURT: Well, we have had 45 minutes of that, I
10 think.

11 MR. TONG: Well, no, I think it's just recently
12 degenerated, if Your Honor would give me that, but in my March
13 12 letter, I never said I was going to give him child
14 pornography, I said we also are not providing copies of the
15 pornography. We have never done it. We have felt this
16 strongly about it in every single case we brought. We will
17 feel this strongly about it in every case from now on, no
18 matter what the outcome today. It's a very important thing to
19 us. We don't want to be in a position of being distributors
20 of the stuff we want to eliminate.

21 And the important point I want to make is, since the
22 case law seems to be of some concern to Your Honor --

23 THE COURT: It's supposed to be; I am a district
24 judge.

25 MR. TONG: I got that impression. And the only case

1 that the defense cites is U.S. v Katz, and he seems to suggest
2 that that's a more recent Fifth Circuit case that calls into
3 question Kimbrough. Now, I didn't address that due to time
4 constraints, but I believe if the court were to look at the
5 Katz case, the court did not there say that the government was
6 required to hand over to the defense child pornography which
7 is illegal contraband.

8 The situation there had to do with the applicability
9 of discovery sanctions where the government showed -- in other
10 words, just displayed to the defense -- poor quality black and
11 white photographs of the child pornography, and then, later,
12 at trial, tried to use much higher quality, color resolution
13 of those same photographs. And the defense raised cane on
14 that and said, you didn't show those items to us in discovery
15 in the same form in which you are now seeking to use them, so
16 our rights have been jeopardized.

17 And the Circuit Court apparently agreed, saying that
18 the failure to disclose the photographs in the identical form
19 it intended to use them at trial either was sandbagging the
20 defense or unprofessional conduct.

21 Okay, that's different from our case. We are
22 saying, we will show it to them as it exists on the computer.
23 We will show it to them in any form they want; we just don't
24 want to give it to them. And that's what we implore you not
25 to require us to do. And I don't for a minute suggest that we

1 will be happy if you order us to, but, as I said, we will live
2 with the order, but we strongly, strongly encourage you to
3 find an alternate way of dealing with this issue that won't be
4 so contrary to everything that we do.

5 MR. KAWANA: Your Honor, may I have just a brief
6 rebuttal?

7 THE COURT: Sure.

8 MR. KAWANA: Okay. Thank you, Your Honor.

9 I realize I have the burden of proof since I brought
10 the motion...

11 If you take a look at the trial court orders that I
12 have had, you'll notice that there's a stipulation pursuant to
13 court order, a disclosure of pornography images. Well, it
14 seems to me that if there is a stipulation, then the
15 government certainly, at least with respect to disclosing
16 child pornography, apparently isn't uniform throughout the
17 United States.

18 Now, secondly, with respect to the Katz case, the
19 court actually sanctioned the fact that child pornography
20 videotapes -- that images were, in fact, provided as a part of
21 Rule 16 discovery. So, certainly, that's the point that I was
22 trying to raise, that there was a -- there is an appellate
23 court decision that says that it's okay, it's within the
24 discretion of the court to allow it. And, certainly, if you
25 don't, if you don't fulfill all of the requirements of Rule

1 16, then you can be sanctioned for it.

2 So I think it's pretty clear that Katz basically
3 undercuts Kimbrough, and that -- I think the scarcity of any
4 other appellate court cases probably is because most courts,
5 as in the exhibits that we provided, feel that this is
6 something that the court can order, and that the government
7 hasn't --

8 THE COURT: Thank you, Mr. Kawana.

9 Okay, I am going to order that the mirror image be
10 provided to the defense, and I am concerned about the controls
11 that will be imposed in this situation, so I am going to ask
12 defense counsel and the counsel for the government to work on
13 an order that meets with the concerns that both have. My
14 intention is that the order be very clear with respect to the
15 limited use, the fact that the defendant is not to have any
16 access to this, and that the -- in the sense of being given
17 any copies, etc. I mean, obviously, he will have to be
18 consulted, but -- and that it all be returned to the
19 government at the conclusion of the case.

20 And I believe that the issues that have been raised
21 by Mr. Kawana, with respect to the fact that there is a need
22 for ongoing review of this material, the fact that the expert
23 having the diagnostic tools and the time to go over this in
24 his own laboratory is important to the defense, and the fact
25 that even up through preparation for trial, and even during

1 trial, there may be points at which it's important for the
2 defense to have access to this information, and I think that
3 it is too much of a burden to place on the defense with
4 respect to the government having the defendant's computer and
5 the defense not being able to go back in the preparation of
6 their case and look at it from a number of different points of
7 view.

8 So, I don't know how long you folks think you will
9 need in order to fashion such an order, but I'm sure if you
10 put your heads together, it's something that -- the concerns
11 that the government has should be addressed, and it should be
12 a very limited order.

13 Yes, Mr. Kawana?

14 MR. KAWANA: Yes, we had submitted a proposed order
15 as part of our motion. Perhaps that can be the basis for
16 starting to --

17 THE COURT: Yeah, and if you folks -- do you think
18 by next Friday you can have something, or sooner? A week from
19 tomorrow?

20 MR. TONG: I think so.

21 MR. KAWANA: I think so, Your Honor.

22 THE COURT: Okay. And I will look for an order that
23 is limited in scope with respect to the issues that the
24 government has raised.

25 If nothing further, we stand in recess -- oh, wait,

1 the trial date.

2 Okay, it's my understanding that the parties have
3 agreed to a trial date of March 11th, at 9:00 in the morning;
4 is that correct?

5 MR. KAWANA: That's fine with the defense,
6 Your Honor.

7 THE COURT: And, Mr. Tong?

8 MR. TONG: Your Honor, that's fine by the
9 government, so long as the time from now until then is
10 excluded, and if the court would please inquire of the
11 defendant directly whether he agrees to the continuance, I
12 would appreciate that.

13 THE COURT: I have done so previously, and it's my
14 understanding that you still agree with this, Mr. Schnepfer;
15 is that right?

16 THE DEFENDANT: Yes, it is, Your Honor.

17 THE COURT: Okay.

18 The court finds that the ends of justice served by
19 such an action outweigh the best interests of the public and
20 the defendant in a speedy trial. The court orders that the
21 period from November 19th, 2002, up to and including March
22 11th, 2003, is excluded from the computation under the Speedy
23 Trial Act, as a failure to grant the continuance would
24 unreasonably deny counsel for the defense reasonable time
25 necessary for the effective preparation, taking into account

1 the exercise of due diligence.

2 And the final pretrial before the magistrate will be
3 February 10, at 10:00 in the morning. And the final pretrial
4 before this court will be February 28th, at 8:30 in the
5 morning. And motions -- any further motions are due by
6 January 28th, and a response by February 11st. And we already
7 have two motions in limine, and I will rule on those motions
8 in limine, either at the pretrial or prior to the pretrial
9 before this court.

10 Anything else that we need to take care of?

11 MR. TONG: Just for clarification, Your Honor, I
12 believe the court previously set jury instruction deadlines
13 that are probably like today or so. Are we free to assume
14 those dates are vacated --

15 THE COURT: Those dates are vacated, and you should
16 look to the standing orders with respect to jury instructions.
17 I believe I did mention earlier that I do have an expectation
18 of joint jury instructions. And to the extent you do not
19 agree, I have an expectation of a jury instruction being
20 proffered and the reasons, with case law, etc., as to why that
21 would be the appropriate one.

22 Anything further?

23 MR. TONG: No, Your Honor.

24 THE COURT: Okay, thank you.

25 We stand in recess.

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MR. KAWANA: Thank you, Your Honor.

THE BAILIFF: All rise.

Court stands in recess.

(The hearing in the above-entitled
cause was concluded at 2:50 p.m.)

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-ooOoo-

I, Stephen B. Platt, Official Court Reporter,
United States District Court, District of Hawaii, do hereby
certify that the foregoing is a true and correct transcript of
proceedings before the Honorable Helen Gillmor, United States
District Judge.



MONDAY, APRIL 12, 2004

STEPHEN B. PLATT, CSR NO. 248