

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS**

UNITED STATES OF AMERICA

Plaintiff,

v.

JUSTIN MARK SHAFER,

Defendant.

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**3:17-CR-00239-N-1
(JGJ)**

DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

1. No good deed goes unpunished. In addition to his work as a dental computer technician, Justin Mark Shafer is also a computer security researcher focused on dental software and patient privacy. His work helps protect the privacy of hundreds of thousands of individuals in the U.S. and elsewhere, whose patient data would otherwise be vulnerable to public exposure. As a reward for his activities in this sphere, the government chose to indict Mr. Shafer in an outrageous prosecution that exemplifies the foundations of our Framers' concern to guard against unbridled federal law enforcement, as expressed in the Bill of Rights and the Constitution's lack of any explicit grant of federal criminal jurisdiction.

2. In short, this case is precisely why the First Amendment was written: to protect the People's right to criticize their government's actions, to demand answers from their government, and to seek redress for their government's wrongs. The government is attempting to convict Mr. Shafer for engaging in these most venerable and necessary rights.

3. In the events leading up to this his indictment, Mr. Shafer was trying to help the government and the public by reporting patient privacy violations and information on a notorious criminal hacker. Rather than reward Mr. Shafer for his efforts to make the internet safer, the FBI chose to engage in armed raids of his family home based on search warrants for crimes he has never been charged with. His property was seized and to date has not been returned. No one from the FBI or the U.S. Attorney's Office provided him with any contact information so he could follow up on his case. The lead FBI Agent, Nathan Hopp, only spoke his name to Mr. Shafer, which Mr. Shafer misheard as "Nathan Hawk." It was Mr. Shafer's speech criticizing the government's repeated armed raids of his family home and the seizure of his property for crimes

he has never been charged for, and his expressed frustration at the lack of any government response to his repeated communications seeking information on this case, that led to his indictment.

4. The only contact information Mr. Shafer had after the two armed FBI raids of his home was for the Magistrate Judge who signed off on the warrants. His repeated communications inquiring about his case and expressing his frustration over it to both the Dallas FBI via phone and Twitter, and to the Magistrate Judge's public docketing email address, were never answered. Instead, without any prior warning from anyone, Mr. Shafer was arrested for cyberstalking and inciting violence against an FBI Agent.

5. One looks in vain to the Indictment for any factual allegations to substantiate its three felony counts totaling a statutory maximum of fifteen years in jail. Not a single particular communication or act by Mr. Shafer or anyone acting at his behest is identified. Instead, there is only a threadbare recitation of the relevant statutory language. To date, the government has failed to identify a single explicit threat by Mr. Shafer directed to anyone in the government. Nor can the government identify a single instance of Mr. Shafer soliciting anyone to commit violence against anyone in the government. Nor does the government identify a single instance of Mr. Shafer going anywhere near any alleged victim in this case. Nor can the government identify a single instance of any third party threatening any of the alleged victims in this case, none of whom ever told Mr. Shafer that his alleged communications were bothering them in any way.

6. Upon cross examination at the successful appeal of Mr. Shafer's pre-trial detention for a blog post criticizing his prosecution, the FBI Agent who signed the affidavit to the originating Criminal Complaint in this case was unable to identify any such instances. Nor is there anything in the government's filings that comes close to meeting the mandates of the Bill of Rights.

7. Yet the government nonetheless indicted Mr. Shafer on three felony counts with a statutory maximum of 15 years in jail based on non-threatening, public, political, expressive speech criticizing and inquiring about the government's actions against him, all made from behind a keyboard, mostly during a seven hour period on March 21st, 2017.

8. This is precisely the type of abusive federal prosecution the Framers feared when they chose not to include an explicit grant of federal criminal jurisdiction in the Constitution, and when they drafted the Bill of Rights. This concern is precisely why the First Amendment forbids Congress from passing any law abridging the freedom of speech or the right of the People to petition the government for redress of their grievances. The fact that most speech occurs through computers these days does not change the wisdom of the Framers on this point.

9. Thus, Justin Mark Shafer moves this Court under Federal Rule of Criminal Procedure 12(b) to dismiss his Indictment because it:

- (1) violates the First Amendment facially and as applied;
- (2) is void for vagueness as applied under the Fifth Amendment;
- (3) is duplicitous as to Counts One and Three;
- (4) is insufficient as a matter of law; and
- (5) lacks specificity sufficient to act as a bar to double jeopardy.

BACKGROUND

1. Defendant Justin Mark Shafer is an established professional in the field of dental computer security. His dedication to protecting the public from internet privacy violations is attested by the fact that he has several confirmed computer security vulnerability disclosures to

his name.¹

2. Since February 2016, armed FBI agents have intruded upon Mr. Shafer's family home three times. Twice to raid his home under search warrants for non-violent computer crimes he has never been charged with. And once to arrest him for his criticism of the government's actions towards him and his repeated, unanswered attempts to get answers from the FBI about the status of his case and his seized property.

3. Prior to the first FBI raid of Mr. Shafer's home, Mr. Shafer was investigating the public exposure of private patient data on the open internet by a publicly traded dental technology company named Patterson Dental.² Around February 6, 2016, Mr. Shafer discovered that Patterson Dental had carelessly exposed patient medical data on a public, unsecured FTP server.³ This unsecured, sensitive and private medical information was available for anyone with internet access to download and exploit. Entities such as Patterson Dental can face substantial criminal and civil penalties for willful and negligent exposure of private patient data.⁴ This creates an incentive for companies to lay the blame for patient privacy violations elsewhere.

¹ A confirmed vulnerability disclosure is an industry-recognized part of the software security lifecycle. It is a published disclosure of a security problem in a software, website, or application, made publicly or privately, often through an industry-recognized disclosure program. Mr. Shafer has several confirmed disclosures with CERT, a well-established disclosure program. *See generally*, CERT, Vulnerability Disclosure Policy, at <http://www.cert.org/vulnerability-analysis/vul-disclosure.cfm>.

² Patterson Dental is a subsidiary of Patterson Companies Inc. (referred to as "PCI" in the Complaint). *See* "Patterson Dental" available at <http://www.pattersoncompanies.com/dental> (last visited on July 10, 2017). It is publicly traded on NASDAQ under the symbol PDCO.

³ "FTP" stands for "File Transfer Protocol." It is a method for sending and receiving files over an internet connection, and has been used since the early 1970s. It can be set up in various ways, and can be set up with or without protections to secure the files themselves, the transfer of those files, and the listing of those files on the server computer. *See* WhoIsHostingThis.com, "A Short History of FTP with Resources," at <http://www.whoishostingthis.com/resources/ftp/> (last accessed July 3, 2017).

⁴ *See, e.g.*, HIPAA Journal "What are the Penalties for HIPAA Violations" (June 24, 2015), available at <http://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/> (last visited July 10, 2017).

4. Mr. Shafer, acting responsibly and through a third party he worked with to expose privacy violations, reported the results of his research to Patterson Dental.⁵

5. Shortly after learning of the fact that they had publicly exposed private medical data on the open internet, Patterson Dental shut down their FTP server.

6. On February 19, 2016, after Mr. Shafer's responsible disclosure of Patterson Dental's negligent and potentially criminal treatment of its private patient data, the FBI opened a criminal investigation for violations of the Computer Fraud and Abuse Act ("CFAA") against Mr. Shafer for his actions in bringing Patterson Dental's privacy violations to light. To date, the government has not filed any CFAA charges, or other charges, related to that investigation.⁶

7. On May 25th, 2016, at about 6:00 am, FBI Agents first raided Mr. Shafer's home. The FBI executed a search warrant but had no arrest warrant. During the search, several of the family's computers, tablet devices, and cellular phones were seized.

8. On the same day, Mr. Shafer used his Twitter account—an account readily identifiable as his—to publicly complain about the FBI raids. He also allegedly posted public comments about "Special Agent Nathan Hawk." (See Compl. at ¶¶ 9, 16.) This was a reference to FBI Agent Nathan Hopp, whom Mr. Shafer had heard identify himself as "Special Agent Hawk."

9. Although Nathan Hopp verbally identified himself to Mr. Shafer, the government provided no written contact information, in the form of business cards or otherwise, for whom Mr. Shafer could follow up with about the status of his case or seized property. The [only?] name

⁵ See "Moving onto Eaglesoft aka Patterson Dental," Justin Shafer Dental Blog, Feb. 17, 2016, at <http://justinshafer.blogspot.com/2016/02/moving-onto-eaglesoft-aka-patterson.html>.

⁶ (See Criminal Complaint at ¶ 8 (Dkt. 1) ("Complaint").)

Mr. Shafer of anyone from the government related to the raid was Magistrate Judge Cureton, who signed the search warrant for the May 25, 2016 raid.

10. Several media outlets published news articles about the first raid, criticizing it and the FBI. This case has continued to attract media attention in both the local and national media.

11. On or about June, 2016, Mr. Shafer was contacted by a hacker known as “TheDarkOverlord.”⁷ Mr. Shafer, in an effort to help law enforcement bring the notorious hacker to justice, contacted the Dallas FBI regarding the fact that “TheDarkOverlord” had contacted him. Mr. Shafer forwarded, in the same email, the stolen files that “TheDarkOverlord” had forwarded him. Mr. Shafer’s email went unanswered, and the government makes mention nowhere of the fact that Mr. Shafer sent them this information. Instead, it cites the fact that the files stolen by “TheDarkOverlord” and previously sent by Mr. Shafer to the FBI were found on Mr. Shafer’s computer after the second FBI raid of his house.

12. The FBI implies in the Complaint that Mr. Shafer was involved in a conspiracy with TheDarkOverlord, something Mr. Shafer vehemently denies and has never been charged with. TheDarkOverlord allegedly engaged in the sale of private medical records over the internet as well as extortion.⁸

13. In December of 2016, Mr. Shafer sent a series of emails to Magistrate Judge Cureton’s chambers via a public docketing email address, discussing, criticizing, and inquiring about his case. Magistrate Judge Cureton’s chambers informed the U.S. Attorney’s Office. No one from

⁷ Opinions vary as to whether TheDarkOverlord is an individual, a specific discrete group, or a loose collective of hackers. *See generally* Motherboard, topics search for “The Dark Overlord.” at https://motherboard.vice.com/en_us/topic/the-dark-overlord

⁸ (Compl. at ¶¶ 10, 11.)

either office, or from the FBI ever responded to Mr. Shafer's emails to the Court's public email address inquiring about his case.⁹

14. On January 9, 2017, Mr. Shafer called the Dallas FBI and left a message for Agent "Nathan Hawk." He publicly tweeted from his public Twitter account that he had done so, stating "Called the Dallas FBI today and left a message for Nathan Hawk."¹⁰ No one from the FBI ever returned his call.

15. On about January 29, 2017, FBI agents from multiple offices raided the Shafers' family for a second time. During this raid, Mrs. Shafer asked about the return of several devices that were not Mr. Shafer's, that the family needed to conduct personal business, prepare taxes using data stored on those devices, and which contained family photos and videos.

16. The government based its search warrant for the January 29, 2017 second armed raid on Mr. Shafer's family home on unspecified "IP Addresses, emails, social media accounts" links between Mr. Shafer and TheDarkOverlord.

17. On February 6, 2017, Mr. Shafer posted a series of tweets from his public Twitter account readily identifiable to him, criticizing the FBI. These tweets were cited as a basis for probable cause in Agent Buentello's Affidavit in support of the third search warrant, based on cyberstalking.

18. No one from the government contacted Mr. Shafer after his February 6, 2017 tweets.

19. On February 13, 2017, in a series of six tweets spanning from 3:54am to 3:59, Mr. Shafer

⁹ Buentello Aff. to third search warrant (sealed), at ¶ 27

¹⁰ Justin Shafer, Twitter account @JShafer817, tweet on 3:01pm, Jan. 9, 2017, at <https://twitter.com/JShafer817/status/818593572026982400>.

again publicly criticized the FBI, stating, among other things that “@FBI you have a lot of double standards.” He inquired about patient privacy reports Mr. Shafer had sent to the Department of Health and Human Services. His final tweet states “@FBI Next time you send a van to threaten me, you better know what you are getting yourself into. Stay out of trouble, FBI.”¹¹ The government has characterized this as a “seeming threat.”¹² It does not seem to have occurred to the government that Mr. Shafer was making a threat of legal action in this tweet.

20. No one from the government contacted Mr. Shafer after his February 13, 2017 tweets regarding the FBI.

21. On March 21, 2017, in an unrelated matter, the criminal complaint in *U.S. V. John Rayne Rivello* was made public. FBI Special Agent Nathan Hopp signed the Rivello Criminal Complaint (the “Rivello Complaint”).¹³ The Rivello Complaint charged a single count of federal cyberstalking under 18 U.S.C. § 2261A. It charged that Mr. Rivello, using the twitter handle @jew_goldstein, sent a strobing GIF¹⁴ to the journalist Kurt Eichenwald. The complaint was eventually dismissed by the government because they were forced to admit this single act could not support the requirement under 18 U.S.C. § 2261A that there be a continuous course of conduct evidencing a continuity of purpose.¹⁵

¹¹ See Justin Shafer, @JShafer817 account post at 11:59pm, Feb. 12, 2017, at <https://twitter.com/JShafer817/status/831050231072616448>

¹² See Gov. Response in Opposition to the Mot. To Continue, Dkt. 68, at p. 3. (Attached as Ex. A.)

¹³ See Travis Andrews, “Tweet that sent journalist Kurt Eichenwald into seizure...,” Washington Post, March 22, 2017, at <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/22/tweet-that-sent-journalist-kurt-eichenwald-into-seizure-considered-deadly-weapon-in-indictment/>

¹⁴ GIF stands for “Graphics Interchange Format,” and is a type of image file which can be animated. See Oxford English Dictionary, “Definition of GIF in English,” at <https://en.oxforddictionaries.com/definition/gif>

¹⁵ <https://www.dallasnews.com/news/courts/2017/11/27/prosecutors-drop-federal-charge-man-accused-sending-tweet-set-dallas-journalists-seizure>

22. On March 21, 2017 Mr. Shafer saw the Rivello complaint and realized that FBI Agent Nathan Hopp, who signed the Rivello Complaint, was the agent he had misheard identifying himself as “Special Agent Hawk.”¹⁶

23. On March 21, 2017, at 4:11am, Mr. Shafer tweeted that he had just realized that “Nathan Hawk” was Agent Nathan Hopp. Mr. Shafer then proceeded to tweet the already public twitter handles and links to the public Facebook pages of members of Agent Hopp’s family’s publicly searchable Facebook pages (with the comment “Close as I will get”), Agent Hopp’s wife’s Facebook page, an obituary possibly of Agent Hopp’s grandfather, and a link from a readily available public database showing a prior home address for Agent Hopp. Mr. Shafer also retweeted a public post from Mrs. Hopp’s Facebook account. Mr. Shafer made no threatening comments. All of the information he posted was already open to the public and not restricted in any manner.

24. At approximately 8:54am, Mr. Shafer sent an email to Agent Nathan Hopp’s FBI email account saying “Hola” and including a smiley face emoji.¹⁷ Agent Hopp did not respond, nor did anyone from the government.

25. On March 21, 2017, Mr. Shafer contacted Ms. Hopp through her publicly searchable and

¹⁶ See Mike Masnick, “DOJ Subpoenas Twitter About Popehat, Dissent Doe And Others Over A Smiley Emoji Tweet,” Techdirt, Oct. 24, 2017 at <https://www.techdirt.com/articles/20171023/18275838465/doj-subpoenas-twitter-about-popehat-dissent-doe-others-over-smiley-emoji-tweet.shtml> (Explaining that SA Hopp’s name appeared on another case’s criminal complaint.); *see also* See Mike Masnick, “DOJ Subpoenas Twitter About Popehat, Dissent Doe And Others Over A Smiley Emoji Tweet,” Techdirt, Oct. 24, 2017 at <https://www.techdirt.com/articles/20171023/18275838465/doj-subpoenas-twitter-about-popehat-dissent-doe-others-over-smiley-emoji-tweet.shtml> (Explaining that SA Hopp’s name appeared on another case’s criminal complaint.)

¹⁷ Specifically “☺,” a standardized symbol in computer fonts since around June 1993. *See* Emojipedia, “White Smiling Face,” at <https://emojipedia.org/white-smiling-face/>.

messageable Facebook page via Facebook's messenger feature. He stated: "How ya doin? ☺.

Tell Nathan I say howdy. ☺ Tell him I want my videos of my kids back . . .and . . . you should just use your real last name on facebook. ☺ ☺ I though he was gay.¹⁸ Neither Mrs. Hopp nor Agent Hopp ever responded to this message. Mr. Shafer never messaged, or tweeted to or about, Mrs. Hopp again.

26. After Mr. Shafer's March 21, 2017 Tweets and Facebook message about his case, he did not Tweet, email or Facebook message Agent Hopp, or anyone in Agent Hopp's family again, nor did he mention them again.

27. Out of 5001 of Mr. Shafer's Tweets¹⁹, none of which contain any explicit threat of violence, the government claims that seven public tweets made over roughly three hours, combined with a few emails and social media interactions, constitute a course of conduct with a continuity of purpose that put SA Hopp and his family in reasonable fear of loss of life and limb or caused substantial emotional distress.

28. On March 31, 2017, FBI Special Agent Ronnie O. Buentello swore out a Criminal Complaint against Mr. Shafer alleging violations of 18 U.S.C. § 2261(A)(2)(B) and 18 U.S.C. § 2261(b)(5).²⁰

¹⁸ Gov. response to Mot. to Cont., Dkt. 68 at pp. 5-6.

¹⁹ Mr. Shafer's Twitter account is still online, available at <https://twitter.com/JShafer817>.

²⁰ (See Compl., Dkt. 1.) Initially filed on a public docket, the complaint has since been sealed, despite the fact that the public filing is readily available on the internet. *See, e.g.* Joseph Cox, DocumentCloud posting, at <https://www.documentcloud.org/documents/3535241-Shafer-Complaint.html>. It is unclear why the document was sealed. The defense objects to anything being sealed in the case on First and Sixth Amendment grounds, and anticipates filing a separate motion, if necessary, to request the documents in this case be unsealed.

29. The Complaint alleged that between May 2016 through and including March 21, 2017 in . . . the Northern District of Texas . . . [Mr.] Justin Shafer, knowingly and with the intent to harass and intimidate and to place under surveillance with intent to harass and intimidate a person . . . did knowingly and intentionally use an interactive computer service and an electronic communication service to engage in a course of conduct that caused, attempted to cause, and would be reasonably expected to cause substantial emotional distress to that person; in that [Mr.] Shafer used his Twitter account to post derogatory and inflammatory statements about [an FBI agent] and personal identifying information of [the FBI agent] and his immediate family and his wife online.²¹

30. The conduct that Mr. Buentello swore in his affidavit in support of the Complaint that Mr. Shafer's conduct only involved the publication of publicly available information.²² Mr. Shafer made no attempt to mask his identity and at no point articulated any threat to commit harm to anyone. Rather, Mr. Shafer expressed his desire for his family photos back.

31. On March 31, 2017, a Friday evening, armed FBI Agents appeared without warning at the Shafers' family home for a third time. Mr. Shafer was not present, but Mrs. Shafer and the children were. They were taken to the back yard, and Mrs. Shafer was ordered to call Mr. Shafer to tell him to return home. The FBI agents then seized Mrs. Shafer's phone. They also seized additional computers. Mr. Shafer voluntarily turned himself in upon returning home.

52. At the initial bail hearing on April 6, 2017, Magistrate Judge Toliver imposed broad

²¹ (See Compl. at 2.)

²² (See e.g. Compl. at 8.)

computer use restrictions. These use restrictions prohibited, among other things, “maintain[ing] or creat[ing] any account on any social media networking site, such as Facebook, Twitter, Instagram, et cetera.”²³ The Conditions also include a no-contact order prohibiting Mr. Shafer from directly or indirectly contacting Agent Hopp.

53. During the period of Mr. Shafer’s pretrial release, he wrote a blog post comprised of constitutionally protected speech criticizing his prosecution. Shortly after the blog post was published, Mr. Shafer received a notice of potential violation of his pretrial conditions of release.

54. On April 18, 2017, a revocation hearing was held before Magistrate Judge Toliver. The government referenced vague concerns regarding flight risk, and claimed that merely “criticizing” SA Hopp in the “blog site” [sic] was indirect contact.²⁴ At the close of the revocation hearing, Magistrate Judge Toliver revoked Mr. Shafer’s pretrial release order.

55. On November 6, 2017, the Defense appealed Mr. Shafer’s pre-trial detention on the basis that it violated both the First Amendment and the statutory factors.²⁵

56. On December 1, 2017, Judge Godbey held a hearing on that appeal. Judge Godbey acknowledged that Mr. Shafer was within his rights to criticize the FBI, the Prosecution, and even the Court.²⁶ Upon releasing Mr. Shafer from pre-trial detention Amendment, Judge Godbey stated on the record that Mr. Shafer could, while on pre-trial release “post on his blog, he can say

²³ (*See id.* at 49:16-18.)

²⁴ (Tr. 5:8-6:10 (Apr. 18, 2017).)

²⁵ (*See* Defense Motion Appealing Pretrial Release Revocation, Dkt. 46.)

²⁶ Judge Godbey recused himself after the government superseded the original indictment adding a third count accusing Mr. Shafer of cyberstalking the Magistrate Judge Cureton, presumably because of a perceived conflict of interest involving both Judges being familiar with each other.

the FBI are jerks, he can say the judges are jerks²⁷” Judge Godbey recognized that this type of speech is political and personally expressive speech about matters of public concern, and falls squarely within the protections of the First Amendment.²⁸ Yet the government, in the record, testimony, and based on the discovery, is attempting to criminalize just this type of speech through its Indictment.

57. FBI Special Agent Ronni Buenetello’s testimony at Mr. Shafer’s appeal of his pre-trial detention demonstrates this intent to criminalize speech. Under cross examination, Agent Buentello admitted that he could not identify an explicit threat of violence by Mr. Shafer directed at anyone in the government.²⁹ He further admitted that Mr. Shafer never asked anybody to commit any type of violence against anyone, nor attempted to engage in acts of violence against anyone.³⁰

58. At the December 1, 2017 hearing, the government announced it was going to supersede the indictment and add a third count based on Mr. Shafer’s emails to Magistrate Judge Cureton’s chambers.

59. On December 5, 2017, the government superseded the indictment. *See* Dkt. 56.

60. On December 19, 2017, Judge Godbey recused himself. *See* Dkt. 57.

61. On December 21, 2017, Senior Judge Hayden Head was assigned to the case.

62. On December 22, 2017, a telephone conference was held and the defense informed the

²⁷ (Hr’g on Appeal of Detention Order Tr. 57:3-5 (Dec. 1, 2017), attached as Ex. B)

²⁸ *See, Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-52 (1988); *Cohen v. California*, 403 U.S. 15, 16-26 (1971).

²⁹ (*See Ex. B*, 46:5-53:16 (Dec. 1, 2017).)

³⁰ (*See id.* at 50:19- 51:2.)

court it was going to file a motion for continuance based on the fact that it needed time to review the voluminous discovery recently produced by the government as well as prepare for the added count.

63. On December 26, 2017, the defense filed a motion for continuance. On December 28, the government opposed.

64. On December 27, 2017 the case was reassigned to Senior Judge Janice Jack.

65. The case is currently scheduled for trial on January 22, 2017.

LEGAL STANDARD

Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure enables a criminal defendant to challenge the sufficiency of an indictment and move to dismiss. Generally, an indictment is sufficient to survive “if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and insures that there is no risk of future prosecutions for the same offense.”³¹ The determination of granting a motion to dismiss “is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact.”³² A court’s consideration of the motion to dismiss is generally proper if questions of law are involved.³³

In the Fifth Circuit, the test for validity of an indictment is “whether it conforms to minimal constitutional standards.”³⁴ Indeed, ordinarily a motion to dismiss an indictment does

³¹ *U.S. v. Coughlin*, No. 4:12-CR-166, 2013 WL 1507217, at *2 (E.D. Tex. Feb. 4, 2013), *report and recommendation adopted*, No. 4:12-CR-166, 2013 WL 1501025 (E.D. Tex. Apr. 10, 2013) (citing *U.S. v. Cavalier*, 17 F.3d 90, 92 (5th Cir.1994)).

³² *Id.* (citing *U.S. v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011)).

³³ *Id.* (quoting *Flores*, 404 F.3d at 324).

³⁴ *U.S. v. Gordon*, 780 F.2d 1165, 1169 (5th Cir.1986) (citing *U.S. v. Webb*, 747 F.2d 278, 284 (5th Cir.1984)).

not demand consideration of whether the government has produced sufficient proof to sustain its charge, but “solely whether the allegations in the indictment, if true, are sufficient to establish a violation of the charged offense.”³⁵ Courts outside of the Fifth Circuit have held that, under exceptional circumstances, a district court may dismiss charges at the pretrial stage “where the operative facts are undisputed” and the government “fails to object to the district court's consideration of those undisputed facts in making the determination” regarding a case.³⁶

ARGUMENT

I. The Indictment Violates the First Amendment's Free Speech and Petition Clauses Both as Applied and Facially

The Indictment violates the Free Speech and Petition Clauses of the First Amendment as applied to Mr. Shafer and as well as facially. The Framers, through the First Amendment and other sections of the country's founding texts, sought to prohibit precisely the type of overarching federal police power over speech and petition of the government at issue in this case. Mr. Shafer is being prosecuted because he criticized, expressed personal frustration at, and sought answers from the government over its repeated armed raids and seizure of his property on the basis of alleged crimes for which he has not been charged. The government never responded to any of his communications, except to arrest him and charge him with felony cyberstalking.

This case must be viewed through the lenses of the First Amendment's Free Speech and Petition Clauses. The speech at issue in this case speaks directly to a matter of public concern:

³⁵ *U.S. v. Moreland*, 207 F. Supp. 3d 1222, 1231 (N.D. Okla. 2016) (citing *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006)).

³⁶ *See Moreland*, 207 F. Supp. 3d at 1231 (holding, in an 18 U.S.C. § 2261(A)(2)(B) criminal matter, that dismissal “is the ‘rare exception,’ not the rule,” and is granted where “undisputed evidence shows that, as a matter of law, the Defendant could not have committed the offense for which he was indicted.”)

the federal government's police actions against its citizens. Mr. Shafer repeatedly sought answers about the government's actions against him, to no avail. All of Mr. Shafer's speech, for which he now faces three felony charges, took place from behind his keyboard. There is not a single instance in the record to date, the government filings, the discovery, or the testimony of Agent Buentello at Mr. Shafer's hearing on the appeal of his detention, of Mr. Shafer or anyone else taking any sort of physical action anywhere remotely near the vicinity of any alleged victim, nor is there anything indicating any plans to do so or any incitement of others to do so. Everything in this case returns to Mr. Shafer typing at his keyboard seeking redress for his grievances from an unresponsive government.

The First Amendment's Free Speech Clause prohibits government criminalization of speech. The First Amendment's Petition Clause prohibits government criminalization of seeking redress from the government for grievances.³⁷ Although these are "cognate rights" in that they are related, the Supreme Court recognizes that they are not necessarily co-extensive.³⁸ Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.³⁹

However, neither the right of free speech nor to petition are absolute. The Supreme Court has carved out limited exceptions to First Amendment protections which arguably could apply to both clauses. But the Supreme Court has not yet precisely delineated the area of overlap and

³⁷ U.S. Const. Amend. I ("Congress shall make no law . . . abridging the right of the people. . . to Petition the Government for a redress of grievances.").

³⁸ *Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 387-89 (2011)

³⁹ See *id.* at 388.

difference between these two clauses. Nonetheless, a review of the exceptions to the Free Speech Clause's protection will show that none of them apply here.

A. Mr. Shafer's Political, Expressive, and Petitioning Speech is Protected by the First Amendment

All three counts of the Indictment violate the First Amendment, because all of Mr. Shafer's speech is protected political, expressive, and petitioning speech on matters of public concern that falls into no recognized exception to the First Amendment's protections.

Generally, the First Amendment protects political, expressive, and petitioning speech from government regulation unless it falls into a recognized exception that the Supreme Court recognizes. These exceptions, roughly put, are: (1) Obscenity; (2) Defamation; (3) Fraud; (4) Fighting Words, Incitement, or True threats; and (5) Speech Integral to Criminal Conduct.⁴⁰ As a threshold matter, if speech does not fall into one of these categories the government cannot regulate it. Mr. Shafer's speech does not fall into any of the categorical exceptions. Thus, the Court should dismiss his Indictment with prejudice, because Mr. Shafer should not have to face the sincere burden and expense of a federal criminal trial when there is no disputed evidence that

⁴⁰ See, e.g., *U.S. v. Cassidy*, 814 F.Supp. 2d 574, 582-83 (D. Md. 2011) (holding 18 U.S.C. 2261(A)(2)(A) facially unconstitutional under the First Amendment in a case involving Twitter and Blog posts), *appeal dismissed* (4th Cir. No. 12-4048, Apr. 11, 2012). These rough categories are a non-exclusive characterization and somewhat arbitrary list that courts have derived from the United States Supreme Court's complex and somewhat piecemeal First Amendment jurisprudence. For purposes of this motion "fighting words," "incitement" and "true threats" are combined as one category since the Supreme Court doctrine for the three is similar if not the same for the purposes of Mr. Shafer's case. There are other categories generally not discussed in the cyber stalking case law that are not applicable to this case, such as time, manner and place restrictions. All the action complained of in the Indictment is from Mr. Shafer sitting at his computer keyboard. See, e.g., Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. Rev. 731, 751-88 (2013).

withstands First Amendment scrutiny.⁴¹

All of Mr. Shafer's speech falls under the First Amendment's Free Speech and Petition clauses because it is: (1) a political critique of the armed raids and seizure of his property for non-violent crimes he has not been charged with; (2) a personal expression of his views of these raids and the government's actions towards him; and (3) repeated unanswered petitioning of the government seeking answers regarding their actions towards him.⁴²

It is the political, expressive, and petitioning nature of Mr. Shafer's speech that makes Mr. Shafer's case different from every reported federal cyberstalking case to date. By far, the majority of those cases involve men stalking ex-girlfriends, ex-spouses, or women who want nothing to do with them, over extended periods of time, and engaging in unprotected speech and tangible criminal conduct.⁴³ Mr. Shafer's case stands in stark contrast to that overwhelming

⁴¹ See, e.g., *U.S. v. Moreland*, 207 F.Supp. 3d 1222, 1231 (N.D. Okla. 2016) (holding that a District Court may dismiss an indictment when there is undisputed evidence showing that the defendant could not have committed the offense for which he was indicted as a matter of law).

⁴² See, e.g., *U.S. v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999) (J. Ginsburg) (vacating on First Amendment grounds the criminal conviction for defendant's repeated telephone harassment of Attorney General Eric Holder by calling him a "negro" and a "criminal" and holding that complaints about the actions of government officials are political speech).

⁴³ Our research has turned up no federal cyberstalking or 18 U.S.C. § 119 case where the defendant was prosecuted for criticizing FBI raids of his home and petitioning the government regarding his case. The majority of the caselaw deals with stalking conduct by men against ex-girlfriends, ex-spouses, or women who reject a man's advances. See *U.S. v. Hobgood*, 868 F.3d 744, 746-78 (8th Cir. 2017) (stalking of ex-girlfriend through extortion); *U.S. v. Conlan*, 786 F.3d 380, 384 (5th Cir. 2015) (stalking of ex-girlfriend over the course of a year culminating in defendant showing up at her house with a gun and riot stick); *U.S. v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (stalking of ex-girlfriend with threatening texts and the posting of her nude photos after being told to stop by ex-girlfriend); *U.S. v. Sayer*, 748 F.3d 425, 428 (1st Cir. 2014) (stalking of ex-girlfriend over four year period by inducing third parties to show up to her home for sex); *U.S. v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (stalking of ex-wife through extortionate threats); *U.S. v. Bowker*, 372 F.3d 365, 371-72 (6th Cir. 2004) (stalking of female T.V. news reporter over a year and a half in violation of protective order); *U.S. v. Ackell*, No. 15-CR-123 (JL), 2017 WL 2913452 (D.N.H. 2017) (stalking of minor female by an over 40 year old man using extortion); *U.S. v. Moreland*, 207 F.Supp. 3d 1222, 1224-26 (N.D. Okla. 2016) (stalking of female reporter via hundreds of messages after being told to stop); *U.S. v. Matusiewicz*, 84 F.Supp. 363, 371-72 (D. Del. 2015) (stalking and murder of ex-wife); *U.S. v. Cassidy*, 814 F.Supp. 2d 574, 578 (D. Md. 2011) (stalking of female religious leader who spurned defendant's marriage proposal). Our research turned up one unreported case where an ex-prisoner stalked over the course of years a witness who

majority. Mr. Shafer's speech is protected speech, as it falls into no recognized First Amendment exception and is on a matter of public concern. Thus, his Indictment is subject to strict scrutiny, and, as discussed below, this Indictment fails when subjected to strict scrutiny.

The first three categories of exceptions to First Amendment protection – obscenity, defamation, and fraud– are not implicated in this prosecution. This leaves the categories of: (4) Fighting Words, Incitement and True Threats; and (5) Speech Integral to Criminal Conduct.

Nothing in the record or the disclosed discovery falls into category (4), because there is nothing here even arguably bringing likely and imminent violence against any alleged victim, or to provoke them to violence against Mr. Shafer. The Supreme Court is clear that in order to exempt speech from the protection of the First Amendment by categorizing it as fighting words, incitement, or true threats, the speech must be of slight social value and likely to bring about imminent violence, or, in the context of true threats, be “a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁴⁴ Nothing in the record or the disclosed discovery comes close to meeting this standard.

Mr. Shafer's speech is not speech integral to criminal conduct because it is not speech whose sole purpose is criminal activity. It is political, expressive, and petitioning speech about matters of public concern- as evidenced by the press coverage this case has received. The phrase

testified against him at trial. *See U.S. v. Sergentakis*, No. 15-CR-33, 2015 WL 3763988 (NSR) (S.D.N.Y. June 15, 2015).

⁴⁴ *Virginia v. Black*, 538 U.S. 343, 358-60 (2003) (reviewing case law); *see, e.g., Hess v. Indiana*, 414 U.S. 105, 108 (1973) (“Under our decisions, ‘the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022 (5th Cir. 1987).

“speech integral to criminal conduct” has been rightly criticized by courts and scholars as easier than articulate the standard for:

“When speech is punished precisely because of what it communicates--for instance, because it may persuade people to violate the law or to boycott someone, because it may offend some listeners, or because it may convey information that helps people commit crimes--the law is operating as a content-based speech restriction. The law is restricting speech precisely because of what is spoken. Therefore, courts should subject such a law to serious First Amendment analysis; they ought not dodge this analysis by simply relabeling the speech as ‘conduct.’”⁴⁵

The doctrine emerges from a 1949 Supreme Court case where the Court upheld an injunction against peaceful picketers because they were pressuring a business to stop selling ice to nonunion ice peddlers.⁴⁶

The fact that *Giboney* upheld an injunction for speech that was solely for a criminal purpose has led some circuits to formulate the test for “speech integral to criminal conduct” as one requiring that the speech in question be solely for a criminal purpose.⁴⁷ Under this standard, Mr. Shafer’s speech is not integral to any criminal conduct because its purpose is political, expressive, and petitioning directly related to a matter of public concern.

Because Mr. Shafer’s speech does not fall into any recognized First Amendment exception to protected speech, and because he is being criminally charged based on his speech’s

⁴⁵ Eugene Volokh, “Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, ‘Situation-Altering Utterances,’ and the Uncharted Zones” 90 Cornell L. Rev. 1277, 1310-11 (2005).

⁴⁶ See *Giboney v. Empire Storage & Ice, Co.*, 336 U.S. 490 (1949); Eugene Volokh, “Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, ‘Situation-Altering Utterances,’ and the Uncharted Zones” 90 Cornell L. Rev. 1277, 1311 (2005).

⁴⁷ See, e.g., *U.S. v. Sayer*, 748 F.3d 425, 434 (1st Cir. 2014) (summarizing case law).

effect on other listeners, it is subject to strict scrutiny. And when subjected to strict scrutiny the Indictment crumbles - it is overbroad as applied and facially under the First Amendment.

B. 18 U.S.C. § 2261(A)(2)(B) and 18 U.S.C. § 119 Are Facially Invalid Under the First Amendment

Both the federal cyberstalking statute underlying Counts One and Three of the Indictment, as well as the statute underlying Count Two of the Indictment, are facially overbroad under the First Amendment and thus unconstitutional.

In order for a facial First Amendment challenge to prevail the challenged statute must be overbroad in the sense that “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁴⁸ This is the case for the federal cyberstalking statute underlying Counts One and Three, 18 U.S.C. § 2261(A)(2)(B), as well as the statute underlying Count Two, 18 U.S.C. § 119.

18 U.S.C. § 2261 (A)(2)(B) prohibits, in part, using the internet to cause, or attempt to cause, substantial emotional distress. One does not have to look far on the internet to see how easy it is for the government to apply this statute to a large number of people, beginning with the President of the United States. President Trump regularly uses his Twitter account to single out individuals, companies, and the Press, including the FBI, for harassment and scorn.⁴⁹ Many of his millions of followers and opponents respond in kind. And therein lies the overbreadth problem with 18 U.S.C. § 2261(A)(2)(B). It is very easy to turn this statute loose on a broad

⁴⁸ *U.S. v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted).

⁴⁹ See Amanda Wills and Alysha Love, “All the President’s Tweets” (Jan. 2, 2018), available at <http://www.cnn.com/interactive/2017/politics/trump-tweets/>

swath of political speech by claiming it upsets one faction or the other. The First Amendment was meant to prevent the federal government from criminalizing political speech, yet 18 U.S.C. § 2261(A)(2)(B), despite its good intent, does just that.

18 U.S.C. § 119 is substantially overbroad on political grounds as well. Its prohibition on the distribution of categories of contact information for a broad range of federal employees and officers criminalizes political protest speech and petitioning directed at those government officials.⁵⁰ Thus the Court should find it facially unconstitutional under the First Amendment.

C. Both Statutes Fail under either Strict or Intermediate Scrutiny

Both the statutes underlying the three counts in the Indictment are conduct based restrictions on Mr. Shafer's speech, and thus subject to strict scrutiny. Even if the statutes are somehow construed to be content neutral, the Indictment still fails under intermediate scrutiny because Mr. Shafer's speech is on a matter of public concern.

All the counts in the Indictment regulate the effect speech has on a listener. Counts One and Three charge violations of 18 U.S.C. § 2261(A)(2)(B) that "caused and attempted to cause and was reasonably expected to cause substantial emotional distress."⁵¹ Count Two charges Mr. Shafer with publishing restricted personal information about Agent Hopp— the publicly available prior home address— "with the intent to threaten, intimidate, or incite the commission of a crime of violence against [him]." As all the counts are dependent on how Mr. Shafer's speech affects either the alleged victims or third party listeners, the statutes as applied to Mr. Shafer are content

⁵⁰ See 18 U.S.C. § 119(2)(A) defining a broad range of people that public dissemination of particular categories of contact information is criminal for.

⁵¹ (Dkt. 56, Indictment, Counts One and Three.)

based restrictions on his speech, subject to strict scrutiny.⁵²

The government has the burden under strict scrutiny of demonstrating that a content based restriction “is necessary to serve a compelling state interest.”⁵³ Stopping emotional distress is not a compelling government interest under current caselaw.⁵⁴ Nor is stopping incitement or solicitation unless it meets the requisite threshold of imminence and probability.⁵⁵ Yet none of Mr. Shafer’s speech comes anywhere near legitimately criminally proscribed behavior.

Our research turned up no federal cyberstalking case with facts similar to Mr. Shafer’s case. Nor is there any significant case law on 18 U.S.C. § 119. However, a decision written by Justice Ruth Bader Ginsburg when she was an appellate judge on the D.C. Circuit is persuasive as to Mr. Shafer’s case. That case is *United States v. Popa*.⁵⁶

In *Popa*, the defendant was convicted of violating a telephone harassment statute for making seven phone calls to the then-U.S. Attorney for the District of Columbia, Eric Holder.⁵⁷ The statute prohibits making an anonymous telephone call “with intent to annoy, abuse, threaten, or harass any person at the called number”⁵⁸ In one voicemail, the defendant said the following:

⁵² See *U.S. v. Cassidy*, 814 F.Supp. 2d 574, 584-87 (D. Mass. 2011)

⁵³ See *U.S. v. Cassidy*, 814 F.Supp. 2d 574, 584-87 (D. Mass. 2011)

⁵⁴ See *Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *U.S. v. Stevens*, 559 U.S. 460 (2010); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-52 (1988); *Cohen v. California*, 403 U.S. 15, 16-26 (1971); *U.S. v. Cassidy*, 814 F.Supp. 2d 574, 585 (D. Md. 2011).

⁵⁵ See *Virginia v. Black*, 538 U.S. 343, 358-60 (2003) (reviewing case law); see, e.g., *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (“Under our decisions, ‘the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022 (5th Cir. 1987).

⁵⁶ *U.S. v. Popa*, 187 F.3d 672 (D.C. Cir. 1999).

⁵⁷ *Id.* at 673.

⁵⁸ *Id.* at 674.

“Eric Holder is a negro. Is a negro. Which is a criminal. He make a violent crime against me, violating the rights in court of the white people. [Inaudible] negro. He’s negro. Eric Holder. Criminal.”⁵⁹

Popa filed a motion to dismiss at the District Court level, arguing the indictment should be dismissed on First Amendment strict scrutiny grounds. The District Court applied intermediate scrutiny and denied the motion.⁶⁰ The D.C. Circuit reversed.⁶¹ And it did so by applying intermediate scrutiny and assuming *arguendo* that the government was correct in arguing that the statute in question was content neutral.⁶² In so doing the Court recognized that Popa’s calls were political in nature because “the actions of a government official were a significant component of his calls.”⁶³ The same is true of Mr. Shafer’s tweets and messages. *Popa* is directly on point, and this Court should follow its lead and dismiss the Indictment because it fails both under strict and intermediate scrutiny.

II. The Statutes Are Void for Vagueness Under the Fifth Amendment

A criminal statute is void for vagueness under the Fifth Amendment’s Due Process clause if “the statute ... Fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorize or encourages seriously discriminatory enforcement.”⁶⁴ Both for the federal cyberstalking statute underlying Counts One and Three, 18 U.S.C. § 2261(A)(2)(B), as well as the statute underlying Count Two, 18 U.S.C. § 119 are void for vagueness on both grounds. They lack of clarity and enable a serious risk of discriminatory

⁵⁹ *U.S. v. Popa*, 187 F.3d 672, 674 (D.C. Cir. 1999).

⁶⁰ *Id.*

⁶¹ *Id.* at 679.

⁶² *U.S. v. Popa*, 187 F.3d 672, 676 (D.C. Cir. 1999).

⁶³ *U.S. v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999).

⁶⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010).

prosecution.

Most citizens with a knowledge of the First Amendment would believe that it gives them the right to criticize a government prosecution as well as petition the Magistrate Judge who signed the search warrant authorizing the armed raid of their home. Indeed, Mr. Shafer's prosecution has all the hallmarks of a discriminatory prosecution - it appears based entirely on the thin-skinned animus of government agents upset over his criticisms.

Likewise with Mr. Shafer's republication of a publicly available address where Nathan Hopp used to live. Count Two defies a plain, logical reading of 18 U.S.C. § 119 in that the statute forbids someone from knowingly making "restricted personal information . . . publicly available." That which is already publicly available, however, cannot be made publicly available. This interpretation defies all logical sense. Nor would any person of ordinary intelligence think that public address information available to anyone with an internet connection somehow would constitute "restricted information" that they would face felony charges for repeating once. Because Count Two hangs entirely on a single retweet of a publicly available previous address, and no person of ordinary intelligence would be on notice that publishing publicly available information would be criminal, Count Two should be dismissed.

CONCLUSION

The Court should dismiss the threadbare and defective Indictment because it:

(1) violates the First Amendment's Free Speech and Petition clauses, both as applied and because the statutes underlying all three counts are facially defective;

(2) violates the Fifth Amendment's Due Process clause and is void for vagueness as applied;

In the alternative, defendant demands a Bill of Particulars so he may properly defend

himself against this barebones indictment, and have a clear bar to double jeopardy that the Indictment does not in any sense provide.

Finally, the defense requests leave to submit additional briefing on two additional grounds for dismissal. Specifically, that:

- (1) Counts One and Three are duplicitous; and
- (2) The First Amendment plain text and judicial interpretation prohibits Congress from using its interstate commerce power to criminalize speech outside the context of carefully limited, recognized circumstances that the statutes here do not embody.

DATED: January 2, 2018

Respectfully submitted,

s/ Tor Ekeland

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff.

v.

JUSTIN MARK SHAFER

Defendant.

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CRIMINAL NO. 17-CR-00239-N

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO COINTNUE

The United States of America, by and through the undersigned Special Assistant United States Attorney, hereby files this, its response in opposition to the Defendant's Motion to Continue and would show the Court the following.

I. FACTUAL BACKGROUND

The Federal Bureau of Investigation-Dallas (FBI) opened an investigation on February 19, 2016, based on the Defendant's actions of accessing an FTP server belonging to Patterson Companies Inc., (PCI) and allegedly downloading approximately 22,000 patient records without PCI's permission. The Defendant operates Onsite Dental Systems, his own business, where he utilizes his knowledge of computer systems to purportedly identify issues with dental provider's securing patient information. The victim in this case, Special Agent (SA) Nathan Hopp, was the primary Case Agent. This investigation remains ongoing but is not part of the instant Indictment and no charges have been filed.

Pursuant to a search warrant approved in the Northern District of Texas, FBI Dallas searched the Defendant's residence on May 25, 2016. During this warrant SA Hopp interviewed the Defendant. On or about May 25, 2016, the Defendant began posting comments on the online

social media networking service, Twitter.com, and tagged the Twitter profiles: “@FBIDallas,” and “@FBI.” the Defendant also posted comments referring to “Special Agent Nathan Hawk.”¹²

On June 29, 2016, another FBI field office opened a criminal computer intrusion investigation on another individual believed to have stolen patient medical records in an attempt to extort the medical facilities he victimized. On January 29, 2017, the FBI executed a second search warrant at the Defendant’s residence. At the time of entry, the Defendant was logged into at least two different workstations in his home office and garage including a chat session appearing to be with the target of the FBI investigation. SA Nathan Hopp was present for this search warrant as well. This investigation also remains ongoing, is not part of the instant case and there have been no charges filed in this matter.

On January 9, 2017, before the execution of the second search warrant, the Defendant posted on Twitter.com the following:

Name	Twitter Account	Date	Post
Justin Shafer	@JShafer817	January 9, 2017	Called the Dallas FBI today and l Nathan Hawk.

¹ It is believed that the Defendant initially thought that SA Nathan Hopp’s true name was “Nathan Hawk.”

² **Twitter** is an online [news](#) and [social networking](#) service based in [San Francisco, California, United States](#), where users post and interact with messages, "tweets", restricted to 140 [characters](#). [Registered](#) users can post tweets, but those who are unregistered can only read them. Users access Twitter through its website interface, [SMS](#) or a mobile device [app](#). Tweets are publicly visible by default, but senders can restrict message delivery to just their followers. Users can tweet via the Twitter website, compatible external applications (such as for [smartphones](#)), or by [Short Message Service](#) (SMS) available in certain countries. Users may subscribe to other users' tweets—this is known as "following" and subscribers are known as "followers" or "tweeps". Individual tweets can be forwarded by other users to their own feed, a process known as a "retweet". Users can also "[like](#)" (formerly "favorite") individual tweets. Twitter allows users to update their profile via their mobile phone either by text messaging or by apps released for certain smartphones and tablets. Twitter messages are public, but users can also send private messages. Information about who has chosen to follow an account and who a user has chosen to follow is also public, though accounts can be changed to "protected" which limits this information (and all tweets) to approved followers.

On February 6, 2017, and on February 13, 2017, the Defendant posted numerous “tweets” referring to SA Hopp, and posted seemingly threatening comments directed to FBI Dallas including the following:

Name	Twitter Account	Time	Date	Post
Justin Shafer	@JShafer817	8:46am	Feb 6, 2016	@FBI @FBIDallas takes big men to steal a 5 year old kid’s saved games from his WII.. But that is who you are. Worthless, without integrity.
Justin Shafer	@JShafer817	8:46am	Feb 6, 2016	@FBI @FBIDallas Cowards.
Justin Shafer	@JShafer817	8:46am	Feb 6, 2016	@FBI @FBIDallas And Nathan Hawk is full of shit.
Justin Shafer	@JShafer817	8:52am	Feb 6, 2016	@FBI @FBIDallas “☺”
Justin Shafer	@JShafer817	3:59am	Feb 13, 2017	@FBI Next time you send a van to threaten me, you better know what you are getting yourself into. Stay out of trouble FBI.

On March 18, 2017, the Defendant tweeted an unrelated, unsealed Criminal Complaint of *United States v. John Rayne Rivello*, found on a publically available website that was signed by SA Hopp, and tagged @FBIDallas. Subsequent comments from the Defendant’s Facebook post and other individuals stated the following:^{3 4}

³ It is unclear at this junction any involvement of “Darrell Pruitt,” if any, beyond the communication above between Shafer and Pruitt on this post or if he is one of the unidentified Twitter users for which the Government seeks information.

⁴ **Facebook** is an online [social media](#) and [social networking service](#) based in [Menlo Park, California](#). Since 2006, anyone who claims to be at least 13 years old has been allowed to become a registered user of Facebook. Facebook may be accessed by a large range of [desktops](#), [laptops](#), [tablet computers](#), and [smartphones](#) over the [Internet](#) and [mobile networks](#). After registering to use the site, users can create a [user profile](#) indicating their name, occupation, schools attended and so on. Users can add other users as [“friends”](#), exchange messages, post status updates and [digital photos](#), share digital videos and links, use various [software applications](#) (“apps”), and receive notifications when others update their profiles or make posts. Additionally, users may join common-interest user groups organized by workplace, school, hobbies or other topics, and categorize their friends into lists such as “People From Work” or “Close Friends”. In groups, editors can pin posts to top. Additionally, users can complain about or block unpleasant people. Each registered user on Facebook gets their own personal profile that shows their posts and content. Facebook enables users to choose their own privacy settings and choose who can see specific parts of their

Facebook Profile	Comment
Justin Shafer	She is Elizabeth Augenstein Hopp, married to Nathan Hopp.. AKA.. Nathan Hawk. FBI Agent. ☺ I figured it out from this document. The jew_goldstein thing going around.
Justin Shafer	Doxxed
Darrell Pruitt	So you found him!
Justin Shafer	I did! ☺
Darrell Pruitt	What an asshole.

Pursuant to a search warrant in this case, agents conducted a search of the Defendant's google account and in particular the search terms that the Defendant utilized in relation to this investigation.⁵

The Defendant's Google Account search history reflects searches with dates ranging from November 23, 2016 to March 31, 2017, showing the email account, justinshafer@gmail.com, "searched" and/or "visited" 18,474 terms. An analysis of this search history demonstrated that the Defendant searched for the following terms related to the victims, the victims' employment, and the victim's family member:

Nathan
Hawk
Hopp
Elizabeth
Beth
Augenstein
FBI

profile. The website is free to its users and requires a user's name and profile picture (if applicable) to be accessible by everyone. Users can control who sees other information they have shared, as well as who can find them in searches, through their privacy settings.

⁵ **Google Search**, commonly referred to as **Google Web Search** or simply **Google**, is a [web search engine](#) developed by [Google](#). It is the most-used search engine on the [World Wide Web](#), handling more than three billion searches each day. The main purpose of Google Search is to hunt for text in publicly accessible documents offered by web servers, as opposed to other data, such as [images](#) or [data contained in databases](#).

JLB
FBI Dallas
Jeffrey Cureton

As a result of conducting a search for the terms above, approximately 681 positive results were highlighted, which ranged from November 23, 2016 through March 31, 2017.

According to the search results, the term "hawk" was searched and/or visited using the email account, justinshafer@gmail.com, approximately 40 separate times from December 03, 2016 through March 21, 2017. The search results revealed that the term "hopp" was searched and/or visited using the email account, justinshafer@gmail.com, approximately 78 separate times beginning in March, 2017 through March 21, 2017. According to the search results, the email account, justinshafer@gmail.com, searched for the term "jlb partners" on March 21, 2017. The victim's spouse was employed with JLB Partners prior to and on the date in which the email account, justinshafer@gmail.com, performed the search. One of these search sessions lasted approximately 7 ½ hours in length.

Additionally, as demonstrative of his intent, prior to making his postings and contacting both SA Hopp and his wife directly, the Defendant searched the following terms:

2261
18 cfaa
cfaa6

The entry of these terms result in webpages fully describing the elements and definitions of cyberstalking under Title 18, United States Code, Section 2261A.

On or about March 21, 2017, the Defendant sent the following Facebook direct message to SA Hopp's wife, using the application Facebook Messenger:

Facebook Profile	Comment
Justin Shafer	How ya doin? ☺

⁶ "cfaa" is a reference to the Computer Fraud and Abuse Act.

Justin Shafer	Tell Nathan I said howdy. ☺
Justin Shafer	Tell him I want my videos of my kids back... and... you should just use your real last name on facebook. ☺
Justin Shafer	☺
Justin Shafer	I thought he was gay.

Contrary to the Defendant's claim in his motion, this communication was not on a publically available and viewable social media platform but rather was a direct person-to-person contact between the Defendant and SA Hopp's wife.

After finding SA Hopp's personal information, and as it relates to this instant motion, on March 21, 2017, the Defendant "tweeted" the following.

Name	Twitter Account	Time	Date	Post
Justin Shafer	@JShafer817	4:11am	Mar 21, 2017	there is a Nathan Hopp at the Dallas FBI? Hmmmm
Justin Shafer	@JShafer817	5:22am	Mar 21, 2017	https://t.co/xVFzHVmjFE ⁷ https://t.co/hVZkFZX7TV ⁸ That is my guess. No facebook profiles that I can tell.
Justin Shafer	@JShafer817	6:06am	Mar 21, 2017	https://t.co/DGpMPCzKDO ⁹ Closer.
Justin Shafer	@JShafer817	7:00am	Mar 21, 2017	Close as I will get. https://t.co/zEvMs06RWU ¹⁰
Justin Shafer	@JShafer817	7:11am	Mar 21, 2017	Skinier version of this dude: https://t.co/Bt1S1HYyqX ¹¹ Is Nathan Hawk.
Justin Shafer	@JShafer817	7:28am	Mar 21, 2017	Elizabeth Augustine...
Justin Shafer	@JShafer817	7:30am	Mar 21, 2017	Bingo: https://t.co/s0K4obLKab ¹²
Justin Shafer	@JShafer817	7:31am	Mar 21, 2017	She kept her maiden name on facebook....

⁷ The Universal Resource Locator (URL) link posted on Twitter.com is a link to the website, crowrivermedia.com, in which the webpage is an obituary of an individual named Ervil Hopp.

⁸ The URL link posted on Twitter.com is a link to the website, stateoftexas.info, in which is a past address location for SA Nathan Hopp and his spouse.

⁹ A Twitter.com posted link to a Facebook profile, belonging to SA Hopp's Mother-Susan Hopp,

¹⁰ A Twitter.com posted link to a Facebook profile, belonging to Katy Olson, SA Hopp's ex-wife.

¹¹ A Twitter.com posted link to a Facebook profile, belonging to Bruce Hopp, SA Hopp's cousin.

¹² A Twitter.com posted link to a Facebook profile, belonging to Elizabeth Hopp, SA Hopp's wife.

Name	Twitter Account	Time	Date	Post
Justin Shafer	@JShafer817	7:39am	Mar 21, 2017	Back the blue. https://t.co/FwJVtqlPJW ¹³
Justin Shafer	@JShafer817	7:56am	Mar 21, 2017	@bethahopp @PogoWasRight This is Nathan Hawk's wife
Justin Shafer	@JShafer817	8:47am	Mar 21, 2017	@bethahopp @PogoWasRight https://t.co/Z8gFb7XHoD ¹⁴ Based on this complaint. The epileptic tweet.
Justin Shafer	@JShafer817	11:19am	Mar 21, 2017	@dawg8u @abtnatural @Popehat @associatesmind @PogoWasRight
Mike Honcho	@dawg8u	11:20am	Mar 21, 2017	@abtnatural @Popehat @associatesmind Nathan Hopp is the least busy FBI agent of all time.

The links contained within these posts contain SA Hopp's grandfather's obituary; SA Hopp's mother's Facebook page; SA Hopp's cousin's Facebook page; a Google Map of SA Hopp's address; SA Hopp's wife's Facebook page; and, SA Hopp's wife's cover photo from her Facebook page.

Also contrary to the Defendant's assertions that his actions occurred in the public domain, he has at various times on different occasions, contacted SA Hopp directly via telephone, via SA Hopp's FBI email address which was not publically available and via the organizational email account of the Dallas FBI leaving a number of messages. One message sent on November 26, 2016 at 3:48 p.m. from justinshafer@gmail.com to the Dallas FBI email account read: "Go fuck yourself, and ask Nathan Hawk if he likes it on the chin or in his ass?" None of these communications platforms were publically viewable and are the function of the

¹³ The image is an image of Dallas, Texas skyline posted by Elizabeth Hopp, stating "Back the Blue." The Defendant shared her image on his Twitter profile feed.

¹⁴ The URL link posted on Twitter.com is a Northern District of Texas Dallas Division, Criminal Complaint of John Rayne Rivello, in which SA Hopp was the affiant referenced above.

Defendant sending a direct communication to them vice “posting” these comments in the public domain.

Furthermore, the investigation into the Defendant’s actions reveal that he engaged in a course of conduct from approximately November 30, 2016 until February 4, 2017, where he emailed the organizational email address of U.S. Magistrate Judge Jeff Cureton in excess of 100 emails and attachments totaling approximately 1000 pages. Judge Cureton was the Magistrate Judge authorizing both the May 2016 and January 2017 searches of the Defendant’s residence.

Also included in communications to the Court was a fax transmission from a dentist, D.K.P to the judge. D.K.P. then responded to the Defendant via email stating that he had contacted the judge and was told that such contact was improper. The Defendant responded to D.K.P. acknowledging that he was unaware of the impropriety of directly communicating with the court but then proceeded to send the majority of the 100 plus emails to the cureton_orders@txnd.uscourts.gov site following this acknowledgement.

II. PROCEDURAL HISTORY

On April 18, 2017, the Grand Jury returned an indictment charging the Defendant in Count I with violation of Title 18, United States Code, Section 2261A- Cyberstalking and in Count II with a violation of Title 18, United States Code, Section 119 – Protection of Individuals performing certain official duties. (Doc. No 18).

On June 12, 2017, the Government disclosed to the Defendant those items contained in Exhibit 1. Contained in this disclosure were the emails and attachments sent by the Defendant to Judge Jeffrey Cureton.

On June 13, 2017, at the request of the parties, the Court granted the Agreed Motion to

Continue setting the case for trial on September 18, 2017. (Doc. Nos. 42 & 43).

On June 20, 2017, the Government disclosed those items in Exhibit 2, to include the Defendant's Twitter account. (Exhibit 2).

On August 28, 2017, at the request of the parties, the Court granted a second Motion to Continue setting the case for trial on December 4, 2017 (Doc Nos. 44 & 45).

On September 13, 2017, the Government informed counsel for the Defendant, via email, that a 4 terabyte hard drive would be required to load the data from the Defendant's Google and Facebook Accounts obtained via a search warrant.

On October 24, 2017, the Government disclosed those items contained in Exhibit 3.

On October 27, 2017, during a meeting with Counsel for the Defendant, the subject of supplying a hard drive was revisited. Counsel for the Defendant supplied two 4 terabyte hard drives to the FBI on or about November 6, 2017.

On November 15, 2017, at the request of the parties, the Court granted a third Motion to Continue setting the case for trial on January 22, 2018 (Doc Nos. 47, 48 & 49).

On November 22, 2017, the Government disclosed those items contained in Exhibit 4 to include the material from the Google and Facebook search warrant and a duplicate copy of the Twitter search warrant return. (Exhibit 4).

On December 5, 2017, the Government obtained a superseding indictment re-alleging Counts I and II and adding Count III. Similar to Count I, Count III alleges a violation of Title 18, United States Code, Section 2261A but identifies Judge Cureton and a member of his staff as the victims. (Doc. No. 56).

III. ARGUMENT

The Fifth Circuit has found that a District Court's decision to deny a motion for continuance lies within the discretion of the trial court. *United States v. Walters*, 351 F.3d 159, 170 (5th Cir.2003). The Court has found that the factors to be considered where a party complains of inadequate preparation time include: (1) the amount of preparation time available, (2) whether the defendant took advantage of the time available, (3) the likelihood of prejudice from a denial, (4) the availability of discovery from the prosecution, and (5) the complexity of the case. *United States v. Lewis*, 476 F.3d 369, 387 (5th Cir. 2007)(Ten days for counsel to prepare for complex trial was not unreasonable in light of the circumstances).

The Government submits that the Defendant has had nearly seven months to prepare for trial. The Government has heretofore posted no opposition to any request for more time from the Defendant. The Government also submits that the remaining items contained in Exhibit 4 were available in September 2017. To date, the Defendant has vast majority of the information in the Government's possession, save for the Defendant's recent jail calls and some additional *Jencks* material additional to those *Jencks* items disclosed on November 22, 2017.

The nature of the case is not complex. It involves those actions of the Defendant vis-à-vis an FBI agent and Judge Cureton. The accounts are simply the medium in which the Defendant's actions were conveyed. Thus while the accounts contain a large amount of information, the actions of the Defendant are not that difficult to understand.

Furthermore, the nature of the case has not changed following the superseding indictment. This is true especially in light of the fact that the Government disclosed the Defendant's emails and attachments sent to Judge Cureton in June 2017.

The Government does not contest that the disclosure of November 22, 2017 was voluminous. However, as previously noted, some of the material, specifically the Twitter search warrant information, had been previously provided. Furthermore, Exhibit 4, Items (3)(f)(iv & v) consist of the phone of the Defendant's wife and the Defendant's phone. This latter phone was password protected and thus inaccessible to the Government but was provided as a matter to ensure complete disclosure.

Finally, while consisting of a large amount of stored data, much of the information contained within the social media accounts are the electronic features of these various accounts rather than any substantive information. By the way of example, the Twitter account information amounts to approximately 1300 printed pages of "tweets" and direct messages. The Google internet search history is also relatively short and consists of the search terms entered by the Defendant as described above in the factual background.

Thus, the relevant data contained within the November 22, 2017 is easily digestible within the time frame allotted for trial. The Government has arranged for its dozen or so witnesses to be prepared and present for trial on January 22, 2018.

IV. CONCLUSION

WHEREFORE PREMISES CONSIDERED, the Government requests that the Court deny the Defendant's Motion to Continue and proceed to trial on January 22, 2018 per the Amended Trial Order (Doc No. 49).

Notwithstanding the Government's opposition to the Defendant's Motion to Continue, should the Court be inclined to grant a continuance, the Government would submit that the week of February 26, 2018 or earlier would be appropriate.

Additionally, based on Judge Head's request to include dates of unavailability, the

undersigned is a member of the U.S. Armed Forces and has reserve duty obligations during the week of February 5, 2018. The week of March 12, 2018 also presents a conflict in that one of the case agents in this matter has a scheduled household move to Washington, D.C. based on her promotion and transfer to another position within the F.B.I. Also, the undersigned also would note that the week of March 12, 2018 is spring break week for Texas schools. In consulting with the Attorney for the Defendant, he has noted that the week of March 30, 2018 is spring break week for New York schools.

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JOHN F. BASH
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By:



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CERTIFICATE OF SERVICE

I hereby certify that per Local Criminal Rule 49.4, this document was filed on December 28, 2017, with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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A handwritten signature in black ink, reading "Douglas W. Gardner". The signature is written in a cursive, flowing style.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA) CAUSE NO. 3:17-CR-239-N
(
vs.)
(DECEMBER 1, 2017
) DALLAS, TEXAS
JUSTIN MARK SHAFER (10:00 A.M.

HEARING ON APPEAL OF DETENTION ORDER

BEFORE THE HONORABLE DAVID GODBEY
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 THE COURT: Be seated. Good morning.

2 So I got the letter from the Government indicating a
3 possible superseding indictment. Has that happened yet?

4 MR. GARDNER: No, sir. We are scheduled for a slot
5 next Tuesday December 5th.

6 THE COURT: Okay. If you will let us know the
7 results of that. I don't know what, if anything, we'll do in
8 response to that, but we're certainly looking at the
9 possibility of getting somebody from outside the district to
10 come take over.

11 MR. GARDNER: Yes, sir.

12 THE COURT: So if you'll let me know, I will let
13 you-all know.

14 So I've looked at the papers and I've looked at the
15 records from the two prior hearings, and just on the cold
16 record I'm not persuaded that we need to protect the public
17 against log posts like the one at issue. I certainly
18 understand why Judge Toliver set the conditions that she did,
19 but in retrospect, as I say, I'm not sure that those pose a
20 great risk to the public. But I'm happy to listen to you-all.

21 I don't know what we contemplate doing in terms of an
22 evidentiary record today. I'm happy to take judicial notice
23 of the two prior hearings so that we don't have to redo that,
24 if you-all want me to do that. But other than that, I'm open
25 to suggestions.

1 MR. GARDNER: Your Honor, the Government's fine with
2 the Court taking judicial notice of the transcripts that we've
3 included as exhibits so we don't have to retread all that
4 ground.

5 Given this is a de novo standard, obviously many of the
6 events that occurred back in April, we've conducted further
7 investigation and we'd like the opportunity to present that
8 before the Court today.

9 THE COURT: Sure.

10 MR. GARDNER: So that would be the Government's
11 stance, Your Honor.

12 THE COURT: Okay. How about on the Defense side?

13 MR. EKELAND: Your Honor, the Defense has no
14 objection to the Court taking judicial notice of the record.

15 THE COURT: Okay. And do you-all anticipate
16 anything by way of an evidentiary presentation today?

17 MR. EKELAND: No, Your Honor. Just if they do put
18 on a witness, we'll cross; but no, nothing --

19 THE COURT: Okay. All right. Then I will take
20 judicial notice of the record from the two prior proceedings
21 in the case. And since this is de novo, I'm happy for the
22 Government to take the first crack.

23 MR. GARDNER: Thank you, Your Honor.

24 Your Honor, the Government calls Special Agent Ronnie
25 Buentello.

1 THE COURT: If you'll step up here and have a seat,
2 please, sir.

3 Could you raise your right hand, please?

4 (Whereupon, the oath was administered by the Court.)

5 THE COURT: The Government may proceed.

6 MR. GARDNER: Thank you, Your Honor.

7 RONNIE BUENTELLO,

8 Testified on direct examination by Mr. Gardner as follows:

9 Q. Could you please state your name for the record, sir?

10 A. Ronnie Buentello. R-O-N-N-I-E; the last name Buentello,
11 B-U-E-N-T-E-L-L-O.

12 Q. And where are you currently employed, sir?

13 A. FBI in the Dallas Division.

14 Q. And are you one of the case agents on this case?

15 A. Yes, sir.

16 Q. So I'd like to talk a little bit about the last two
17 hearings without going into a lot of it. And did you have the
18 opportunity to review Special Agent Sherman's testimony for
19 the initial detention preliminary examination hearing?

20 A. Yes, sir.

21 Q. And I believe on page 26 she talks about jail calls with
22 respect to Mr. Shafer talking to his wife about whether or not
23 he committed the crime of stalking.

24 A. Yes, sir.

25 Q. Okay. And could you just briefly go over that again on

1 what the jail call was?

2 A. Basically it was a jail call between Mr. Shafer and his
3 wife talking about why he was arrested and whether or not it
4 was stalking. Based on his comments, he said that he didn't
5 believe he conducted stalking because it didn't occur over
6 state lines.

7 Q. Okay. Since that time, have you had an opportunity to
8 review search warrant returns from his Twitter account, his
9 Facebook account, and his Google account?

10 A. Yes, sir.

11 Q. And with respect to his Google account, did it also
12 include his browsing history?

13 A. Yes, sir.

14 Q. And so prior to him being arrested for this particular
15 offense, what did you find in his browsing history that
16 relates to the crime of stalking?

17 A. Basically he conducted searches, a specific search
18 22 U.S.C. -- 18 U.S.C. § 2261(a), which is the cyberstalking
19 violation. He conducted that search numerous times. Other
20 than that, I mean, it was -- he numerously or consistently
21 also searched for himself in regards to the arrest and charge,
22 the first two previous search warrants at his house; that it
23 -- consistently and everyday basically always searching for
24 Justin Shafer, cyberstalking, arrests, and stuff like that.

25 Q. So let's go back to the 2261(a). And that's currently

1 the charge under Count 1 of the existing indictment. Is that
2 correct?

3 A. Yes, sir.

4 Q. All right. So did he search for 2261(a) prior to making
5 the blog posts and the communications with and about Special
6 Agent Hopp?

7 A. Yes, sir, he did.

8 Q. Did he also Google or browse the term CFAA?

9 A. Yes, sir.

10 Q. And what does that stand for?

11 A. It's the Computer Fraud -- oh, my gosh.

12 Q. Abuse Act?

13 A. Abuse Act. Yes, sir. In which it's the violation of
14 2261, which basically calls for cyberstalking the violations
15 pertaining to it.

16 Q. Did he also conduct any searches on DOJ cyber websites?

17 A. Yes. He conducted searches and visited the United States
18 Department of Justice website. Specifically on this site
19 there is numerous entities and descriptions about the stalking
20 charge.

21 Q. And in your opinion, based on these searches, was he well
22 aware of the elements of the crimes to which he now stands
23 charged?

24 A. I believe so, yes.

25 Q. Again, was this prior to him actually committing the

1 offense or allegedly committing the offense?

2 A. Yes, sir.

3 Q. Did Mr. Shafer also seem to access the Pacer system?

4 A. Yes. Through my forensic analysis and reviewing his web
5 browsing history, I'm not sure if he has his own Pacer account
6 based on the data that was seen, but he actively searched for
7 and accessed the Pacer website. But because -- with the
8 forensics, you're not able to actually view the actual
9 documents that he viewed or -- but he did access that website
10 numerous times.

11 Q. Okay. And is that possibly concerning due to the
12 exposure of Special Agent Hopp's true name on another
13 unrelated criminal complaint?

14 A. Yes, sir; maybe.

15 Q. And since the time of his arrest have you also been able
16 to obtain the emails that the Defendant sent to the Dallas FBI
17 organizational email box?

18 A. Yes, sir. He -- there's a Dallas FBI, just a general
19 email. As an agent with the FBI I don't have access to that.
20 I'm not sure who actually -- what entity it goes to within the
21 FBI within Dallas itself, but we did obtain those emails
22 recently and I did review them, yes.

23 Q. And I've previously marked one of those emails. Before
24 that about how many emails did you recover from the Dallas FBI
25 organizational box from Justin Shafer?

1 A. Approximately 20.

2 Q. Okay. So you have in front of you Government's Exhibit
3 No. 1.

4 MR. GARDNER: I'll tender that to Ms. Moore for the
5 Court.

6 Q. (BY MR. GARDNER) This is one of the 20 emails. Is that
7 correct?

8 A. Yes, sir.

9 Q. And if you will, just read into the record a couple of
10 those highlighted areas that you and I discussed before coming
11 in here today.

12 A. Yes, sir. In an email sent on November 26 of 2016 to the
13 Dallas FBI email address, it also -- it was titled "The
14 ultimate test was this." Basically the -- verbatim what it
15 says in the email, "Go fuck yourself and ask Nathan Hawk if he
16 likes it on the chin or in the ass?"

17 Q. Okay. You consider that a threat?

18 A. Yes, sir, I do.

19 Q. Okay. More importantly, though, I'd like you to go down
20 a little bit starting on the line "You didn't," didn't in all
21 caps. Would you read that one, please?

22 A. Yes, sir. "You didn't, and it will come back to haunt
23 your dumb asses."

24 Q. And then below that he additionally calls the government
25 corrupt. Is that correct?

1 A. Yes, sir.

2 Q. All right. Now, have you also had the opportunity to
3 review his tweeting history?

4 A. Yes, sir.

5 Q. Okay. And his tweets consist of actual tweets that
6 everyone can see and also direct messages within the Twitter
7 account. Correct?

8 A. Yes, sir.

9 Q. All right. Did you find any other evidence in those
10 tweets consistent of what you believe might be considered
11 threats of violence against Special Agent Hopp?

12 A. Yes, sir.

13 Q. And if you could relate those to the Court, please.

14 A. Numerous times he's sending tweets. I can't verbatimly
15 [sic] -- I can't remember exactly the exact words he says, but
16 in essence he said -- one -- on one instance said, "I should
17 use them to steal people's identities because the FBI
18 fist-fucked me." Numerous times he stated, you know, comments
19 such as these that I reviewed; pretty explicit.

20 Q. And do you have your notes in front of you on the Twitter
21 account?

22 A. Yes, sir, I do.

23 Q. So I'm actually looking at page 3.

24 A. So basically on threats of violence that he conducted
25 with Special Agent Hopp, one of the statements he made was,

1 "Wish I could just hit Nathan Hawk in the head with my sling
2 shot. Not enough to kill the guy; just a massive headache."
3 Smiley face emoji. And that was on February 2016. Or
4 February 16. I'm sorry.

5 Q. And then there's another tweet that we've reported on the
6 notes, and what's it say on the second one on February 16th of
7 2016?

8 A. "I had like a fucking meltdown over it. The worst of it
9 was not attending my family functions. Got pretty bad Pogo.
10 When I kept thinking of ways to kill myself and shit, it was
11 pretty bad. I want them to pay for that. I really do."

12 Q. So I want to turn to a little bit of your review of his
13 browsing and tweeting history.

14 How often does he send either tweets or direct messages?

15 A. Pretty extensively. I would say at least he's either
16 tweeting or searching or online at least once a minute. It's
17 pretty extensive in the amount of data that was provided by
18 Google in the search history and the browsing history and the
19 amount of tweets that were from the Twitter return on how many
20 and how extensively he's on -- he's conducting activity.

21 THE COURT: Could you clarify the time frame we're
22 talking about, please?

23 MR. GARDNER: Yes, sir. Thank you, Your Honor.

24 Q. (BY MR. GARDNER) So you have one search warrant in May
25 of 2016 and a second search warrant in January of 2017 before

1 he's arrested in March of 2017. Correct?

2 A. Yes, sir.

3 Q. All right. So with respect to the Court's concern, what
4 is the time frame of these tweets and these searches being
5 conducted and sent by Mr. Shafer?

6 A. Well, in particular with the Google return, we issued a
7 Google return after -- or once we opened the investigation on
8 his threats to Agent Hopp and his wife on March --
9 approximately March 31st, and we received data from Google
10 going back to approximately March -- I'm sorry. Yeah,
11 probably about March 18th all the way through March 31st. And
12 within those -- within those -- that time frame, approximately
13 I would say once every minute, on some occasions once every
14 ten seconds, there is activity, and all times throughout the
15 day. It could be during the day, it could be at nighttime, it
16 could be in the middle of the night, in the morning time, and
17 it was pretty extensive and it took a long time just to go
18 through all of them.

19 Q. And so, again, looking at your notes on his tweets, I
20 want to talk about one to a recipient ID 187211434. Have you
21 been able to identify the user handle of that person?

22 A. I believe it to be Pogo Is Right.

23 Q. Okay. And just generally from his tweets and emails, who
24 is Pogo Is Right to Mr. Shafer?

25 A. It's a friend -- it's an acquaintance of some sort. I

1 believe she's a reporter. She's been assisting him on this
2 case putting -- writing articles on the situation, on the
3 arrest warrant after the first of one in May of 2016. You
4 know, it goes back to his emails. And basically throughout my
5 investigation I was able to determine -- I found emails in
6 which he began sending her explicit, derogatory, degrading
7 emails within a quick, really rapid-fire time frame; really
8 degrading, really explicit, sexual in nature.

9 Q. Okay. And the reason you bring that up is have you seen
10 this sort of impulse issues in other cases involving people
11 possibly violating the CFAA?

12 A. Yes, sir.

13 Q. So I want to talk a little bit about some of his impulse
14 control as reflected in his tweets.

15 So there's one within this time frame that says, "Justin,
16 my friend is dying. I really have no energy or interest in
17 this stuff right now. Please leave me alone for a bit." Is
18 that from Pogo Is Right?

19 A. Yes, sir.

20 Q. And then what does Mr. Shafer do in response to that?

21 A. He responded by sending 13 more direct messages,
22 including one stating that he "won't have my First Amendment
23 rights stepped on anymore."

24 Q. And is this in response to anything Pogo Is Right was
25 saying to him, or just part of this rapid fire?

1 A. Just part of this rapid fire, you know, tweeting or
2 messaging.

3 Q. And do you have a tweet from her to Mr. Shafer
4 introducing his current attorney Mr. Ekeland --

5 A. I believe that --

6 Q. -- for possible representation?

7 A. I believe that was an email, sir. I believe that was an
8 email. Yes, sir.

9 Q. And how does she describe Mr. Shafer's actions?

10 A. The email that she sent to and copied Mr. Shafer and his
11 attorney Tor Ekeland, it specifically says that Shafer is
12 impulsive, really quick to -- quick off the handle. But the
13 impulsive word was directly included in that text.

14 Q. And did your review of his browsing history and tweeting
15 history confirm his impulsive nature?

16 A. Yes, sir.

17 Q. Now, you have in front of you Government's Exhibit 2.
18 Which is a string of emails to Judge Cureton's --

19 MR. GARDNER: I'm tendering that to the Court there.

20 Q. (BY MR. GARDNER) This is not all the emails to Judge
21 Cureton. Is that correct? Or his organizational box?

22 A. No, I don't believe so.

23 Q. And we'll get into some of the more specific ones here in
24 a bit, but how does this particular exhibit pertain to his
25 impulsive nature?

1 A. So on February 4th of 2017, not even -- I'm not even sure
2 how many, but it's at least 20, maybe 50 emails, to
3 cureton_orders@txnd.uscourts.gov, the first one beginning at
4 3:25 a.m.

5 Q. Okay. Just let me stop you there. You're referring to
6 the date and the time stamp in the upper right hand corner.
7 Correct?

8 A. Yes, sir.

9 Q. All right. So the first one is at 3:25 a.m.?

10 A. Yes, sir. I can go through each individual times --

11 Q. Just go through the times, and if the date changes then
12 just note that, please.

13 A. Okay. So the first email sent at 3:25 a.m.; the next one
14 at 3:34 a.m.; the next one at 3:35 a.m.; the next one at 3:40
15 a.m.; the next one 3:41 a.m.; the next one at 4:23 a.m. --

16 Q. Okay. Stop you right there. And what's he actually say
17 in this one?

18 A. On 4:23.

19 Q. 4:23 a.m. on February 4th. Again, this is after the
20 second search warrant that Judge Cureton signed. Correct?

21 A. Yes. The email consists of "Yes.....YES"--all
22 caps--"muahahahaha??? Night, man. I am not really an asshole,
23 but when dealing with the FBI I can be a dick."

24 Q. Okay. And so when's the next email after that? And just
25 go through again the time stamps on those, please.

1 A. The next one is at 4:24 a.m.; next one, 4:32 a.m. And on
2 this one he's describing a white van that threatened --
3 pertains -- or threatened himself. I'm not sure exactly what
4 happened there, though.

5 Q. Let me stop you there on the white van. Have you seen
6 other mentions of this purported white van showing up at his
7 house?

8 A. I've seen his blogging about it and tweeting about it,
9 purporting some sort of white van that visited his house and
10 threatened his life, yes.

11 Q. FBI, were they present in a white van at any time when
12 conducting any of the search warrants?

13 A. No, sir.

14 Q. And from your review of the records, was a white van --
15 is it indicated it occurred sometime other than the search
16 warrants?

17 A. Yes, sir.

18 And one particular thing to note on the white van,
19 hearing the jail calls and listening to the jail calls that
20 Mr. Shafer conducted with his family members, he specifically
21 states later on he really didn't know who was in that white
22 van; it could have been the FBI or it could have been somebody
23 else. And I don't remember who the other person was or entity
24 or that that person who he was describing, who it was. I
25 don't even know who that -- who he was talking about. So it

1 just seems that he just -- he didn't really know, but he's
2 accusing us on numerous times that we had a white van going to
3 his house and threatened his life, which we have no idea what
4 he's talking about.

5 Q. And then 4:35, just to short circuit a little bit, 4:41,
6 4:44, 5:00 a.m. with an attachment, talks about the white van,
7 5:25 a.m., 5:56 a.m., 5:57 a.m., 6:06 a.m., 6:13 a.m., and
8 6:24 a.m. Correct?

9 A. Yes, sir.

10 Q. All right. Any response from anybody either on the CC
11 line or a Cureton response at that point?

12 A. No response from anybody else, no. No. No, sir, no
13 response.

14 Q. All right. Kind of along these lines, on your review of
15 the jail calls, his Twitter activity, and his browsing
16 history, what other examples of his impulsive nature did you
17 locate?

18 A. I'm sorry. Say that again, sir.

19 Q. What other examples of his impulsive-type activity did
20 you note?

21 A. On?

22 Q. On Twitter, jail calls, and/or browsing history.

23 A. Just particular to note that he just exhibits traits of
24 impulsive nature. One particular thing to note is we
25 interviewed his sister and she mentions that he thinks -- or

1 she thinks that he might have bipolar disorder; numerous
2 instances of tweeting numerous times, rapid fire in
3 succession, emailing individuals of rapid fire succession; his
4 consistent nature of Googling himself, searching for himself.
5 Q. Okay. I want to stay on the impulsive nature aspect for
6 a second.

7 I'm handing the court reporter Government's Exhibit 3 you
8 have in front of you.

9 This is a fax from a David Pruitt, and on the back of it
10 are attached an email from Mr. Pruitt to Mr. Shafer after
11 being sent from Ms. Koye of Judge Cureton's chambers. Can you
12 explain this a little bit?

13 A. So, yes, sir. Daryl (ph) Pruitt sent a fax on
14 Mr. Shafer's behalf to Judge Cureton's office. The actual fax
15 did not come through, in which the -- only the cover page came
16 through. So in essence the actual -- after he sent the fax,
17 Mr. Pruitt sent an email to Shafer stating this: "Justin, I
18 faxed a letter to the magistrate judge's office, and his
19 secretary called me to tell me that it is illegal to contact
20 judges concerning pending"--it seems like the text got cut
21 off--"pending. Have someone call me."

22 And then Justin replied, "I didn't know that. My bad.
23 Justin."

24 Q. In particular on this one, what is the date of this
25 exchange between Mr. Pruitt and Mr. Shafer?

1 A. December 1st, 2016.

2 Q. And of this hundred plus emails sent from Mr. Shafer to
3 Judge Cureton, did the bulk of them occur before or after this
4 particular exchange with Mr. Pruitt?

5 A. I would say after.

6 Q. Okay. And do you not, in fact, have emails from
7 Mr. Shafer to Judge Cureton all the way past the second
8 search warrant?

9 A. Yes. Yes, sir.

10 Q. Special Agent Buentello, if you will, turn to
11 Government's Exhibit 4.

12 Again, one of the things the Court has to consider is
13 whether or not there are conditions that Mr. Shafer will abide
14 by.

15 What are these emails from?

16 A. The emails from Justin Shafer using his Gmail account,
17 and they are to Judge Cureton's office; again, the same email
18 address cureton_orders that we mentioned before. In essence,
19 these emails are very cryptic in nature, really hard to
20 understand, a lot of links called weblinks for individuals to
21 click on. You know, statements in the emails consist of the
22 following: "Seriously, dumbest fuckers I have ever had to
23 deal with, FBI. I guess FBI" --

24 Q. That's on February 9th. Right?

25 A. And that's on February 9th, yes, sir.

1 Q. And that's after the second search warrant?

2 A. Yes, sir.

3 Q. Okay. And there's one before, I don't know if you have
4 it on your page, sent on February 2nd to "Judge Cureton!!!
5 WTF is wrong with you?"

6 A. Yes, sir.

7 Q. Do you have that one?

8 A. Yes, sir. So that one says, just like you said, "WTF.
9 What is wrong with you?!" And a forwarded message it says,
10 "floss em. And then after that -- or prior to that it's a
11 link to a YouTube link. Again, I don't really understand what
12 these messages mean or what they're about.

13 Q. Now, the one on February 15th speaks for itself. But
14 before I go into the next one sent on December 12th, you
15 weren't present at the interview of Ms. Koye, Judge Cureton's
16 judicial assistant, were you?

17 A. I'm sorry. Say it again, sir.

18 Q. You were not present at --

19 A. No, sir, I was not present.

20 Q. Was that Special Agent Sherman?

21 A. Yes, sir.

22 Q. Did she relate to you the steps that Ms. Koye took to
23 block any emails coming from Mr. Shafer?

24 A. Yes, sir. Ms. Koye mentioned that they began receiving
25 numerous emails from Justin Shafer, and she took steps and

1 contacted their technical support, their IT unit, to actually
2 block his email address so they wouldn't receive as much
3 emails as he was -- as they was -- as they were receiving.
4 According to her, Justin Shafer found a way to either bypass
5 or use some other different -- another email address. I'm not
6 sure what. Then he continued this effort after the blocking
7 occurred.

8 Q. So then going to the 12/12/2016 email, the subject line
9 there, this one is "absolutely harassment." And then there's
10 another for Oroku Saki Was Here. Did you have the opportunity
11 to sort of do some research or what that phrase meant?

12 A. I believe it has something to do with the Teenage Mutant
13 Ninja Turtles and the character within that cartoon or show,
14 episode, whatever it is.

15 Q. It's a nothing --

16 A. I believe it to be the character Shredder.

17 Q. Is he the villain in that --

18 A. The villain in that --

19 Q. Again, the Teenage -- how old is Mr. Shafer?

20 A. I believe he's -- he's in his 30s; 35, 38. I'm not sure
21 of his exact age. I can't recall.

22 Q. And then the next one is also -- I think we've kind of
23 seen that one, but I want to talk about the last one. And for
24 some reason the date got cut off on that one, at least on my
25 copy.

1 Does it say, "You stupid ass dumb shit judge"?

2 A. Yes, sir. Yeah, my date's also cut off. The title of
3 the email is "Oh, yeah?" And then it contains a link of --
4 I'm not sure where that link -- of -- goes to. And then the
5 subject -- the content of the email says, "Cert said thanks
6 regarding that FTP server, the one you raided me over. You
7 stupid ass dumb shit judge."

8 Q. And does that refer to the first search warrant, the
9 first case that is not subject to the proceedings here today?

10 A. Not subject to the proceedings, no.

11 Q. So talking about whether he can abide by any conditions,
12 and one of the other things the Court needs to consider is his
13 family ties, so are you aware that his father, his mother, and
14 his wife are all here in the Dallas/Fort Worth area? Correct?

15 A. Yes, sir.

16 Q. So I'd like to talk a little bit about the quality of
17 those ties. Have you been able to review the jail calls
18 between those three individuals and the Defendant?

19 A. Yes, sir.

20 Q. Okay. Does your review of those jail calls seem to
21 indicate that Mr. Shafer listens to his father, his mother,
22 and/or his wife?

23 A. No. Based on the phone calls I've listened to,
24 unfortunately on numerous occasions he's very demanding,
25 demeaning to his wife and to his mother, and sometimes his

1 father. It doesn't seem that -- based on my hearing of the
2 phone calls, he doesn't listen to them much, especially when
3 he's angry. He orders them to do things, calls them
4 derogatory names--stupid, such as -- you know, things such as
5 that nature. Whenever they don't do the actual actions that
6 he requests, it seems that he gets very upset at them. I've
7 heard numerous phone calls in which he's gotten irate over
8 them -- to them based on whatever the details or whatever the
9 actions or the circumstances call for.

10 Q. And you have in front of you Government's Exhibit 5.
11 This is another email to the cureton_orders, but if you would
12 please just read into the record what over judges'
13 organizational inbox he is including on these.

14 A. Yes, sir. He included the email address
15 oconnor_orders@txnd.uscourts.gov, and I believe that will be
16 Judge O'Connor in the Northern District. Also he included
17 means_orders@txnd.uscourts.gov. And he also included
18 kinkeade_orders@txnd.uscourts.gov.

19 Q. And what is the actual content, just in general terms, of
20 the email that he appears to have cut and pasted?

21 A. It appears to be a cut and paste content of his blog. I
22 believe Mr. Shafer has a blog. I'm not sure the exact weblink
23 to it. I don't recall. But it seems that he cut and pastes
24 contents of his blog on these emails to these numerous
25 individuals.

1 Q. And turning to the second to last page of that, in all
2 fairness to Mr. Shafer, do you have any evidence that he wrote
3 what's pasted on this blog? Do you have any evidence he wrote
4 this stuff?

5 A. Yes, I believe so he did.

6 Q. Well, actually wrote it physically himself, or does it
7 appear he cut and pasted and forwarded it to somebody?

8 A. I believe he copied and pasted it, yes.

9 Q. All right. And then also the date on it is 12/28/2016,
10 long before he was arrested. Correct?

11 A. Yes, sir.

12 Q. Okay. And before he appeared before Judge Toliver?

13 A. Yes, sir.

14 Q. All right. But on the second to last page it refers in
15 derogatory terms to Judge Toliver, does it not?

16 A. Yes, sir.

17 Q. Also what the Court has to consider with respect to the
18 quality of the family ties is whether or not the family is
19 going to accurately represent to anyone supervising Mr. Shafer
20 the truth. And did you have the opportunity to read
21 Ms. Shafer's affidavit attached to the motion for release?

22 A. Yes, sir, I did.

23 Q. So I want to talk a little bit about that.

24 In that affidavit, Ms. Shafer talks about agents pointing
25 guns at her children.

1 A. Yes, sir, she does.

2 Q. Okay. Were you present during all three search warrants?

3 A. Yes, sir.

4 Q. And were the children present on all three occasions?

5 A. I believe so; on two at least. I'm not sure of the
6 third, or whatever -- which -- in order sequentially, I'm not
7 sure which one, but on at least two, yes.

8 Q. And I understand that maybe Ms. Shafer isn't familiar,
9 but what is the standard FBI policy with respect to executing
10 a search warrant involving firearms?

11 A. The standard FBI policy when conducting an arrest warrant
12 or a search warrant, the FBI agents are carrying their
13 weapons. We do not conduct search warrants or arrest warrants
14 without our weapons. It's common practice.

15 Q. And, to your knowledge, were any weapons pointed at any
16 children at any time?

17 A. No, sir. We do -- me personally -- on numerous occasions
18 that I've participated in search warrants or arrest warrants,
19 when there are children present we depress our weapons. We
20 don't want to point weapons at children. Me having child --
21 me having numerous girls, daughters, I don't point weapons at
22 children. You know, in certain circumstances whenever there
23 is a threat involved, you know, circumstances call for a
24 weapon to be pointed and drawn at individuals. On numerous
25 occasions, and specifically on this occasion -- on these

1 occasions we did not point weapons at the children. No, we
2 did not.

3 Q. Upon executing the search warrants, was it determined
4 fairly quickly that these were not high threat circumstances?

5 A. Yes, sir.

6 Q. Now, Mr. Shafer also says that she was ordered to provide
7 her phone and forced to send a text to her husband --

8 A. Yes, sir.

9 Q. -- who was not at the house on the March 31st arrest. Is
10 that correct?

11 A. Yes, sir.

12 Q. Okay. Can you explain the circumstances you recall on
13 that date?

14 A. Yes, sir. On the circumstances in which we were trying
15 to locate Mr. Shafer for that arrest, we had Ms. Shafer's
16 phone and we asked for permission to use that phone to call
17 -- specifically we asked her to call him first. She agreed to
18 it. She called him, and then the phone was passed over to
19 another agent that was conducting -- that was assisting on the
20 arrest. He explained to him, Mr. Shafer, what was going on,
21 that we had an arrest warrant, and then he hung up the phone.

22 Throughout the investigation we determined that she --
23 that Mr. Shafer traveled to his sister's house, and we began
24 communications with his sister to try to get Mr. Shafer back
25 to the house.

1 Specifically on the message that was sent, we would
2 actually type the message out using her phone and we would
3 show her the message and ask her if this was okay with her
4 before we sent it. We did not order her to do these things.
5 We did not make her do these things. We specifically asked
6 her if this was okay and we received her consent.

7 Q. She also makes a claim that agents damaged the car. Have
8 you heard a number of talk on Mr. Shafer's jail calls as well
9 as his browsing and Twitter history about this?

10 A. Yes, sir.

11 Q. Prior to the first search warrant, did you discover a
12 tweeting history or email history between him and others
13 talking about how damaged his car was?

14 A. Yes, sir. There was some information that we determined
15 that he was complaining about mechanical issues with his car,
16 body damage of some sort. Not sure exactly what the specific
17 issues that were within the car, but this was -- but these
18 were present, according to his words, prior to our first
19 search warrant on May 25th.

20 Q. And then is it standard FBI practice to take pre-search
21 photos and pre-exit photos?

22 A. Yes, sir. On every occasion when we conduct a search
23 warrant, we have a photographer with us, and the photographer
24 before we conduct a search goes into the residence, takes, you
25 know, pre-photos--we call them photos--and they go throughout

1 the whole house, take pictures of every room, take pictures of
2 documentation, and specifically the garage in which the car
3 was inside that -- which was inside the garage.

4 Q. Again, is the purpose of that to protect the FBI from
5 these type of claims?

6 A. Yes, sir.

7 Q. In your review of those photos, do you see a fairly
8 decrepit car that has Bondo on the hood and a primed bumper?

9 A. Yes, sir. The photos, you know, show a car that had work
10 that was already on it or conducted on it, items sitting on
11 top of the hood, and so -- but basically the photo -- the pre
12 and then the exit -- and then the actions that we take after
13 we conduct a search warrant, we take the same photos. We go
14 throughout the house and take the same exit photos to show
15 what, if any, damage we caused by either breaching a door or
16 throughout -- you know, whatever action that we had to do to
17 search a room, either had to break a garage -- a closet door
18 of some sort. On this occasion we didn't have to breach any
19 door at all.

20 And the same photo was taken of that same vehicle, and
21 the image shows it was in the exact same condition. And not
22 only that, on the last arrest warrant the same photos were
23 taken, the pre and the exit photos, in which the car was in
24 the same condition.

25 Q. So same as the first in May and same as the last on March

1 31st?

2 A. Yes, sir.

3 Q. And in conversations Mr. Shafer admits pre first search
4 warrant his car was damaged?

5 A. Yes, sir.

6 Q. Finally, Ms. Shafer complains about the fact that FBI
7 hasn't returned their property; in particular, some
8 photographs. Understanding that the Northern District of
9 Texas and the Northern District of Georgia recused from this
10 case, have you reached out to them to determine whether any
11 Rule 41(g) motion for returned property's been filed?

12 A. No, sir.

13 Q. And based on discussions that I've had with Mr. Ekeland,
14 have we represented we are going to at least attempt to get
15 back their family photos and vehicles?

16 A. Yes, sir.

17 Q. But that's the first time you're aware that something
18 like that happened.

19 A. Yes, sir.

20 MR. GARDNER: Your Honor, that's all I have, sir.

21 THE COURT: And are you offering Government's 1
22 through 5?

23 MR. GARDNER: I'm sorry, Your Honor. Yes. Thank
24 you very much. I am offering Government's Exhibit 1 through
25 5.

1 THE COURT: Any objection?

2 MR. EKELAND: No objection, Your Honor.

3 THE COURT: They're admitted.

4 MR. GARDNER: Your Honor, I forgot one last area of
5 inquiry.

6 THE COURT: All right.

7 MR. GARDNER: Thank you, sir.

8 Q. (BY MR. GARDNER) Have you reviewed the jail calls where
9 Mr. Shafer talks about acquiring firearms?

10 A. Yes, sir, I have.

11 Q. And I won't belabor the point. Those two transcripts of
12 those are included in the Government's response as Exhibit 5?

13 A. Yes, sir.

14 Q. Okay.

15 MR. GARDNER: Thank you, Your Honor.

16 THE COURT: Cross?

17 MR. EKELAND: Yes, Your Honor.

18 Your Honor, I just would like to note quickly for the
19 record that we were not served with the Government's sealed
20 response. We did not get an ECF bounce and it doesn't appear
21 on the docket when we checked it, so we just found out this
22 morning. I think it's just -- I don't think it was
23 intentional or that there's anything malicious going on. We
24 just have not read the Government's response because we did
25 not get an ECF bounce when it was filed sealed on the docket.

1 And the Government didn't serve us with a copy. So a lot of
2 -- to the extent that these 1 through 5 were a part of that
3 response, this is the first time we're seeing them in this
4 context.

5 But nonetheless, we shall go on.

6 CROSS EXAMINATION

7 By Mr. Ekeland:

8 Q. You're an FBI agent.

9 A. Yes, sir.

10 Q. And as an FBI agent you are trained at Quantico in
11 Virginia.

12 A. Yes, sir.

13 Q. Correct?

14 And as part of your training you were taught to do
15 thorough investigations.

16 A. Yes, sir.

17 Q. And as part of your training you were at least trained
18 partially in the law, in federal criminal law.

19 A. Yes, sir.

20 Q. And the reason you were trained in federal criminal law
21 was so that you could make probable cause determinations as to
22 whether or not you should recommend that a United States
23 Attorney prosecute a crime.

24 A. Yes, sir.

25 Q. And you spoke -- you testified earlier about Mr. Shafer

1 Googling information on 18 U.S.C. § 2261(a). Do you recall
2 that?

3 A. Yes, sir.

4 Q. As far as you're aware, is it illegal to do legal
5 research on the internet?

6 A. No, sir.

7 Q. And you -- so it's fair to say that it wasn't illegal, to
8 your knowledge, that Mr. Shafer Googled § 2261(a) to see what
9 the elements of cyberstalking were.

10 A. Yes, sir.

11 Q. And it's fair to say that it wasn't illegal, to your
12 knowledge, for Mr. Shafer to do legal research to see what the
13 elements of the Computer Fraud and Abuse Act were. Is that
14 correct?

15 A. Correct, sir.

16 Q. Okay. So as you said, part of your training at Quantico
17 was to be very thorough with your investigations. Is that
18 correct?

19 A. Yes, sir.

20 Q. And you were the agent that signed the criminal complaint
21 in this case. Is that correct?

22 A. Yes, sir, I am.

23 Q. And as part of that criminal complaint you made a series
24 of allegations under oath regarding the facts in this case.
25 Correct?

1 A. Yes, sir.

2 Q. Okay. So I just -- what I'd like to do, because you
3 testified a lot about a lot of emails and a lot of tweets on
4 certain dates, so I'd like to put that in context for
5 everybody so I could go back and review certain dates that you
6 wrote about in your criminal complaint. Do you understand?

7 A. Yes, sir.

8 Q. Okay. So let's just start with February 6th, 2016.

9 A. Okay.

10 Q. Now, do you recall in your complaint how you wrote that
11 that is when Justin Shafer supposedly downloaded a bunch of
12 records from Patterson Dental's FTP server. Correct?

13 A. I recall that, yes. That was not my investigation. That
14 was Special Agent Hopp's investigation.

15 Q. Right. But that's what you were told by Special Agent
16 Hopp.

17 A. Yes, sir.

18 Q. And you had no reason to disbelieve Special Agent Hopp.

19 A. Correct, sir.

20 Q. And you're aware that those records on that FTP server
21 weren't password protected. Correct?

22 A. I have no knowledge of that investigation.

23 Q. You have no knowledge of that investigation, yet you
24 wrote in your criminal complaint that Mr. Shafer downloaded
25 that information without permission from Patterson Dental.

1 A. I believe that information was included in that affidavit
2 to provide a background on why Mr. Hopp was investigating
3 Mr. Shafer; nothing pertaining to why that affidavit -- that
4 included the actions associated with his cyberstalking of
5 Mr. Hopp or Agent Hopp.

6 Q. You have no knowledge of that investigation.

7 A. Minimal knowledge, yes.

8 Q. So you have no way of knowing whether or not that
9 information downloaded from that server was password protected
10 or not.

11 A. I don't -- No, I don't. That does not pertain to this
12 investigation at all.

13 Q. Right. So you know nothing about the tactical
14 circumstances involved with Mr. Shafer downloading information
15 from Patterson Dental's FTP server on February 6th.

16 A. Correct. And I don't believe it pertains to this
17 investigation at all.

18 Q. Now, I believe you wrote in your criminal complaint that
19 the FBI Dallas opened their investigation on February 19th,
20 2016. Does that sound right to you?

21 A. It sounds right, yes.

22 Q. All right. And then the first raid of Mr. Shafer's home
23 is on May 25th, 2016. Correct?

24 A. Correct.

25 Q. Were you part of that raid?

1 A. Yes, I was.

2 Q. You were part of that raid.

3 And that raid was based on Mr. Shafer downloading the
4 information from the Patterson Dental FTP server. Correct?

5 A. I really don't know. I wasn't the affiant on the case,
6 Agent Hopp was, so I really can't answer that question.

7 Q. But you were part of that raid.

8 A. I was a part of that search warrant, yes, sir.

9 Q. And the FBI agents had carried weapons on that raid.

10 A. Yes. Like I explained before, it's our common practice
11 to carry our weapons when we conduct a search warrant or an
12 arrest warrant.

13 Q. That was a yes?

14 A. Yes.

15 Q. All right. And you didn't leave your business card with
16 Mr. Shafer at that raid, did you?

17 A. I did not, no, sir.

18 Q. You have a business card. Correct?

19 A. Yes, I do.

20 Q. FBI agents carry business cards. Correct?

21 A. We don't carry them with us when we conduct search
22 warrants and arrest warrants normally.

23 Q. But you could.

24 A. Yeah, could but I don't. I mean, it's not a common
25 practice, no.

1 Q. But you're not aware of anyone giving Mr. Shafer any
2 contact information on that May 25th, 2016 raid, are you?

3 A. I'm not aware one way or the other. I'm not sure, sir,
4 no. I know I did not.

5 Q. So that's -- you're not aware of anyone giving him any
6 kind of contact information whatsoever.

7 A. I'm not aware, no. I didn't interact with Mr. Shafer at
8 all, other than the pre-arrest in which we detained Mr. Shafer
9 coming out of the house before we conducted our clear of the
10 residence.

11 Q. And when you raided Mr. Shafer's house with your guns
12 drawn, he didn't fight back, did he?

13 A. No, sir, he did not.

14 Q. He cooperated. Correct?

15 A. Yes. From what I remember, he cooperated, yes.

16 Q. Right. And you're not aware if Special Agent Hopp, who
17 is one of the alleged victims in this case, ever provided
18 Mr. Shafer with this contact information.

19 A. I'm not -- I don't know if he did or not, no. I'm not
20 aware.

21 Q. And you're not aware whether or not Mr. Shafer was ever
22 informed of who the United States Attorneys were on this case,
23 are you?

24 A. I'm not aware, but I don't believe he would have because
25 it's not common practice for us to notify a subject of who the

1 prosecutors are or the judges pertaining to that
2 investigation. It's not common practice that we do that.

3 Q. So you have no knowledge whatsoever if Mr. Shafer was
4 ever provided with any contact information by anyone in the
5 United States government involved with raiding his house and
6 executing the search warrant on it.

7 A. No. No, sir; not aware.

8 Q. Okay. Now, you've -- after this May 25th raid, are you
9 aware that Mr. Shafer contacted attorneys afterwards; that he
10 contacted me?

11 A. I wasn't aware, but if you say so then --

12 Q. But you have no reason to disbelieve that. It makes
13 sense that someone would contact an attorney after they're
14 raided.

15 A. Well, let me correct that. So at the time, no, I did not
16 know; but after reviewing Mr. Shafer's emails pertaining to
17 this current investigation of cyberstalking yes, I did see
18 emails in which he did reach out to attorneys in -- different
19 attorneys; not only you; but he also contacted other attorneys
20 as well.

21 Q. Is the FBI reviewing privileged information in this case
22 that you're aware of?

23 A. We have a taint special agent that does review and mark
24 evidence that's taint. It's called the taint process. I did
25 not and I do not and I did not review any of the information,

1 but there are searches in which he did contact and actual
2 communications he had with Pogo Is Right in which he asked her
3 for advice on what attorneys to contact and which we saw
4 Pogo's email in which she introduced Mr. Shafer with you, yes.
5 I saw that email.

6 Q. Are you aware of the FBI reviewing any communications
7 between Mr. Shafer's attorneys and him?

8 A. Say it --

9 Q. Has anyone, to your knowledge, from the FBI reviewed
10 communications between Mr. Shafer's attorneys and Mr. Shafer?

11 A. Like I said, there is a taint special agent that is
12 assigned to go through and -- not to review the email, but to
13 do a search. And if there's -- on this search if there's any
14 key words that match either your name or the term attorney or
15 privilege, they get those emails, they mark them, and those
16 are separated out so we cannot review them. No. So, to my
17 knowledge, nobody from the FBI reviewed emails or any kind of
18 communication between Mr. Shafer or yourself or any attorneys.

19 Q. And do you know the name of that taint person?

20 A. Yes.

21 Q. What is their name?

22 A. Special Agent Ryan Gowdy.

23 Q. Ryan Gowdy?

24 A. Gowdy.

25 Q. Can you spell that for me?

1 A. G-O-W-D-Y.

2 Q. And are they with FBI Dallas?

3 A. Yes, sir, they are.

4 Q. FBI Dallas.

5 Any other agents you're aware of on the team that are
6 reviewing for privileged communications?

7 A. Like I said, they're not reviewing content; they're just
8 reviewing whether or not there is any actual message that are
9 sent between you or attorneys to Shafer. So they don't review
10 the content; they just mark potential emails or communications
11 between -- you know, attorney/client privileged
12 communications. Again, they don't review them; they just mark
13 them and they are segregated out.

14 Q. Okay. Moving on.

15 So you're aware -- I believe you allege this in your
16 complaint that on June 29th, 2016 the FBI Atlanta opened an
17 investigation into a hacker called The Dark Overlord.

18 A. Yes, sir.

19 Q. And are you aware that on July 1st Mr. Shafer emailed the
20 Dallas FBI with information regarding The Dark Overlord,
21 including a zip file of the Farmington database that you refer
22 to later in your complaint, saying that The Dark Overlord had
23 hacked this and that the FBI should look into it?

24 A. I'm not aware of it. I don't have the total context of
25 that. But I do believe, after my review of his emails, I do

1 believe he may have sent that. But I'm not sure. I never
2 reviewed it. That email was not sent to myself or any agent
3 in particular. I believe if it was sent it was sent to just
4 the Dallas general email.

5 Q. But you did do a review of all the emails, as part of
6 your thorough investigation that you were trained to do, that
7 Mr. Shafer sent to the Dallas FBI. Correct?

8 A. I reviewed as many emails as I could. Because of the
9 amount of emails that he sent, it was very hard to review in
10 depth and understand all the emails that he did send. But
11 because he sent so many, I'm not sure I could actually spout
12 out on every email he sent and what they all meant.

13 Q. But you have no reason to believe that Mr. Shafer didn't
14 send--and I can produce it if necessary to the Court, because
15 I was CCed on it--an email with the Farmington database that
16 was provided to The Dark Overlord asking the FBI to do
17 something about it, to investigate The Dark Overlord and do
18 something about this. Correct?

19 A. Yeah. I'm not trying to say that he did not send it. I
20 just did not review it. I was just trying to answer your
21 question. Yes, sir.

22 Q. But as far as you're aware, Dallas FBI never contacted
23 Mr. Shafer about this information that he sent regarding The
24 Dark Overlord asking the FBI to investigate The Dark Overlord.
25 You're not aware of any communication of that sort in any of

1 the reviews that you did.

2 A. Not to my knowledge, no, sir.

3 Q. But you wrote about The Dark Overlord in your criminal
4 complaint, implying somehow that Mr. Shafer was involved in a
5 conspiracy with The Dark Overlord and was involved with
6 criminal behavior that The Dark Overlord was engaging in. Is
7 that correct?

8 A. Yes. Like I said, by way of a background, we had to
9 explain the two previous search warrants, and we included that
10 just to provide a background on why the second search warrant
11 was conducted based on Atlanta's investigation.

12 Q. Based on Atlanta's investigation. But before you wrote
13 your criminal complaint, did you review Mr. Shafer's emails to
14 the FBI, Dallas FBI? Did you do a search?

15 A. No. At that time we had no -- I had no knowledge that he
16 sent numerous emails to the Dallas FBI general email address.

17 Q. And you don't have any knowledge, do you, of any kind of
18 criminal activity that Mr. Shafer engaged in with The Dark
19 Overlord?

20 A. I don't, no. Not saying that he did not, but I'm not
21 aware of anything in particular.

22 Q. Now, on January 9th, 2017, do you recall -- I mean, you
23 reviewed -- you just testified that you reviewed Mr. Shafer's
24 tweets. Correct?

25 A. Like I said, I tried to review as many as I could.

1 Because of the extensive amount of them, I can't say that I
2 remember each and every one of them, but I reviewed as many as
3 I could, yes, sir.

4 Q. There was about 5,000 of them. Right?

5 A. If you say so, yes, and I believe you.

6 Q. And it's a public Twitter account. Right?

7 A. Correct.

8 Q. And it's readily identifiable to him. Is that correct?

9 A. His Twitter handle is jshafer817, and so you could say
10 that is his, yes.

11 Q. And are you aware of a single instance over this entire
12 time span that you've testified to here today where anybody,
13 anybody from the FBI or the United States Attorney's Office
14 told Mr. Shafer, You shouldn't tweet like that; you're
15 crossing the line?

16 A. It's not the FBI's position to dictate and to tell people
17 what to do with their Twitter account and how to do it, so no,
18 not to my knowledge. We don't tell individuals how many or
19 how much or how often they should tweet or use any of their
20 social media, no.

21 Q. I'm sorry. Maybe my question wasn't clear. I wasn't
22 asking about the policy position of the FBI. What I'm asking
23 about is whether or not you were aware of a single
24 communication from the FBI during the entire span of this
25 case, through every one of Mr. Shafer's 5,000 public tweets,

1 through the Facebook interaction in this case, through the
2 phone calls that his wife made, that he made to the FBI, if
3 you are aware of a single communication to Mr. Shafer saying,
4 Stop this behavior; you're crossing the line?

5 A. From the FBI, no, but I know, like we testified earlier
6 -- like I testified earlier, I don't think it would have
7 mattered because when he was notified that -- from Daryl
8 Pruitt's fax and emails that it was illegal to contact the
9 Court, it didn't matter to him; he kept on doing it, so -- but
10 other than that, no, I'm not aware of any other communication
11 that he sent -- or that we sent as the FBI, no.

12 Q. So I'm correct to sum up your answer as essentially, No,
13 I'm not aware of anyone from the FBI ever communicating with
14 Mr. Shafer telling him to stop his tweets.

15 A. Correct. And it's not our policy to communicate with a
16 subject of an investigation as well.

17 Q. Now, I think January 9th, 2017 Mr. Shafer said -- he
18 tweeted to the FBI Dallas Twitter handle saying he had a
19 message for Nathan Hopp. But the FBI Dallas Twitter account,
20 that's a public account. Right?

21 A. I believe so, yes.

22 Q. And then on January 29th, 2017, Mr. Shafer's house is
23 raided by FBI Dallas, FBI Atlanta, FBI New Orleans, and FBI
24 Newark.

25 A. I believe so.

1 Q. Correct?

2 A. I believe so, yes, sir.

3 Q. Were you part of that raid?

4 A. Yes, I was.

5 Q. And you went in with your guns drawn.

6 A. Of course; yes, sir.

7 Q. Right. Because that's your policy.

8 A. Yes, sir.

9 Q. Right?

10 Now, between the first FBI raid on -- I'm sorry. I need
11 to go back and look here. The first FBI raid, which was on
12 May 25th, 2016, which was allegedly for CFAA violations
13 regarding the Patterson FTP server--right?--and January 29th,
14 2017, are you aware of a single act of physical violence by
15 Mr. Shafer?

16 A. No, sir.

17 Q. Are you aware of a single instance where Mr. Shafer went
18 to the United States Attorney's Office?

19 A. That he traveled to there? Not aware, no.

20 Q. Are you aware of a single instance where Mr. Shafer was
21 anywhere near Special Agent Hopp's house?

22 A. Not that I'm aware, no.

23 Q. Now, this first two raids, the raid in--sorry--May 15th,
24 2016 and January 29th, 2017, Mr. Shafer has never been charged
25 with any crimes related to those two raids. Correct?

1 A. I'm not aware, no. I don't believe so; not yet, if there
2 is --

3 Q. His property was seized. Correct?

4 A. Correct.

5 Q. Guns were pointed at his children?

6 A. No, sir. I do remember an article that was written after
7 the first raid in which it specifically called that weapons
8 were drawn and pointed at the baby's crib, feet away from the
9 door, in which, you know, that is incorrect and not true
10 because there's not a crib feet away from the door. It's
11 actually in another room separated by a brick wall.

12 And actually in emails that I reviewed afterwards, he
13 actually admitted to the person that wrote the article that
14 that was not correct and she was wrong in her article, and
15 then he responded to him saying, Well, that's how you related
16 it to me; that's how she believed it to be.

17 But no, no weapons were never pointed at their children,
18 you know. No. I don't do that. I don't point weapons at
19 children, and I think that's -- you know, I think that's
20 incorrect, sir.

21 Q. Did you read Ms. Shafer's declaration?

22 A. Yes, I did.

23 Q. So you think Ms. Shafer was lying in the declaration when
24 she said you did that. Not you, but that that the FBI did
25 that. It's your testimony --

1 A. My testimony that --

2 THE REPORTER: I'm sorry. If you could speak one at
3 a time, please.

4 MR. EKELAND: I'm sorry. My apologies.

5 Q. (BY MR. EKELAND) You read Ms. Shafer's declaration?

6 A. Yes, sir.

7 Q. And you read how she said that the FBI pointed guns at
8 her children?

9 A. Yes, sir, I did.

10 Q. And it's your testimony that that's false.

11 A. Yes, it is.

12 Q. Now, you're not aware of anybody at that raid, the second
13 raid on January 29th, 2017, leaving any contact information
14 for anybody at the FBI, are you?

15 A. I'm not aware, no.

16 Q. You're not aware of anybody on that January 2017 raid
17 leaving contact information for any of the United States
18 Attorneys involved in this case, are you?

19 A. Not aware, no.

20 Q. As a matter of fact, the only contact information that
21 was on any of the papers on that raid was for Judge Cureton
22 because Judge Cureton signed the warrant. Correct?

23 A. I believe so, yes.

24 Q. Now, do you recall on January 31st, which is two days
25 after your raid, Mr. Shafer tweeting -- complaining about the

1 FBI raid on Twitter?

2 A. I believe so, yes.

3 Q. On his public Twitter account.

4 A. Correct.

5 Q. None of those tweets, I don't think there's a single
6 tweet actually in this entire case or any kind of
7 communication that I've seen in this entire case--perhaps you
8 can correct me if I'm wrong--that makes an explicit threat of
9 violence against anybody.

10 A. Not that I'm aware, other than the instances that we
11 described, and according to the violation it's threats of
12 violence or harassment or intimidation, so.

13 Q. Can you name off the top of your head without looking at
14 any of your papers right now in this courtroom a single
15 explicit threat of violence in anything you reviewed here?

16 A. On the communication with his wife about getting a gun,
17 about how he's going to protect himself, listening to his
18 voice on that.

19 Q. Where's the threat -- let's stop. Let's talk about the
20 gun. Where's the threat? You have a Second Amendment right
21 to carry a gun. Right?

22 A. Yes, sir.

23 Q. It's not illegal -- is that a yes?

24 A. Yes, sir.

25 Q. It's not illegal for somebody -- for Mr. Shafer to buy a

1 gun, is it?

2 A. No, sir, it's not; unless he's a felon, then he can't,
3 yes.

4 Q. But he's not a felon.

5 A. Correct.

6 Q. So where's the threat of violence in that conversation?

7 A. Specifically toward an agent, none.

8 Q. None. Right. There is no explicit threat of violence.

9 Anywhere else you want to tell me where there's an
10 explicit threat of violence in anything that you reviewed in
11 this case?

12 A. Other than the instances that we talked about before
13 about hurting or stating in round-about statements about how
14 the FBI's going to pay. Other than that, no.

15 Q. I'm sorry. I couldn't understand what you just said.

16 A. Other than the instances that we talked about earlier in
17 which he made accusations or insinuations about harming the
18 FBI, there are no other specific threats that I can recall or
19 do know about, no.

20 Q. But those weren't directed at any FBI agent, were they?

21 A. Correct.

22 Q. Those were in private conversations he was having with
23 somebody else.

24 A. Correct.

25 Q. And there's not a single instance in this record

1 anywhere, anywhere of Mr. Shafer asking anybody to commit any
2 kind of violence against anybody.

3 A. Yes, sir.

4 Q. You're not aware of physical -- a single physical act of
5 violence that Mr. Shafer's committed from the entire time
6 stamp from the first raid to today, are you?

7 A. Not aware, no.

8 Q. You're basing everything in this case in your
9 investigation off of his speech.

10 A. Speech and actions toward his -- in the -- the actions he
11 conducted on behalf of harassing and intimidating Special
12 Agent Hopp and his wife.

13 Q. Well, let's talk about that for a second. Let's talk
14 about that. What you're really talking about is a series of
15 tweets that he sent on March 21st, 2017 over the course of
16 seven hours. Correct?

17 A. Correct.

18 Q. That's the whole basis of your cyberstalking charges in
19 this case. Then you've got an 18 U.S.C. § 119 charge on the
20 basis that he looked up a publicly available record on the
21 internet and posted that. Right?

22 A. Correct.

23 Q. He made -- somehow made public that which was already
24 public.

25 Okay. So those tweets -- first of all, you understand

1 from the context of all this is that's the day where
2 Mr. Shafer first figured out that the FBI agent, who had never
3 identified himself or given him -- well, let me withdraw that.

4 It's clear from the record in this case and what you've
5 reviewed that Mr. Shafer thought Special Agent Hopp was
6 somebody named Nathan Hawk.

7 A. Correct.

8 Q. And are you familiar with the Rivello complaint that
9 Mr. Hopp signed?

10 A. Yes, I am.

11 Q. And that was a complaint -- it was on a 2261(a) complaint
12 that was against Mr. Rivello. Right? If I'm remember his
13 name correctly. Right?

14 A. Correct.

15 Q. Based on the fact that he sent a tweet to a *Newsweek*
16 journalist that induced an epileptic seizure.

17 A. I believe so, yes, sir.

18 Q. And that complaint, because it was a very interesting
19 application of the cyberstalking statute, got national media
20 attention. Correct?

21 A. I believe so, yes, sir.

22 Q. And Mr. Hopp's name was at the bottom -- it was the
23 signature on that complaint.

24 A. He was the affiant on that complaint, yes.

25 Q. And from the record you can see that Mr. Shafer saw

1 Mr. Hopp's name, saw that he was with FBI Dallas, and then
2 realized, That's the FBI agent that raided my house. Correct?

3 A. Yeah. It's evident that's how it occurred, yes.

4 Q. So when you look at the tweets on March 21st, 2017, you
5 can just see Mr. Shafer thinking out loud and figuring out who
6 Nathan Hopp was. Correct?

7 A. Yeah; correctly. But the actions of posting it on
8 Twitter, it just seems -- it's bragging of -- he's got to let
9 the world know that, I found out who he really was. After all
10 these times and all these instances prior to that, him
11 thinking his name was Nathan Hawk, it's like he had to tell
12 the world, Hey, I found out who he is now, and here's his
13 family, here's his wife, here's his wife's Facebook, here's
14 his grandfather's obituary. And yes, you are correct, it's
15 all public information, but I believe whenever he stepped over
16 the line whenever he shares an address of Agent Hopp and makes
17 it public knowledge that these two tie together, that's when
18 it goes over the line.

19 Q. You're not aware of any threats against Agent Hopp from
20 anybody else, are you?

21 A. Not that I know of, no.

22 Q. You're not aware of any threats from Ms. Hopp from
23 anybody, are you?

24 A. Not that I'm aware. It doesn't mean it hasn't happened.

25 Q. You can't identify a single instance where anyone has

1 threatened any of these people.

2 A. Correct. And that's why we took the actions that we did
3 and stopped the actions of Mr. Shafer before it did go to that
4 point, and that's why we took the necessary actions of issuing
5 -- getting a complaint so we can stop him from doing those
6 things. If he did go so far -- through searches and through
7 reviewing the searches of his Google account, we did find that
8 he was aware of Ms. Hopp's employment, so it wasn't going to
9 be long before -- if he starts posting information about her.
10 And so, of course, that wasn't known at the time, but we
11 wanted to do -- we did what we did to stop him before he did
12 escalate it to the point where somebody would get hurt.

13 Q. Okay. He did Google searches of public information.

14 A. Correct.

15 Q. And you just said you had to stop him from doing stuff
16 based on his public searches of information. Is that correct?
17 Did I hear that right?

18 A. We had to stop him before he posted -- before somebody
19 did get hurt, yes. That was our intent. Before somebody did
20 get hurt, that was our intent.

21 Q. Before somebody got hurt.

22 A. Yes, sir.

23 Q. Based on what? What makes you think that somebody was
24 going to get hurt here? The tweets on March 21st?

25 A. Whenever he shares his address, his intent is let

1 everybody know where they live.

2 Q. But that address is public. Was public. Correct?

3 A. I'm aware -- I believe so. I'm not sure, though.

4 Q. And that happened once. Correct?

5 A. I believe so, yes.

6 Q. And that was on March 21st in a seven-hour period between

7 4:30 a.m. and about 11:18 a.m. Correct?

8 A. I believe so, yes, sir.

9 Q. And after that he never re-tweeted that address.

10 Correct?

11 A. No, because after that we arrested him about ten days

12 later so he didn't have access to it anymore.

13 Q. You arrested him ten days later. Well, let's talk about

14 that ten-day span. Let's talk about that ten-day span.

15 During that ten-day span, Mr. Shafer could have tweeted

16 anything he wanted. Right?

17 A. Correct.

18 Q. He could have gone on Facebook and said anything he

19 wanted during that entire span. Right?

20 A. Correct.

21 Q. He never contacted Ms. Hopp during that entire span, did

22 he?

23 A. He sent her a Facebook message. Yes, he did.

24 Q. That was on the 21st. Correct?

25 A. Correct, yes.

1 Q. After the 21st he had no contact with her.

2 A. No. Not that I'm aware of, no.

3 Q. He never talked about her again, did he?

4 A. I'm not aware, no.

5 Q. And like you testified earlier, he never showed up at her
6 house or anywhere where she was.

7 A. Not that I'm aware, no.

8 Q. And during that ten-day span before you arrested him,
9 nobody from the FBI contacted him?

10 A. No, sir.

11 Q. You just wrote a criminal complaint and arrested him on
12 the basis of his speech.

13 A. No; on the basis of a violation of cyberstalking
14 violation. That's what the basis of the complaint was; not
15 his speech.

16 Q. On the basis of his speech.

17 MR. EKELAND: I don't have any further questions,
18 Your Honor.

19 THE COURT: Any redirect?

20 MR. GARDNER: Just one brief area of inquiry, Your
21 Honor.

22 THE COURT: All right.

23 MR. GARDNER: Thank you, sir.

24

25

REDIRECT EXAMINATION

By Mr. Gardner:

Q. Mr. Ekeland asked you about was there any instance where anyone told him not to tweet or any communication. I think he restricted that question to just the FBI. Do you recall that question?

A. I'm sorry. Say it again.

Q. Mr. Ekeland talked about the 5,000 tweets and was there any communication from the FBI telling him not to do that, and it was your policy not to communicate with suspects and/or --

A. Correct.

Q. But in your review of the jail calls, the browser history, the tweets, did Pogo Is Right tell him on a number of occasions what he was doing was not proper?

A. Yes.

Q. Did his wife, his mother, and his father also tell him that it was improper to contact and call out the name of the agent and his wife?

A. Yes.

Q. Did he listen to any of those folks?

A. No.

Q. Okay. And Mr. Pruitt also told him it was illegal to contact the Judge. Did he listen to Mr. Pruitt?

A. Correct.

Q. Okay.

1 MR. GARDNER: Thank you, Your Honor.

2 MR. EKELAND: No further questions, Your Honor.

3 THE COURT: Thank you, sir. You may step down.

4 MR. GARDNER: Your Honor, the Government has no
5 further evidence to present.

6 MR. EKELAND: Your Honor, we have no evidence.

7 THE COURT: All right. Based on the record that's
8 in front of me, I'm going to grant the motion. I'm going to
9 revise the conditions of supervised release as follows:

10 And what I would like is for you-all to confer after I
11 say this and see if you can agree on language to implement
12 what I'm saying.

13 On page 2, paragraph 7(g) where it's "Avoid all contact,
14 directly or indirectly," and it specifically identifies
15 Special Agent Hopp, I want to add to that the special agent's
16 wife, Magistrate Judge Cureton, and his assistant, I'm sorry,
17 who's name is I'm not remembering.

18 MR. GARDNER: Margaret Koye.

19 THE COURT: Margaret Koye, yes. So those additional
20 three people are specifically listed.

21 In addition to 7(k) that says "The Defendant shall not
22 possess a firearm, destructive device, or other weapon," I'd
23 like to add to that that he shall not purchase or otherwise
24 acquire any firearm.

25 I read with great care the transcript of the phone calls

1 where he was talking about weapons, and they do not appear to
2 me to be threats directed at any person with the government.
3 The language is a little bit ambiguous and it's, honestly,
4 quite troubling. And my worst nightmare would be that I order
5 the Defendant released and that he physically harm someone,
6 but on the record that's in front of me, I don't believe that
7 that's likely. I want you to know that I'm extremely
8 sensitive on that subject and that's why I want to add in
9 addition to not possessing a firearm that he shall not
10 purchase or otherwise acquire one. And if the Government has
11 any additional thoughts on how to emphasize that point, I
12 would certainly be very receptive.

13 And then I want to add a carve-out on page 4 what
14 currently is paragraph (u), sub 5, about use of social
15 networking. I want to explicitly carve out that he's
16 permitted to post on his blog as long as those posts are
17 consistent with the balance of the conditions. And in
18 particular, he is not permitted to post on his blog any
19 identifying information relating to Special Agent Hopp, his
20 wife, Judge Cureton, or Ms. Koye, or to do anything that would
21 encourage other people to harass.

22 MR. GARDNER: Your Honor, before we get too far down
23 the line, could I suggest to the Court on both that condition
24 and on 7(g) to also include the current investigating agents
25 in this case?

1 THE COURT: Yes.

2 MR. GARDNER: Okay. Thank you.

3 THE COURT: So he can post on his blog, he can say
4 the FBI are jerks, he can say the courts are jerks, he can say
5 the judges are jerks, he can say I'm a jerk, but don't say,
6 Here is how I found Special Agent Hopp's home address; if you
7 do this you can find his address, too. Or here is the email
8 account for these people. Like-minded patriots should take
9 note and act accordingly, I don't want to see anything like
10 that. Commenting on the case, the people, don't like them,
11 they're ugly, they're stupid, I don't think that's a big deal
12 personally.

13 So with that guidance from me, can counsel confer and see
14 if you can reach agreement on language that would effectuate
15 that?

16 MR. GARDNER: Yes, Your Honor.

17 MR. EKELAND: Yes, Your Honor.

18 THE COURT: Okay. Good.

19 Then I'm going to take a recess until I hear back from
20 you that you've got agreed language to amend the conditions of
21 release. So we'll take a short recess.

22 (Brief recess.)

23 THE COURT: Be seated. Sorry to keep you waiting.
24 I understand everybody's on board with the language?

25 MR. GARDNER: That's correct from the Government,

1 Your Honor.

2 MR. JENNINGS: Yes, Judge.

3 THE COURT: Okay. Good. I have signed the
4 conditions.

5 And I understand folks are available to provide the ankle
6 monitor for Mr. Shafer and that at that point he is ready to
7 get cut loose.

8 I have checked and can confirm for you that if there is a
9 superseding indictment that raises Magistrate Judge Cureton,
10 that I will be recusing and I believe a judge from outside the
11 district will be recruited to take over at that point. So in
12 all likelihood this is the last time you're going to have to
13 put up with me.

14 Let me observe, Mr. Shafer, that you've got a very good
15 lawyer or lawyers here. If there's any question about whether
16 your conduct is permissible, I would suggest that you confer
17 with your counsel and take their counsel. They're here to
18 help you and help you stay out of trouble with the Court. I
19 don't think there's anybody who's so smart that they don't
20 benefit from advice from someone who's there to help you, so I
21 encourage you to take advantage of that. And I'll quit there.

22 Anything else we need to take up today?

23 MR. GARDNER: No, Your Honor. Just so I can
24 clarify, you still want me to contact Ms. Moore on Tuesday if
25 the superseding indictment is still returned?

1 THE COURT: Correct. Please.

2 MR. GARDNER: Thank you.

3 THE COURT: Anything else on the Defense side?

4 MR. JENNINGS: None, Your Honor.

5 THE COURT: Okay. For those of you who are from out
6 of town, have safe travels home.

7 And the Court will stand in recess.

8 (End of hearing.)

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts 12/20/2017

10 _____DATE_____
11 SHAWN McROBERTS, RMR, CRR
12 FEDERAL OFFICIAL COURT REPORTER
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CERTIFICATE OF SERVICE

I, Frederic B. Jennings, certify that on Jan. 2, 2018, I served the attached motion via ECF on the attorneys of record in the above captioned proceeding.

DATED: Jan. 2, 2018

s/ Frederic B. Jennings
Frederic B. Jennings (NYS Bar
No.5246079)
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