

HAS HAL MARTIN FINALLY GOTTEN THE GOVERNMENT TO ADMIT HE DIDN'T FEED SHADOW BROKERS?

Hal Martin may finally get a plea deal.

On Tuesday, Martin's (excellent) public defender James Wyda asked to cancel a guilty plea to one of the 20 charges against him which had been scheduled for next week, stating that continuing negotiations may settle the whole case.

The defense requests a cancellation of the Rule 11 guilty plea hearing currently scheduled for January 22, 2018. The parties are continuing negotiations with the hope of resolving the entire case.

As John Gerstein had previously reported, last month Martin unilaterally moved to plead guilty to retaining one document described as "a March 2014 NSA leadership briefing outlining the development and future plans for a specific NSA organization," though the government still threatened to ask for the maximum sentence on that one charge. But something changed since then to reinvigorate plea discussions.

I'm particularly interested in the schedule Judge Marvin Garbis had set in response to Martin's bid to plead to one charge. The plea would have triggered a CIPA review, the process by which judges decide what classified information is necessary for a criminal trial, often in substitute form.

This is to confirm, as stated at the conference held this date:

1. On January 8, 2018, Defendant shall file a letter including its version of

the statement of facts as to Count One of the Indictment.

2. Defendant Martin intends to plead guilty to Count One on January 22, 2018 at 10:00 A.M.

3. Defendant Martin expects to file a CIPA § 4 submission on January 26, 2018.

4. The Government shall make an ex parte presentation regarding its contentions and its pending CIPA § 4 motion in an on-the-record sealed proceeding on February 1, 2018 commencing at 10:00 A.M.

5. Defendant Martin shall make an ex parte presentation regarding its contentions and its forthcoming CIPA § 4 submission in an on-the-record sealed proceeding at a time to be scheduled by further Order.

That's presumably an indication that Martin wanted to use classified evidence to mitigate his sentence. And all of this has happened in a six week extension Martin's lawyers asked for on December 8, explaining that they had only just gotten access to information seized (back in August 2016) from Martin's car and home.

On November 28, 2017, we had the opportunity to conduct an evidence review at the Baltimore FBI Field Office's Sensitive Compartmented Information Facility for the first time of some of the items allegedly seized from Mr. Martin's car and residence. In light of the volume of material made available for our review, we expect to return to the FBI multiple more times to review the remainder of the items.

All of which suggests the defense saw something in their classified discovery that made them think they can mitigate Martin's sentence and,

possibly, eliminate the government's interest in trying him for those other 19 retained documents.

So to recap: on December 8, Martin's lawyers ask for more time. On December 22, he moves to plead guilty. In the last few weeks, the judge set in motion the process to allow Martin to use classified information in his sentencing (and his lawyers submitted their version of what he would plead guilty to). And now a plea deal may be in the offing.

All that happened in the wake of Nghia Hoang Pho pleading guilty on December 1, after some interesting timing delays as well, timing which I laid out here.

The actual plea deal is dated October 11. It states that "if this offer has not been accepted by October 25, 2017, it will be deemed withdrawn." The information itself was actually signed on November 29. Friday, the actual plea, was December 1.

So while there's not a substantial cooperation component in the plea deal, certainly a substantial amount of time took place in that window, enough time to cooperate.

And consider the news coverage that has happened during that period. The initial plea offer was made in the week following a **big media blitz** of stories blaming Pho (and through him Kaspersky) for the Russian theft of NSA tools. In the interim period between the offer and the acceptance of the plea deal, Kaspersky confirmed both **verbally** and then in a **full incident report** that his AV had found the files in question, while noting that a third party hacker had compromised Pho's machine during the period he had TAO's tools on it.

In other words, after at least an 18 month investigation, Pho finally signed

a plea agreement as the media started blaming him for the compromise of these tools.

In that plea deal, the government noted that they could have charged Pho as they had charged Martin, with one count for each retained file (though in reality Martin got charged for a tiny fraction of what he brought home).

During much of that period, Harold Martin was in custody and under investigation for a similar crime: bringing a bunch of TAO tools home and putting them on his computer. Only, unlike Pho, Martin got slammed with a 20-count indictment, laying a range of files, and not just files from NSA. Indeed, the Pho plea notes,

This Office and the Defendant agree that the Defendant's conduct could have been charged as multiple counts. This Office and the Defendant further agree that had the Defendant been convicted of additional counts, ... those counts would not group with the count of conviction, and the final offense level would have increased by 5 levels.

That is, the government implicitly threatened Pho to treat him as Martin had been, with a separate charge tied to the individual files he took.

Now, perhaps that's all that Martin's lawyers were going to note, that a similarly situated defendant in the same district had been able to plead guilty to a single charge.

But I wonder if there's not more, specifically related to that plea, pertaining to the real source of the Shadow Brokers files. That is, if

Pho was permitted to plead guilty after having making the Shadow Brokers files accessible to third party hackers coming in after Kaspersky's AV got shut down, then why couldn't Martin, whose files were air gapped from such measures, obtain a similar plea?