

# THE GOVERNMENT REFUSES TO NAME FBI AGENT ACCUSED OF DECEIT IN MALWARETECH CASE

Here's the basic argument that Marcus Hutchins' (AKA MalwareTech) lawyers are making in an effort to get his post-arrest interview suppressed.

[D]espite Mr. Hutchins' multiple direct questions to the FBI agents who arrested him about the nature of his circumstance (e.g., "Can you please tell me what this is about?," asked at the outset of the interrogation) and notwithstanding his frequent expressions of uncertainty about the agents' focus of inquiry, the agents intentionally concealed from him the true and pertinent nature of his then-existing reality (e.g., "We're going to get to it," then somewhat revealing things 75 minutes later). Under these circumstances, bolstered by his known-to-the-agents exhaustion and status as a foreigner (among other things), Mr. Hutchins "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" was fatally compromised.

For its part, the government largely dodges the question of whether the agents misled (or refused to inform) Hutchins why he was being questioned, arguing (incorrectly – deception is mentioned twice in the first motion) that Hutchins didn't raise deceit until after learning more details about the process, and focusing on the law in isolation from the facts. Ultimately, though, they argue that the

substance of the crimes of which Hutchins was accused doesn't matter because he knew he was arrested. To substantiate that, they present claims that go to the heart of the deceit question – the circumstances surrounding Special Agent Lee Chartier informing Hutchins that he had been indicted in Wisconsin.

Like the defendant in Serlin, Hutchins was aware of the nature of the FBI inquiry. Hutchins knew that the FBI's interview on August 2, 2017, related to a criminal inquiry because Hutchins was handcuffed with his hands placed behind his back and told that he was under arrest based on federal arrest warrant. Doc. #82 at 20. And as if that was not enough, the questions posed to Hutchins, like the questions in Serlin, "would have alerted even the most unsuspecting [individual] that he was the . . . focus of the [criminal inquiry]."

[snip]

Unlike the defendant in Giddins, Hutchins was never misled about the criminal nature of the FBI investigation. There is no dispute that Hutchins was placed in handcuffs and **told he was under arrest based on an arrest warrant issued from the Eastern District of Wisconsin**, and that before any questioning, Hutchins was advised of his rights and waived those rights.

On that bolded bit, there very much is a dispute. Tellingly, the government never once mentions the name of the agent, Lee Chartier, who claims to have done this, the same agent that Hutchins accuses of deceit. That's interesting, not least, because even after the agents "colluded" (curse you for using that term, Hutchins' legal team!!!) about their story, whether and how Chartier informed Hutchins of his indictment while he had Hutchins in a stairwell is one of the matters on which

their sworn testimony differed.

At the outset, it is very important for the Court to remember the agents' pre-hearing collusion. As Agent Butcher revealed, she and Agent Chartier got together to "mak[e] sure that we were on – you know, that our facts were the same." (Id. 112:4-5.) Their synchronization of their testimony calls into question their entire characterization of events, and any benefit of any doubt the Court has regarding what happened should accrue to Mr. Hutchins' favor.

[snip]

Agent Chartier testified that he revealed he was with the FBI and told Mr. Hutchins that he was under arrest pursuant to a federal arrest warrant just after Mr. Hutchins had been detained, when he and the customs officers took Mr. Hutchins from the lounge to a stairwell. (Hearing Tr. 19:8-23.) By his own admission, however, Agent Chartier did not explain the charges or what was going on, despite Mr. Hutchins' numerous questions in the hallway. (Id. at 19:25- 20:4; 58:25-59:1.)<sup>4</sup>

In addition, Agent Chartier claimed that after he escorted Mr. Hutchins to the (pre-arranged) interrogation room, he and Agent Butcher again advised Mr. Hutchins that he was under arrest pursuant to a federal arrest warrant. (Id. 20:25-21:1.) Notably, they did not explain anything else. Agent Chartier acknowledged that Mr. Hutchins was not told that the arrest warrant flowed from an indictment, much less that the indictment charged six felony offenses stemming from the development and sale of Kronos. (Id. 56:22-24.)

Further, although the agents tried to coordinate their testimony, Agent Butcher's testimony about these meaningful events was quite different from Agent Chartier's. **She did not testify that he (Agent Chartier) advised Mr. Hutchins that he was under arrest pursuant to a federal arrest warrant.** Only Agent Chartier makes this claim, one that is undermined by Agent Butcher and otherwise lacks any support in the record. [my emphasis]

There's actually a very good reason why Butcher didn't describe Chartier doing this. He did so, if he did, in the stairwell; Butcher wouldn't have been a witness.

Ordinarily, an FBI agent would get the benefit of the doubt on this point, but for two reasons, the public records suggests they shouldn't in this case.

First, the time that Jamie Butcher estimated Hutchins was given his Miranda warning, 1:18PM, would only allow for a minute to transpire between the time Hutchins exited the airport lounge and his interview started post-waiver.

Despite the fact that Mr. Hutchins was escorted out of the lounge at 1:17 p.m. and the audio recording started at approximately 1:18 p.m. (see Exhibits 14 and 9), Agent Chartier claimed that he read Mr. Hutchins the Advice of Rights form (Exhibit 9) and Mr. Hutchins read and signed it. (Hearing Tr. 24:25-25:6.)

Further, as an excerpt from the transcript reveals, Butcher told Chartier he (the more experienced agent on questioning witnesses of the two) was all over the place just minutes after he would have given such a warning.

5:05-5:22

Chartier: Okay. And I don't know if we

did this in the beginning. Sorry, my brain is like—

Butcher: You're like a mile a minute. Go ahead.

Chartier: Did you—did we have a passport for you? I didn't have—we didn't take one off of you. Did you have a passport.

Hutchins: It's in the bag.

Chartier: It's in your bag? Okay. All right. Well just for the record, could you go ahead and state your full name and then give your date of birth?

Again, this would have happened just minutes after Chartier would have given Hutchins his Miranda warning. Whatever the verdict on Hutchins' competence to waive his rights, it does raise questions about the carefulness of the warning that Chartier gave.

Ultimately, both these motions have the feeling of rushed filings, with some errors and imprecisions. Ultimately, the judge is likely to rule against Hutchins here (though it will form important background as she considers much more substantial challenges to the charges against him). As I've said, though, the entire process has undermined both agents' credibility if this ever goes to trial.

Hutchins' motion is also interesting for the evidence it gives that this was still ultimately about getting Hutchins to cooperate against people the government was certain he was still communicating with, something I've been maintaining from the start.

Chartier: And what was the name of that?

Hutchins: Oh, fuck. I really can't remember. No, I'm drawing a blank. I mean, like, I actually sell the code. I sell it to people and then they do what the fuck they want with it.

Chartier: I understand, I understand, I understand. But you see why we're here?

Hutchins: Yep. I can definitely see.

Chartier: I mean, you know, Marcus, I'll be honest with you. You're in a fair bit of trouble.

Hutchins: Mmm-hmm.

Chartier: So I think it's important that you try to give us the best picture, and if you tell me you haven't talked to these guys for months, you know, you can't really help yourself out of this hole. Does that make sense?

Hutchins: Yeah.

Chartier: Now, I'm not trying to tell you to do something you're not doing, but I know you're more active than you're letting on, too. Okay?

Hutchins: I'm really not. I have ceased all criminal activity involving—

Chartier: Yeah, but you still have access and information about these guys.

Hutchins: What do you mean? Like, give me a name and I'll tell you what I know about that.

This is what the entire case is about: the government used a trumped up claim of really attenuated criminal liability to try to get Hutchins to provide information on "these guys." And they didn't decide to do so until after Hutchins came back to their attention after he saved the world from WannaCry.

If this ever goes to trial, that should be the central issue. And going forward, too, that should be the central issue: that the government got itself into a very deep hole on a legally deficient claim because they did a back door search on the guy who saved the world and decided arresting him was the best way to coerce

his cooperation moving forward.

But I'm still betting this doesn't go to trial.