

A DIFFERENT DOJ SEARCH OF NOTE: JOSHUA SCHULTE

Josh Schulte should have grown concerned when David Denton – one of the two AUSAs in charge of his prosecution – didn't show up to a status conference on July 26.

THE COURT: All right. Good afternoon, everyone. Mr. Lockard, will Mr. Denton be joining us?

MR. LOCKARD: He will not be joining us today.

For that matter, he should have sussed something was up a month earlier, during trial, when Denton objected to Schulte's bid to introduce a script he wrote as evidence at his trial because of ongoing and escalating security concerns.

[Y]our Honor, we have accepted a continuing expansion of the defendant's use of a laptop that was originally provided for the purpose of reviewing discovery, but to us, this is really a bridge too far in terms of security concerns, particularly in light of the issues uncovered during the last issue with his laptop and the concerns that the MDC has raised to us about tampering with the law library computer. We have not taken any action in response to that, because we're in the middle of trial and we're loath to do things that would disrupt the trial at this point.

As I laid out, among the security concerns Denton was worried about was that, just weeks before trial when Schulte claimed that his laptop was broken, IT staff at the US Attorney's Office discovered that Schulte had been tampering with the BIOS on his laptop, seemingly

in an attempt to bypass WiFi restrictions.

First, with respect to the defendant's discovery laptop, which he reported to be inoperable as of June 1, 2022 (D.E. 838), the laptop was operational and returned to Mr. Schulte by the end of the day on June 3, 2022. Mr. Schulte brought the laptop to the courthouse on the morning of June 3 and it was provided to the U.S. Attorney's Office information technology staff in the early afternoon. It appears that the laptop's charger was not working and, after being charged with one of the Office's power cords, the laptop could be turned on and booted. IT staff discovered, however, that the user login for the laptop BIOS¹ had been changed. IT staff was able to log in to the laptop using an administrator BIOS account and a Windows login password provided by the defendant. IT staff also discovered an encrypted 15-gigabyte partition on the defendant's hard drive. The laptop was returned to Mr. Schulte, who confirmed that he was able to log in to the laptop and access his files, along with a replacement power cord. Mr. Schulte was admonished about electronic security requirements, that he is not permitted to enable or use any wireless capabilities on the laptop, and that attempting to do so may result in the laptop being confiscated and other consequences. Mr. Schulte returned to the MDC with the laptop.

¹ The BIOS is firmware used to provide runtime services for operating systems and programs and to perform hardware initialization during the booting process. The BIOS settings can determine, for example, whether external ports and wireless capabilities are enabled or disabled.

So DOJ revealed evidence that Schulte was attempting to hack his discovery laptop before trial, Denton implied DOJ was waiting until after trial to do anything about it, and Denton was too busy to show up at the status hearing on July 26.

He appears to have been busy getting a search warrant for the laptop. The government served Schulte with the warrant and seized the offending laptop two days later, on July 28. After Schulte attorney Sabrina Shroff complained, the government explained that since they had not yet charged Schulte in conjunction with the new warrant, they didn't have to provide their affidavit.

[T]he Government's investigation of the defendant's conduct that gave rise to the search warrant is ongoing, no charges related to his use of the laptop have been filed, and the scope and precise nature of the conduct that the Government is investigating are not known either to the public or to the defendant.

If that investigation results in the use of information obtained pursuant to the search warrant, the Government will comply with its discovery obligations promptly.

They did, however, object to getting Schulte a new laptop.

The defendant has seven weeks to draft and file his pro se motions pursuant to Federal Rules of Criminal Procedure 29 and 33, and can do so using the normal resources available to pro se inmates at the Metropolitan Detention Center. The defendant "has the right to legal help through appointed counsel, and when he declines that help, other alternative rights, like access to a [personal laptop], do not spring up." United

States v. Byrd, 208 F.3d 592, 593 (7th Cir. 2000). Particularly in view of the Magistrate Judge's determination that there is probable cause to believe that the defendant's previous laptop contains evidence of additional crimes, there is no reason that the defendant should be afforded special access to a new laptop simply because the Court has permitted him to proceed partially pro se for certain matters going forward.

Shroff's reply, in addition to making a legitimate case that Schulte should be able to get a laptop to finish his Rule 29 and 33 motions, provided more detail of what she knows about the warrant. This is not about espionage. She mentions only additional counts of contempt and possessing contraband, the same charges investigated in 2018 when Schulte's phone was found (though those crimes seem inconsistent with the security concerns – hacking – described leading up to the trial).

The search warrant itself notes that the government is not alleging it has probable cause for any acts of espionage.

[snip]

Notably, while the government's letter states the factors which may permit an affidavit to be withheld – e.g., to preserve confidential sources or protect witnesses – the government never explains how those factors possibly could apply here, where someone already incarcerated is accused of violations of Title 18, United States Code, Sections 401(3) (contempt of court) and 1791(a) (possessing contraband in a correctional facility). There are no confidential sources or witness at risk – and production of the affidavit in support of the search warrants implicates none of the articulated concerns.

But that's not right. It *can't* be right. If Schulte got contraband, it means someone – his legal team, his family, or the guards – shared it with him. He has a history of getting the latter two involved in ferrying information or goods improperly. I'm mindful, too, of Schulte's curious replication of a WikiLeaks-seeded propaganda campaign about Mike Pompeo, even in spite of being on SAMs.

After suggesting there couldn't be witnesses in a situation where there'd have to be witnesses, Shroff turns the government's efforts to avoid disrupting Schulte's trial on its head, claiming it is proof that waiting until after the trial is punitive.

The timing of the search warrant sought by the government as it relates to its stance on a replacement laptop is perhaps informative. Right before start of trial, a guard at the MDC dropped Mr. Schulte's laptop. See ECF Docket Entry No. 838. In an effort to "fix" the laptop, Mr. Schulte provided it to the government – for that limited purpose. The government then returned the laptop saying it was working but asked Mr. Schulte about the organization of the laptop and then asked the court to admonish Mr. Schulte for manner in which he was maintaining it. The government did nothing more. It did not ask the Court for a search warrant or to curtail Mr. Schulte's access to the laptop. The government allowed Mr. Schulte to keep his laptop – all through the trial – and only now seeks its seizure. The timing appears punitive and not keyed to any potential harm to a third party.

Ultimately, Judge Jesse Furman declined to intervene, in part because the warrant was obtained in EDNY, not SDNY.