

**TWENTY-SEVENTH ANNUAL**  
**DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION**

No. 11-647

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

---

**UNITED STATES OF AMERICA**

**--against--**

**DONALD POWERS**

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**ON WRIT OF CERTIORARI TO THE**  
**COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**

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**RECORD ON APPEAL**

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF BOERUM**

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**UNITED STATES OF AMERICA**

**INDICTMENT**

**--against--**

**DONALD POWERS**

**Cr. No. 11-647**

-----X

**The Grand Jury Charges:**

**BACKGROUND:  
RELEVANT PERSONS AND ENTITIES**

1. The National Security Agency/Central Security Service (“NSA/CSS”) is an agency operating within the United States Department of Defense (“DoD”) with headquarters at the Fort George G. Meade military installation in the state of Maryland and field offices around the country, including one within the state of Boerum. NSA/CSS's primary responsibilities involve the collection and analysis of foreign communications as well as the protection of sensitive American communications involving the use of cryptography.

2. United States Cyber Command (“USCYBERCOM”) is a DoD organization formed in 2009 and supervised by the Director of NSA/CSS. USCYBERCOM is responsible for the protection and organization of DoD and military computer networks and for the performance of military cyberspace operations. USCYBERCOM headquarters are located at Fort Meade in the state of Maryland.

3. Natoristan is a nation-state located in the Middle East. The United States purchases from Natoristan large quantities of oil and natural gas and, in exchange, provides economic and military assistance. The United States maintains a consulate in Natoristan's capital city of Neutralia. Nonetheless, the United States has expressed concerns that Natoristan may harbor or support terrorist organizations. Natoristan has rapidly developed a nuclear program over the past four years. The United States has publicly warned Natoristan that any efforts to develop nuclear weapons will not be tolerated, though no official action has been taken because Natoristan maintains that it is developing peaceful nuclear energy programs.

4. Spectreia is a nation-state located in the Middle East that shares a border with Natoristan. Spectreia is an ally of the United States and a co-signatory of a bilateral mutual defense treaty entered into in 1997. Natoristan has publicly expressed its belief that Spectreia is a threat to Natoristan's security and does not maintain diplomatic relations with Spectreia.

5. Donald “Don” Powers (“defendant”) was employed at USCYBERCOM at its formation in 2009. In March 2009, the defendant was appointed to lead a team of programmers known as Team Brushfire, which developed an advanced computer worm named the “Brushfire Worm”

that was designed to perform controlled attacks on encrypted computer systems. In July 2010, the Brushfire Worm was deemed by the NSA/CSS to be uncontrollable and thus too imprecise to implement in furtherance of National Security initiatives. The worm along with the accompanying encryption and coding was allegedly destroyed by USCYBERCOM. In August 2010, in recognition of his contribution to cyber defense, the defendant was promoted to Chief of Operations at the USCYBERCOM office in the state of Boerum. The defendant's security clearance within NSA/CSS permitted him access to classified documents up through the level of Sensitive Compartmentalized Information ("SCI"), the highest level possible for a government employee.

6. Natalie Cook ("Cook") was a Staff Reporter for the National Desk at the *National Times Post*, a national daily newspaper headquartered in New York, New York. Cook's whereabouts are currently unknown.

### **RELEVANT TERMS**

7. A "worm" is a program that travels from one computer to another but does not attach itself to the operating system of the computer it "infects." It differs from a "virus," which is also a migrating program, but one that attaches itself to the operating system of any computer it enters and can infect any other computer that uses files from the infected computer.

8. 18 U.S.C. § 798(b) provides that as used in 18 U.S.C. § 798(a)(3):

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States.

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

### **COMMON ALLEGATIONS**

9. In or about October 2010, American and European newspapers reported that Natoristan's primary nuclear reactor had been shut down. The cause of the shutdown was reportedly a massive failure of the reactor's computerized control system, caused by a computer worm. The origin of the worm was and remains unknown to the United States government and military. Natoristan's government subsequently reported that the resulting damage would be extremely

difficult if not impossible to repair and that it expected the reactor to be inoperable for at least one year. To date, Natoristan's nuclear program remains dormant.

10. On or about November 16, 2010, the defendant accessed an SCI Level classified document from the Office of the President, Memorandum USCC-185, via his NSA/CSS computer workstation number, "CC-36912." This Memorandum contained the contents of a confidential meeting between NSA/CSS chiefs and Spectreian security officials during which cyber secrets were discussed and traded. In accessing this document, the defendant triggered a "flagged" incident to Information Technology Security.

11. In or about December 2010, the defendant communicated or caused to be communicated to Cook the information contained in Memorandum USCC-185. The defendant advised Cook that the Brushfire Worm was among the cyber secrets traded to Spectreia and that he was certain the Brushfire Worm was the cyber weapon used to attack Natoristan's nuclear reactors.

12. On or about January 4, 2011, the defendant communicated with Cook concerning the publication of an article about the United States' involvement in the Natoristan incident. In this communication, the defendant expressed his enthusiasm to "show the truth the light of day."

13. On or about January 5, 2011, the *National Times Post* published an article authored by Cook entitled "Feds Get Spectreia to Do Their Dirty Work." The article was featured on the front page of the *National Times Post* and discussed how a confidential informant inside the NSA/CSS told the reporter about a confidential memorandum that proved the United States gave the Brushfire Worm to Spectreia to perform high powered cyber-attacks on another nation.

14. As a result of the disclosures contained in the *National Times Post's* article, the United States' relations with Spectreia and Natoristan have been materially harmed.

15. On or about January 6, 2011, officials from NSA/CSS and the United States Department of Justice ("DOJ") began an investigation into the leak of the memorandum from the Office of the President accessed by the defendant.

### **COUNT ONE**

#### **(Unauthorized Disclosure of Classified Information) 18 U.S.C. § 793(d)**

16. The Grand Jury realleges paragraphs 1-15 of this Indictment as though fully set forth herein.

17. Between on or about November 16, 2010 and January 5, 2011, in the Southern District of Boerum, the defendant, lawfully having access to documents relating to the national defense or information relating to the national defense which the defendant had reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, specifically Memorandum USCC-185, willfully communicated the same to Natalie Cook, a person not entitled to receive it, all in violation of Title 18, United States Code, Section 793(d).

**COUNT TWO**

**(Disclosure of Classified Information)  
18 U.S.C. § 798(a)(3)**

18. The Grand Jury realleges paragraphs 1-17 of this Indictment as though fully set forth herein.

19. Between on or about November 16, 2010 and January 5, 2011, in the Southern District of Boerum, the defendant knowingly and willfully communicated to an unauthorized person, Natalie Cook, classified information that concerned the communication intelligence activities of the United States, specifically Memorandum USCC-185, all in violation of Title 18, United States Code, Section 798(a)(3).

\* \* \*

January 26, 2011

/s/



PHOEBE LIN  
FOREPERSON

/s/



JOANNE GALLOWAY  
ASSISTANT UNITED STATES  
ATTORNEY  
SOUTHERN DISTRICT OF BOERUM

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF BOERUM**

-----X  
**UNITED STATES OF AMERICA**

**--against--**

**Cr. No. 11-647**

**DONALD POWERS**  
-----X

March 2 and 3, 2011

TRANSCRIPT OF HEARING AND DECISIONS ON PRE-TRIAL MOTIONS BEFORE THE  
HONORABLE WINSTON CHAMBERS,  
DISTRICT JUDGE, UNITED STATES DISTRICT COURT

**APPEARANCES:**

For the United States of America:

Mitchell McDeere  
United States Attorney *by*  
Joanne Galloway  
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Livingston, Boerum 40256

For Defendant Donald Powers:

Bradley Binder  
Binder and Swinder, LLP  
7 Park Plaza  
Livingston, Boerum 40259

Court Reporter:

Adam Smith  
5000 John F. Kennedy Boulevard  
Livingston, Boerum 40256

1 CLERK: United States of America versus Donald Powers. Counsel, note your appearance for the  
2 record.

3 MS. GALLOWAY: Joanne Galloway for the United States.

4 MR. BINDER: Bradley Binder of Binder and Swinder, LLP, for the defendant, Donald Powers.

5 THE COURT: Good afternoon. First, due to the potential national security issues that we will  
6 discuss today, this hearing will be conducted in camera. So, I understand that we have three  
7 separate motions before us today. We have one defense motion seeking to introduce the contents  
8 of the third email in an email conversation between Mr. Powers and journalist Natalie Cook  
9 under the rule of completeness of Federal Rule of Evidence 106, is that correct?

10 MR. BINDER: Yes, judge.

11 THE COURT: And there is a Government motion that moves to introduce a recorded  
12 recollection of Agent Madison Hunt under Federal Rule of Evidence 803(5) as an exception to  
13 the hearsay rule, is that right?

14 MS. GALLOWAY: Yes, your Honor.

15 THE COURT: Finally, the defendant is moving to admit statements made by a subsequently  
16 deceased witness to her attorney, correct?

17 MR. BINDER: Correct, your Honor.

18 THE COURT: I'd like to turn first to the issue of the emails and the rule of completeness. Ms.  
19 Galloway, can you begin by giving me the background to this motion?

20 MS. GALLOWAY: Yes, your Honor. First, the defendant has acknowledged in writing that he  
21 and Ms. Cook exchanged the three emails marked for identification as COURT EXHIBIT A, on  
22 January 4, 2011. For convenience, the emails have been titled Email 1, Email 2, and Email 3 and  
23 labeled as such. These are exact copies of the emails that they sent to each other. In support of  
24 this motion, we have filed with the court, as an offer of proof, Mr. Dylan Bosley's affidavit,

1 marked for identification as COURT EXHIBIT B. We seek to introduce Mr. Bosley's testimony  
2 at trial in order to show that he always turns over emails in response to a subpoena by  
3 reproducing them exactly as they appear on the email server.

4 THE COURT: Counsel, do you contest the authenticity of the emails in question?

5 MR. BINDER: No, your Honor. The defense agrees to stipulate that these emails have been  
6 accurately reproduced and are in fact an exchange between Mr. Powers and Ms. Cook.

7 THE COURT: Noted. You may proceed, Ms. Galloway.

8 MS. GALLOWAY: Thank you, your Honor. During our investigation of the defendant, we  
9 subpoenaed Mr. Bosley from USCYBERCOM's IT Security subdivision to turn over all emails  
10 sent and received from the defendant's government email address for the two years prior to  
11 January 10, 2011. We discovered that the defendant and Ms. Cook had exchanged three emails  
12 on January 4, 2011. At trial, we will seek to introduce Email 1 sent by the defendant, in which he  
13 writes, quote, I can't wait to see what you make of the information that I gave you, unquote, and,  
14 quote, The Beltway is going to blow a fuse once we show the truth the light of day, unquote. We  
15 will also seek to introduce Email 2 sent by Ms. Cook, in which she writes, quote, I'm sure that  
16 this is going to be an even bigger deal than Wiki, unquote.

17 THE COURT: And what is the purpose of Email 1 and Email 2?

18 MS. GALLOWAY: Judge, they are direct evidence that the defendant transmitted to Ms. Cook  
19 the classified information about the U.S. allegedly giving the Brushfire Worm to Spectreia in  
20 order to perform cyber-attacks on Natoristan.

21 THE COURT: How are they direct evidence of that transmission?

22 MS. GALLOWAY: Your Honor, on January 5, 2011, the *National Times Post* published a front  
23 page article authored by Ms. Cook entitled, quote, Feds Get Spectreia to Do Their Dirty Work,  
24 unquote. The January 5, 2011 article is marked for identification as COURT EXHIBIT C. That

1 article discusses the very classified information that the defendant is accused of leaking. The  
2 emails clearly show that, just one day before this article was published, the defendant and Ms.  
3 Cook were emailing about information given by the defendant to Ms. Cook that would expose  
4 information that is quote, an even bigger deal than Wiki, unquote, by which she obviously meant  
5 Wikileaks. That information was, we contend, the classified information about the U.S. giving  
6 the Brushfire worm to Spectreia. The emails are especially crucial to our case because Ms.  
7 Cook, the recipient of the confidential information, has disappeared, and the *National Times Post*  
8 has no information concerning her confidential source.

9 THE COURT: Counsel, on what basis should the Court admit the first two emails?

10 MS. GALLOWAY: Judge, the statement contained in Email 1 is a statement of the defendant  
11 and therefore falls squarely within the hearsay exemption for party admissions under Federal  
12 Rule of Evidence 801(d)(2)(A). Also, the statement in Email 2 is excepted from the hearsay rule  
13 as a statement against penal interest under Federal Rule of Evidence 804(b)(3) because the  
14 statement exposes Ms. Cook to potential criminal liability. Furthermore, Ms. Cook is an  
15 unavailable declarant as required by the Rule. Despite the Government's best efforts to locate  
16 her, she cannot be found.

17 THE COURT: Mr. Binder, do you object to the admission of the statements in Email 1 and  
18 Email 2?

19 MR. BINDER: Yes, your Honor. As argued in Mr. Powers' memorandum of law, both emails  
20 contain statements that are inadmissible hearsay, and, also, under Federal Rule of Evidence 403,  
21 the unfair prejudice to Mr. Powers substantially outweighs any probative value of the emails.  
22 The statements are not relevant because they discuss matters outside of the realm of this  
23 proceeding.

1 THE COURT: All right. Mr. Binder, if I were to admit the first two emails, what is your  
2 argument that Email 3 should be admitted under Federal Rule of Evidence 106?

3 MR. BINDER: Well, your Honor, we are moving to introduce the contents of Email 3, written by  
4 Mr. Powers, under the rule of completeness. This email concerns the late Ms. Elizabeth “Bitty”  
5 Jones, who worked in the Boerum office at USCYBERCOM and was a member of Team  
6 Brushfire with Mr. Powers. In the email, Mr. Powers writes, quote, Well I’m just doing my civic  
7 duty, but I don’t want to get accused of doing anything that would cause me to go to prison. Oh,  
8 by the way, I was having dinner with Bitty, and when I came back from the bathroom, I  
9 overheard her talking on the phone about how she fed someone at the *National Times Post* some  
10 information on the Natoristan worm situation. When she noticed me, she quickly stopped talking.  
11 Looking forward to reading about that one too, unquote. Rule 106 provides, quote, when a  
12 writing or recorded statement or part thereof is introduced by a party, an adverse party may  
13 require the introduction at that time of any other part or any other writing or recorded statement  
14 which ought in fairness to be considered contemporaneously with it, unquote. Further, the  
15 Advisory Committee’s Notes explicitly state that Rule 106 is intended to cure, quote, the  
16 misleading impression created by taking matters out of context, unquote. The statements in  
17 Email 3 should be admitted contemporaneously with Email 1 and Email 2 because, without  
18 Email 3, Emails 1 and 2 will be taken out of context and, therefore, would be misleading.

19 THE COURT: Why are Emails 1 and 2 misleading without the inclusion of Email 3?

20 MR. BINDER: Because, your Honor, Email 3 shows that Ms. Jones, and not Mr. Powers, gave  
21 the information about the Natoristan scandal to Ms. Cook. Email 3 also shows that Mr. Powers  
22 gave information about a different news story to Ms. Cook, specifically, her news article that was  
23 published on January 6, 2011, quote, Frayed USCYBERCOM Continues to Unravel: Sources  
24 Reveal Culture of Waste and Corruption, unquote, marked for identification as COURT

1 EXHIBIT D. The January 6, 2011, article discussed specific acts of corruption within the main  
2 branch of USCYBERCOM in Fort Meade, Maryland. The current prosecution in no way relates  
3 to the statements about corruption contained in Emails 1 and 2, nor would a prosecution be  
4 warranted for such statements. Without the admission of Email 3, Emails 1 and 2 will be taken  
5 out of context to mean something that they do not actually mean, and that is exactly what Rule  
6 106 is intended to prevent. The Government is attempting to mislead the court by introducing  
7 only Emails 1 and 2 and objecting to the admission of Email 3.

8 THE COURT: What is the Government's argument about why the contents of Email 3 are not  
9 admissible under Rule 106?

10 MS. GALLOWAY: Your Honor, Rule 106 does not admit what are otherwise inadmissible  
11 statements. Email 3 explicitly contains statements that constitute inadmissible hearsay. None of  
12 these statements falls within any exemption from the hearsay rule nor do they constitute an  
13 exception to hearsay.

14 THE COURT: Mr. Binder?

15 MR. BINDER: Your Honor, while we acknowledge that the statements do not fall within any of  
16 the Rule 803 or 804 exceptions or exemptions, the statements in Email 3 are admissible under  
17 the residual exception of Federal Rule of Evidence 807.

18 THE COURT: Ms. Galloway?

19 MS. GALLOWAY: Your Honor, the residual exception in no way applies to admit any of the  
20 statements in Email 3. By blaming other parties, the statements are self-serving and, therefore, do  
21 not have the requisite, quote, equivalent circumstantial guarantees of trustworthiness, unquote.

22 THE COURT: Mr. Binder, anything further on this email?

23 MR. BINDER: Yes, your Honor, Due Process mandates the admission of Email 3.

24 THE COURT: Ms. Galloway?

1 MS. GALLOWAY: Your Honor, the statements in Email 3 are not materially exculpatory  
2 because they are made by the defendant himself, are self-serving and, are therefore unreliable.

3 THE COURT: Alright. Turning to the issue of what Rule 106 may or may not admit, Ms.  
4 Galloway, what is your argument?

5 MS. GALLOWAY: Yes, judge. A number of circuit courts, including the Fourth and Sixth  
6 Circuits, have made it clear that Rule 106 does not admit statements that are otherwise  
7 inadmissible. Instead, Rule 106 admits only statements that are themselves independently  
8 admissible under another evidentiary rule. As the Advisory Committee's Note indicates, Rule  
9 106 cures the problem of, quote, the inadequacy of repair work when delayed to a point later in  
10 the trial, unquote. In that way, Rule 106 merely affects the timing of admitting statements that  
11 are otherwise admissible under the Federal Rules of Evidence.

12 THE COURT: Mr. Binder?

13 MR. BINDER: Your Honor, other circuit courts, including the Second Circuit and the District of  
14 Columbia Circuit, correctly hold that Rule 106 admits any statement in fairness in order to avoid  
15 taking matters out of context, even if the statement would be otherwise inadmissible.

16 THE COURT: Thank you, counselors. Now I would like to turn to the Government motion  
17 seeking to introduce Agent Hunt's handwritten notes as a recorded recollection. Ms. Galloway?

18 MS. GALLOWAY: Yes, your Honor. The Government seeks to introduce the handwritten note  
19 of Agent Madison Hunt dated November 17, 2010, marked for identification as COURT  
20 EXHIBIT E, which contains a unique Memorandum number and workstation number. Before I  
21 go into more detail, your Honor, in support of this motion, we have filed, as an offer of proof,  
22 two affidavits, one prepared by Mr. Dylan Bosley, marked for identification as indicated earlier  
23 as COURT EXHIBIT B, and one prepared by Agent Madison Hunt, marked for identification as  
24 COURT EXHIBIT F. At trial, we intend to present the testimony of Dylan Bosley and Agent

1 Madison Hunt regarding the Memorandum number of the classified information that was  
2 allegedly leaked to the press in this case and an identifying workstation number of the computer  
3 that allegedly accessed the classified information.

4 THE COURT: Noted. Ms. Galloway, can you explain the factual background of this recorded  
5 recollection? Why are there two individuals testifying in support of it?

6 MS. GALLOWAY: Yes, judge. As indicated earlier, Dylan Bosley is a staff member of IT  
7 Security who monitors the daily computer activity of government employees within a certain  
8 government entity. Mr. Bosley informed us that, on November 16, 2010, he was monitoring the  
9 computer activity of the USCYBERCOM division when he observed a flagged incident in which  
10 an individual accessed classified information originating from the Office of the President. Mr.  
11 Bosley also informed us that he had telephoned Agent Madison Hunt of the FBI the day after he  
12 saw the flagged incident and recited to Agent Hunt the Memorandum number of the accessed  
13 classified information and the workstation number of the computer that accessed the information.  
14 Agent Hunt wrote down the Memorandum number and workstation number in her handwritten  
15 notes dated November 17, 2010.

16 THE COURT: What is the purpose of the writing, counsel?

17 MS. GALLOWAY: Your Honor, the written notes indicate that the memorandum accessed was  
18 Memorandum USCC-185, which contained the classified information that was leaked to the  
19 press. The notes also indicate that the workstation number of the computer that accessed the  
20 pertinent information was CC-36912. Through further investigation, we discovered that the  
21 workstation number is registered to the defendant, Donald Powers. Therefore, your Honor, the  
22 recorded recollection is evidence that the defendant was the individual who accessed the  
23 classified information at issue.

24 THE COURT: Very well, what are your arguments as to the admissibility of this evidence?

1 MS. GALLOWAY: Well, first, your Honor, under Federal Rule of Evidence 803(1), the  
2 statements of Mr. Bosley and Agent Hunt's handwritten notes should be admissible under the  
3 hearsay rule because they are present sense impressions.

4 THE COURT: I thought this motion focused on Rule 803(5)?

5 MS. GALLOWAY: Yes, your Honor, but, alternatively, the Government argues that the  
6 statements are admissible as present sense impressions.

7 THE COURT: But weren't Mr. Bosley's statements made the day after Mr. Bosley viewed the  
8 two items on the computer network?

9 MS. GALLOWAY: Yes, your Honor. However, as argued in our memorandum of law, we  
10 believe that Mr. Bosley's recitation to Agent Hunt was made within a short enough time to  
11 guarantee the reliability of the statements and to satisfy Rule 803(1).

12 THE COURT: Mr. Binder, what is your argument with respect to Rule 803(1)?

13 MR. BINDER: Your Honor, it is clear that Mr. Bosley's statements were not made when the  
14 information was fresh in his mind. They were, as you indicated, made nearly twenty-four hours  
15 after Mr. Bosley saw the numbers. Although there is no standard timeframe after an incident  
16 occurs during which a statement must be made in order to qualify as a present sense impression,  
17 Rule 803(1) contemplates a period significantly less than twenty hours. Due to this excessive  
18 gap in time between Mr. Bosley viewing the items and reciting them to Agent Hunt, the  
19 statements here, your Honor, are plainly not present sense impressions.

20 THE COURT: I agree with you, counsel. Mr. Bosley's statements are not present sense  
21 impressions. Moving on, Ms. Galloway, I assume your other arguments are more persuasive?

22 MS. GALLOWAY: Federal Rule of Evidence 803(5) provides an exception to the hearsay rule  
23 for a past recollection recorded. Here, the past recollection recorded involves more than one  
24 individual. Both Mr. Bosley and Agent Hunt have indicated in their affidavits in support of this

1 motion that they will testify as to the accuracy of the recitation and transcription, respectively.  
2 Even though Agent Hunt did not show or read the handwritten notes to Mr. Bosley after she  
3 made the transcription, as long as the two witnesses attest to the accuracy of their recitation and  
4 transcription, this is sufficient to satisfy the requirements of the rule.

5 THE COURT: Mr. Binder, what are your arguments against admissibility of the recorded  
6 recollection?

7 MR. BINDER: Thank you, judge. The handwritten notes in fact do not satisfy the requirements  
8 of the recorded recollection exception to the hearsay rule because they were neither made by a  
9 single witness nor adopted by a single witness. Federal Rule of Evidence 803(5) carves out a  
10 hearsay exception for, quote, a memorandum or record concerning a matter about which a  
11 witness once had knowledge but now has insufficient recollection to enable the witness to testify  
12 fully and accurately, shown to have been made or adopted by the witness when the matter was  
13 fresh in the witness' memory and to reflect that knowledge correctly, unquote. Because the agent  
14 never read back to Mr. Bosley what she wrote down and because Mr. Bosley never saw the  
15 agent's transcription when the information was fresh in his mind, there is without question no  
16 adoption here. Mr. Bosley is the witness who at one time had personal knowledge of the two  
17 pieces of information. In accordance with the Rule, there is no way that Agent Hunt's  
18 handwritten notes can, quote, reflect that knowledge correctly, unquote, without Mr. Bosley in  
19 some way adopting or verifying that what was written was what Mr. Bosley had said. There is  
20 simply no way to know whether Agent Hunt's notes accurately reflect what Mr. Bosley saw. In  
21 short, the Government's proffered past recollection recorded is inadmissible hearsay.

22 THE COURT: Thank you, Mr. Binder. Ms. Galloway, do you have any other arguments in  
23 support of admissibility of the agent's notes?

1 MS. GALLOWAY: Yes, your Honor. The Government submits that there is no need for Mr.  
2 Bosley to have adopted Agent Hunt's transcription by viewing or hearing what Agent Hunt  
3 wrote down at the time the information was fresh in his mind. The Seventh, Third, and Tenth  
4 Circuits correctly hold that a past recollection recorded involving multiple participants is  
5 admissible so long as each individual in the chain of the recorded recollection can testify as to  
6 the accuracy of his or her part, whether it be recitation or transcription, in the chain. That is what  
7 will be done here, your Honor.

8 THE COURT: Mr. Binder?

9 MR. BINDER: Your Honor, the plain language of the rule expressly indicates that the recording  
10 must be, quote, shown to have been made or adopted by the witness, unquote. The recording  
11 here, your Honor, was not made by Mr. Bosley, and it was not adopted by Mr. Bosley.

12 THE COURT: Ms. Galloway, anything further?

13 MS. GALLOWAY: Yes, judge. There is no need for strict interpretation of the language of the  
14 Rule. Three Circuit Courts did not find that it was necessary. As argued in our papers, Congress  
15 agrees that strict interpretation of the language of the Rule is unnecessary.

16 THE COURT: Mr. Binder?

17 MR. BINDER: This is a simple question of interpreting an unambiguous statute. Congress has  
18 made it clear. Adoption is required, and testimony as to the accuracy of the individuals' roles in  
19 the chain is not adoption.

20 THE COURT: Ok, and with respect to the reliability of the statements, Mr. Binder?

21 MR. BINDER: The testimony as to the accuracy of the recitation and the transcription do not in  
22 any way, shape, or form provide sufficient indicia of reliability. Mr. Bosley recited these two  
23 letter and number combinations to Agent Hunt over the phone nearly twenty-four hours after he  
24 had viewed the two items on the computer screen.

1 THE COURT: Ok, I have heard enough on those points. Moving along, the defendant wants to  
2 introduce into evidence the prospective testimony of attorney Martin Mallow. And I'll note for  
3 the record that Mr. Mallow's affidavit was previously sealed, but was inadvertently placed in the  
4 record by a member of my staff along with the other unsealed affidavits. It is now unsealed, but  
5 I'll still consider all discussion of potentially privileged material to be in camera and  
6 confidential. Mr. Mallow's affidavit has been marked for identification as COURT EXHIBIT G.  
7 Mr. Binder, please describe the testimony at issue.

8 MR. BINDER: Your Honor, Mr. Mallow's testimony is highly material to his case. The late  
9 Elizabeth "Bitty" Jones, Mr. Powers' former co-worker and the woman mentioned in Email 3  
10 earlier, contacted Mr. Mallow on January 7, 2011. She told him that she was, quote, really  
11 scared, unquote, and said that a leak which originated from her office had been published in a  
12 newspaper. She also told Mr. Mallow, quote, I'm so afraid for my friend Don. I think they're  
13 going to arrest him for something that I did. They should be coming after me, instead. I'm going  
14 to tell the U.S. Attorney everything right now, there's just no other way, unquote. Immediately  
15 after leaving Mr. Mallow's office, Ms. Jones was struck by a car and died the next day as a result  
16 of these injuries. Ordinarily, this material would indeed be protected by the attorney-client  
17 privilege, but we think that when the privileged communication is exculpatory or exonerating,  
18 the court can make an exception to the general rule of privilege.

19 THE COURT: Counsel, do you have any law on this?

20 MR. BINDER: No, your Honor, this circuit has not addressed the issue to date.

21 THE COURT: Has any?

22 MR. BINDER: Not explicitly, your Honor, but we think it instructive to refer to the  
23 confidentiality rules--

1 THE COURT: The ABA Rules? I don't believe they have any binding effect on this court, and at  
2 any rate I don't recall such an exception to the rules of confidentiality for exculpatory material.

3 MR. BINDER: Your Honor, it's true that the ABA Rules have not acknowledged such an  
4 exception, but they do allow an attorney to break confidentiality for other reasons. The state of  
5 Massachusetts has explicitly adopted an exception to prevent wrongful incarceration.

6 THE COURT: You're suggesting that this court should follow a Massachusetts state ethical rule?  
7 You're in federal court, Mr. Binder.

8 MR. BINDER: Of course, but, respectfully, your Honor, the policy arguments here are strong.  
9 We are talking about highly exculpatory information. It would be a miscarriage of justice to  
10 convict my client without allowing him to present evidence that could very likely place the  
11 prosecution's case entirely into question.

12 THE COURT: That may be true, Mr. Binder, but there are pretty strong policy arguments on the  
13 side of the privilege, as well. Ms. Galloway, your response to Mr. Binder's novel argument?

14 MS. GALLOWAY: Thank you, your Honor. First of all, there is no support in the law for an  
15 exception to the attorney-client privilege for exculpatory information. Courts have had ample  
16 opportunity to consider one, and have all rejected the idea. The attorney-client privilege is  
17 fundamental to our legal system, and any exceptions to it are made only for incredibly important  
18 reasons, saving a life, for example. The privilege is based on the idea that clients need to be able  
19 to have full and open communication with their attorneys. That rationale has nothing to do with  
20 the content of the conversation.

21 THE COURT: But Mr. Binder argues that we are talking about evidence that is material to the  
22 guilt or innocence of the defendant. Surely this is not evidence that should be kept out  
23 mechanistically.

1 MS. GALLOWAY: Well, first of all, your Honor, we disagree with Mr. Binder on just how  
2 material this proposed evidence is, but, that aside, it is not this court's job to create a new  
3 exception to the attorney-client privilege. The federal court system is governed by the Federal  
4 Rules of Evidence. There is a system for changing the Rules.

5 THE COURT: Mr. Binder, any response to Ms. Galloway's argument that it's not my place to  
6 consider your exception?

7 MR. BINDER: Your Honor, Rule 501 gives the courts the ability to shape the contours of  
8 privilege. Privilege rules are generally developed by the courts.

9 THE COURT: But, if I were to acknowledge this exception, I would be the first federal judge to  
10 do so, would I not?

11 MR. BINDER: Yes, your Honor, this is fresh territory. But we think this is a unique case, and the  
12 exception would not have to be so broad that it seriously impedes the function of the privilege.

13 THE COURT: Ms. Galloway, anything to add?

14 MS. GALLOWAY: Just that recently adopted Rule 502 shows clearly that the Federal  
15 Rulemakers have considered privilege and are willing to use the Rules to make changes. Rule  
16 501 gives courts the general ability to change privilege doctrine, but something this significant  
17 should go through the formal rule-making process.

18 THE COURT: All right, I'll take it into consideration, counselors. Mr. Binder, I believe you have  
19 an alternate ground for admission, too?

20 MR. BINDER: Yes, your Honor, even in the absence of an exception to the privilege, we feel  
21 that Due Process requires the admission of privileged material when it is highly exculpatory, as  
22 Mr. Mallow's testimony clearly is. We have included the relevant cases in our memorandum.

23 THE COURT: Ms. Galloway?

1 MS. GALLOWAY: Your Honor, none of the cases Mr. Binder refers to is binding on this court  
2 on this issue. There is ample case law holding that the attorney-client privilege is absolute,  
3 survives death, and cannot be pierced simply so the defendant can access material supposedly  
4 useful to his case. At any rate, it's still not entirely clear that Ms. Jones' statements are  
5 exculpatory enough to justify piercing the privilege. There's nothing in her statement to prove  
6 that she's talking about the disclosures at issue here. Even if she is trying to take responsibility  
7 for leaking information, she could not have known whether the defendant made additional  
8 independent disclosures. Moreover, she certainly could have been just trying to help her friend.

9 MR. BINDER: Your Honor, the evidence is clearly exculpatory. Ms. Jones told Mr. Mallow that  
10 Mr. Powers was going to be arrested for something he didn't do, and that she was in fact  
11 responsible for it, herself. She is taking direct responsibility for the crime that my client is  
12 accused of. If she was just trying to help Mr. Powers, why would she take steps to get herself  
13 arrested?

14 THE COURT: All right, counselors, I think I have enough. Ms. Galloway, any final words?

15 MS. GALLOWAY: Yes, your Honor, even if the privilege is pierced, Ms. Jones' statements to  
16 Mr. Mallow are still inadmissible hearsay.

17 MR. BINDER: Your Honor, the statements fit solidly into Rule 803(3) as a declaration of intent.  
18 The discussion between Ms. Jones and Mr. Mallow involves Ms. Jones' plans to speak to the  
19 government. There's no problem with reliability under these circumstances.

20 THE COURT: It seems pretty clear to me, too, that we have an exception here, but I'll give it  
21 some thought. Thank you, counselors.

22 \* \* \* \*

1 **DECISIONS ON PRE-TRIAL MOTIONS**

2 **March 3, 2011, 9:37 a.m.**

3 THE COURT: Good morning, counselors. After careful consideration of the issues presented, I  
4 have reached a decision on the motions. Since counsel have indicated that they have no  
5 objection to my announcing my decision from the bench, I will do so. You may pick up copies of  
6 the formal order and decision from my clerk tomorrow.

7 The three emails at issue on this motion were all part of an exchange that occurred on  
8 January 4, 2011, between Donald Powers and Natalie Cook, and have been marked as Emails 1,  
9 2, and 3. Email 1 was sent from Powers to Ms. Cook at 9:32 a.m. Email 2 was a reply by Cook to  
10 Powers sent at 10:46 a.m. Finally, Email 3 was sent from Powers to Cook at 11:13 a.m, on the  
11 same day. Email 1 is admitted pursuant to Federal Rule of Evidence 801(d)(2)(A) because it was  
12 authored by Powers and is being entered against him, and thus constitutes a party admission.  
13 Email 2 is admitted pursuant to Federal Rule of Evidence 804(b)(3) because it is a statement  
14 made against the penal interests of Cook, who is unavailable. Any prejudice the emails may  
15 cause is substantively outweighed by their probative value.

16 The focus of Powers' rule of completeness motion is the admission of Email 3, sent from  
17 Powers to Natalie Cook on January 4, 2011 at 11:13 a.m. Email 3 is not admissible under the  
18 residual exception of Federal Rule of Evidence 807 because it is self-serving and thus does not  
19 provide the requisite indicia of reliability. Further, the Due Process Clause does not mandate the  
20 admission of Email 3 because Powers' own statements are self-serving, so they are not  
21 materially exculpatory. However, the court grants Power's motion seeking to admit the contents  
22 of Email 3 under the rule of completeness of Federal Rule of Evidence 106. The Court agrees  
23 with the holding of the District of Columbia Circuit in *United States v. Sutton*, 801 F.2d 1346,  
24 quote, Rule 106 is concerned with more than merely the order of proof and can adequately fulfill

1 its function only by permitting the admission of some otherwise inadmissible evidence when the  
2 court finds in fairness that the proffered evidence should be considered contemporaneously,  
3 unquote. While Email 3 is inadmissible as hearsay, Email 3 is still admitted into evidence in  
4 order to comport with the intent of Rule 106 because the statements in Email 3 provide the  
5 critical and necessary context for understanding the meaning of Email 1 and Email 2. The  
6 exclusion of this evidence would lead to the potential for misinterpretation or confusion with  
7 regard to Email 1 and Email 2.

8         Next, the Government's motion to admit the handwritten notes of Agent Madison Hunt is  
9 denied. As indicated during the hearing, the statements made by Mr. Bosley to Agent Hunt do  
10 not fall within the present sense impression exception to the hearsay rule under Federal Rule of  
11 Evidence 803(1) because the statements were made approximately 20 hours after Mr. Bosley had  
12 seen the Memorandum number and workstation number on the computer network. The  
13 statements also do not fall within the recorded recollection exception of Federal Rule of  
14 Evidence 803(5). The Rule expressly requires that a recording be shown to have been made or  
15 adopted by the witness when the matter was fresh in that witness' memory. There is no evidence  
16 of Bosley's formal adoption or verification of the transcription that was made by Agent Hunt. As  
17 a result, there is no indication that the notes taken by Agent Hunt are an accurate or reliable  
18 reflection of Bosley's personal knowledge at the time of the communication, and the admission  
19 of such evidence violates the fundamental meaning of Rule 803(5). We are not persuaded by the  
20 reasoning of the Third, Seventh and Tenth Circuits decisions relied on by the Government.

21         Regarding Powers' motion to admit the testimony of Attorney Martin Mallow, the  
22 motion is granted over the Government's objections based on attorney-client privilege and the  
23 rule against hearsay. The contents of Mallow's conversation with Bitty Jones are highly relevant  
24 to Powers' case, and are clearly material and exculpatory, as they suggest that Ms. Jones was

1 taking responsibility for the crime with which Powers is charged. Powers' argument that this  
2 Court should acknowledge an exception to the privilege when the defendant seeks to introduce  
3 material exculpatory evidence is compelling. Given the unique circumstances here, there is little  
4 concern that my ruling will seriously restrict the scope of the attorney-client privilege by  
5 adopting a narrow exception for materially exculpatory evidence. Because the courts are  
6 charged by Federal Rule of Evidence 501 to develop the privilege rules, I am willing to  
7 recognize such an exception in this Court. Moreover, given the highly exculpatory nature of  
8 Mallow's testimony, I find that withholding it based on a mechanical application of an  
9 evidentiary rule would violate Due Process. I find support for this proposition in *Chambers v.*  
10 *Mississippi*, 410 U.S. 284 (1973), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

11 Finally, the Government's hearsay argument is misplaced. Jones' statements fit squarely  
12 within the Federal Rule of Evidence 803(3) exception for a declaration of intent. Jones'  
13 statements clearly express her intent to speak to the authorities, and the circumstances in no way  
14 suggest that this statement lacks the indicia of credibility Rule 803 anticipates.

15 \* \* \* \*



**OFFICIAL DOCUMENT:** UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

**DEPARTMENT:** IT SECURITY SUBDIVISION

**RECEIVED BY:** DYLAN BOSLEY; JANUARY 10, 2011

**AUTHORIZATION:** REQUEST FOR PRODUCTION BY UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF BOERUM IN REGARD TO UNITED STATES V. POWERS



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**EMAIL 1:**

From: **Donald Powers** <Donald.Powers@USCybercom.gov>  
Date: Tues, Jan 4, 2011 at 9:32 AM  
Subject: Checking In  
To: Natalie Cook <Natalie.Cook@NatTimesPost.com>

Hi Nat,

I hope all is going well. I can't wait to see what you make of the information that I gave you. The Beltway is going to blow a fuse once we show the truth the light of day.

Thanks,

D

Donald Powers  
Chief of Operations  
U.S. Cyber Command, State of Boerum  
Donald.Powers@USCybercom.gov  
(718) 728-0523

This communication and any attached files may contain government information that is classified, confidential, or privileged. If this communication has been received in error, please delete or destroy it immediately.

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**EMAIL 2:**

From: **Natalie Cook** <Natalie.Cook@NatTimesPost.com>  
Date: Tues, Jan 4, 2011 at 10:46 AM  
Subject: Re: Checking In  
To: Donald Powers <Donald.Powers@USCybercom.gov>

D,

I'm so excited that we're going to drop the bomb on this one. My editors are reviewing it now, but I'm sure that this is going to be an even bigger deal than Wiki. I'm working on a couple of other things, but it should be on the front page in the next couple of days. You're a real patriot.

Nat

Natalie Cook  
Staff Reporter for the National Desk  
*National Times Post*  
Natalie.Cook@NatTimesPost.com  
(212) 620-1220

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**EMAIL 3:**

From: **Donald Powers** <Donald.Powers@USCybercom.gov>  
Date: Tues, Jan 4, 2011 at 11:13 AM  
Subject: Re: Checking In  
To: Natalie Cook <Natalie.Cook@NatTimesPost.com>

Oh, okay. Well I'm just doing my civic duty, but I don't want to get accused of doing anything that would cause me to go to prison. Oh, by the way, I was having dinner with Bitty, and when I came back from the bathroom, I overheard her talking on the phone about how she fed someone at the National Times Post some information on the Natoristan worm situation. When she noticed me, she quickly stopped talking. Looking forward to reading about that one too.

D

Donald Powers  
Chief of Operations  
U.S. Cyber Command, State of Boerum  
Donald.Powers@USCybercom.gov  
(718) 728-0523

This communication and any attached files may contain government information that is classified, confidential, or privileged. If this communication has been received in error, please delete or destroy it immediately.





**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF BOERUM**

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**UNITED STATES OF AMERICA**

**--against--**

**AFFIDAVIT OF DYLAN BOSLEY  
IN SUPPORT OF THE  
GOVERNMENT'S  
MOTION TO ADMIT EVIDENCE  
UNDER FED. R. EVID. 803(5)**

**DONALD POWERS**

**Cr. No. 11-647**

-----X

STATE OF BOERUM )  
 : SS.:  
COUNTY OF BOERUM)

I, Dylan Bosley, being duly sworn, declare under penalty of perjury:

1. My name is Dylan Bosley. I was born on October 20, 1983, in the State of Boerum. I currently live in Arlington, Virginia. I attended the Massachusetts Institute of Technology, where I received my Bachelors of Science degree in Science, Technology and Society in 2006. I work as a staff member of the Information Technology (“IT”) Security subdivision of the United States Office of Personnel Management (“OPM”) in Washington, D.C., which is directly supervised by the OPM’s Chief Information Officer.
2. When I am on duty at the IT Security subdivision, I monitor the computer activity of employees of one office, subdivision, or department within the United States Government to ensure that government employees of that entity access only information that they are authorized to access.
3. There are four levels of security clearance. From lowest to highest, they are as follows: Confidential, Secret, Top Secret, and Sensitive Compartmentalized Information (“SCI”).
4. Every computer within the United States Government has a unique workstation number. Additionally, every computer is registered to an individual government employee. The

computer network of the IT Security subdivision monitors the computer activity of each individual employee via these workstation numbers.

5. The computer network flags instances when employees access classified information that they are not authorized to access. The computer network also flags every instance when the information that was accessed originated in the Office of the President, regardless of whether the individual allegedly accessing the information has security clearance authorizing such access.
6. When an instance is flagged, I am able to click on the red flag on the computer network and view four pieces of information: a document label identifying the particular information that was accessed, the security clearance level required to access the information, the workstation number of the computer that accessed the particular classified information, and the security clearance level of the individual employee to whom that particular accessing computer is registered. I then use my discretion as to when to contact my supervisor regarding a flagged incident.
7. On November 16, 2010, I was working for IT Security, monitoring the computer activity of employees of the United States Cyber Command (“USCYBERCOM”) office within the Department of Defense.
8. At approximately 3:30 p.m., I observed a flagged incident on the computer network. I clicked on the red flag and discovered that the information was from the Office of the President requiring a security clearance level of SCI. I also found that the individual to whom the accessing computer was registered had the required security clearance level.
9. Even though the individual had the appropriate SCI clearance level, I thought I should contact Agent Madison Hunt of the Federal Bureau of Investigation (“FBI”), because I

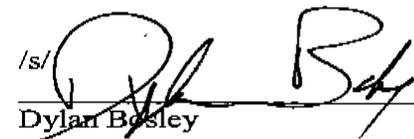
thought that SCI level information originating in the Office of the President was crucial enough to report.

10. Before I could call Agent Hunt, my computer crashed. I learned quickly that a computer virus had been planted into the IT Security system. I worked with the other IT Security staff members who were on duty that day to combat the virus. We were able to stop it within the hour. However, the log of computer activity from 3:00 p.m. through 4:30 p.m. on November 16, 2010, was deleted from the computer network, and the tape backup system for that time period had been corrupted.
11. Due to the computer virus, I was overwhelmed with the data problems and other matters and did not remember to contact the FBI until the next day. At approximately 11:00 a.m. on November 17, 2010, I called Agent Hunt at her desk and told her first that I had discovered a flagged incident where a computer had accessed SCI level information from the Office of the President the day before. I also informed her that the individual to whom the computer was registered had the appropriate clearance level, indicating that the individual was authorized to access the information.
12. Agent Hunt then asked me to recite to her the document label, which in this case was a Memorandum number, and the workstation number of the accessing computer.
13. I told Agent Hunt about the computer virus and my inability to read the information straight from the computer network. But at the time, I could recall the Memorandum number and the workstation number from memory.
14. I first recited the Memorandum number to Agent Hunt. I remember that it was a memorandum from the Office of the President. However, I do not now remember the Memorandum number.

15. I next recited the workstation number of the accessing computer to Agent Hunt. I do not now remember the workstation number.
16. Agent Hunt informed me that she had written down both the Memorandum number and the workstation number. She informed me that it likely was not a problem, but that she would keep a record of it. At that time, she did not repeat back the numbers to me to confirm they were what I had stated to her.
17. Again, I do not now recall the Memorandum number or the workstation number that were listed on the computer network for the flagged incident. However, I believe that my recitation of the two items to Agent Hunt was accurate and reliable. I am very good with numbers, so remembering the two items came naturally for me.
18. With regard to the subpoena duces tecum issued by the Government, I approved the production of the emails of former Chief of Operations, Donald Powers, for a two year period prior to January 10, 2011. Upon production, my team and I verified that each email produced to the government was, in fact, either sent by or received by Donald Powers' USCYBERCOM email address, Donald.Powers@USCybercom.gov.
19. Additionally, each email lists the sender and the recipient(s) of that email. Before producing the documents to the Government, my team and I have confirmed that all of the sender and recipient lines are secure and have not been tampered with.

Sworn to and subscribed before me  
This 14th day of February, 2011.

/s/   
\_\_\_\_\_  
Notary

/s/   
\_\_\_\_\_  
Dylan Bosley



## Feds Get Spectreia to Do Their Dirty Work

*Newly uncovered documents show U.S. spy agency instrumental in Natoristan nuclear hacking*

By Natalie Cook

January 5, 2011

The United States' top computer intelligence agency was behind the October shutdown of Natoristan's nuclear reactor, according to a confidential memorandum made available to the *National Times Post*. A source reveals that United States Cyber Command, or USCYBERCOM, a Department of Defense agency tasked with securing the military's computer networks, worked closely with the government of Spectreia to create and deliver the computer worm that devastated Natoristan's nuclear infrastructure. These revelations put to rest the months of speculation that have followed the apparently hostile destruction of Natoristan's computer networks, which had been blamed on a wide range of groups including international terrorist organizations, environmental and human rights groups, and rogue states. Natoristani officials have stated that the attack on the fledgling nation's computer system has set its nuclear program back nearly a decade.

In early October 2010, Natoristan's main nuclear reactor was shut down as a result of a cyber attack, which also damaged much of the government's centralized computer system. The attack was widespread and led many experts to believe that it was the result of a computer worm. Professor Daniel Breambaker, a Professor of Computer Science at the Massachusetts Institute of Technology, described this worm as "an incredibly powerful worm, the likes of which I have never seen before. The worm must have been the product of a top-secret government project because academics and professionals in my field would not disseminate an uncontrollably destructive cyber tool."

Based on top secret documents recently obtained by the *National Times Post*, Professor Breambaker's theory seems to be confirmed. A high-ranking source within USCYBERCOM, speaking on condition of anonymity, acknowledged the existence of a team of eight elite programmers, assembled shortly after USCYBERCOM's formation in 2009, who worked to develop a sophisticated computer worm that could be used in targeted attacks on foreign computer networks. In July 2010, the team presented the finished product, dubbed the "Brushfire Worm," to the National Security Agency. The program was ultimately rejected, however. "The NSA felt it was too uncontrollable and too imprecise to be used for National Security initiatives," the source told the *Times Post*. "We were told it should be destroyed, and the team erased all of the encryption and coding written by USCYBERCOM. It was our understanding that every trace of it was eliminated."

Government documents show that this was not the case. According to a confidential memorandum, the worm was not destroyed; rather, it was handed over to Spectreia in a clandestine meeting between the CIA and Spectreian intelligence agents that occurred just weeks before the attack on Natoristan. Spectreian officials vehemently denied being responsible for the computer attack, although they acknowledged that hostilities between the two nations have escalated over the last year. Spokespersons for the White House and USCYBERCOM refused to comment on these allegations.

Relations between the United States and Natoristan, whose statehood was recognized by the U.S. and U.N. in 2008, have been uneasy, with the United States making public statements warning Natoristan that any attempts by the nation to weaponize its nuclear program will be swiftly countered by America's withdrawal of economic and military support. Some American politicians have suggested that Natoristan harbors and supports terrorist organizations, though these claims have thus far been unsubstantiated. Nonetheless, Natoristan has remained a valuable

trade partner, as the United States has purchased large amounts of oil and natural gas from the Middle Eastern nation.

The U.S. has endured international criticism for its support of the often unpopular and controversial diplomatic decisions of Spectreia, with whom the U.S. signed a mutual defense treaty in 1997. While the alliance with Spectreia received harsh criticism from conservative politicians domestically, the U.S. government defended the alliance as being a mutually beneficial development, encouraging global security and peace in the Middle East.

These newly uncovered documents expose the extent of the relationship between the U.S. and Spectreia. The confidential memorandum confirms that there was a discussion between Spectreian officials and U.S. Cabinet members about taking action against Natoristan. Though the U.S. officials did not expressly endorse any attacks, the memo specifically documents the delivery of the “Brushfire Worm” to Spectreian officials, with the clear implication that Spectreia would use it against Natoristan.





## Frayed USCYBERCOM Continues to Unravel: Sources Reveal Culture of Waste and Corruption

*Embattled spy agency taking kickbacks from computer networking giant*

By Natalie Cook

January 6, 2011

While United States Cyber Command struggles to manage the fallout from revelations that it may have been behind October's computer attack on Natoristan's nuclear infrastructure, new leaks reveal corruption and kickbacks reaching the highest levels of the agency. Sources within USCYBERCOM told the *Times Post* that Senior Chief of Operations, George N. Greenhouse, accepted cash payments from the computer networking giant, Crisco Computing, in exchange for two multi-billion dollar contracts. Crisco was given the exclusive right to develop advanced networking hardware and software for the agency, which is responsible for ensuring the security of the United States' military's computer networks. A USCYBERCOM spokesman had no comment on the allegations.

Shortly after its creation slightly over two years ago, USCYBERCOM announced its intention to solicit bids for both its network hardware and its networking software. The contracts were expected to be worth two to three billion dollars in total. It came as a surprise to observers when USCYBERCOM announced that Crisco Computing was the winner of both contracts in June 2009, as experts in the field considered Crisco to be a minor player in the network infrastructure business.

According to sources, Greenhouse, the top-ranking civilian executive in USCYBERCOM's Fort Meade, Maryland head office, had final approval over contract bids. After Crisco was selected as the exclusive provider for USCYBERCOM, there was much criticism within the agency because of Crisco's poor reputation. "We asked Greenhouse if he was crazy, that we were trying to build a cutting edge facility, and that Crisco was not what

anyone had in mind. He attempted to address our concerns by telling us that he was looking for the type of company that would grow with our needs, and that Crisco was prepared to devote serious efforts to the job,” a confidential source stated. “Despite these assurances, we all thought something was a bit rotten, I mean, we are not some Silicon Valley start-up. The programmers on board with USCYBERCOM from day one were top notch, and we were all ready to hit the ground running with cutting edge networking tools.”

However, it was not until recently that major internal suspicions arose surrounding the Crisco contract. On November 16, 2010, a computer virus infected the IT Security subdivision of the United States Office of Personnel Management in Washington, D.C. Many believed that the success of the virus was a result of failed cyber defense by the United States Government, and primarily by USCYBERCOM. Many officers under Greenhouse blamed this failure on Crisco. Greenhouse, however, publicly voiced his support for Crisco.

A high ranking official within USCYBERCOM told the *Times Post* that Greenhouse's quid pro quo with Crisco was common knowledge inside the agency. “Everyone knew Greenhouse was on the take,” the source, who asked to remain anonymous, said. “It was just a matter of time before this got out. The whole office is corrupt.



11/17/2010

Memo # USCC 185

SCI Level

Workstation, CC 36912





4. During that phone call, Dylan Bosley informed me that information originating in the Office of the President had been accessed. Bosley informed me that the clearance level was Sensitive Compartmentalized Information (“SCI”), and since it was of this clearance level and information from the Office of the President, he wanted to notify my office.
5. Mr. Bosley then informed me that a computer virus had caused the information regarding the flagged incident to be deleted from the system, and the backup of the time period had been corrupted. Mr. Bosley assured me that he could recall from memory the workstation number and the Memorandum number of the information accessed.
6. Mr. Bosley then recited to me the Memorandum number of the document that was accessed and the workstation number of the computer that accessed the information. As he spoke, I immediately recorded the two items in my notes, but I did not repeat the numbers back to him to confirm I had properly recorded them. I saved this note.
7. My handwritten note is dated November 17, 2010. It indicates that the workstation number was “CC-36912” and the Memorandum number was “USCC-185.”
8. I then accessed the memorandum based on the Memorandum number Bosley gave me and found that the memorandum was with regard to recent work done by USCYBERCOM.
9. Dylan Bosley relayed to me that he had been assigned to monitor the USCYBERCOM subdivision of the Department of Defense.
10. Since the employee worked in USCYBERCOM, I decided not to move forward with further investigation at that time, but I kept my notes of the Memorandum number and the workstation number in the event that it would be needed in the future.

11. I do not remember at this time the Memorandum number or the workstation number. I always am very careful to take accurate notes in relation to my work at the FBI. I believe that I accurately wrote down the Memorandum number and workstation number that Mr. Bosley read to me over the phone. The two items written in my notes should be an accurate reflection of what Mr. Bosley said to me the morning of November 17, 2010.

*/s/ Madison Hunt*  
\_\_\_\_\_  
Madison Hunt

Sworn to and subscribed before me  
This 16th day of February, 2011.

*/s/ [Signature]*  
\_\_\_\_\_  
Notary



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF BOERUM



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UNITED STATES OF AMERICA

--against--

**AFFIDAVIT OF MARTIN  
MALLOW IN SUPPORT OF  
DEFENDANT'S  
MOTION TO ADMIT EVIDENCE  
UNDER FED. R. EVID. 804(3)**

DONALD POWERS

Cr. No. 11-647

-----X

STATE OF BOERUM    )  
                          : SS.:  
COUNTY OF BOERUM)

I, Martin Mallow, being duly sworn, declare under penalty of perjury:

1. My name is Martin Mallow. I was born on July 17, 1953, in the State of Boerum, where I currently live. I was admitted to practice law in the State of Boerum in November, 1979 and in the Southern District of Boerum in January, 1980.
2. I am a founding partner of the law firm of Steiner, Mallow, & Shaw, LLP, a criminal defense practice. Since 1984, I have personally tried over forty criminal cases in both federal and state court, predominantly related to drug and violent crimes.
3. On January 7, 2011, I was visited at my office by a woman who introduced herself to me as Elizabeth Jones, also known as "Bitty." Ms. Jones told me she was concerned about a possible prosecution for leaking confidential government information. When she visited my office, she was highly agitated and seemed upset and confused.

4. I asked Ms. Jones to calm down and try to explain to me what happened. Before she proceeded, I informed Ms. Jones that espionage was somewhat outside the field of criminal cases I normally defend and that she might want to meet with an attorney with more expertise in the area. But I agreed to listen to her concerns to see if it was something I could manage. I informed her at that time that she could consider our conversation privileged and confidential.
5. Ms. Jones told me she was “really scared” and said that a leak had originated from her office and was “in the papers” and “we’re going to be in big trouble.” She said, “I’m so afraid for my friend Don. I think they’re going to arrest him for something that I did. They should be coming after me, instead. I’m going to tell the U.S. Attorney everything right now. There’s just no other way.”
6. I advised Ms. Jones that she should not speak to the authorities until she had consulted in more detail with an attorney, but she insisted that she “had to do it right now.”
7. I promised to contact her the next day with a decision about whether or not to take her case. Ms. Jones seemed confused, but thanked me and left my office.
8. After Ms. Jones left my office, I briefly researched the Espionage Act and related cases and quickly determined that the case was too far outside my expertise and would be too complicated for my small firm to handle. I drafted a letter to Ms. Jones explaining my reasons for refusing her case and recommended a larger firm with experience in complex espionage and white collar criminal cases. I asked my secretary to mail the letter the following morning.
9. I later learned that upon leaving my office, Ms. Jones was struck by a car while crossing a street against the signal. She fell into a coma and died on January 8, 2011. I did not send the letter I had drafted, of course, and did not pursue the matter in any way.

10. On the afternoon of January 9, 2011, I became aware of the story in the *National Times Post* published on January 5, 2011, revealing United States involvement in the computer attack on Natoristan's nuclear facilities. While Ms. Jones had not told me the nature of her disclosure, it seemed to me that it was quite likely that she was involved with this news story.
11. I read the *National Times Post's* continuing coverage of the disclosures, up to and including the January 24, 2011 article recounting Mr. Donald Powers' surrender to the FBI in relation to the incident.
12. I also learned from the *National Times Post's* coverage on January 24, 2011, that Mr. Powers had hired Bradley Binder to represent him. I have known Mr. Binder socially for over a decade.
13. I was deeply troubled to learn of Mr. Powers' indictment in light of my January 7, 2011, conversation with Ms. Jones and reasoned that she had probably been referring to Mr. Powers when she spoke of her "friend Don." It occurred to me that my conversation with Ms. Jones could be extremely useful to Mr. Powers and could be very exculpatory.
14. Keeping in mind that I nonetheless considered my conversation with Ms. Jones to be protected by confidentiality and privilege rules, I contacted Mr. Binder on January 27 and informed him that I might be in possession of exculpatory material related to his client, but believed that I was prevented from disclosing it by privilege and confidentiality rules. I nonetheless told him I had spoken with a person who might have been involved with the leak and that that person's statements to me contained potentially strong exculpatory evidence for his client, Mr. Powers. I did not identify this person.

15. Mr. Binder thanked me for contacting him and promised not to do anything to jeopardize my ethical standing. He asked if I would be willing to testify or submit an affidavit if so ordered by the court, and I indicated that I would.

16. On Mr. Binder's suggestion, I drafted and sent a letter to the trial judge on February 7, 2011, expressing in general terms my concerns about the information I possessed. The judge subsequently ordered me to submit this affidavit.

/s/   
Martin Mallow

Sworn to and subscribed before me  
This 15th day of February, 2011.

/s/   
Notary



**UNITED STATES COURT OF APPEALS  
FOR THE FOURTEENTH CIRCUIT**

-----X  
**UNITED STATES OF AMERICA,**

*Appellant,*

**--against--**

**Cr. No. 11-647**

**DONALD POWERS,**

*Defendant-Appellee,*

-----X

July 1, 2011

Before: JOHNSON, RODRIGUEZ and ZHU, *Circuit Judges:*

**OPINION OF THE COURT**

RODRIGUEZ, *Circuit Judge.*

This interlocutory appeal, brought by the United States pursuant to 18 U.S.C. §§ 3731 and 3731-A,<sup>1</sup> arises directly from the District Court’s rulings against the Government on three pretrial evidentiary motions: (1) granting a defense motion seeking to admit the contents of the third email in an email conversation between defendant-appellee, Donald Powers (“Powers”), and journalist, Natalie Cook, under Federal Rule of Evidence 106; (2) denying a government motion seeking to admit the handwritten notes of Agent Madison Hunt as a recorded recollection under Federal Rule of Evidence 803(5); and (3) granting a defense motion to admit the statements of Elizabeth “Bitty” Jones made to her attorney, Martin Mallow. For the reasons that follow, this Court also rejects the Government’s arguments and affirms the decisions below.

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<sup>1</sup> “An appeal by the United States shall lie to a court of appeals from a decision or order of a district court admitting defendant’s evidence in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States Attorney certifies to the district court that the criminal proceeding concerns classified information or documents or information relating to the national defense, and that the appeal has not been taken for the purposes of delay.” 18 U.S.C. § 3731-A. [This statute has been created for the purposes of the 2012 Dean Jerome Prince Memorial Evidence Competition.]

## **I. Factual Background**

On January 26, 2011, defendant-appellee Donald Powers was indicted and charged with unauthorized disclosure of classified information under 18 U.S.C. § 793(d) and disclosure of classified information under 18 U.S.C. § 798(a)(3). A summary of the facts leading to Powers' arrest and indictment follows. The factual summary is drawn from the allegations in the indictment and the record of the pretrial motions.

### **The Brushfire Worm**

In January 2009, Powers was employed as a full-time programmer for United States Cyber Command ("USCYBERCOM"), an organization formed by the United States Department of Defense ("DoD") and supervised by the Director of the National Security Agency/Central Security Service ("NSA/CSS"). USCYBERCOM is responsible for the protection and organization of DoD and military computer networks, as well as the performance of military cyberspace operations. In March 2009, Powers was appointed to lead Team Brushfire, an eight-member team tasked with the development of a sophisticated computer worm named the "Brushfire Worm." The worm was specifically designed by the programmers to perform controlled attacks on encrypted computer systems.

In July 2010, Powers and the other members of Team Brushfire, including Elizabeth "Bitty" Jones ("Jones"), presented the completed Brushfire Worm to the NSA/CSS. However, the Brushfire Worm was deemed by the NSA/CSS to be uncontrollable and too imprecise to implement for National Security initiatives. As a result, USCYBERCOM allegedly destroyed this worm, as well as all accompanying encryption and coding. In August 2010, Powers was promoted to Chief of Operations for USCYBERCOM's Boerum State office and obtained the security clearance level of Sensitive Compartmentalized Information ("SCI"), the highest clearance level.

## **Natoristan Nuclear Shutdown**

In early October 2010, American and European newspapers reported a sudden shutdown in the primary nuclear reactors of Natoristan, a Middle Eastern nation which maintains trade relations with the U.S. The shutdown was attributed to a massive failure in the reactor's computerized control systems brought on by a computer worm.

### **Flagged Computer Activity and Access to Memorandum USCC-185**

On November 16, 2010, Dylan Bosley ("Bosley"), an employee of the IT Security subdivision of the U.S. Office of Personnel Management, was on duty, monitoring the employees in USCYBERCOM. The IT Security subdivision oversees daily technological operations ensuring that classified and confidential information is not accessed by individuals lacking the appropriate security clearance. To do so, individual employees monitor the computer activities of employees within their assigned departments. The monitoring system is set up to flag instances in which an employee has accessed classified information. When an instance is flagged, the IT Security employee is able to view the Memorandum number of the information accessed, the workstation number of the accessing computer, and the security clearance levels required to access the information and of the individual to whom the accessing computer is registered. Here, only two pieces of that information are at issue: (1) the Memorandum number of the document that was accessed, and (2) the workstation number of the accessing computer.

At approximately 3:30 p.m. on November 16, 2010, Bosley received notice of a flagged computer activity on his computer screen. The notice informed Bosley that information from the Office of the President had been accessed and that SCI clearance level was required to access this information. Although Bosley learned that the accessing individual had the requisite SCI security clearance, he decided to go above and beyond his usual duties and contact the FBI to inform them of the flagged incident. However, shortly after viewing the flagged incident and

before he could contact the FBI, Bosley's computer crashed due to a rampant computer virus. This virus deleted all computer log and tape backups of computer activity that took place from 3:00 p.m. to 4:30 p.m. on November 16, 2010.

At approximately 11:00 a.m. on November 17, 2010, Bosley remembered the flagged incident from the day before and called Agent Madison Hunt ("Agent Hunt") at the FBI to inform her of the circumstances surrounding the flagged incident from the previous day. Bosley briefed Agent Hunt on the situation, and Agent Hunt requested that Bosley provide her with the workstation number from the computer network. In response to this request, Bosley informed Agent Hunt that a computer virus had interfered with his ability to retrieve the information from the computer network. However, Bosley told Agent Hunt that he could recall the Memorandum number and the workstation number from his memory and proceeded to recite both numbers. Agent Hunt wrote these numbers down, and her handwritten note is attached to the District Court record as EXHIBIT E. Later, Agent Hunt retrieved the accessed Memorandum and discovered that it was directly related to recent work done in USCYBERCOM.

### **The Leaked Information and Subsequent Government Investigation**

On January 5, 2011, the *National Times Post* published a front page article authored by Natalie Cook ("Cook") entitled, "Feds Get Spectreia to Do Their Dirty Work," attached as EXHIBIT C to the record before the district court. The article discussed how a high level informant at NSA/CSS disclosed information regarding a confidential memo that allegedly proved that the U.S. gave the Brushfire Worm to the Middle Eastern nation of Spectreia, for the purpose of performing high powered cyber-attacks on the neighboring state of Natoristan.

On January 6, 2011, the Government began its investigation into the identity of the source of this leaked information. On January 7, 2011, the Government discovered that the information leaked to the press was information contained in a memorandum of the Office of the

President: "Memorandum USCC-185." This discovery prompted the Government to request that all IT Security staff and supervisors retrieve information regarding flagged computer activity relating to the memorandum at issue.

In response to the Government's request, Bosley stated that he remembered there being one flagged incident in the USCYBERCOM office relating to information from the Office of the President in November 2010. Bosley told the Government that despite his current inability to remember information about the flagged incident, he had recited the workstation number and Memorandum number to Agent Madison Hunt over the phone the day after the incident and that Agent Hunt wrote this information down. The Government questioned Agent Hunt and learned that on November, 17, 2010, she accurately wrote down the workstation and Memorandum number at the time Bosley recited them to her but that she could not recall what they were during the time of questioning. See EXHIBIT F in the record before the district court. However, Agent Hunt never repeated the memorandum number back to Bosley for confirmation, nor did Bosley have the opportunity to see the written recording and confirm that it was identical to his recollection. Agent Hunt's recording ultimately revealed to the Government that the workstation number associated with the flagged incident was "CC-36912," and the accessed Memorandum was "Memorandum USCC-185." Upon further investigation, the Government learned that workstation "CC-36912" was registered to Powers.

Subsequently, on January 10, 2011, the Government subpoenaed Bosley to produce all e-mails sent and received by Powers from his government email address, "Donald.Powers@USCybercom.gov" for the two years prior. While reviewing these emails, the Government discovered that, on January 4, 2011, Powers and Cook exchanged the three emails that are attached as EXHIBIT A in the record before the District Court. It is undisputed that the

emails are reproduced fully and accurately in their entirety and that Powers and Cook authored their respective emails.

On January 6, 2011, the day after the publication of “Feds Get Spectreia to Do Their Dirty Work,” the *National Times Post* published another front page article authored by Cook entitled, “Frayed USCYBERCOM Continues to Unravel: Source Reveals Culture of Waste and Corruption,” attached as EXHIBIT D to the record before the district court. The second article discussed corruption within the main branch of USCYBERCOM in Fort Meade, Maryland. The Government made several unsuccessful attempts to subpoena Cook. However, her current location is unknown to all parties. In addition, the *National Times Post* claims to have no knowledge concerning the sources Cook used for the two articles.

**Elizabeth “Bitty” Jones’ Conversation with Attorney Martin Mallow**

On January 7, 2011, two days after the publication of the “Feds Get Spectreia to Do Their Dirty Work” article, Jones visited the law offices of Steiner, Mallow, & Shaw, LLP, and met with Martin Mallow (“Mallow”). She was concerned about a possible prosecution for disclosing confidential government information. During this meeting, Jones appeared to Mallow to be in a highly agitated, upset, and confused state. Jones told Mallow she was “really scared” and said that a leak had originated from her office and was “in the papers” and “we’re going to be in big trouble.” She said, “I’m so afraid for my friend Don. I think they’re going to arrest him for something that I did. They should be coming after me, instead. I’m going to tell the U.S. Attorney everything right now, there's just no other way.”

Mallow then advised Jones that she should not speak to the authorities until she had consulted further with an attorney. Mallow promised to contact Jones the next day to tell her whether he would take her case. Jones was struck by a car shortly after leaving Mallow’s office and died the next day, on January 8, 2011.

On January 24, 2011, Mallow learned that Powers was under investigation by the FBI and was being represented by Bradley Binder (“Binder”), a criminal defense attorney in the State of Boerum. Mallow continued to follow the story and learned that on January 26, 2011, Powers was indicted under the Espionage Act, 18 U.S.C. §§ 793(d) and 798(a)(3), for leaking classified government documents to the *National Times Post*.

Mallow contacted Binder on January 27, 2011 and informed him that he had information that might be relevant to Powers’ defense, but that such information was likely protected by the attorney-client privilege and ethical rules of confidentiality. Mallow told Binder that he had spoken with an individual who might have been involved with the leak and that the conversation contained very strong exculpatory evidence. Alerted to the situation, the trial court ordered Mallow to submit a sealed affidavit to the District Court, detailing his meeting with Jones. The affidavit, submitted on February 15, 2011, was inadvertently placed in the record by a District Court clerk, and subsequently unsealed by the District Court.

## **II. Procedural Background**

On the advice of Binder, Powers voluntarily surrendered to the FBI on January 24, 2011. On January 26, 2011, the Grand Jury returned a two-count indictment charging Powers with communication of information relating to the national defense under 18 U.S.C. § 793(d) and with communication of classified information under 18 U.S.C. § 798(a)(3).

### **The Pre-Trial Motions**

First, the Government moved to introduce Email 1 and 2 of the conversation between Powers and Cook. Then, Powers moved to introduce Email 3 of the conversation between Powers and Cook under Federal Rule of Evidence 106. Second, the Government moved to introduce the written recording of Agent Hunt under Federal Rule of Evidence 803(5) as a past recollection recorded. Third, Powers moved to introduce the statements of Jones through

Mallow as exculpatory evidence under the Due Process Clause and a novel exception to the attorney-client privilege for exculpatory material. The District Court heard argument on these motions on March 2, 2011, and on March 3, 2011, the District Court ruled in favor of Powers on all of the motions.

The Government appealed all of these decisions to this Court.

### **III. Analysis**

#### **A. Email 3 and the Rule of Completeness—Federal Rule of Evidence 106**

After admitting Email 1 and Email 2,<sup>2</sup> the District Court granted Powers' motion to admit Email 3, sent from Powers to Cook on January 4, 2011, pursuant to the doctrine of completeness of Federal Rule of Evidence 106, even though the District Court found that Email 3 contained inadmissible hearsay. The admissibility of Email 3 under Rule 106 presents the issue of whether Rule 106 admits into evidence "a writing or recorded statement or part thereof" that is not admissible under another evidentiary rule. Fed. R. Evid. 106.

Rule 106 provides that, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."<sup>3</sup> *Id.* The Advisory Committee's Note on Rule 106 indicates that Rule 106 is intended to cure the problem of "the inadequacy of repair work when delayed to a point later in the trial." Fed. R. Evid. 106 advisory committee's note. In this way, Rule 106 provides an avenue by which a party may alter the normal timing of the introduction of evidence.

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<sup>2</sup> Below, Powers argued unsuccessfully that Emails 1 and 2 were inadmissible. This Court does not have jurisdiction to entertain an appeal of the District Court's decision on that issue. *See* 28 U.S.C. §1291.

<sup>3</sup> Congress has proposed amendments to the Federal Rules of Evidence to become effective on December 1, 2011. In this opinion, we apply only the language of the current Rule 106. The proposed Rule 106 reads: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." We find it conclusive that the advisory committee's note on the proposed Rule states that the amendment is "intended to be stylistic only" and that "[t]here is no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 106 advisory committee's note.

However, the Advisory Committee's Note includes another purpose for the adoption of Rule 106: Rule 106 is intended to cure "the misleading impression created by taking matters out of context." Fed. R. Evid. 106 advisory committee's note. Thus, Powers argues that Rule 106 must admit Email 3 so that Email 1 and Email 2 are not taken out of context.<sup>4</sup> He contends that Email 3 demonstrates that Jones, and not Powers, gave the information about the Natoristan worm scandal to Cook and also shows that Powers gave information to Cook about her January 6, 2011, article on waste and corruption, which would not have subjected him to criminal liability.

Yet the Government contends that Rule 106 can admit evidence only when it is admissible under another evidentiary rule. The Government argues that Email 3 cannot be admitted under Rule 106 because Email 3 contained inadmissible hearsay, as the contents of Email 3 did not fall within any of the hearsay exceptions, could not be admitted under the residual exception of Federal Rule of Evidence 807, and could not be admitted under the Due Process Clause.

While this Court notes that "there are conflicting Circuit Court decisions on whether [Rule 106] makes admissible parts of a document that otherwise would be inadmissible under the Rules of Evidence," *United States v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988) (citations omitted), and that Email 3 is, in fact, inadmissible hearsay, this Court, in affirming the decision of the District Court, rejects the Government's argument that Rule 106 can admit only otherwise admissible evidence.

Rule 106 admits evidence that is "necessary to explain the admitted portion, to place it into context, to ensure a fair and impartial understanding of the admitted portion, or to correct a misleading impression that might arise from excluding it." *United States v. Rivera*, 61 F.3d 131,

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<sup>4</sup> On appeal, Powers cannot raise and, thus, has not raised the arguments that Email 3 is admissible under Federal Rule of Evidence 807 or under the Due Process Clause, both of which he lost in the District Court. *See* 18 U.S.C. § 3731.

135-36 (2d Cir. 1995) (citations omitted). Thus, “Rule 106 is concerned with more than merely the order of proof[] . . . [and] can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously.” *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986). Regardless of whether the evidence in question is admissible under another evidentiary rule, when its admission is vital to guarantee fairness and ensure that the proper context exists to evaluate the previously admitted evidence, the evidence must be admitted under the doctrine of completeness. Although Email 3 is inadmissible hearsay, Email 3 must be admitted because Email 3 is necessary to provide the context for Email 1 and Email 2 and to prevent a misleading interpretation of Email 3. Further, the Government has opened the door to the admission of Email 3 by introducing Email 1 and Email 2. The Government cannot now create unfairness by admitting Email 1 and Email 2 while simultaneously objecting to the admission of Email 3. Holding otherwise would circumvent the explicit aims of Rule 106 and result in lack of fairness.

This Court therefore affirms the District Court’s decision that Email 3 is admissible under Rule 106.

#### **B. Recorded Recollection—Federal Rule of Evidence 803(5)**

The facts of this case present the issue of a recorded recollection constructed by two individuals, Bosley and Agent Hunt. A day after observing a flagged computer activity on his computer screen, Bosley telephoned Agent Hunt to inform her about the flagged computer activity, reciting from memory the Memorandum number of the accessed information and the workstation number of the accessing computer to Hunt, who wrote the two items down in her notes, but did not read them back to Bosley. The workstation number was that of Powers and the memorandum contained the information allegedly disclosed.

The Government argues that the handwritten notes were sufficient to satisfy the requirements of Rule 803(5) as a past recollection recorded because Bosley and Agent Hunt would testify as to the reliability of their recitation and transcription, respectively, as indicated in their affidavits.<sup>5</sup> Powers argues that because Agent Hunt did not read to Bosley what she had written down, the contents of the note were never verified and therefore were never “made” or “adopted” by a single witness as required by the Rule. The District Court rejected the Government’s argument that the note constituted a past recollection recorded, upholding a strict interpretation of the language of Rule 803(5). We agree.

The issue of admissibility of multiple participant recorded recollections is not expressly addressed in the language of the rule. Rule 803(5) states:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.<sup>6</sup>

Some circuits have suggested that a recorded recollection constructed by multiple participants is admissible where each individual is able to attest to the reliability and accuracy of

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<sup>5</sup>The Government also argued that the oral statements of Bosley to Agent Hunt are admissible under Rule 803(1) as present sense impressions. The District Court rejected this argument because the statements were made over twenty hours after Bosley had viewed the flagged incident on the computer network. The Government has not renewed this argument on appeal. The Government also does not argue on appeal that Agent Hunt’s notes are admissible as a business record under Rule 803(6) and in any event could not do so, having failed to make the argument below.

<sup>6</sup>Congress has proposed amendments to the Federal Rules of Evidence to become effective on December 1, 2011. In this opinion, we apply only the language of the current Rule 803(5). The proposed language for the new rule is exactly the same as the language of the current rule, although the formatting has changed. The proposed Rule 803(5) reads:

- (5) Recorded Recollection.** A record that:
- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
  - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
  - (C) accurately reflects the witness's knowledge.
- If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

We find it compelling that Congress did not change the language of the rule even in light of the uncertainty among the courts regarding multiple participant recorded recollections.

his or her role. *See, e.g., United States v. Hernandez*, 333 F.3d 1168, 1176-79 (10th Cir. 2003). We disagree.

The plain language of Rule 803(5) requires that the recorded recollection must be “made” or “adopted” by a single witness, in this case, Dylan Bosley. This reading of the rule is supported by the Senate committee report regarding the House of Representative’s amendment to Rule 803(5), adding “or adopted by the witness.” *See S. Rp. No. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7074* (“The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved. When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible.”) Here, witness Bosley neither made nor adopted the recorded recollection of Madison Hunt.

The drafters of the Rule chose to require that the recorded recollection be “made” or “adopted” by a single witness in order accurately to “reflect the knowledge” that witness once had. This is not the same language used in states that come to a different conclusion. *See, e.g., Cal. Evid. Code § 1237.*

To hold differently, we would run afoul of the purpose of the hearsay rule: to exclude out-of-court statements that are not reliable when offered to prove the truth of the matter asserted. *See McCormick On Evidence § 245, at 421-422* (Broun ed., 6th ed. 1999). The testimony the Government offers in support of the admissibility of the handwritten note does not evince sufficient reliability because Rule 803(5) requires adoption of the statement.

### **C. The Testimony of Martin Mallow—Attorney-Client Privilege & Due Process**

The Government appeals the decision to allow the prospective testimony of Martin Mallow, an attorney who spoke with the late Ms. Jones on January 7, 2011, arguing that Jones’ statements are both privileged and inadmissible hearsay. The District Court admitted Mallow’s

statements on two grounds: first, that there is an exception to the attorney-client privilege when a criminal defendant seeks to introduce exculpatory evidence; and, second, that even in the absence of such an exception, Due Process overrides the privilege. We affirm.

*i. Exception to the Privilege*

At issue in this case is Jones' statement to Mallow, "I'm so afraid for my friend Don. I think they are going to arrest him for something that I did. They should be coming after me, instead." The content of this statement is clearly exculpatory. While this is the first time a court has recognized an exception for exculpatory evidence, we find the policy considerations behind it to be compelling, and, if restricted to narrow circumstances such as those present in this case, this exception will not undermine the efficacy of the privilege.

Other rule-making bodies have recognized that the privilege is not absolute. For example, The American Bar Association Model Rules of Professional Conduct acknowledge that a lawyer may reveal otherwise privileged information "to prevent reasonably certain death or substantial bodily harm." Model Rules of Prof'l Conduct R. 1.6(b)(1) (2011). Some state ethical codes have extended this exception to cover exculpatory or exonerating material. *See* Mass. Rules of Prof'l Conduct R. 1.6(b)(1). Moreover, the ABA Rules were amended in 2009 to require prosecutors to turn over any exonerating evidence and take affirmative steps to reverse a conviction that they believe was incorrect. Model Rules of Prof'l Conduct R. 3.8(g)-(h). The evolution of these rules reflects the increasing understanding of the importance of exculpatory and exonerating evidence. *See also* Peter A. Joy & Kevin C. McMunigal, *New Rules for Scientific and Exculpatory Evidence*, 23 *Crim. Just.* 44 (2008-2009).

Rule 501 of the Federal Rules of Evidence vests the federal courts with the responsibility to interpret the rules of privilege "in the light of reason and experience." Fed. R. Evid. 501. In so drafting Rule 501, Congress showed "an affirmative intention not to freeze the law of privilege."

*Trammel v. United States*, 445 U.S. 40, 47 (1980). It is true, as the Government argues, that the attorney-client privilege is the oldest and most well-recognized confidential privilege known to the common law, and that encouraging frank and honest communication between lawyer and client is crucial to the fair administration of justice. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Nonetheless, society's interest in assuring fair verdicts and avoiding wrongful convictions is equally compelling. Where, as here, a criminal defendant seeks to introduce exculpatory evidence protected by the attorney-client privilege, and there is no other source for that evidence, the court should recognize an exception to the privilege and admit the evidence.

*ii. Due Process*

The District Court also held that Due Process overcomes the attorney-client privilege when the evidence in question is materially exculpatory. Neither this Court nor the Supreme Court has yet addressed whether the attorney-client privilege may be overridden to present exculpatory evidence. The District Court relied on the authority of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Both of these cases stand for the proposition that inflexible application of evidentiary rules may violate Due Process. Moreover, some District Courts have found that Due Process can override the attorney-client privilege in certain circumstances. *See, e.g., United States v. W.R. Grace*, 439 F. Supp. 2d 1125, 1145 (D. Mont. 2006); *Salem v. State of N.C.*, 374 F. Supp. 1281, 1283 (W.D.N.C. 1974).

Whenever a constitutional right conflicts with a rule of evidence, we must balance the competing interests. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). As discussed above, the interests underlying the attorney-client privilege are strong. On the other hand, as the Supreme Court has noted, “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers*, 410 U.S. at 302.

*Ritchie* suggests that privileged evidence may be introduced when its contents are “material” to the accused’s defense. *Ritchie*, 480 U.S. at 58. Statements are material when they could change the outcome of the trial. *Id.* Here, the statements are clearly exculpatory and material. Ms. Jones told Mr. Mallow, “I’m so afraid for my friend Don. I think they’re going to arrest him for something that I did.” If credited, her statements would suggest to a reasonable juror that she was in fact responsible for the disclosures of which Mr. Powers is accused. This goes to the very heart of the case. We hold that Jones’ statements to Mallow as contained in Mallow’s affidavit are material and exculpatory.

Furthermore, Ms. Jones is deceased, and the testimony of Mallow is the only feasible way Powers could present her statement. While the Supreme Court has held that the privilege survives death, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the fact that the client is deceased is nonetheless relevant to the Due Process analysis. *See, e.g., Morales v. Portuondo*, 154 F. Supp. 2d 706, 730-31 (S.D.N.Y. 2001). In exceptional circumstances like those present here, involving highly material exculpatory evidence and a deceased witness, the interests served by the privilege do not outweigh the defendant’s constitutional rights. In all, the District Court correctly decided that it would admit Mallow’s prospective testimony regarding his conversation with Ms. Jones.<sup>7</sup>

#### **IV. Conclusion**

For the above reasons, the ruling of the District Court is AFFIRMED, and the matter is REMANDED for further proceedings.

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<sup>7</sup> The District Court admitted Mallow’s testimony regarding Jones’ statements under Federal Rule of Evidence 803(3) as a declaration of intent. In her statement to Mallow, Jones said, “I’m going to tell the US Attorney everything right now, there’s just no other way.” The Government has not challenged that ruling in this Court.

**ZHU, Circuit Judge, dissenting.**

**A. Email 3 and the Rule of Completeness—Federal Rule of Evidence 106**

I resolutely disagree with the majority’s conclusion that Federal Rule of Evidence 106 requires the admission of the undisputed self-serving hearsay in Email 3. Moreover, the majority explicitly acknowledges that those statements in Email 3 are *inadmissible* hearsay because they do not fall within any subsection of Rules 803 or 804 of the Federal Rules of Evidence, and they certainly cannot fall within the residual exception of Federal Rule of Evidence 807 because they are unreliable. Indeed, the majority decided one important issue correctly here: Email 3 contains inadmissible hearsay.

The Advisory Committee’s Notes to Rule clearly state the Rule is meant to alter the normal timing of the introduction of evidence. Thus, Rule 106 merely addresses “an order of proof problem.” *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982). It does not and cannot make “admissible the evidence which is otherwise inadmissible under the hearsay rules.” *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996). While Rule 106 allows for admission in order to avoid misleading or taking matters out of context, that can occur only when the statements themselves are admissible. Thus, assuming *arguendo* that Emails 1 and 2, considered without Email 3, would be misleading, Email 3 is none the less inadmissible hearsay and cannot be admitted under Rule 106.

**B. Recorded Recollection—Federal Rule of Evidence 803(5)**

In holding that Federal Rule of Evidence 803(5) requires, in a recorded recollection constructed by multiple participants, that the individual who at one time possessed personal knowledge must have adopted a record of that information made by a second individual, the

majority adopts a bright-line rule that is unwarranted, unnecessary, and likely to exclude otherwise relevant and reliable evidence without proper basis.

The majority focuses too heavily upon Congress' use of the words "made or adopted by the witness" and uses an excessively strict interpretation of the Rule. In doing so, the majority misconstrues Congressional intent behind the addition of this phrase to the text of Rule 803(5). The Senate expressly indicated in its committee report that nothing in the House of Representatives' amendment should prevent or prohibit the admissibility of a recorded recollection created by multiple participants. S. Rp. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7074.

Other circuits that have analyzed this same issue take a completely different approach that more liberally construes the reach of the Rule. *See, e.g., United States v. Hernandez*, 333 F.3d 1168, 1176-79 (10th Cir. 2003). In accordance with the holdings of these other circuits, the Government's proffered testimony of Agent Hunt and Bosley that attests to the reliability of Bosley's recitation and Hunt's transcription is more than sufficient to satisfy the requirements of Rule 803(5).

Although the majority attempts to support its strict interpretation by pointing to the distinction between the text of the Federal Rule of Evidence 803(5) and California's state rule which does not refer to "adoption," Cal. Evid. Code § 1237 (2011), the analogy is unpersuasive. True, the language of the two rules is different, yet many states that have state recorded recollection rules identical to Federal Rule of Evidence 803(5) have held that adoption by the witness with personal knowledge is unnecessary so long as the individuals involved in the creation of the recorded recollection can testify as to the reliability of their recitation or transcription that contributed to the recording. *See, e.g., Boehmer v. LeBoeuf*, 650 A.2d 1336, 1340 (Me. 1994).

There is no need to limit the admissibility of recorded recollections constructed by multiple participants in the way the majority does today. With the supporting testimony, Agent Hunt's handwritten notes are clearly reliable and trustworthy and therefore sufficient to fall within Rule 803(5)'s exception to the hearsay rule.

### **C. Testimony of Martin Mallow—Attorney-Client Privilege and Due Process**

Finally, the District Court admitted over the objection of the Government the prospective testimony of Mallow, an attorney who spoke with Jones. His testimony would contain allegedly exculpatory evidence suggesting that the authorities were pursuing the wrong suspect, Powers, and that Jones was actually responsible for the alleged crime. This prospective testimony was held to be admissible under a newly-created "exception" to the attorney-client privilege and alternatively under a Due Process theory. These theories, accepted by the District Court and the majority here, have no basis in law.

Powers and the majority can point to no law supporting an exception to the attorney-client privilege when the defendant wishes to present allegedly exculpatory evidence. Rather, the majority refers to the ABA Model Rules of professional conduct (which do *not* recognize such an exception), and a Massachusetts ethics rule. Neither of these is binding on the courts, and no court has recognized an exception of the character proposed here. The majority suggests that it was within the District Court's purview to create a new privilege rule because Rule 501 of the Federal Rules of Evidence charges the courts to interpret the rules of privilege. This step is well beyond an interpretation of the attorney-client privilege and drastically alters the character of it. The attorney-client privilege exists to encourage "full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Piercing the privilege whenever a criminal defendant suggests that exculpatory evidence will become available would greatly undermine the purpose of the privilege.

The majority's Due Process rationale is no less dubious. The vast majority of cases to consider whether Due Process considerations trump the application of the attorney-client privilege have upheld the privilege. See Jon J. Kramer, *Dead Men's Lawyers Tell No Tales: The Attorney-Client Privilege Survives Death*, 89 J. Crim. L. & Criminology 941, 969-972 (1999) (collecting cases). The majority relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to support its finding. These cases are inapposite to the circumstances here. The privilege in question in *Ritchie* was statutorily-created and was not absolute. *Ritchie*, 480 U.S. at 57-58. The exculpatory evidence in *Chambers* was not even privileged, but rather barred by other state evidentiary rules. *Chambers*, 410 U.S. at 295. While these cases may stand for a general proposition that strict application of evidentiary rules can violate Due Process, they do not hold that the attorney-client privilege must be pierced when a defendant wishes to present exculpatory evidence. I would find that Mallow's prospective testimony is privileged and inadmissible.

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In affirming the rulings of the District Court the majority has erroneously interpreted four well-established legal principles. Accordingly, I respectfully dissent.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 2011

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UNITED STATES OF AMERICA,  
Petitioner,

-against-

DONALD POWERS,  
Respondent.

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December 13, 2011

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limiting to the following certified questions.

- I. To clarify and place in context two Emails introduced by the Government, does the Federal Rule of Evidence 106 completeness principle permit the defendant to introduce a third related Email, even though it is otherwise inadmissible hearsay?
- II. Does a writing satisfy the requirements of the Federal Rule of Evidence 803(5) hearsay exception for a recorded recollection when it was made by a witness who will testify that she accurately wrote down information received over the telephone from another person, even though that other person never saw or adopted the writing but will testify that when he provided the information, he believed it to be correct?
- III. Is there an exception to the attorney-client privilege for a subsequently deceased client's statement to her attorney exculpating another person who is later indicted, when there is no other source for that information?
- IV. Does a criminal defendant's Due Process right to introduce material exculpatory evidence override the attorney-client privilege that otherwise protects that evidence from disclosure?