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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,) Cr. No. 2:09-195
)
)
VERSUS) Columbia, SC
) February 9, 2010
PASCAL ANDRE ETCHEBER,)
)
Defendant.)
)
-----)

TRANSCRIPT OF PROCEEDINGS
(EXCLUDING EX PARTE HEARING)

BEFORE THE HONORABLE JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Appearances:

For the Government: MARK C. MOORE, ESQ.
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1 THE COURT: All right. This is the case of United
2 States of America versus Pascal Andre Etcheber. We are here
3 for a pretrial conference to address numerous motions that have
4 been filed since the last time we were together.

5 There is one motion that is under advisement, and I
6 can go ahead and say now, Mr. Barton, before you became
7 involved in the case we heard the motion to suppress statements
8 made by the defendant that was said to be made in violation of
9 Miranda.

10 We heard testimony from the defendant and the ICE
11 agents involved, and I have held that under advisement. But
12 I'm going to announce today that I'm going to deny that
13 motion. There were some credibility issues, and I basically
14 resolved most of those credibility questions adverse to the
15 defendant.

16 I will do a written order, but I just feel like I owe
17 you a response on that so we know how to proceed and move
18 forward in the case.

19 Now, with that being said, we have a lot of motions,
20 and I will just leave it up to you gentlemen to tell me how we
21 should proceed, which of the -- in what order we should
22 proceed.

23 MR. BARTON: I don't know if I could identify some
24 being simpler than others. We certainly have the motion -- the
25 appeal on the bond issue --

1 THE COURT: Let's go into that for a second, that's a
2 good idea.

3 MR. BARTON: May I go first, Your Honor?

4 THE COURT: Yes, sir.

5 MR. BARTON: And I'm just going to briefly state what
6 is -- restate what is in the appeal document that I have
7 filed. The question that has got to be addressed is safety of
8 the community and the risk of flight in this case.

9 Regarding the safety of the community, Your Honor, I
10 think it's been shown and the magistrate has found, there is no
11 suggestion of any violence, threats of violence, no weapons
12 involved in anything -- I don't even think we have a witness
13 that says anything like that about the defendant, that he has
14 made threats of violence.

15 The magistrate found, and I think correctly, that any
16 of the detention presumptions do not apply, or they were
17 adequately rebutted by the defendant. Part of what Your Honor
18 can look at is the weight of the evidence against the
19 defendant.

20 And in reality, the reason the defendant is in the
21 situation he is in is the second superseding indictment in
22 which the government charged two counts -- a count of witness
23 tampering --

24 THE COURT: Didn't he agree to have no contacts with
25 his former girlfriend?

1 MR. BARTON: He did not, Your Honor, that was not a
2 condition of the bond.

3 MR. MOORE: I dispute that.

4 THE COURT: Would he agree from this point forward?

5 MR. BARTON: Absolutely, Your Honor, he would
6 absolutely agree to that. That is not a problem. They have a
7 daughter together, and they have -- they went through -- they
8 were having regular e-mail communications about the daughter.

9 But he is certainly willing to stop all contact with
10 her. Any questions concerning the daughter he can go through
11 his family court attorney or the daughter's guardian ad litem,
12 who has been very responsive about those issues. So, he's
13 certainly happy to discontinue --

14 THE COURT: Let me think that through, would there
15 have to be a meeting, an in-person meeting to hand off the
16 daughter?

17 MR. BARTON: She currently is -- I'm sorry, Your
18 Honor, I'm on medication -- she is currently with the mother
19 and the maternal grandparents who -- the mother was recently in
20 an automobile accident and is barely ambulatory, so the grand
21 parents take the daughter to school.

22 He could arrange to meet the grandparents or have the
23 grandparents bring the daughter -- he does not need to
24 personally have any further contact -- telephone, e-mail -- no
25 further contact with the mother whatsoever. I mean, there is

1 no need for that at all and he would certainly agree to that.

2 I mean, this defendant, Your Honor, he's college
3 educated, he's been a very successful businessman, traveled
4 extensively around the world. He has no criminal record
5 whatsoever. The guardian ad litem, who again has been
6 remarkably responsive, I think all the parties regarding the
7 daughter says he has -- and this is a quote -- great aptitude
8 as a dad.

9 He's passed all the drug tests that the court has
10 ordered. I just don't see how -- where this concern about
11 safety of the community would come from from this defendant.

12 I will tell Your Honor that the e-mails that form the
13 basis of counts 5 and 6, the mother had those for approximately
14 seven weeks before she alerted the authorities. The
15 authorities had them for three weeks before they acted upon and
16 arrested the defendant.

17 So, I mean at least from those instances -- and
18 again, as you can see in another motion, I think the evidence
19 doesn't exist that that is a crime, but it is certainly -- even
20 if you assume it is, it is startling weak evidence that it is a
21 crime. So, I don't think there is a concern about the safety
22 of the community from this defendant.

23 And most importantly the magistrate judge found that
24 there were conditions that could be imposed that would assure
25 that. And I don't think there is any reason to believe this

1 defendant cannot comply with them. He complied with the
2 conditions that he was on before. I mean, we have a track
3 record with this defendant out on bond and the probation
4 office, to my knowledge, has never voiced a complaint about
5 him.

6 But he would certainly agree if the safety and the
7 concern of either the girlfriend-mother of their daughter, or
8 any other witness that has a concern, he will certainly
9 restrict all e-mail, or any contact whatsoever.

10 I think --

11 THE COURT: Judge Joe McCrorey heard this?

12 MR. BARTON: He did.

13 THE COURT: I thought Bristow Marchant was supposed
14 to hear this.

15 MR. BARTON: Judge Marchant heard -- what had
16 happened, the defendant was out on bail, a \$250,000 bail. Upon
17 the return of the second superseding indictment, the bondsman
18 wanted off the bond. And Judge Marchant heard that matter and
19 released the bondsman, so the defendant lost his \$25,000
20 premium payment. It was non-refundable. And without having a
21 bond -- and I believe the government at that time moved for
22 detention as well.

23 That's when we filed the motion allowing -- referring
24 all matters that would be heard by the Charleston magistrate to
25 the Columbia magistrate and Judge McCrorey heard -- we had a

1 couple-hour detention hearing in front of him, and he issued
2 the order in which he left the bond at \$25,000 and said that --
3 saying there were conditions that could be met and that if
4 there was a bond that the defendant met, he would set
5 additional conditions.

6 It was like, "I don't need to do that now until he
7 makes bond," and if he makes bond, I don't think there is
8 anything the judge can order that we won't agree to so --

9 THE COURT: He can't make the \$25,000 bond presently?

10 MR. MOORE: It's \$250,000.

11 MR. BARTON: It's \$250,000, with 25 -- he cannot,
12 Your Honor. He has been in custody since before Thanksgiving.
13 And you can see I'm asking for \$100,000 with 10 percent
14 deposit. I think that is a substantial bond, and what I'm
15 trying to do is create a target that will be easier for his
16 friends and family to hit.

17 I mean, his parents have tried to mortgage property
18 in France, and apparently elderly people have a very hard time
19 mortgaging property in France, so they are trying to sell
20 property in France. I imagine their market is as bad if not
21 worse than here, so they are having a hard time raising the
22 money. But -- and he has relied on friends to provide the
23 money and a friend provided that \$25,000.

24 I believe if I can go to them and say, "It's only
25 \$10,000 now and there is a very real possibility that you can

1 get the money back at the -- you will get the money back at the
2 conclusion of this because it will be deposited with the
3 court," that is a much easier bond for him to make.

4 Now, I think the government's -- part of the
5 government's big push regarding a bond -- and they have in fact
6 moved for detention, if you will, they have appealed as well --
7 is the risk of flight element.

8 And he's certainly a French national, Your Honor, and
9 another foreign national who was indicted in this matter did in
10 fact flee. But I will tell you this, this defendant, when
11 he -- after having been interviewed, being aware of the
12 investigation, being aware people were talking about all this
13 cocaine usage in Charleston, he went to France, took his
14 daughter with him for a couple of weeks to visit his family
15 there, and returned to the United States, even with the
16 knowledge that this was going on.

17 Right now his passport, I believe it's in the custody
18 of the clerk. His daughter, who is a joint U.S. and French
19 citizen has a French passport. The guardian ad litem has the
20 French passport. There was electronic monitoring and he has
21 been on it, and there were now issues whatsoever regarding
22 that.

23 And again, that being the obvious condition that can
24 be imposed -- you know, Your Honor, if he needs to call into
25 the probation office daily, if he needs to set up a web cam so

1 he can go on and wave to the probation office from his home,
2 anything like that we can do to assure his presence.

3 I think the strongest argument I have for him not
4 fleeing, though, are his ties to the community. He's
5 certainly, again, an international businessman and travels
6 extensively, but he has had a residence here in South Carolina
7 since about 2007.

8 But the strongest thing, Your Honor, is his daughter,
9 and the ties and the love he has for his daughter. Again, the
10 guardian says he has great aptitude as a dad. It is killing
11 him to be away from his daughter.

12 It's amazing what they have. He has a home he is
13 renting, and continues to rent while he's in custody, in hopes
14 he can get out so that he could get custody of the daughter,
15 jointly share it with the mother, if need be.

16 But it's a beautiful home, I have been there. He has
17 pictures of her all over the place. She has got her own room
18 with her name, they have got a rocking horse, they have got all
19 the terrible Walt Disney videos, I mean, it is -- it's a huge
20 yard. It is a perfect place for a daughter, and it is killing
21 him not to see her.

22 The importance of that, so you will understand where
23 I'm coming from, he didn't have Thanksgiving with her because
24 the government waited until right before Thanksgiving to arrest
25 him. He didn't have Christmas with her because he -- he's been

1 in custody ever since. She turns three years of age this
2 weekend, and right now it looks like he's not going to be able
3 to celebrate the third birthday.

4 The reason I say that, and I think the importance of
5 that is, Your Honor, if he were to flee, he knows he would not
6 see his daughter for another 15 years. I don't know if he
7 could ever -- he could be extradited from France, maybe not,
8 but he couldn't see his daughter for 15 years, until she is 18
9 and might choose to travel to see him, but he would lose
10 that --

11 THE COURT: What would keep the daughter from going
12 over there?

13 MR. BARTON: The mother. I mean, I think she may
14 very well need permission from the mother to go over there. I
15 mean, the mother may revoke her passport and she can't get over
16 there. But at least he knows he could not see her here for any
17 extended period of time for 15 years.

18 And I made this argument before the magistrate, and I
19 don't think I did it very well. This is the little girl. This
20 is his daughter, and my point is, Your Honor, I don't think he
21 is going to risk not seeing her during the pendency of this
22 matter, or if he were to flee, because of how much she means to
23 him.

24 And I don't think there is -- frankly, whatever else
25 you want to impose on him is fine. This little three year old

1 is the reason he's not going to flee, because he is not going
2 to risk going back to jail, he's not going to tamper with any
3 witnesses, because he doesn't want to go back to jail because
4 he wants to see the daughter.

5 I think it's important -- you know, you don't want to
6 risk losing things that are important to you. And she is so
7 important to him, he is going to steer the straight and narrow.

8 Mr. Moore, before the magistrate, said, well, that
9 wasn't enough to keep him from doing it before, sending these
10 e-mails to the mother. And again, assuming those e-mails
11 constitute some kind of tampering, which I do not believe they
12 do, he understands now what he needs to do and what he should
13 not do. And he understands the risk of what he loses if he
14 does that.

15 And sometimes you don't realize that until you lose
16 it. And I think that's where he is at this point in time. He
17 understands the importance of complying with every condition so
18 that he can get out, have a home for his daughter, interact
19 with his daughter, and frankly continue to assist in the
20 defense of his case.

21 Mr. Etcheber is an extremely intelligent man, he has
22 been very involved in all of the decisions having been made
23 before I was appointed in the case, and continues to be. I
24 have to go out to Lexington County jail to interact with him.
25 There is no e-mail, there is no telephone. It makes it

1 difficult to have meaningful communication with him. But,
2 again, if we have to, we have to.

3 But this little girl is the reason I think Your Honor
4 can take comfort in setting a bond that he can make. Because,
5 again, there are ample conditions as found by the magistrate,
6 there are ample conditions that will assure safety and his
7 presence at trial.

8 THE COURT: All right. I think you have covered it,
9 let me hear from the government now.

10 MR. MOORE: Your Honor, I will try to be as brief as
11 I can. We, in the original stages of this case, Mr. Etcheber
12 was arrested. We had a detention hearing before Magistrate
13 Judge Carr. After hearing all the evidence Magistrate Judge
14 Carr set a \$250,000 bond. And that was just on a one count
15 false statement case.

16 Since that time we have charged Mr. Etcheber with
17 other offenses. The stash house offenses carry a presumption
18 of detention, but we typically don't rely on presumption of
19 detention.

20 But in addition, since that time, Mr. Etcheber has
21 stood in front of Magistrate Judge Marchant in a previous
22 bond-lowering request asking for change in bond conditions and
23 denied that he's committed any of these offenses, which is not
24 true. He has taken the witness stand before Your Honor and
25 testified under oath. And as Your Honor just said -- Your

1 Honor is in a better position to judge his credibility than
2 the magistrate judges, because Your Honor has listened to him
3 testify under oath.

4 And you just stated on the record that you resolved
5 the credibility differences in the government's favor and
6 against his. I would posit that could leave Your Honor no
7 other conclusion than he took the witness stand and knowingly
8 and willingly lied under oath. And he sent these e-mails.

9 And given all of that, he not only opposes a bond
10 revocation, he wants you to give a bond under less strenuous
11 conditions than were originally imposed by Judge Carr some
12 eight months ago. He wants you to ignore, ignore his bond
13 violations and impose a bond he now says he can make.

14 And I have argued for detention, because I think the
15 evidence clearly shows that he's violated the terms and
16 conditions of his bond by violating the law in multiple
17 respects.

18 Maybe that doesn't mean detention, because as Judge
19 McCrorey found there are conditions that can be fashioned.
20 But as Judge McCrorey also found, there are additional
21 conditions that should be fashioned, if he can meet the bond
22 as it was set by Magistrate Judge Carr.

23 And after a lengthy hearing, taking evidence,
24 Magistrate Judge McCrorey did not lessen the bond. And I
25 think it sends the wrong message to a defendant that you can

1 come in and you can falsely deny that you committed these
2 crimes -- and, you know, we are going to litigate whether he
3 did or did not commit these crimes.

4 But he said under oath, he said to agents he's never
5 used cocaine in the United States. Well, I'm going to call
6 about 10 or more witnesses who are going to say that is a lie;
7 not just his girlfriend, but a number of other witnesses.

8 And Your Honor heard his testimony, and if Your Honor
9 didn't believe him, that's another bond violation. It sends
10 the wrong message to reduce his bond. Bottom line.

11 MR. BARTON: Your Honor, 30 seconds?

12 THE COURT: All right.

13 MR. BARTON: I don't want you to ignore what
14 Mr. Moore says are his bond violations, I want you to look at
15 those and evaluate and analyze those, that those -- if they
16 exist at all, it's an incredibly weak example of misbehavior.

17 Because again, as I stated in my motion addressing
18 those counts, there is simply no corrupt conduct in there. But
19 again, since there are conditions, I believe the statute
20 requires setting a bond the defendant can make and I believe we
21 can make \$100,000 with 10 percent posted --

22 THE COURT: All right. After hearing from both sides
23 I'm constrained to deny the motion to modify the terms of the
24 bond. I'm going to leave the present order of Judge McCrorey
25 in place.

1 I will say that this case does give me some concern. It's not
2 an easy call, and I do think we need to try to move through
3 these discovery motions as expeditiously as possible and tee
4 this case up for trial as soon as reasonably possible. It
5 looks like that might not be March, however. Do you want to go
6 ahead and take that up next, in terms of a trial date?

7 MR. MOORE: Well, given the fact that two motions
8 have been filed and I haven't even had a chance to respond to
9 them and my time for responding hasn't run, and some of these
10 other motions are going to require a hearing, I don't see how
11 we can try this case in March. If I have to, I can.

12 THE COURT: Let's go through all the motions then we
13 will talk about it.

14 MR. MOORE: I think that's a better idea.

15 THE COURT: That might be premature. Also, when we
16 finished the hearing in Charleston when the previous attorney
17 was in the case for Mr. Etcheber, it was our understanding we
18 ruled on everything except the Miranda motion. The docket is
19 still showing a lot of motions pending, but you are not looking
20 for an answer from me on those earlier motions --

21 MR. MOORE: It's my understanding that all those
22 motions were mooted at the -- it was -- the only motion that
23 was then outstanding that Your Honor needed to rule on was the
24 suppression motion.

25 THE COURT: Right. And then, of course, there has

1 been a passel of motions --

2 MR. MOORE: Now we are going to have to deal with
3 Mr. Barton.

4 THE COURT: Right. Right. Let's move on then into
5 Mr. Barton's motions.

6 MR. BARTON: We will just do the discovery, go ahead
7 and get that out of the way, Your Honor.

8 THE COURT: That sounds good.

9 MR. BARTON: I think if we just go through them one
10 at a time, and we can respond back and forth?

11 THE COURT: All right.

12 MR. MOORE: Can I ask for one favor? I'm going to
13 ask, can Ms. Floyd print me out the discovery motion? Because
14 I get over here, despite having asked for the file to be in
15 current shape, and guess what, it's not in the file.

16 MR. BARTON: I'm sorry, I hadn't --

17 MR. MOORE: It's not your problem, it's mine.

18 MR. BARTON: Well, I have an extra copy --

19 THE CLERK: Which one do you need?

20 (Off record discussion)

21 THE COURT: Mr. Barton, going back to what I was
22 talking about, about the earlier motions when the earlier
23 attorney was in the case, do you agree you do not need any of
24 those earlier motions that were disposed of? A lot of them are
25 showing up on the docket.

1 MR. BARTON: I don't think I do. I'm not sure I
2 understood some of them so --

3 THE COURT: Just take a look at the docket of what is
4 still pending from Charleston and let me know if there's any
5 that you need --

6 MR. BARTON: I will. I will. I will write -- file a
7 letter and let you know --

8 THE COURT: We can give you a list of them today if
9 you want us to.

10 MR. BARTON: I have got the paper printout.

11 THE COURT: Go ahead with the current discovery
12 motions, Mr. Barton.

13 MR. BARTON: This will be the first one, the lengthy
14 one.

15 The first item I asked for, Your Honor, are any notes
16 concerning the 100 -- approximately 100 conversations that
17 Agent O'Neal apparently testified that he had with Thomas
18 Ravenel.

19 I got that number frankly, Your Honor, from your
20 sentencing memorandum in the Ravenel case in which
21 apparently -- I don't know where that came from, I don't know
22 if Agent O'Neal testified to that or not, but that's where that
23 came from. And I think Mr. Ravenel is going to be a
24 significant witness in this case, and if there are any notes,
25 recordation, or anything about those 100 --

1 THE COURT: You are not talking about 302s, you are
2 talking about raw notes?

3 MR. BARTON: Or whatever memorialization that Agent
4 O'Neal may have prepared concerning this.

5 THE COURT: Mr. Moore?

6 MR. MOORE: First of all, Your Honor, I don't know
7 where that number came from, but I know -- if Agent O'Neal
8 disposed of some at some juncture, I don't know. I have given
9 Mr. Barton all of the 302s or SLED reports and the transcripts
10 of the interviews from Mr. Ravenel. I believe I have given him
11 everything that I have.

12 I will go back and ask Agent O'Neal to produce any
13 raw notes. Although I read his raw notes and I believe Your
14 Honor has reviewed raw notes as well and concluded that the raw
15 notes that I produced to you were not discoverable.

16 THE COURT: That's correct.

17 MR. MOORE: The bottom line is, I can't imagine
18 frankly talking to Mr. Ravenel hundreds of times. But if he
19 did it --

20 THE COURT: Well, I remember now we put that in the
21 sentencing memorandum because it was a big battle about a
22 departure sentence --

23 MR. MOORE: Yes, sir, I recall that.

24 THE COURT: -- and the extent to which Mr. Ravenel
25 had cooperated. And I think I put in an emphasize point that

1 there had been a lot of interaction with Mr. Ravenel and if
2 anything was going to come of his cooperation, it probably
3 would have come to light by then. And I don't think I made up
4 the figure of 100 meetings, I think there was testimony to
5 support it.

6 MR. MOORE: I don't think there was testimony so much
7 as perhaps statements by Mr. Ravenel's lawyers.

8 THE COURT: Well, maybe so.

9 MR. MOORE: And/or a statement at some point by Agent
10 O'Neal.

11 THE COURT: My law clerk said maybe the agent said,
12 "I talked to him twice a week for the last X months," or
13 something like that.

14 MR. MOORE: It's my understanding that when he did
15 talk to him he did not make notes, but I will -- and if there
16 are no notes, I can't produce them.

17 MR. BARTON: That's all I need to know, Your Honor,
18 if there are notes that's fine. And again, I got that number
19 off of your sentencing memorandum. I assumed there was some
20 record for it, but if there are no notes then --

21 THE COURT: Mr. Moore, as an officer of the court you
22 can say there are no notes of those meetings?

23 MR. MOORE: I'm going to call -- at the conclusion of
24 this hearing I'm going to call Special Agent O'Neal and I will
25 be able to confirm it. As I told Mr. Barton earlier, I wish we

1 had this discussion before we got here, but we didn't. But I
2 will check into that and report back.

3 THE COURT: Get back to Mr. Barton on that.

4 MR. MOORE: Yes, sir.

5 THE COURT: What is next?

6 MR. BARTON: The second thing is interview
7 transcripts. Mr. Moore has provided me with several
8 transcripts of interviews of Thomas Ravenel. One of them
9 starts off, it says it is a first draft. I don't know if it
10 has subsequently been modified and we have a final draft --

11 Are you talking to me?

12 THE CLERK: No, Mr. O'Leary needs to be downstairs.

13 (Off record discussion)

14 MR. BARTON: The interview on June 15th of Mr. -- oh,
15 and the interview on June 16th does not contain the notation
16 "first draft," the interview on the June 15th obviously begins
17 after -- the transcript begins after the interview had
18 started. Just from the discussion you can tell that Mr. O'Neal
19 had been talking with Mr. Ravenel for some period of time, I
20 don't know. That's what I'm looking for.

21 It sort of goes in conjunction with the next item
22 under number 2, which are recordings of any interviews. You
23 know, I asked for that, Your Honor, because I think there is
24 considerable exculpatory information on recordings that I have
25 seen, the problem being, there are inaudibles throughout.

1 And now after the conclusion of the investigation it
2 may be easier to pick up on maybe some of the inaudibles.
3 There may be names that weren't known when it was originally
4 transcribed.

5 So, what I'm asking for is any transcripts that have
6 been prepared that are final drafts that I don't have. I'm
7 asking for those, and the actual tape recordings of any of the
8 interviews of these individuals.

9 MR. MOORE: I think the only person that was tape
10 recorded was Mr. Ravenel. But if there is a transcript of an
11 interview and I haven't already provided it, I will provide it.

12 But I would note that Mr. Barton's motion goes a
13 little bit further. He not only wants interviews of these
14 people, he then suggests he wants statements from any other
15 person the government has interviewed regarding the
16 investigation of any of those people.

17 So, he not only wants us to provide Your Honor with
18 the statements of the folks in the indexes, but he wants us to
19 go search every index to see if any person has ever spoken
20 about those folks and produce that in discovery. I don't know
21 what authority he has for that.

22 THE COURT: The second part I rule is not
23 discoverable, but the first part, the tape recordings and notes
24 of the Ravenel interviews, if not already produced, need to be
25 produced.

1 MR. MOORE: Notes need -- the notes need to be
2 produced to you in camera, if they exist, if I think they are
3 different; isn't that correct?

4 THE COURT: Different from --

5 MR. MOORE: If they are different from the 302s.
6 That's the ruling that Your Honor had previously --

7 MR. BARTON: That's not even what I'm talking about
8 in that -- I don't know that a 302 or anything was prepared
9 from the notes. Are we talking about the 100 Ravenel
10 interviews?

11 MR. MOORE: If there are notes of the 100 Ravenel
12 interviews -- first, if there are notes of any discussions that
13 Special Agent O'Neal had with Mr. Ravenel and the substance of
14 them has not already been produced, then I will produce them.

15 THE COURT: All right. Very good.

16 MR. BARTON: Again, if they have interviewed these
17 folks, and I think in connection with this investigation others
18 that I have not gotten in discovery, I have not gotten until
19 Mr. Moore -- had been interviewed about this, I want the
20 transcripts and the actual tape recordings, if they exist. I
21 don't know if they do, Mr. Moore does.

22 MR. MOORE: First, I thought Your Honor just said you
23 would rule that that was not discoverable.

24 THE COURT: That's my ruling, right. That's my
25 ruling. Let's move on.

1 MR. BARTON: The fourth thing is surveillance. If
2 there have been surveillances of any of these individuals, I
3 think that is material to my defense, if the government has
4 notes of surveillances or documentation reflecting
5 surveillances of these individuals.

6 I know Agent O'Neal in one of the interviews with
7 Mr. Ravenel said they had been following around Michael Miller
8 for two years and -- a number of people being followed. I
9 don't know what information they have concerning the
10 surveillance as represented, but I think I'm entitled to that.

11 MR. MOORE: Under what theory? Under the theory that
12 it's Gigglia in relation to a witness that the government is
13 going to call?

14 Because, Your Honor, Mr. Barton is painting with
15 perhaps the broadest brush that I have seen someone try to
16 paint in a discovery motion. It almost makes me wishful for
17 Mr. McCann.

18 The bottom line is, he wants everything from the --
19 not just a charging document, not just discovery of their
20 involvement in a particular case, not just of their statements,
21 but he wants to look at everything the government has ever done
22 and force the government to go look through various law
23 enforcement files to check and see if there is anything there.

24 And I don't think that's the law on what is Gigglia
25 and what is not. I know my obligations under Gigglia, and as I

1 stated, I have given out in this case far more than the defense
2 is entitled to.

3 I said I would give them a copy of the SLED
4 investigation that resulted in Mr. Ravenel's charges,
5 everything about that, and I have done that. And now that I
6 have done that, now he wants us to go searching through various
7 law enforcement files for anything about the people who may
8 have been interviewed in that case. And I just don't -- he
9 hasn't cited you any authority in support of that proposition,
10 so before I'm ordered to provide it I would like some specific
11 authority on --

12 MR. BARTON: It's Rule 16, Your Honor, because if
13 these -- if SLED or FBI were following these people,
14 surveilling any of these people, some of who apparently -- 10
15 of whom may be witnesses against my client, and there are
16 instances that were surveilled that they have claimed my client
17 was present and the surveillance notes indicate that he was
18 not, I think that is clearly material to my defense.

19 MR. MOORE: That may be.

20 THE COURT: I was going to say --

21 MR. MOORE: But not all surveillances, and records of
22 all surveillances, is not. But I will get all of the agents
23 together who participated in this investigation and I will tell
24 them, "If you have any surveillance notes of any of these folks
25 and those surveillance notes indicate any meetings with

1 Mr. Etcheber, or indicate that the witness was at X when the
2 witness said he was with Mr. Etcheber and proves differently,"
3 then I will produce it.

4 THE COURT: Let's do that. That's granted. Go
5 ahead. What is next?

6 MR. BARTON: Thank you, Your Honor.

7 Specifically on grand jury, the grand jury
8 transcripts, the first items are presentations of the second
9 and third superseding indictments in this case.

10 MR. MOORE: I don't have any problem with giving him
11 that, I thought it had already gone out, but if it hasn't it
12 will go out.

13 MR. BARTON: And Your Honor, that's sort of what
14 prompted -- and Mr. Moore had told me to ask for this early on
15 in the case and you said I would get them when he got them, and
16 that's what is causing me some concern. The second superseding
17 indictment was presented on November 10th, which was three
18 months ago.

19 THE COURT: All right. Well, he's going to produce
20 it now.

21 MR. MOORE: I will go back and make sure, if we don't
22 have them, that we get them.

23 THE COURT: All right.

24 MR. MOORE: I have been a little occupied with other
25 cases, but I'm going to take the time now to make sure that all

1 this stuff is produced.

2 THE COURT: That request is granted.

3 MR. BARTON: The testimony of the same list of
4 individuals, if any of them testified before the grand jury.

5 MR. MOORE: They have not.

6 MR. BARTON: None of these individuals --

7 MR. MOORE: They have not testified before any
8 federal grand jury.

9 MR. BARTON: C under request number 5 deals with the
10 testimony of any other person concerning any of these
11 individuals. And I make that request because I have been
12 provided a grand jury transcript, I forget which agent it
13 was -- actually it was Agent Waizenhofer -- who discussed some
14 of these individuals, my client, and some of these individuals
15 as well. I don't know if there are any other witnesses who
16 testified before the grand jury concerning these individuals or
17 not. That's what I'm asking for.

18 MR. MOORE: What we decided a long time ago,
19 perhaps -- we have had so many hearings, I can't remember, but
20 I believe we decided to give them everything, every testimony
21 of every law enforcement witness who appeared before the grand
22 jury that related to this case or a related case.

23 That included the Ravenel case, because that's the
24 only other federal case that it's related to. And I have given
25 that up already. There is no other federal grand jury

1 testimony with respect to these other individuals.

2 THE COURT: All right. So that's been produced and
3 Mr. Moore says as an officer of the court there is no more.

4 MR. BARTON: That's perfectly adequate, Your Honor.

5 Number 6 are polygraph examinations. I know that
6 request had been made before, I don't know -- I think Mr. Moore
7 said at that time, this was back in October, that there were no
8 polygraph results to present.

9 MR. MOORE: And that's still the same.

10 MR. BARTON: Well, but Your Honor, the reason I
11 renewed that motion, if you will, the second individual listed
12 there, Chris Blackmore in the discovery I have received, he was
13 polygraphed on April 16th, 2007, and I have that -- and
14 Mr. Moore says there are none.

15 I guess what I'm asking is, there was at least one,
16 and I'm asking him to double check and see if anybody else has
17 been polygraphed. Because either he wasn't aware or they had
18 not told him that Mr. Blackmore had in fact been polygraphed.

19 MR. MOORE: I'm going to bring in Agent O'Neal and
20 Agent Waizenhofer and tell them they have to bring in everybody
21 else who has knowledge, and we are going to go over this again,
22 hopefully for the last time.

23 MR. BARTON: Well, Your Honor, had that been done
24 originally, we wouldn't be here doing all this.

25 THE COURT: Well, let's just --

1 MR. MOORE: I didn't produce anything with respect --
2 first of all, Mr. Barton has never asked me for Mr. Blackmore's
3 polygraph reports, and the information about Mr. Blackmore was
4 not originally produced in the first round of discovery.

5 So, when I said there were no polygraphs, since we
6 hadn't produced anything about Mr. Blackmore, because I had no
7 information at that point that he had any information to
8 provide, my answer was correct.

9 The only reason Mr. Blackmore showed up is after a
10 later hearing I told the agent, "Get me the stuff on
11 Mr. Blackmore, I think it ought to be produced." That's why
12 that happened.

13 THE COURT: All right.

14 MR. MOORE: It's not that I spoke in ignorance.

15 THE COURT: It's now been resolved. What is number
16 7?

17 MR. BARTON: Number 7, Your Honor, is a proffer
18 letter, it's an agreement not to prosecute, and I would like to
19 bring out -- I understand from one of the earlier hearings
20 Mr. Moore said that if he had a proffer -- any proffer
21 agreements with any of these defendants or any of these
22 witnesses, he would provide it to me.

23 I'm not sure it was fully covered, all -- any
24 immunity agreements with these witnesses. And the reason that
25 I guess I'm bringing this up, Your Honor, is that I believe a

1 number of these witnesses are going to -- a number of these
2 individuals are going to appear as witnesses at this trial,
3 either called by Mr. Moore or by me.

4 They have admitted to extensive -- some of them have
5 admitted to extensive criminal activities, which they are going
6 to be asked about on the stand, which may force Your Honor to
7 advise them they have a Fifth Amendment privilege and that type
8 of thing, and I'm just trying to avoid that if we can.

9 If there are immunity agreements with these people, I
10 would like to know -- I'm certainly entitled to know that up
11 front. But I'm really looking on down the road at the trial,
12 trying to avoid the problems that may occur when these
13 individuals are cross-examined.

14 MR. MOORE: There are no immunity agreements for
15 anyone. Anything that has been reduced to writing, as I told
16 Mr. McCann before and I will tell Mr. Barton, if we end up in
17 negotiating such an agreement, it will be given to them. A
18 number of these witness were interviewed, they did not have a
19 lawyer, they didn't ask for a lawyer, and they didn't ask for a
20 proffer.

21 If I'm going to call them as a witness at a trial I
22 will give them a proffer at that time, because I think that's
23 only fair to them.

24 THE COURT: All right.

25 MR. MOORE: But I can't give them a proffer -- and I

1 will give them the proffer letter as soon as one is executed,
2 but I can't create one that doesn't exist --

3 THE COURT: That will be produced if and when a
4 proffer letter is formulated.

5 MR. MOORE: That's correct, Your Honor.

6 THE COURT: All right. That takes care of number 7.
7 What about 8?

8 MR. BARTON: Number 8, Your Honor, is the files with
9 the Department of State regarding the defendant, including
10 records about his entry into and exit out of the country.

11 I believe that was asked for before and Mr. Moore
12 said he would get it. He couldn't assure the court when he
13 would. The reason I have renewed that motion, again, Your
14 Honor, is back in October Agent Sherota testified -- I believe
15 that was at the suppression hearing -- that in order to get
16 this information he went to his computer, put in the
17 defendant's name and his birthdate, and the information came up
18 on his computer.

19 So, what is the deal? This is a two- or three-minute
20 process of getting it. And back in October Mr. Moore said he
21 would produce it, and we don't have it yet. And that is
22 incredibly material to the defense case, because of the
23 allegations where he may have been, from the government's
24 witnesses. I think that record will disprove it.

25 And I'm sitting here since -- it would have been good

1 to have it back in October. At least from Agent Sherota's
2 description it's a matter of punching in the name and the
3 birthdate, and that's where the information is.

4 MR. MOORE: Well, punching in a name and a birthdate
5 does not give you a whole file, and I think what we said back
6 in October is that we would get that information from the
7 computer. I instructed the agents to do it, they haven't done
8 it, but they are going to do it now.

9 THE COURT: Tell them I said to have it within 15
10 days.

11 MR. MOORE: Yes, sir. I will tell them that that's
12 an order.

13 MR. BARTON: Number 9 deals with the file of ICE and
14 various other components of the Department of Homeland Security
15 concerning the defendant. I understand from the earlier
16 hearings, I have read them, and Mr. Moore was adamant that
17 there was no file, ICE file, concerning this defendant,
18 criminal ICE --

19 MR. MOORE: Criminal ICE.

20 MR. BARTON: -- concerning the defendant. But
21 apparently part of the defense -- or the government's case is
22 the materiality of the statements he made on October 30th
23 concerning his status. There has to be an administrative file
24 dealing with the defendant and what is going to happen.

25 THE COURT: I think we went through this thoroughly

1 last time.

2 MR. MOORE: You did.

3 MR. BARTON: But again you discussed it as the
4 criminal file, but not the administrative file concerning the
5 defendant's status, which again is part of the government's
6 theory of materiality in this case.

7 MR. MOORE: No, that's wrong. The government does
8 not say that he lied about his status, the government's point
9 is that if he were to admit using cocaine, that could affect
10 his status. It's a different point from the point Mr. Barton
11 was making. The bottom line is, I don't think that entitles
12 him to a file from ICE.

13 And do you have some authority for it?

14 MR. BARTON: Sure it does, Your Honor. If the theory
15 is that that lie could have affected his status in this
16 country, if ICE has done nothing with regard to that, I'm
17 entitled to know that.

18 MR. MOORE: They have done nothing.

19 MR. BARTON: There is no administrative file?

20 THE COURT: I thought we went -- Mr. McCann had a
21 witness on the stand and he grilled him up and down about not
22 having any kind of file, civil or criminal --

23 MR. MOORE: He did.

24 THE COURT: He said there's no such -- there's
25 nothing there.

1 MR. BARTON: I guess my other --

2 MR. MOORE: But I want to make a point while we are
3 here. Mr. Barton knows that some detention agents went to see
4 Mr. Etcheber.

5 MR. BARTON: I'm very aware of that.

6 MR. MOORE: And they did so not under -- with my
7 approval. In fact, when I was contacted about the fact that
8 they wanted to contact -- they contacted the FBI, the FBI agent
9 called me and told me that these two detention agents wanted to
10 speak to Mr. Etcheber. I told him to relate to them that they
11 were not to speak to Mr. Etcheber, that he was a represented
12 person and they had to go through Mr. Barton.

13 MR. BARTON: Mr. Moore in fact called me and told me
14 that, and I said absolutely we do not want --

15 MR. MOORE: I called him immediately when I heard
16 that. And despite that statement, they went to see him anyway.
17 Now, has there been sort of a file generated or some sort of
18 report generated from that contact with Mr. Etcheber? I
19 frankly haven't asked that question, but I will.

20 THE COURT: I think you need to ask that question. I
21 think you should. If there's any kind of file generated
22 because of that meeting I think it needs to be produced.

23 MR. MOORE: Or in advance of the statement.

24 THE COURT: Right. Because of it, as a result of it,
25 or in advance of it.

1 MR. MOORE: That I don't have a problem with.

2 THE COURT: All right.

3 MR. BARTON: Your Honor, number 10 is the portions of
4 Thomas Ravenel's presentence report concerning the offense
5 conduct and any statements of witnesses. I understand there
6 are a number of them. I have seen plenty of presentence
7 reports. If I go through there -- I will be surprised if there
8 is anything there that has not already been produced to me.

9 I don't believe that is confidential. I will keep it
10 as confidential in a separate file, but I believe I'm entitled
11 to see what was stated to the probation office by some of these
12 very same witnesses that may testify against my client.

13 MR. MOORE: Why would they have any statements, the
14 probation office -- the probation office, as Your Honor
15 typically knows, and as Mr. Barton knows, the probation office
16 takes the statements that they are given in discovery and uses
17 that information. It's not going to be inconsistent.

18 But the bottom line is, I can't give up portions of a
19 presentence report unless Your Honor orders it.

20 THE COURT: Let's do it. I see no problems, I see no
21 prejudice to anyone. Go ahead and produce the selected
22 portions of the --

23 MR. MOORE: That has to be ordered to the probation
24 office, I think.

25 THE COURT: Okay. I'm ordering the probation office

1 to do that. Can you identify what --

2 MR. MOORE: I think he said offense conduct, which is
3 typically what is done. And the offense -- it would just be
4 the offense conduct section and the criminal history section,
5 because although Mr. Barton already has the criminal history of
6 Mr. Ravenel --

7 MR. BARTON: I'm not asking for it. But that's okay.
8 That's fine.

9 MR. MOORE: Typically what has been done in these
10 situations is offense conduct, criminal history.

11 THE COURT: All right. That's what needs to be
12 produced.

13 THE PROBATION OFFICER: Your Honor, that's for
14 Ravenel?

15 MR. MOORE: For Ravenel only, unless Mr. Barton wants
16 Mr. Miller as well.

17 MR. BARTON: If I had wanted that I would have asked
18 for it.

19 MR. MOORE: Okay.

20 THE COURT: Just for Mr. Ravenel. Let's move on to
21 number 11.

22 MR. BARTON: Your Honor, this is the search warrant
23 and the affidavit that was apparently prepared. I'm not sure
24 if it was ever executed, but it was apparently prepared. I
25 can't find any record of it in the court's files, and I'm

1 looking for the search warrant, the application, and the
2 affidavits.

3 THE COURT: Of what?

4 MR. BARTON: I believe it was -- I can't tell, just
5 from notes from Mr. Waizenhofer, Agent Waizenhofer, a search of
6 Thomas Ravenel. They may have been trying to get hair,
7 something like that. I'm just trying to see what the agents
8 reflected in their probable cause for that.

9 MR. MOORE: I think what he's talking about -- and
10 you know, most of this Ravenel stuff, I wish I could forget. I
11 wish I had never bothered taking the case, but be that as it
12 may, I believe there was a discussion at some point of a search
13 warrant, and then maybe a court order for Mr. Ravenel's hair.

14 THE COURT: Right.

15 MR. MOORE: And Your Honor may be familiar with that.

16 THE COURT: I'm familiar with that, right.

17 MR. MOORE: I think that's what Mr. Barton was
18 talking about. It was never served --

19 THE COURT: Wasn't served, and didn't need to be
20 served --

21 MR. MOORE: Because Mr. Ravenel made admissions when
22 he was visited by the agents.

23 THE COURT: I don't think that bears on this case at
24 all.

25 MR. MOORE: I don't see how it does, but -- there was

1 no search warrant that was ever -- don't think we even asked
2 for one, but I will go back and check. If it's a statement of
3 an agent, if it's a statement of Special Agent Waizenhofer and
4 Special Agent Waizenhofer is going to testify, then maybe an
5 argument can be made.

6 THE COURT: All right --

7 MR. MOORE: I will go check.

8 MR. BARTON: Your Honor, so you won't think I'm
9 making this up out of whole cloth, back in August of '07 Agent
10 Waizenhofer sent a request for payment to Chris Blackmore, a
11 cooperating witness payment, and in that he specifically
12 references Mr. Blackmore is responsible for the information
13 that appeared in the search warrant. That's where that comes
14 from.

15 THE COURT: All right.

16 MR. BARTON: I don't know what it is, but whatever it
17 is, I understand.

18 THE COURT: Take a look at that, Mr. Moore.

19 MR. MOORE: Yes, sir.

20 MR. BARTON: Pretrial services report concerning my
21 client. Your Honor, there was a reference to it during an
22 earlier detention hearing, and frankly I think I'm entitled to
23 see it. And --

24 MR. MOORE: I don't have an objection to that, Your
25 Honor. Again, that has to be ordered to the probation office,

1 not me, I don't have it.

2 THE COURT: Probation needs to produce Mr. Etcheber's
3 pretrial services report.

4 THE PROBATION OFFICER: I have a copy of that.

5 THE COURT: If you have got an extra copy, go ahead
6 and give it to them.

7 THE PROBATION OFFICER: Yes, sir.

8 MR. BARTON: Your Honor, 13, 14, and 15 are somewhat
9 related. I think this deals specifically -- 13 deals with any
10 communications between the agents prior to the meeting of my
11 client on October 30th, 14 deals with the file that was sealed
12 by Your Honor on July 31st and October 8th, and 15 deals with
13 any similar file.

14 I'm a little bit in the dark, Your Honor. The
15 sealing of the file referenced in number 4 -- and I would be
16 happy to explain to the court my reasons for this in camera.
17 Again, I don't think I should be obligated to disclose my
18 theory of defense to the government.

19 But again, I am not ignorant, I saw where Your Honor
20 sealed the file. But what I am ignorant of is exactly how that
21 file -- what the authority was for the sealing of the file.
22 Now, we have a local rule concerning sealing of information --

23 THE COURT: All right. Does this go back to the same
24 search warrant you were just talking about?

25 MR. MOORE: No, sir, it goes back to the national

1 security matter that I presented to you.

2 THE COURT: All right.

3 MR. MOORE: Mr. McCann had asked for it. I presented
4 the entire matter to Your Honor in camera for Your Honor --

5 THE COURT: I mean, you had it passed -- you had it
6 passed and I looked at it thoroughly, I remember.

7 MR. MOORE: You looked at it. And you indicated that
8 a copy of that would be maintained under seal in the record for
9 the review of the court of appeals. And that's where the
10 sealing comes in, because obviously the court of appeals may
11 want to review Your Honor's decision in that matter.

12 And I believe that that file is still maintained by
13 Your Honor --

14 THE COURT: It really had nothing to do with the
15 charges in this case.

16 MR. MOORE: No, sir, it does not. Now, I know
17 Mr. Barton has some theory, and I don't know what that theory
18 is, but I will also tell Your Honor that I know that since that
19 time --

20 THE COURT: My law clerk reminds me there were about
21 14 pages in that report that you agreed were discoverable.

22 MR. MOORE: That's correct.

23 THE COURT: But everything else was not and was
24 sealed.

25 MR. MOORE: Everything else was not and was sealed.

1 And I think at some point we are just going to have to make a
2 copy of that so that it is in the record, the entire file that
3 you reviewed.

4 THE COURT: All right.

5 MR. MOORE: I do know that there have been -- there's
6 other information about Mr. Etcheber and national security that
7 has been developed since that time, but I'm not at liberty to
8 talk about it in open court.

9 MR. BARTON: Your Honor, again, I go back to my
10 original premise, I do ask for the opportunity to explain to
11 you why I want this. But I guess I'm going back -- if this is
12 a national classified -- national security information, I
13 believe the authority for sealing that is the Classified
14 Information Procedures Act.

15 And I see no reference to that in the transcript, I
16 see no -- I don't know how fully complied with it it was. I
17 guess you could claim it was, but if it is national security
18 information that has been classified to be sealed, that falls
19 under the Classified Information Procedures Act.

20 I may go so far as to require a petition from the
21 attorney general -- maybe it's been delegated to the U. S.
22 Attorney or his assistants, maintaining that it is -- is that
23 level of information and that disclosure would be harmful to
24 the government.

25 But it appears that that is the authority by which

1 that has to be filed or be sealed, and I guess I'm asking, is
2 that how that was done?

3 THE COURT: Well, I was not aware of the statute, but
4 I can assure you that my law clerk and I both looked at that
5 file.

6 MR. MOORE: And I think Mr. Barton is confusing -- he
7 keeps hanging his hat on the word "sealed." If I presented
8 other information to Your Honor that had nothing to do with
9 national security but it was information that I did not think
10 was disclosable in a criminal case, and I sought Your Honor's
11 review of it in camera and Your Honor reviewed that information
12 in camera and denied any production and the defendant went to
13 trial, a copy of that material that Your Honor reviewed in
14 camera would be maintained in the file under seal for review by
15 the court of appeals. That's exactly what was done in this
16 case.

17 MR. BARTON: I understand that, Your Honor --

18 MR. MOORE: That's mixing apples and oranges.

19 MR. BARTON: I'm not trying -- I know I don't have
20 it, by whatever means I do not have it. I believe I am
21 entitled to it. I read the transcript, Mr. McCann offered no
22 argument as to why he thought he was entitled to it.

23 I do believe that if the information is relevant and
24 helpful to the defense, it has to be disclosed. If it is
25 classified information, there are procedures by which that is

1 disclosable. But I believe I'm entitled to show Your Honor why
2 it would be relevant --

3 THE COURT: Do you want me to ask the government to
4 step outside?

5 MR. BARTON: I would, Your Honor.

6 THE COURT: All right.

7 MR. MOORE: But Your Honor, I don't believe the
8 standard is Mr. Barton says it's relevant and helpful to the
9 defense and therefore he gets it. Because if that was the
10 standard, any defense attorney could come in and say, "Well,
11 this information is relevant to the defense and so I should get
12 it." There is a balancing and weighing here.

13 THE COURT: I understand. Well, let me see what he
14 can tell me in camera, and we will ask the government to step
15 out Do you want probation to step out, Mr. Barton?

16 MR. BARTON: I trust probation to be discrete about
17 this, but if you are more comfortable leaving, that's fine.

18 (Ex parte hearing)

19 (Intentionally left blank)

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1 (Intentionally left blank)

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9 (In open court)

10 THE COURT: All right, Mr. Moore, the reason we kept
11 you out so long, I heard from Mr. Barton and I conferred with
12 my law clerks for a good while. Then Mr. Barton said while you
13 were out, we could take up some vouchers, CJA stuff that we
14 needed to discuss ex parte, which we did.

15 MR. MOORE: Yes, sir.

16 THE COURT: So, we are back now. Anything else you
17 want to say on the --

18 MR. MOORE: Well, I guess my question is, is Your
19 Honor prepared to reverse your ruling?

20 THE COURT: No, I'm going to stick with my ruling.
21 I'm going to stick with my ruling.

22 MR. MOORE: Okay.

23 THE COURT: I've heard Mr. Barton and I understand
24 the point he's trying to make, but I'm going to stick with the
25 ruling. I've reviewed the material you submitted in camera.

1 It was filed, as you suggested, because it was possible
2 discovery that I ruled was not relevant, and therefore just to
3 preserve the record I ordered it filed under seal.

4 MR. MOORE: Right. I mean, there was nothing about
5 CIPA or about the Administrative Procedures Act that was
6 invoked or in any way at play here.

7 THE COURT: All right. What's next, Mr. Barton?

8 MR. MOORE: And I provided all that information to
9 Your Honor in camera after getting the appropriate approvals
10 through Ms. Shackelford, and the department, saying that
11 because Your Honor was a Title III Judge and was granted top
12 secret security clearance, it could be done.

13 THE COURT: All right.

14 MR. BARTON: I understand that and I guess that goes
15 to 14 and 15.

16 13, any notes or memoranda or e-mails or
17 correspondence between Agents Sherota, Dave Espie, and Robert
18 Waizenhofer prior to that meeting on October 30th. Again, for
19 the same reasons I have discussed with Your Honor in camera, I
20 believe I'm entitled to that as well -- if there is any, there
21 may not be any. But I need to understand --

22 THE COURT: That's number 13?

23 MR. BARTON: Number 13, yes.

24 THE COURT: All right, Mr. Moore.

25 MR. MOORE: Well, I don't think there is any, but to

1 the extent -- what I'm going to have to do is go back and check
2 and see if there is any, review it myself, and determine if
3 there is any discoverable material therein. And so I would ask
4 for leave to do that and report back.

5 THE COURT: All right. Do that and report back to
6 me.

7 MR. BARTON: That's fine, Your Honor.

8 THE COURT: All right, what's next?

9 MR. BARTON: Your Honor, I have -- I don't know if
10 it's mooted or not, but I don't think it is, a motion to
11 dismiss count 4 of the second superseding indictment. It is
12 the one charge --

13 THE COURT: All right, that covers all the discovery
14 issues presently?

15 MR. BARTON: It does. I have a motion for discovery
16 for selective prosecution --

17 THE COURT: Right. We'll take that up later. All
18 right, do you want to move in now to your motion to dismiss the
19 counts?

20 MR. BARTON: Well, Your Honor, again, the motion --

21 MR. MOORE: Let me short circuit it. For the motion
22 to dismiss the count, I filed a new indictment, that charge was
23 not brought in the third superseding indictment. To the extent
24 it's there, I don't consider it there any longer. But to the
25 extent that you officially need to dismiss that count as it

1 appeared in the second superseding indictment, I have no
2 objection to it.

3 THE COURT: All right. So with the government's
4 consent we will dismiss count --

5 MR. BARTON: 4 of the second superseding indictment.

6 THE COURT: All right, 4 --

7 MR. MOORE: There is a new count four in the third
8 superseding indictment that's different. It alleges a
9 different thing.

10 THE COURT: All right, so count 4 of the second
11 superseding indictment is dismissed. Why do we need to dismiss
12 that if it's -- the superseding replaces the other earlier one,
13 doesn't it?

14 MR. BARTON: You know, Your Honor, every time it was,
15 "Dismiss all pending --" every time you would --

16 THE COURT: All right.

17 MR. BARTON: -- at a sentencing hearing. Again, I
18 wasn't sure it needed to be made, but I don't want --

19 THE COURT: All right. Well, that's granted, that's
20 granted.

21 MR. BARTON: The motion for discovery of the INS or
22 the -- Homeland Security about complaints and reports
23 concerning illegal immigrants, Your Honor.

24 So Mr. Moore will know, I briefly described to the
25 judge my basis for that while you were out of the courtroom

1 because -- I don't think Your Honor has ruled on that motion.
2 The one that was filed today, Mr. Moore may want time to
3 respond to it, but --

4 MR. MOORE: I don't know how I can make a meaningful
5 response other than to say that I think it's ludicrous, I see
6 no authority for it. I think -- my response would simply be
7 that. Your Honor has heard, I suppose, his --

8 THE COURT: I have heard Mr. Barton. I understood
9 what you said in camera about why you should have access to
10 this. Do you object to telling Mr. Moore what it was so he can
11 respond to it?

12 MR. BARTON: I do, Your Honor, that's my theory of
13 defense. I mean, he's not ignorant, I think he can probably
14 figure it out on his own, but I don't think I should be
15 compelled to disclose that to Mr. Moore at this stage.

16 MR. MOORE: I mean, that's asking for an incredibly
17 broad amount of information. And I see no relevance to this
18 defense -- to the defense. And maybe he has some strange
19 theory.

20 I think I can probably go some of the places where I
21 think he's going, but the bottom line is, I can't imagine he
22 presented Your Honor with any information which would justify
23 making the government produce five years of that data, which we
24 don't even have.

25 MR. BARTON: Well, I would be happy with the

1 question -- but Your Honor, I don't have to satisfy him it's
2 relevant, I have to satisfy you.

3 MR. MOORE: That's true.

4 MR. BARTON: And I believe I've shown Your Honor my
5 basis for asking for this information. Now, if Mr. Moore would
6 like to make inquiry of these agencies about what is available
7 and the difficulty involved, and maybe we can reach some
8 accommodation, or you might want to deny it on that basis.

9 But right now he says they don't even have it. I
10 don't know how he would know that. I mean, I cannot imagine
11 that, you know, ICE does not keep some recordation of --

12 MR. MOORE: Well, I mean, first of all, I can tell
13 you that ICE will object to the production of this information
14 in whatever form that they have it, and I can see no valid
15 ground to produce it. So, I would respectfully oppose its
16 production.

17 As Your Honor has heard, his submission, if Your
18 Honor wishes me -- if Your Honor has some concerns that you
19 want to address to me or you wish me to respond in a different
20 fashion, I will do whatever Your Honor tells me to do. I can't
21 respond any more meaningfully.

22 THE COURT: I don't think I can without giving
23 Mr. Barton's theory of defense. I think that would be
24 improper.

25 MR. MOORE: Well, was Your Honor persuaded that it's

1 producible?

2 THE COURT: Well, not yet, but I understand his
3 point.

4 MR. BARTON: It goes right to the heart of my
5 defense. And again, I'm happy to try and accommodate these
6 agencies if Mr. Moore would inquire of them if they have it,
7 the format they have it in, and the difficulty of producing
8 it. A summary would be fine.

9 THE COURT: Is it not something that the court could
10 take judicial notice of?

11 MR. BARTON: I need numbers, Your Honor, I need
12 specific -- you know, "We got this complaint and we ignored it,
13 we got this complaint and we responded to it. We got these 400
14 complaints we ignored, and we responded to this one." That's
15 what I'm looking for, Your Honor. I believe that goes to the
16 heart of my --

17 MR. MOORE: He asked for all the complaints. He
18 didn't ask for raw data or how many complaints they received,
19 okay. That's not what he asked for in this motion. Now, it
20 looks like he's changing that to say he wants some sort of --

21 MR. BARTON: No, I will be happy to take -- you were
22 complaining about raw data --

23 THE COURT: You would be satisfied with just the
24 numbers, rather than any compilation?

25 MR. BARTON: Well, how about if we start with the

1 numbers. We will start with the numbers, and I will try and
2 accommodate -- that may satisfy me there as to what they -- if
3 they can give me the numbers, just the number of complaints we
4 got in on these categories and --

5 THE COURT: Tell me again the categories of
6 complaints.

7 MR. BARTON: The complaints or reports received from
8 any sources concerning immigrants working in South Carolina
9 without the proper visa, illegal immigrants working in South
10 Carolina, immigrants using illegal drugs in South Carolina, and
11 illegal immigrants using illegal drugs in South Carolina.

12 THE COURT: Now, I'm not sure that those reports are
13 compiled.

14 MR. BARTON: I'm actually giving Mr. Moore the
15 opportunity to find out for us. But if they are --

16 MR. MOORE: The opportunity.

17 MR. BARTON: Your Honor, ICE gets complaints -- you
18 know, the big raid they had at the chicken plant up in
19 Greenville, that is on the basis of a complaint where they go
20 in there and find a bunch of illegal immigrants working there.
21 That's the type of information I'm looking for.

22 If someone complained to them, "You need to come down
23 here and do something with this construction site because they
24 are all illegals," if they maintain that type of record and
25 what they do --

1 THE COURT: Let's just do this. For now, Mr. Moore,
2 I want you to make inquiry of ICE if they have a master list of
3 the raw number of complaints they receive.

4 MR. MOORE: Okay.

5 THE COURT: And that's just raw -- the number of how
6 many complaints they received for -- the last three calendar
7 years, Mr. Barton?

8 MR. BARTON: Actually, I prefer five but I will take
9 the last three calendar --

10 THE COURT: The last three. The last three.

11 MR. MOORE: I'll make that inquiry. But I will also
12 tell Your Honor that, for example, I don't know how -- I will
13 find out what the universe is, if there is in fact such a
14 universe, which I somewhat doubt.

15 But you know, ICE is not the largest agency, at least
16 not in this district, it's larger in some other places. DEA
17 gets complaints about illegal immigrants using drugs every day,
18 and that doesn't necessarily flow to ICE. The Richland County
19 Sheriff's Department gets complaints about illegal immigrants
20 selling drugs.

21 THE COURT: Let's just leave it with ICE for right
22 now. Just ICE.

23 MR. MOORE: There's going to be all sorts of problems
24 with Mr. Barton even introducing ICE records and representing
25 that it's something that it's not.

1 MR. BARTON: It's an ICE record, I will --

2 THE COURT: All right, just ICE records for now is
3 all you need to inquire about.

4 MR. MOORE: I will check and get back to Your Honor.

5 THE COURT: All right.

6 MR. BARTON: Your Honor, the next motion is my motion
7 to strike the language out of the -- I think it's the new
8 paragraph 4, about how the defendant as a principal -- as an
9 aider and abettor and as a co-participant in organized criminal
10 activity.

11 And my reply to the government's response, my concern
12 is, Your Honor, that makes it appear that Mr. Etcheber is
13 involved in some other criminal activity --

14 THE COURT: Right. Is it the "organized criminal
15 activity" phrase you don't like?

16 MR. BARTON: The --

17 THE COURT: I mean, aider and abettor, nothing
18 unusual about that.

19 MR. BARTON: Nothing unusual about that. Mr. Moore
20 provided me with a number of his previous indictments for 1001,
21 some have it in, some don't. And he can leave it as a --
22 principal and as an aider and abettor --

23 THE COURT: To me that conjures up RICO.

24 MR. MOORE: That language is Pinkerton theory of
25 liability.

1 THE COURT: Right.

2 MR. MOORE: You know, the Pinkerton theory of
3 liability is based on reasonable foreseeability of acts of
4 someone you are in concert with.

5 THE COURT: Right.

6 MR. MOORE: Maybe that's not the most artful
7 phrasing, but the law -- I will agree to strike those words,
8 but I'm -- the aider and abettor part is -- if we struck those
9 now --

10 THE COURT: Let's strike the organized criminal
11 activity phrase only, leave in aider and abettor.

12 MR. MOORE: With the understanding that if I ask for
13 a Pinkerton charge or a Pinkerton theory of liability, and I
14 can prove, Your Honor, that such a charge is necessary, that
15 I'm not -- by agreeing to strike that, not waiving that. And I
16 put him on -- and I charged it to put him own notice of it.
17 He's on notice.

18 THE COURT: All right. Pinkerton may well be an
19 issue in the jury charge, I agree with you. I agree with you.
20 We'll decide that at the proper time.

21 MR. MOORE: Yes, sir.

22 MR. BARTON: That's all I have for you, Your Honor.

23 THE COURT: All right.

24 MR. BARTON: I have the motion to dismiss counts 5
25 and 6 of the third superseding indictment, Your Honor.

1 My basis for that, Your Honor, if you look at the
2 e-mails in question -- and from what Mr. Moore has told me,
3 that these counts are based -- and they are dated September
4 18th, 2009. I believe in my motion I said 2007. I corrected
5 it, it should be 2009.

6 That the series of e-mails -- and he believes all the
7 e-mails -- I took out of those e-mails and put in my motion
8 those parts that I believe he is relying on to maintain that my
9 client either obstructed justice or tampered with a witness.

10 The problem I have with this, Your Honor, the statute
11 is clear, that conduct has to be done corruptly. And Mr. Moore
12 agrees that I have stated accurately how that is -- has been
13 interpreted by the courts.

14 Your Honor, there is no threat, no request to lie, no
15 providing of a story that ought to be told. What my client is
16 doing is saying, "I believe your statements are a pack of
17 lies. If they are a misrepresentation of what you told the
18 FBI, go correct it."

19 That's essentially what it boils down to. "I think
20 it's a pack of lies. If it is incorrect, please -- didn't say
21 please -- but all you have to do is go tell the FBI that what
22 they have written down is incorrect and I'm a free man."

23 Your Honor, that is asking her to tell the truth.
24 Now, Mr. Moore is going to sit up here and say, "Well, he knows
25 that is a lie and we have all these witnesses that

1 otherwise --" well, you know, that's what is being litigated
2 here.

3 The question is the interpretation of what we deem
4 they will say. And there being no basis -- I believe there
5 being no basis to find that anything was done there corruptly,
6 there is no way that this could be a valid indictment before
7 the grand jury.

8 And I think the Fourth Circuit case I cited stands
9 for the proposition that if there is a finding that there is no
10 evidence before the grand jury, you have the authority to
11 dismiss the indictment.

12 And if Your Honor just reads those -- those e-mail
13 exchanges --

14 THE COURT: I read through it.

15 MR. BARTON: Oh, I know.

16 MR. MOORE: He hasn't even seen -- he's already told
17 you today he hasn't even seen the grand jury presentment, but
18 now he wishes to make Your Honor conjecture that there was no
19 evidence offered to the grand jury to support the charge.

20 THE COURT: All right, I'm going to hear from you in
21 just a minute, let me finish with Mr. Barton.

22 MR. BARTON: Thank you.

23 THE COURT: Go ahead.

24 MR. BARTON: And taking -- and I'm basing it on what
25 Mr. Moore has told me the evidence is. And based on the

1 language in those e-mails, there is nothing there done
2 corruptly.

3 The typical situation with a witness intimidation is
4 "Judge Anderson, I need you to tell the FBI this," or you know,
5 "Don't lie or I'm going to harm you if you do otherwise, or you
6 stick with your story."

7 My client is saying, "I believe you have lied, or the
8 FBI has misrepresented what you said. If they have, if the FBI
9 has misrepresented what you said, go ask them to correct it."
10 That's it.

11 And how that can somehow now be witness intimidation,
12 I think is stretching the statute far beyond what any court has
13 interpreted corruptly meaning.

14 And again, if I tell you it's a lie, if I say, "This
15 is what I want you to say, you can't tell them what you said,
16 this is what I want you to say," that -- I know I'm stepping
17 over the line. Mr. Etcheber doesn't even come close to that in
18 any of these e-mails. But, again, I think I have adequately
19 outlined it.

20 And again, we may need to put this in abeyance,
21 based on Mr. Moore's interruption of me, so that I can get the
22 presentation of this, which again was done three months ago and
23 I'm still waiting.

24 THE COURT: All right, Mr. Moore.

25 MR. MOORE: Mr. Barton's presentation of evidence is

1 overly simplistic and ignores several important details. As
2 Mr. Barton knows, there is now a count 4 which predates counts
3 5 and 6.

4 And in count 4 we have evidence from Ms. Hardin,
5 Mr. Etcheber's former girlfriend, that he, lots of other people
6 in Charleston, knew that there was an investigation of Thomas
7 Ravenel.

8 And he and his good friend, Pasquale Pellicoro, who
9 was a regular cocaine user with him and with Thomas Ravenel,
10 approached Ms. Hardin at his home and said to her, "Have you
11 been interviewed by the FBI? If you are interviewed by the
12 FBI, you need to tell them that you have never used cocaine
13 with Thomas Ravenel, and you don't know anything about our use
14 of cocaine."

15 To which she responds -- she doesn't tell them that
16 she's been interviewed -- but to which she responds, "Well,
17 that's ridiculous. There's no way I'm going to lie and tell
18 the FBI that. My God, Pasquale, you are the most notorious
19 cocaine user in the battery or in downtown Charleston. Why
20 would I do that?" And then he throws her out.

21 Now, that's her testimony.

22 THE COURT: That's count 4, that's not --

23 MR. MOORE: That's count 4, but it comes well before
24 counts 5 and 6.

25 Then Mr. Etcheber -- she is interviewed and she tells

1 agents a lot about Mr. Ravenel and about Mr. Pellicoro and
2 about Mr. Etcheber. And like a lot of other witnesses who were
3 interviewed about Mr. Etcheber, saying that Mr. Etcheber is a
4 frequent regular user of cocaine.

5 Mr. Etcheber reads that in discovery. And the
6 government's position is going to be, when he read it in
7 discovery, A, he knew she was telling the truth, B, he was
8 angry with her, as he was angry with her previously, for not
9 agreeing to lie.

10 And he comes to her in the course of the e-mails
11 talking about their daughter and says, "I have read your
12 reports, they are a pack of lies."

13 Well, if he knows that they are not a pack of lies,
14 stating that they are a pack of lies is in and of itself
15 engaging in misleading conduct, which the statute prohibits.
16 It doesn't just prohibit actual threats of physical violence,
17 it says "And engage in misleading conduct towards another
18 person."

19 And that is specifically charged in the witness
20 tampering count. When he says to her, "Go and take back the
21 statements that you have already given," knowing that she has
22 given true statements, that's corrupt. That's done for bad
23 purpose. That is done for the purpose of having her remove
24 herself as a witness.

25 And while he may wish to argue to a jury that he was

1 simply stating what he thought was true, that is up to a jury
2 to decide whether he was acting corruptly. Because he knew
3 that what she had said was true, and he wanted to remove her as
4 a witness and perhaps then walk free.

5 And he also says in the course of those things,
6 "Making false statements to the FBI can make them liable for a
7 lot of money." I read that as, "We have a daughter together.
8 You take back the statements, I sue the FBI, maybe we all
9 benefit."

10 And I think those are reasonable inferences for me to
11 argue from all that. The bottom line is, Your Honor, I think
12 it's up to a jury to decide whether or not it was corruptly
13 done, it's not up to Mr. Barton to decide.

14 THE COURT: And the grand jury had all that
15 background about count 4 --

16 MR. MOORE: They did.

17 THE COURT: -- before they heard count 5?

18 MR. MOORE: They did. They had -- now, they had it
19 certainly when they returned the current superseding
20 indictment. Count 4, as it currently stands, was not presented
21 to them initially. Although I didn't present it and I have to
22 go back and look at the testimony, my recollection is that that
23 information was presented to them, it just wasn't the basis of
24 a subsequent count. It was certainly presented to them when
25 they true billed the indictment in its current form.

1 THE COURT: Mr. Barton, I thought I agreed with you
2 at first on these e-mails. But now when I look at it in light
3 of what Mr. Barton just said about count 4 -- I'm sorry,
4 Mr. Moore.

5 MR. BARTON: Well, Your Honor, that is somewhat
6 compelling, but in addition to Ms. Hardin --

7 THE COURT: I really was prepared -- I thought I was
8 probably going -- if there was any motion I thought I was going
9 to grant today it was going to be this one, but I'm not sure
10 now.

11 MR. BARTON: Well, I think it has been agreed to by
12 the FBI in prior testimony that -- and again, this is a
13 credibility issue, I guess the jury may have to resolve it
14 regarding count 4.

15 But there is a single witness, Ms. Hardin, regarding
16 count 4. She is an abuser of cocaine, prescription pills,
17 alcohol. She is suicidal, she's been diagnosed with ADH -- no,
18 ADD, anxiety, bipolar, and maybe worst of all she at this time
19 in September of 2009 was in a -- probably the strongest bias
20 possible -- she was in a bitterly contested, hotly contested
21 custody dispute with this defendant.

22 So, the notion that there is going to be money from
23 the FBI that is going to be shared seems preposterous on its
24 face, given that.

25 But in addition to all that, Your Honor, I believe --

1 this is going to sound somewhat hyperbolic -- but I believe I
2 can objectively, demonstrably prove Ms. Hardin to be lying
3 about the allegations of count 4. But, you know, that's what I
4 have got to do at trial if we get that far.

5 THE COURT: Right.

6 MR. BARTON: But the language in -- I mean, they are
7 totally separate matters. Keep in mind, this is the way
8 Mr. Moore describes his evidence. I have not seen the grand
9 jury presentation. It's Pasquale Pellicoro who makes these --
10 asks her to change her testimony, not my client. And then
11 after that she leaves the home. And then he is linking the
12 two, that since she would not do that, would not comply with a
13 request by Mr. Pellicoro -- who to my knowledge is not going to
14 be a witness in this case -- my client -- links her failure to
15 do that and asks her to leave the home. Your Honor, I just
16 don't see it.

17 I would ask Your Honor again, take a look at that
18 Eighth Circuit case, it's a 1920 Eighth Circuit case, and it
19 talks about how, you know, if you are asking a witness to
20 change his testimony from what they have already testified --
21 if you believe they are wrong and you believe there is another
22 version, that is not doing it corruptly.

23 THE COURT: In ruling on this motion, do I look at
24 the allegations of count 5 in isolation, or am I permitted to
25 look at what preceded it in count 4?

1 MR. MOORE: I think you are entitled to look at all
2 of the evidence. And again, I don't know that Mr. Barton has
3 presented to you -- with a case that says that you are allowed
4 to do it at this stage of the proceedings, to dismiss a count
5 based on what the defense believes the evidence would show.

6 Because if that's the case, then we are going to
7 pre-try every allegation before a jury gets to hear it. And
8 that's not the right message to send or the right road to go
9 down.

10 In addition, Your Honor, he also had some contacts
11 with her sister. And I didn't charge it as a tampering count
12 because I didn't think it rose to the level of tampering, but
13 he basically accosted her sister in a bar in Mt. Pleasant
14 because he thought that she had been the one who had provided
15 information to the FBI and went into a tirade with her.

16 All of that goes to his intent. Because intent here,
17 corruptly intend, is the ultimate issue in fact. And what a
18 jury is going to have to determine is, when he made those
19 statements to Ms. Hardin, was he simply saying -- asking her to
20 do the right thing or asking her to do the wrong thing for his
21 own benefit?

22 And the government's evidence -- when a jury hears
23 all of the evidence in this case and they hear all of the
24 evidence about his cocaine usage and they also contrast that
25 with the fact that he lied to the FBI about his cocaine

1 usage -- his story when he lied to the FBI was a little
2 different than his story when he talked to SLED a couple of
3 months previous.

4 And oh, by the way, it also doesn't match up with his
5 story under oath to a family court judge because he told the
6 family court judge that he and Ms. Hardin used cocaine and
7 Ecstasy and marijuana.

8 You have to look at all of the evidence in totality
9 in determining what was -- after reviewing all the discovery in
10 this criminal case, what was his intention when he sent
11 Ms. Hardin these e-mails.

12 THE COURT: Let me say, we have been going over an
13 hour and-a-half, let's take a recess here.

14 MR. MOORE: Yes, sir.

15 THE COURT: Give the staff a break. Let's take a 10
16 minute recess --

17 MR. MOORE: Yes, sir.

18 THE COURT: -- we'll come back. We'll pick up on
19 this and then move through the other motions.

20 (Short recess)

21 THE COURT: Before we start back, I want to clear up
22 a point about the hundred meetings, the hundred meetings with
23 Mr. Ravenel. This is a transcript of the Ravenel sentencing
24 hearing on April 10th, 2008.

25 Question by Gedney Howe, "How many different times

1 since this event have you gathered some information from
2 Mr. Ravenel?

3 Answer, "Sometimes I will call him. Sometimes in the
4 past couple of months I have called him, you know, like maybe
5 once a day when I'm trying to obtain certain information about
6 somebody or somebody that was involved. Since I initially
7 stopped him, I probably talked to him a hundred times.

8 The court, "How many times?"

9 The witness, "Approximately a hundred times."

10 So, in my sentencing memorandum, I wrote, "After
11 hearing the arguments of the evidence presented at the downward
12 departure motion, including Agent O'Neal's representation that
13 he had talked with Ravenel approximately 100 times since June
14 15th, 2007, it is perplexing to the court that the government
15 could not present a single name of an individual to which
16 Ravenel's substantial assistance led."

17 Dropped a footnote, said, "Not including weekends,
18 holidays, and the two-month period that Ravenel was in rehab,
19 there remained only 146 business days within which Agent
20 O'Neal's 100 conversations with Ravenel could have taken
21 place."

22 So, I stand by what I said. I think it's fully
23 supported in the record, for what it's worth.

24 All right, what's next?

25 MR. BARTON: Well, Your Honor, on motions 5 and 6,

1 you have not ruled. Might I suggest, since I don't have the
2 transcripts of the presentation, you might want to take that
3 under advisement --

4 THE COURT: All right, 5 and 6?

5 MR. BARTON: 5 and 6. I can supplement -- if I need
6 to, I can supplement the motion and I will let you know one way
7 or the other.

8 THE COURT: Let's do that. You get the transcripts
9 of the grand jury and we will hold those in abeyance.

10 MR. BARTON: Your Honor, I have this motion for
11 judicial supervision of the government's discovery obligations.
12 Now, I believe I pointed out to Mr. Moore the problems I have
13 had -- the problems I see in the case that, you know -- I'm not
14 getting transcripts, like the grand jury presentations and that
15 type thing. I don't know when they are being ordered.

16 And the reason that concerns me, Your Honor, I'm
17 being put in a position that I kind of get the discovery when
18 he gives it to me, and that may be late. There's no good
19 explanation for it being late.

20 THE COURT: I'm supervising it right now by virtue of
21 what we are doing today, am I not?

22 MR. BARTON: Correct. But again, Your Honor, my
23 point being that he -- I'm not sure when some of this stuff is
24 being asked for so that I can get it in a timely fashion.

25 However, that being said, I think he now understands

1 my concern. I think unless I see some other problem, I think
2 I'm going to withdraw this motion. I'll formally file a motion
3 to withdraw this motion --

4 THE COURT: All right.

5 MR. BARTON: -- so that it is no longer in the
6 record. But if I have to renew it, I will. But again, the
7 only reason I did it was, there were things I did not
8 understand and reasons I'm not getting stuff in a timely
9 fashion. But I will withdraw that so that it is out of the
10 record.

11 The only other matter is the motion for discovery of
12 evidence of selective prosecution that was filed. And what I
13 had anticipated, Your Honor, is -- and what I have asked for in
14 that is a hearing on that so that I can make my prima facie
15 case with witnesses. I do anticipate another similar motion to
16 be filed on another basis that could probably be handled at the
17 same --

18 THE COURT: We don't need to go into it today? You
19 want to put up some evidence?

20 MR. BARTON: I don't think we need to go into it
21 today. I need to subpoena witnesses or get Mr. Moore to agree
22 to bring certain agents here.

23 THE COURT: You acknowledge it's a very high burden
24 you have got to go to even talk about getting discovery on it.

25 MR. BARTON: I understand. I believe that's in my

1 first paragraph of my memorandum. I don't disagree with that.
2 But that's why I think -- I have got witnesses and I think I
3 can make a substantial showing about that.

4 And again, I anticipate another motion to be filed
5 concerning vindictive prosecution that has a different
6 standard, different elements, and different standards of
7 review. And these same witnesses I believe will have some
8 information about that, so we can probably kill two birds with
9 one stone.

10 THE COURT: All right. We'll schedule that as soon
11 as it's fully briefed and both sides are ready to go forward
12 with it.

13 And what about a deadline for Mr. Moore to provide
14 the grand jury transcript? How long will that take,
15 Mr. Moore?

16 MR. MOORE: Judge, assuming the court reporter gets
17 it to me quickly, I can do it in 15 days.

18 THE COURT: All right.

19 MR. MOORE: I should be able to do it in less,
20 though.

21 THE COURT: Well, let's say a 15-day deadline. And
22 tell the court reporter that I put that deadline on it.

23 MR. MOORE: I will.

24 THE COURT: All right.

25 MR. MOORE: Of course, you know, part of my problem

1 is, I have been telling the same person who is responsible for
2 keeping file who doesn't have motions in my file.

3 THE COURT: All right.

4 MR. MOORE: But I'm going to take a more active role
5 in insuring that it's done.

6 THE COURT: All right. Now, what about the trial
7 date? Currently we are scheduled for a March trial, in
8 Charleston, by the way.

9 MR. BARTON: Yes, sir. Mr. Etcheber did ask for a
10 Charleston jury and a Charleston location for the trial. I
11 have explained to him that these various motions I filed, all
12 of which I have discussed with him, would probably -- would
13 almost undoubtedly necessitate a delay of the March trial date.

14 And again, I believe the additional discovery I'm
15 going to be having, I need adequate time to review it so that I
16 can make a cogent motion -- any other motions I need to make
17 and supplement, and that simply takes time. And the last thing
18 we need to do is to rush through something like this.

19 It does bother me because he remains in custody.
20 Again, I'm not questioning Your Honor's ruling, but it's an
21 issue. But he understands, and he may remain in jail longer.

22 Now, if the trial is continued a second time, and I
23 believe -- you can ask him -- but I believe he is okay with
24 that.

25 THE COURT: All right, Mr. Etcheber, you have a right

1 under federal law, under the Speedy Trial Act, to have this
2 case tried during the March or March-April term of court,
3 either the month of March or the month of April. My terms of
4 court run two months long.

5 Mr. Barton, your new attorney, says it's in your best
6 interest to bump it to the May term of court because he needs
7 time to gather all this information and receive what Mr. Moore
8 is going to produce. And so I would ask you at this time, do
9 you agree with Mr. Barton's request that we carry your case
10 over?

11 THE DEFENDANT: Yes, I do. I do agree with
12 Mr. Barton.

13 THE COURT: All right. Very good. Mr. Moore, would
14 you prepare an order?

15 MR. MOORE: I will prepare an order based on the
16 defendant's consent.

17 MR. BARTON: Your Honor, do you have any idea which
18 day in May?

19 THE COURT: Well, we can go ahead and set a day if
20 you want to.

21 MR. MOORE: I know that one of the issues was, were
22 you are going to bring in a panel --

23 THE COURT: Right.

24 MR. MOORE: -- or are you going to use a Charleston
25 judge's panel and draw it from it.

1 THE COURT: Hold on one second.

2 MR. BARTON: We are going to do this in Charleston,
3 right?

4 THE COURT: Right. All right, I'm informed -- Judge
5 Seymour, as you know, has a Charleston docket.

6 MR. MOORE: Yes, sir.

7 THE COURT: She brings a Charleston jury venire up
8 here to draw the Charleston cases, which I would not do if I
9 had a Charleston docket, I do not approve of that. But in view
10 of the fact that it's going to be a Charleston jury up here,
11 would it not be economical for both of you to draw --

12 MR. MOORE: Yes, sir.

13 THE COURT: -- the jury here with the understanding
14 we are going to try it in Charleston --

15 MR. MOORE: Yes, sir.

16 THE COURT: -- but since both lawyers are here, it
17 would save you driving time to go to Charleston just to pick
18 the jury?

19 MR. MOORE: Absolutely.

20 THE COURT: If we pick out of Judge Seymour's jury
21 and then -- it suits me to try it right away in Charleston, the
22 next day or two days later.

23 MR. BARTON: What day are we talking about?

24 THE COURT: Well, we can go ahead and pick a day
25 right now if you want to.

1 MR. MOORE: When is Judge Seymour's jury selection?

2 THE COURT: May 6th.

3 MR. MOORE: Right now I have -- Judge Currie
4 schedules me for lots of trials, but she has scheduled me for
5 no trials in May.

6 THE COURT: All right.

7 MR. MOORE: So, right now my May is free.

8 THE COURT: How long is this trial going to take?

9 MR. MOORE: Well, I used to say with Mr. McCann, it
10 would take at least a week. I think it will take a week.

11 MR. BARTON: I think a week is likely, Your Honor.

12 MR. MOORE: Hopefully no longer than a week, but who
13 knows.

14 May 6th is a Thursday.

15 THE COURT: Right.

16 MR. MOORE: And so I suppose start trial either that
17 Friday or start the following Monday, the 10th?

18 MR. BARTON: I would suggest the 10th, Your Honor,
19 because --

20 MR. MOORE: That's fine with me.

21 THE COURT: Well, here is one problem. I have got a
22 conflict the week of the 17th, the whole week. So, if we are
23 going -- if there is any danger that this case is going to run
24 more than a week, we ought to go on and start that Friday.

25 MR. MOORE: I think that's a good idea.

1 MR. BARTON: I've got no problem with that. We can
2 run on Saturday if you want to.

3 THE COURT: I have got my jury selection here the
4 following Tuesday. And that May term is a busy term for us
5 too, isn't it?

6 MR. MOORE: Do you want to do it on the 24th? I
7 don't have a problem with that.

8 THE COURT: Well, I was going to say, we have an
9 option, Judge Houck has a jury on the 4th.

10 MR. MOORE: In Charleston?

11 THE COURT: In Charleston. I think we better shoot
12 for that. Just go down there and draw out of his jury. We'll
13 probably have to let him pick his cases first, and then we draw
14 his jury -- draw from his panel, and then move right on into
15 the trial that afternoon.

16 MR. MOORE: Good.

17 MR. BARTON: I have no doubt -- even if you have to
18 be here on the 11th, I'm sure we will be finished by the end of
19 that week.

20 MR. MOORE: I agree.

21 THE COURT: I would like to draw the jury on the 4th
22 and then go ahead and start that afternoon, assuming that we
23 draw it in the morning.

24 MR. MOORE: Yes, sir.

25 MR. BARTON: Okay.

1 THE COURT: All right. We've got that settled.
2 Anything else?

3 MR. MOORE: I think that's it.

4 THE COURT: We will schedule a hearing seasonably as
5 soon as the briefing and all is done on these two remaining
6 motions and any new motions that come in. All right.

7 MR. MOORE: Thank you, Your Honor.

8 THE COURT: Thank you very much.

9 MR. BARTON: Can I approach about something totally
10 unrelated?

11 THE COURT: Yes, sir.

12 MR. MOORE: Don't worry, John, I trust you. You may
13 not trust me, but I trust you.

14 (Off record bench conference)

15 THE COURT: All right, we will be in recess.

16 MR. BARTON: Thank you, Judge.

17 (Thereupon, the proceedings were adjourned.)

18 * * * * *

19 CERTIFICATE OF REPORTER

20

21 I certify that the foregoing is a correct transcript
22 from my stenographic notes in the above-entitled matter.

23

24 s/ Gary N. Smith

April 15, 2010

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