No.

In the Supreme Court of the United States

MARY WILKERSON - PETITIONER

v.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

APPENDIX IV

PETITION FOR A WRIT OF CERTIORARI OF
MARY WILKERSON, PETITIONER

APPENDIX

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Hearing Transcript – 7/11/2014
(RE: 100K Late Discovery)
Doc. 552

(3 Days Before Trial Date)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CASE NO. 1:13-CR-12

UNITED STATES OF AMERICA

Plaintiff,

Vs.

STEWART PARNELL,
MICHAEL PARNELL,
MARY WILKERSON

Defendants.

MOTION HEARING

BEFORE THE HONORABLE W. LOUIS SANDS
UNITED STATES DISTRICT COURT JUDGE

DATE:	JULY 11, 2014
LOCATION:	ALBANY, GEORGIA
COURT REPORTER:	R. DARLENE PINO

APPEARANCES:

FOR THE PLAINTIFF:	ALAN DASHER PATRICK HEARN MARY ENGLEHART
FOR CODEFENDANT S. PARNELL:	TOM BONDURANT SCOTT AUSTIN KEN HODGES
FOR CODEFENDANT M. PARNELL:	EDWARD TOLLEY DEVIN SMITH
FOR CODEFENDANT WILKERSON:	TOM LEDFORD

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EXHIBITS

THE COURT: All right. Good morning.

COUNSEL COLLECTIVELY: Good morning.

THE COURT: There are a couple matters that the Court set down for hearing this morning based on recent motions filed. I think all defendants moved for a motion to dismiss based on alleged violations of discovery by the government. I've read your briefs on that issue.

And also there's a secondary issue with regard to a notice as to a particular expert witness so the Court wants to hear all those things this morning.

Who wants to lead off for the defendants in the motion to dismiss?

MR. BONDURANT: Yes, Your Honor. Good morning. Tom Bondurant on behalf of Stewart Parnell.

THE COURT: Yes.

MR. BONDURANT: Your Honor, on behalf of Stewart Parnell, if we could divide this argument in half. I have not had an opportunity to personally look through the new 100,000 pages of discovery but my partner Scott Austin has. So I would like to make some general comments about the motion and then Mr. Austin will actually get down into the details of why this in particular exculpatory evidence and particularly the evidence we found so far is prejudicial to the defendant.

THE COURT: All right.

MR. BONDURANT: Your Honor, the issue here is really very simple, I believe. Basically this late discovery and late notice and two expert witnesses has rendered it impossible for the defense to review, digest, put the -- these new documents in context with the other 4 million documents we have gotten and be effective at trial starting Monday. What is really more disturbing about the response of the government to this simple problem -- not simple problem, but simply stated problem is what the government did not say in their response. I mean, I fully expected something like, well, you know it is late because it is newly discovered or, you know, we made a mistake or it's hidden under someone's desk, but they basically said it is all Jencks Act material, which it is not, and I'll leave that to the argument of my partner here, and we withheld it because we can.

Now, if you looked at the context of the discovery history in this case, we received all the other Jencks Act material over a year ago. So they didn't just withhold Jencks Act because they can, by their own admission and their response they must have gone in and pulled out what they considered to be bad Jencks Act.

THE COURT: Well, also there's a question though about Jencks and I don't remember, I think one of the other of you pointed out that the Court didn't

specifically address Jencks Act in the discovery order. But I do know as tradition in this District it has been that Jencks Act will be produced at least a day before a witness is expected to testify. So to the degree that it is Jenkins, then this earlier production would actually be earlier than the traditional disclosure of Jenkins.

MR. BONDURANT: I understand that, the traditional, but in this case we don't think it is Jencks and if I could leave that part of my argument to my partner because he's actually looked at some of this. I have been trying to close down my law practice the last two week so I can be down here for two months, so I haven't had a chance to look at it personally.

We don't believe it is Jencks, there may be some of it is, but most of it is not Jencks, so I don't think that's the answer. But my point is they produced all the other Jencks a year ago so they must have intentionally gone in and removed what they considered the bad Jencks and waited and then intentionally turned it over at the last minute in order to create an unfair advantage over the defendant.

Even what is more disturbing than that is the late disclosure of the two expert witnesses. In one late disclosure, they didn't follow the procedure in the statute about identifying the witness, the summary of the

testimony, the underlying documents, they simply said, look it is discovery CD Number 4, which contains a financial investigation. It named some spreadsheets from the FDA, contained some other documents. I am not sure exactly what they are. So we are supposed to look at the discovery Number 4 and determine what the testimony is. If it is what we believe it might be, I think it is subject to a Daubert motion, but we can't file a Daubert motion until at least they tell us -- give us some hint about what that testimony might be.

Then just a couple of days ago they filed another expert witness designation and basically said, well, her testimony is in the discovery. Well, that doesn't get it.

And in contrast, I would like to say, Judge, the defense played by the rules. We gave advance notice of Dr. Conley. We provided a written summary of his testimony. We provided all the underlying materials to his testimony. We gave the government months and months and months to have a Daubert hearing. We engaged in Daubert hearing, and we lost. I mean, looking on it now, I guess we would have been better off waiting and filing Dr. Conley's designation last night because we played by the rules and lost and they're not playing by the rules at all when it comes to expert witnesses.

Now, we looked at 40 -- well, we have looked at more

pages now obviously, but before we filed the motion to dismiss -- Mr. Scott will discuss this. We looked at 40 pages out of an approximate 10,000 or 100,000 documents or pages. We identified what we believed to be about ten percent of those 40 pages to be exculpatory evidence. The government's response is, okay, fine. You have found the exculpatory evidence. You know about it. So it is like the NBA rules of law, no harm, no foul. You know what the exculpatory evidence is. What they failed to realize there's still 99,960 pages to go through, and if ten percent of 40 is exculpatory, the law of odds means many tens of thousands of pages are going to be exculpatory. So just because we found some exculpatory evidence doesn't solve the problem.

Judge, if this was a -- if this was nick knack paddy whack dope case and the issue is whether somebody sold dope to somebody on a certain night and the government came in the morning of trial and they had a piece of exculpatory evidence, say that a witness saw this guy somewhere else or something, well, that's not a problem. It's a simple case, a simple matter, it's a simple thing of exculpatory evidence. It might be the kind of thing the defense lawyer can take and say, okay, this is great, this is good cross examination, and go to trial; or the Judge might continue the trial for a day or two so the

defense could go out and get a witness to support the exculpatory evidence.

But this ain't no nick knack paddy whack dope case. This is a major complex, white-collar case with over 4 million documents, and to file -- and every document that's filed late has an effect on the documents filed before because you have to take the new documents and put them in context with the other documents to figure out what they really mean. That's not like, you know, something in a small case that happens. It is an extraordinarily difficult thing to do.

And then to add insult to injury almost, last night at 9:53 p.m. I get an e-mail from the government saying, by the way, we've got three more disks of discovery we're turning over and we're mailing it to your office in Roanoke. Well, I am not in Roanoke, Judge, I am in Georgia and I expect to be here for two months. And, you know, it's, like, okay, so we'll mail it to Roanoke and that way if you get it tomorrow or maybe Saturday maybe we can turn around and mail it to you so maybe you might get it by the second or third day of the trial. And I don't know how many documents are on three disks but a disk can obviously hold thousands of pages, but I don't know what is on there.

So there again waiting until the last minute to turn

over evidence.

Stewart Parnell wants to go to trial. If you remember from day one we have never moved for continuance. We asked for the trial to be started the first day it was set. I don't remember the day now, but every time we have asked for the trial to be started, Stewart is adamant he wants to go to trial. His life has been ruined the last five-and-a-half years. He can't get a job, the press is all over him, Congressmen come make a scapegoat out of him every chance they get, and he wants to go to trial. The Constitution allows him to go to trial in a speedy fashion, and it's been five-and-a-half years since this event happened. It's been a year-and-a-half since he's been indicted.

And the only remedies we believe at this point in time -- of course, the traditional remedy offered by the government in their brief is, well, let's continue it. Well, if we're going to continue it and really learn this material, it is going to be a long continuance, Judge. We don't want a continuance, we want to go to trial.

THE COURT: That was one of the questions the Court had. Of course, obviously everybody says they want to go to trial and want to start, and the government says it wants to go to trial, the defense wants to go to trial, but isn't the practical effect is if there's a late

production such that you need an opportunity to review it in effect a continuance would be a solution; would it not be?

MR. BONDURANT: A continuance is a solution, but only if it violates Stewart Parnell's right to a speedy trial. The answer in this case. The government put themselves in their own trick bag in this case. According to their response, they intentionally held all this material back to the last minute and sprung it on us, so they should pay the price of creating the problem themselves. The answer in this case, we strongly believe, is a motion to dismiss. That part of the indictment which leads to this case --

THE COURT: On that issue, too, all parties -- all defendants, rather, asked on that basis and you used the Stevens matter as a -- as a comparison. But isn't it not exactly an accurate comparison of cases when Stevens is talking about disclosures the government failed to make before, during, and after the trial as far as -- even, I suppose, intentional misrepresentation of false matters, so there was nothing that could be corrected about the Stevens matter. This is a dispute about timeliness and what the nature of the disclosures are prior to trial when there is an ability, an opportunity to address it by having the appropriate amount of time to prepare for

trial.

MR. BONDURANT: But then that violates -- I think the Stephenson memo, and I am paraphrasing here, I don't have it in front of me, I think the Stephenson memo goes on to say to the prosecutors thou shalt not manipulate the discovery process to create an unfair --

THE COURT: I'm not arguing that with you. I understand the idea that the government has that duty to step forward with the evidence and produce it. I am saying that the impact of the alleged wrongdoing in Stevens, part of what made it so, I guess, uncorrectable was that it occurred after the trial, discovered after the trial so to speak.

MR. BONDURANT: Yes, sir. I agree with that.

THE COURT: Whether the government agrees with you or not as to whether their conduct has been -- has been inappropriate, we stand at a place that it can be addressed.

MR. BONDURANT: Yes, sir. I understand that. But it can only be addressed by way of continuance if you violate Stewart Parnell's right to speedy trial. I mean -- I mean, you are violating -- you're trying to save one Constitutional right from being violated by violating another Constitutional right.

Now, the other remedy is exclusion of this evidence,

this late disclosure, and of the witness testifying that's related to it. That way everybody's rights are protected. We get to go to trial, we're not being unfairly prejudiced by a late -- an intentionally late disclosure, and we can try the case on the other matters. I mean, this exclusion will not kill the government's case, there's other matters this doesn't have anything to do with. There, again ,I'll let Mr. Scott talk about the particular documents.

THE COURT: Yes. I want to hear the particular documents because one of the -- one of the things the defendants have to show is that they are so prejudiced about the particular disclosures that it can't be -- it can't cured in a sense. So I know that what I've heard so far there are thousands of documents, and I don't know what witnesses they relate to. I know you named some witnesses, particularly the -- I guess the government's -- all these witnesses won't be called the same day necessarily. Apparently they've been -- there's some idea about how they will fall. So it is not like you have to have a 100,000 dollars -- 100,000 documents read by Monday because we are talking about an eight week trial. So it is not a two day drug trial either.

So does that mean that there's not a capacity to adequately review what needs to be reviewed and still be prepared?

MR. BONDURANT: I don't believe so because you have a 100,000 documents you've got to go through to figure out what is there to begin with. I mean, we don't know whether witness 1 is in the 100,000 documents or not until we go through them.

And also the way -- I mean, there's some examples of what is exculpatory material. I mean, it's not like a searchable thing. I mean, if you search someone's name, that doesn't necessarily tell you whether it is exculpatory in terms of how certain tests are run, how a certain sample was taken, and matters like this. So, you know, I understand what you are saying, if it was discrete pieces of evidence, like, you know, pages 1 through 5 is a statement of so-and-so. But it's not, it's all jumbled together, and until you read the whole thing, you're not sure how it fits in context.

So I don't believe we could. I understand what the Court is saying. If this was a simple case, absolutely. If this was just your standard drug case or standard bank embezzlement case or, you know, telemarketing case or something like that, and had a discreet amount of documents and volumes and you had discreet issue involved, you are absolutely right, Judge. But that's not the kind of case this is. This is an overlapping, very complex case where everything joins together. And we find one

document, you have got to go back and put it in context of the other 4 million documents you got before. It is not something so discreet that I think you can get ready for trial in the manner the Court suggests.

Your Honor, like I said, I haven't looked at the documents yet overall, but Mr. Scott has.

THE COURT: All right.

MR. AUSTIN: Please the Court. Good morning.

THE COURT: Good morning.

MR. AUSTIN: Scott Austin also here for Stewart Parnell. Judge, before I get to the documents, I would like to address the Court's concern regarding the comparison with the Stevens case. The Court correctly outlines that in the Stevens case there were due process violations before, during, and after trial. We believe that we're in a position now where we are unable to review the documents before the trial. We have reviewed a few hundred pages, that I'll mention some of the documents we found. We're going to continue to review them during the trial. If during the trial, we discover impeachment material for a witness that has already gone, then that will violate his due process during the trial. We will review them after the trial. If we find impeachment material after the trial that would have impeached the witness during the trial, then his due process would have

been violated after the trial. So in that respect, Judge, we believe this is a --

THE COURT: That's not necessarily so. It's not -- it's not merely -- because in a way the evidence is had, so things are turning on what you have reviewed at a given time for use at a given time. It doesn't always equal a violation --

MR. AUSTIN: Yes, sir.

THE COURT: -- necessarily. I don't want -- I understand your point, essentially, but I don't want to --

MR. AUSTIN: Yes, sir.

THE COURT: -- overstate that these events would necessarily be true in all circumstances.

MR. AUSTIN: You are correct, Judge. It creates the possibility and, in our view, the likelihood. And the reason that we believe that's likelihood, as I'll get to, is because we have reviewed 200, 250, 300, somewhere around there, pages, and we believe that the material that we have found thus far, the impeachment material, you can extrapolate from that sample to the larger sample and say, as Mr. Bondurant did, if ten percent of these then ten percent of those.

The government as we understand it, maintains that perhaps we found any of the impeachment evidence in there.

Our reasoning on this regard though is similar to the

government's reasoning in the case generally. The government says that because they claim there was salmonella in one sample, a small sample from PCA product, then they can extrapolate from that, that the entire lot was contaminated. Similarly, here, if we can demonstrate that in our small sample there's impeachment material, we can extrapolate to the larger lot and that that's contaminated as well.

It should be noted, Judge, that the defendants are loath to have this exercise and go through these documents because what we are doing is we are demonstrating to the government not just the impeachment value of the specific documents that were referenced, but also we are giving them a window into our larger tactics and trial strategy. So just by having to do this process in this way because they gave us these documents so late is violative in some way of the confrontation rights of Mr. Parnell.

I would without further delay though, Judge, get to the documents. As the Court is aware the government maintains that this is Jencks Act material, that they are there for reports or statements. Statements that are signed or affirmed by the person making them, they are mechanical transcriptions of some kind and they're verbatim or verbatim Grand Jury. That's what they said. They also maintain that they are not impeachment documents

contained in this.

May I give this to you?

THE COURT: Yes.

(Hands notebook to the Court and government counsel)

MR. AUSTIN: Judge, we have jointly marked these exhibits as Exhibit A. They are documents provided at one time or another by the government. We'd ask that the exhibit just at the beginning be admitted into evidence.

THE COURT: All right. Any objection?

MR. HEARN: This is the first time I have seen the binder, Your Honor. If I could have a few minutes to review it.

MR. AUSTIN: Well, I'll wait until the end to offer it, Judge.

THE COURT: All right. That's fine.

MR. AUSTIN: Under Tab Number 1, Judge, and I did this -- I thought it would be easier for folks to follow along than using the ELMO. I hope that was the correct decision.

Under Tab Number 1 is simply the documents that we attached to our brief, so there's nothing new there that the Court hasn't seen, the Court is familiar with the documents, I won't rehash them here.

Instead moving to Tab Number 2. This document, as are the documents that I'm going to talk about, are all

contained for the first time in the production that we got in June of 2014. This first document is from Jenny Scott to, among others, Mr. Hearn, Ms. Englehart, and Mr. Dasher. Ms. Scott is a designated expert for the government. She attaches her CV. She says, "I have attached my CV which should be relatively up-to-date. With respect to an FDA expert witness, I think Don should be your primary and I should be back up primarily because he has the Ph.D. and has been in multiple peanut butter making facilities and I have not." In essence, she is saying I am not sure I really am a FDA expert witness.

Despite receiving this e-mail in January of 2013, the government noticed Ms. Scott as an expert and provided her CV. The did not, however, provide this e-mail. It was withheld or held back until June of 2014. This is not Jencks Act material, this is impeachment material.

Under Tab 3, this is a document we received two weeks ago from another government witness, Darcy Brillhart. Darcy Brillhart is a named designated government witness who was designated in June of 2013. She is going to be an expert, presumably, in FDA sampling protocol. Also in addition to being an expert on FDA sampling protocol, she also handled one of the key pieces of information in the case. The key piece of information that she handled is one of the environmental swabs taken from PCA that was

later found to contain salmonella.

For the first time, we learn this information. I'm going ot read from the beginning. "Sample 447409, environmental swabs, were sealed 1/9/09 and placed into cooler with ice packs, transported to hotel with analyst, and stored inside of the in-room refrigerator of Darcy."

Now, Judge, I don't need to tell the Court how many violations of FDA protocol and BAM protocol that this represents. There's nothing in the FDA protocol or the BAM protocol that permits analysts to utilize refrigerators in local lodging houses. It's just not there. She violates the BAM protocol and the FDA protocol, and this is the first time we learned of that. Questions that this might raise include, but certainly are not limited to, why would this expert witness who is a FDA sampling protocol expert violate FDA protocol. What was the make and model and age of the mini-fridge in the room? Was it mini-fridge, was it a large fridge? What is the cooling power per square foot of the fridge? Was it plugged in when she got there or was it brought up because if it was brought up, it would start at room temperature? What was the factor preset temperature reading on the refrigerator? Did she change the temperature setting? Does the temperature fluctuate on this type of refrigerator? Did she sanitize the refrigerator before

she put it in there? Were there other items like a mini bar in the refrigerator? Did power to the fridge fail at any time perhaps while the analyst was out to dinner or asleep? These kinds of questions would be raised had we this earlier, and, again, extrapolating to the larger lot --

THE COURT: Those questions you just exampled are questions you could directly ask this witness if she sits on a stand as an expert.

MR. AUSTIN: But, Judge, what we cannot do is get our own sampling protocol expert to explain why this is wrong and what difference it makes. Sure we can ask the questions, but we are three days from trial. The defendant cannot employ an expert is a sampling protocol expert to say this was done incorrectly. We had no reason to believe that we should even have -- require such an expert until now. That's why we're prejudiced.

THE COURT: When you say you can't is that because you can't or you don't want to? I mean, are you really -- And I am not being facetious. Are you really telling me you could not now, knowing this, seek such an expert.

MR. AUSTIN: Well, Judge, I -- I suppose that -- that while -- I guess during the course of the trial we could have someone at our office try to summon an expert

in this regard, but it certainly would not be done in the manner and fashion that we would have conducted it had we been able to do this several months ago. We could conceivably get an ad hoc expert to come in who is available and can review these documents in short order. So I don't want to represent to the Court that it's impossible, and if the trial were to go forward, we may certainly avail ourselves of the Court's suggestion and obtain an expert. But it certainly is a hindrance to have it done now.

Also it says here, "All samples delivered on 1/10/09 to SRL refrigerator by analyst."

Although I didn't include the other e-mail, I also note that the other analyst said it was delivered directly to him.

SRL refrigerator, I'm not sure what that means. The best I can determine it means Swift refrigerator line, which is a -- which is a company. Of course, we would have questions for them as well.

Under Tab 4, Judge, this is an e-mail from May 27, 200, which is over five years ago. This is from the other FDA sampling protocol expert who took the second environmental swab that is of considerable importance in this case because it is, like the first, the only environmental swab taken from PCA that tested positive for

salmonella. Now, the sample did not match the outbreak strain, but it is nonetheless mentioned in the indictment and it's a key piece of evidence upon which the government would rely.

Karen Satterwhite. Leslie Satterwhite -- Well, I guess she goes by both. -- writes this. "Jeff, I have a few comments. One of the positive swabs at PCA was from the floor of a cooling stabilizing area. I took the swab from a spot on the floor between pallets of finished product where it looked like something had been -- had spilled and not been cleaned up."

Now, Judge, for the first time -- First of all, this is clearly not Jencks material. But for the first time we are getting this document that demonstrates that their expert sampling protocol witness who took this environmental swab took it, not randomly, she took it from a spot she specifically identified as a place that might contain some type of contaminant. Now, we didn't know that she did that. We didn't know it wasn't random, we didn't know that there was some kind of spill she that she had identified. Perhaps the spill itself contained the offending microorganism. Somebody drops an old Coca-Cola or whatever and it is not cleaned up, perhaps that material contained the salmonella and not -- it was not inherent in the plant. We don't know the answers to these

questions, we just know that they're questions.

Furthermore on Number 2 she mentions, "They may also want to mention sampling dried spills if any are visible." So she instructs other people to do that as well.

More concerning though for this FDA sampling protocol witness is the paragraph that begins "I'm much more concerned with DFI bulletin 30 instructions for environmental sampling." I am not going to read this, Judge. I'll just read snippets of it because it is kind of long. "We should not be putting DE broth on surfaces inside of plants. Spongesicles are already wet with a buffer solution"--

COURT REPORTER: Could you read a little slower, please?

MR. AUSTIN: Yes, ma'am.

"Spongesicles are already wet with a buffer solution, And DE should only be added after sampling. If it's added before sampling as the bulletin instructs, it is depositing nutrients for bacteria to grow on the firm's equipment surfaces." So what we have here is the FDA sampling protocol expert saying don't follow the protocol.

Now either she's correct that what they are doing is depositing nutrients for bacteria to grow. She's either right about that or she's incorrectly telling her subordinates not to follow the FDA/DFA bulletin 30

instructions. But whichever way it is, it's clearly impeachment evidence.

She goes on, on Number 2, Judge, and says, "The bulletin says to put each sterile Whirl-Pak spongesicle bag inside another sterile Whirl-Pak bag. One investigator I went out with insisted on doing this. First, it is just not necessary. One big bag for all the swabs is fine. Second, it's painfully slows the process of taking 100-plus swabs. Third, it wastes 1 to 300 bags. Fourth, it increases the chance of a mix-up because swab ID stickers after sampling were put on the outer bags and the analyst has to remove the outer bag before incubation."

Again, either the witness is correct that the protocol that everybody else is following, including the person she identified as insisting on doing it, either they're wrong or she's wrong. We don't know which, we can't get an expert to find out for the reasons that I previously mentioned.

So this begs the question, is this grim fiction or is this the grim reality.

Moving on to Number 5. Judge, I would like to direct the Court's attention to page 2. This document purports to be a summary of environmental swabs from PCA customers. For the first time, two weeks ago, the defendants are

given the summary of environmental swabs from PCA customers. Towards the end of the -- about the last 25 percent of the page, Judge, where it starts "Of the 41 firms assigned for inspection at the outset of the assignment, eight were identified by the District as a warehouse facility that did not manipulate any product received by PCA Blakely."

Because we first got this two weeks ago, we just have to accept that that's true because we have no way to know -- to determine if that is correct. But eight cannot be swabbed.

We also learn that an FDA 483 was issued in 19 of those. So it goes on to say "Final classification of all inspections has not been completed; however, it is anticipated that at least three of these inspections may be classified as official action indicated," which I don't have to tell the Court is the most severe action that can be taken in this.

But more troubling, for the first time, one paragraph under where it says, "Number one, a total of 53 environmental samples," it says, "Three samples collected during DEN/DOs inspection of American Nutrition, Inc. salmonella serotypes detected include," and they list seven different salmonella types. What this document says, for the first time, is that a customer of PCA that

had a product that was charged in the indictment, Count 22 and Count 55, had three positive environmental swabs, more than at PCA, and seven different serotypes.

If you -- Also, it mentions two other customers by the way who also tested positive for salmonella. They are not mentioned in the indictment. But American Nutrition, Inc. is responsible for having been in the chain of custody for Counts 22 and 55.

And if the Court will indulge me to move forward to a couple pages to this yellow and blue thing here. This is a document that we received from the government some time ago. This was not in the most recent production, this was given to us much earlier. And it's labeled Product and Environmental Samples Tested by FDA, and it lists the products and environmental samples tested by the FDA.

We note to the Court that though the defendants believe this was all of the product and environmental samples tested by FDA, American Nutrition, Inc. is nowhere mentioned on that document. So those three environmental samples that are on a lot, that represent two different counts in the indictment, are not on this chart, and we only now get this document that indicates that they had three positive environmental swabs representing seven different salmonella strains.

And though the seven salmonella strains do not match

the outbreak strain that's irrelevant because the government has maintained all along that the two environmental swabs from PCA are certainly relevant even though one of them is salmonella Tennessee, not salmonella Typhimurium, which was the outbreak strain.

Judge, under Tab 6, if the Court could move to page 2, this is an e-mail between two experts. Well, it talks about two experts identified by the government, Brillhart/Satterwhite, and it says -- it's an e-mail to Mr. Peckinpah (sp), it says -- from Karen Satterwhite. "Mr. Brillhart" -- and this is in 2012. "Mr. Brillhart and I were never asked to participate in the review of those documents so we were not familiar with them and do not have access to copies." What they are talking about are the JLA/PCA lab reports. So these are their experts who we now know as late as 2012 had not even had access to those documents.

Moving forward. This is a quick one, Judge. Under Tab 7. Were the Court to admit Dr.Ian Williams as an expert, just briefly it says, "I just participated in a call with CDC and the Minnesota Department of Health. During the call, I heard that Minnesota had a presumptive positive epidemiologically linked open tub of King Nut peanut butter and that additional analysis of the nationwide case control study had resulted in significant

associations between illness and peanut butter and other possible -- and possibly other foods." Possibly other foods.

Certainly this is not Jencks Act material, and certainly we would be permitted to ask Dr. Williams, the head of the CDC, what other foods possibly could have contributed to the outbreak as is evidenced by this e-mail.

Moving forward, Judge, to Tab Number 8. This is, in January of 2009 -- first, it evidences -- this, of course, we got two weeks ago. First, it evidences that the government had focused its attention on peanut better as early as January 28, 2009, but more important, it indicates how labs should sample peanut butter. How labs should sample peanut butter. So what this tells us is, number one, the government is instructing labs, state Departments of Health, et cetera, how to test for salmonella or how to take samples of peanut butter. But we also now know that those Departments of Health were not utilizing their normal protocol. So this raises all kinds of questions, who received these sampling questions, did all the Departments of Health receive them, just some? We don't know. But now those questions have to be answered.

The next page, Judge, is several days later in February 2009, and if the Court would permit me to read

the first sentence. It says, "FYI, DFS guidance that streamlines the method for salmonella isolation and identification from peanut butter samples to be used for salmonella Typhimurium in peanut butter outbreak samples." So not only are they telling them how to sample peanut butter, they're telling them the type of salmonella to look for and how to do it.

So who received this? The Departments of Health? We know for a fact that the Department of Health in South Carolina, which was the subject of the woman's illness, we know they got it because we found it in -- we found something in their file that referenced a report that we didn't have. But now when know that this was something that was -- they were instructed to do.

Page 10 -- or let's see. I'm sorry. Behind page 9, Judge, and if the Judge will permit me, my 42nd birthday was Tuesday and my wife has been telling me for some time I needed reading glasses, and I told her she wasn't correct, but this document will require me to use these.

THE COURT: The question is did you get those from the drug store or from the optometrist?

MR. AUSTIN: I got these -- I got these from my eye doctor's office because I was so adamant that I didn't need them, I said I'd go in and get tested and I walked out with a pair.

THE COURT: I can tell you, you can get them a lot less expensively at the drug store.

MR. AUSTIN: Well, I am certain I will break this during the course of the trial, Judge.

On this document, if I could be permitted, and it's difficult to read, but starting from the bottom. This is from Suzanne Lance to Ian Williams, who is -- the Court is aware of who he is. It says, "Hi, Ian. Karen is really needing some information. FBI is involved in this now, and a lot of pressure is coming." So was this witness under pressure, did the FBI pressure this witness? We don't know. What we do know is it is not Jencks Act material, and we do know that we would be permitted to ask Dr. Williams about it were he to testify.

Skipping up a couple, and the Court may just note in passing that Dr. Williams asks several questions that are neither here nor there for this analysis, but asks several questions. And then Jennifer Kensiac -- I may be saying that wrong -- which is one, two, three e-mails down. It's Jennifer Kensiac to Kelly Heis. The last paragraph says, "Maybe some of the people asking the questions below" -- That's Dr. Williams. "maybe some of the people asking the questions below don't quite understand that codes don't necessarily mean those isolettes were involved in an outbreak or investigation." And then -- "Especially the

older codes since we don't assign codes to everything like we used to. It seems like they want isolettes with good epi-data. And of those codes mentioned above, only the Typhimurium peanut butter would have that."

So, again, Dr. Williams, as we understand it, is here -- is being proposed to testify about cluster codes and PFGE sample matches, when here's somebody saying he doesn't understand it and, furthermore, that the code matching don't necessarily mean that the isolettes were involved in the outbreak. Well, that's what he says, that's his opinion, that the PFGE matches means that they are part of the outbreak. So how this is not impeachment evidence I have no idea.

Under Number 10, this is an e-mail from Robert Nelligan, and the Court will recall that there's been for some time some dispute between the government and defendants as to whether certain products contained finished product from PCA. Most recently the discussion concerned Austin peanut butter crackers and the South Carolina woman that was the subject of a brief that was supplied by the government and by the defendant. If the Court would flip to the next page. I've included page 10 of the June 16, 2014, brief filed by the government in this case. The highlighted part reads, "The food products were peanut butter and peanut butter crackers. The

suppliers of the peanut butter and manufacturer of the peanut butter crackers identified PCA Blakely as the source of the peanut butter."

The defendants have been saying all along that that's not correct, that it's a Kellogg's product. But the government has represented to the Court that the suppliers of the peanut butter in manufacture, that is, Kellogg has identified PCA Blakely as the source of the peanut butter.

Now, if the Court will switch back a page to Robert Nelligan, in January 2009,which is certainly well before June 16, 2014, the government has in its possession a document that reads, "Up to this point peanut paste has been a nonissue since it is further processed upon delivery to the customers. Examples include Austin Quality Foods." Then it gives the address. "Austin Quality Foods is a large snack cracker manufacturey for peanut butter crackers, et cetera. They receive the paste and, in essence, make their own peanut butter from the paste."

That is what we have been saying all along. And it would have been nice if we had this document to bolster our argument and include in our many briefs on this subject.

Moving to page 11, Judge -- or Tab 11. This is a document from Janet Gray dated July 30th, 2008. The Court

will recall that the indictment, which I have attached as the last page under Number 11, which is page 47 of the indictment, number 60 relates to Stewart Parnell. This is, if the Court has it, it is the last page under Tab 11.

Page 47, number 60, reads, "E-mail exchange via the Internet between locations in Georgia and Virginia in which Kilgore suggested to Stewart Parnell and unindicted co-conspirator number 2 that PCA officials should" --

COURT REPORTER: Slower, please.

MR. AUSTIN: "should falsely state to FDA that PCA's product has been rejected by a customer because of size issues when, in fact, the product has been rejected because it contained metal fragments stating 'we all need to have our stories straight if and when we are questioned by the FDA.'" The indictment further suggests that Mr. Parnell affirmed this statement. However, when you look at the July 8th -- July 30th, 2008, Janet Gray memo from the Department of Health and Human Services on page 2, at the bottom, the last complete -- the last sentence that's not complete on the page, it talks about this load and how it was rejected, had a rejection sticker on it. This is the medium chop load that was stopped by customs that contained the metal fragments. It is the subject of that count of the indictment.

And it says, "Mr. Lightsey stated that they never saw

the actual in the metal fragments that their customer had allegedly found, so it is possible that they had experienced the same problem with small pieces of the full bag inadvertently falling into the product when the bags were opened. No other metal fragments were observed during the reconditioning."

Far from getting their stories straight and suggesting that it's just a size issue as alleged in the indictment, Ms. Gray knew in July 2008, when she did the investigation, from Mr. Lightsey, who is a PCA employee, that there were metal fragment in there. Now, that doesn't mean that Mr. Parnell didn't want him to say it necessarily. But it's certainly impeachment evidence and it's certainly something that the defense would be able to inquire of both Mr. Lightsey and Ms. Gray.

Moving to Tab 12. This is an e-mail between two of the government's experts that we just received two weeks ago. It is from Richard Hartline to Karen Satterwhite, and it says, "When are you going to be at your office again? If possible, I would like to go over your CD with you and change some of the folder titles to answer questions that I am sure will be asked."

Now, were those the CDs that we received? What questions? What were the original delineations of the folders in the CDs? We don't know. We didn't know they

were changed. We still don't know. But we certainly would have been permitted to inquire a little further had we had this document. I think it's inarguable that this is not Jencks Act material, and I think it's also inarguable that the defendants would have had a right to inquire as to what were the original folder names before the change.

Under Tab 13, similarly, is a document we received two weeks ago. On page 2 of the document, the last one, two, three, four entries, for whatever reason, don't deal with PCA, they deal with Smuckers. The government has noticed an industry standards expert who we assume will say that PCA had insanitary conditions as alleged in the indictment and that that was violative somehow of the industry standards. Well, here Smuckers -- and I hope nobody has any peanut butter and jelly sandwiches. Smuckers was positive for filth analysis, rat/mouse excreta, rat mouth toothmarks, mammalian urine, whatever that is, rat/mouse hair. It goes and lists all sorts of problems that they have. Now, surely that goes to whether the industry standard is one that is as their government witness would suggest.

Finally, under page -- Tab 14 -- And I'll comment here in preface to this document. When the government talks about how many documents are in the production that

they gave us on June 2014, i forget the number, but it is 3,600, something like that. And as Mr. Tolley pointed out in their brief, when they say documents, they don't mean pages, they mean documents. This 52-page document is much more typical of what a document means in the discovery. In fact, we culled this down. There are ten drafts of this establishment inspection report. Ten drafts, over 500 pages, that's counted as one document.

Nonetheless, we didn't have time to go through all the edits along the way. But what this is, is Janet Gray initially drafted this establishment inspection report. And if the Court will move to page 10 -- And the Court will recall that -- And I think it has been plainly obvious, I don't know that it has been overtly stated by the defendants, but it's been plainly obvious that Stewart Parnell's contention has been from the beginning that he did not authorize activity the plant, he maintained three different plants, he was not somebody involved in the day-to-day. So the establishment inspection report here, the red notations and the cross-outs are supervisory additions or removals. They are not the original author's changes.

Down at the bottom of the page, the last paragraph says, "Mr. Sammy Lightsey is the operations manager for the firm and the most responsible individual present at

the firm on the day-to-day basis. He began working at this firm on 7/7/08, and he replaced Danny Kilgore, the former operations manager. Mr. Lightsey provided information on product distribution, raw ingredients, operations and equipment, internal testing procedures, sanitation procedures, and private laboratory test results. He provided accompaniment throughout the inspection and access to the records. His position of authority was evidenced by his acceptance of FDA documents and issuing instructions to employees in the office and production areas."

That's how it was originally drafted. The changes are in red. "Who were observed following his instructions." Does he have any authority over the release of finished product from the Blakely facility? Who authorized the release of finished product that tested positive for salmonella? Was it Lightsey or was it Lightsey under the direction of Stewart Parnell. It will surprise no one that the final report says that it was at the direction of Stewart Parnell, and that was not contained in the original author's recitation of who had authority.

So, Judge, if Jencks Act material is as anybody has described it in their briefs, this is not it. If impeachment material is as anybody has described it in

their briefs, it's not this.

THE COURT: It is true, though, that some document or information can be both Jencks and --

MR. AUSTIN: It can be, Judge. But it is our view, and I believe that of the Eleventh Circuit, that Constitutional rights are not trumped by the Jencks Act.

Also, as Mr. Bondurant pointed out, when you deliberately decide to hold back material until the late stages of litigation because you are under the belief that it is Jencks Act material and it does not contain impeachment or exculpatory evidence, you better be sure. You better be sure. And if you're wrong it should not be the other side that bears the consequences of that.

The problem with continuing this trial is that the government, we recognize and we've put in our briefs, has a huge expert witness problem. They are trying to get in illness, death, they need medical doctors to do that, they need MEs to do that, medical examiners. They don't have any of those people. When we filed our brief, our Motion In Limine, and said you don't have any of the experts you need, what did they do, they immediately noticed Dr. Ian Williams as a summary expert witness hoping this Court would permit that witness to talk about things he had nothing to do with. South Carolina woman who was sick from salmonella, where is the doctor who says she was

sick? So what's going to happen is if the Court grants a continuance, the government is going to notice all those people, and instead of a two month trial, we're going to have a ten month trial; and instead of the defendants being in the position they are in now, which is three days before trial with the government not having the people that they need, we're going to be sitting here two years from now where the defendants are facing a mountain of expert witnesses.

They only benefit by a continuance. And we believe a continuance seriously violates Stewart Parnell's due process rights. That's what we ask the Court to do.

THE COURT: Well, what is -- Let me ask you this, I am not asking you about your strategies or anything of that nature but your resources. I know there's lead counsel here in the courtroom will be here. What is the nature of any ability of -- for the defendants to make use of and review this material --

MR. AUSTIN: Judge, if the Court --

THE COURT: -- prior to or during trial?

MR. AUSTIN: If the Court orders, our firm maintains about 55 lawyers, and I think that I can speak on behalf of our firm, that all 55 lawyers would drop what they are doing to assist us with this case. However, I also think that would be an undue hardship on both our

firm, the individual lawyers, and the other clients that they represent. But we'll do what we have to do Judge.

But going forward now, admitting Dr. Williams, we don't have any of his underlying CDC data. So if the Court did not want do continue it and Court did not want to dismiss it, then surely someone like Jenny Scott who says I am not an really expert anyway, who has 71,000 files attached to her name in the June 2014 production, surely she should be excluded, surely any documents that were contained in there that we don't have an opportunity to review should be excluded, and any testimony that goes along with it. But as Mr. Bondurant says that's not a death nail to the government's case, they can still proceed with the Certificate of Analysis issue, which does not require that type of expert. They can continue with the Mexican/Argentinean peanut paste issue. So this is not an outright -- necessarily an outright dismissal of the entire indictment. There's a middle ground. The defendants have asked that it all be dismissed and we believe going forward would be violative of our due process rights.

However, there is a middle ground. And the middle ground is to exclude the documents provided in June 2014 because if the trial proceeds, they're going to start calling their experts first because they will want to get

them on before we read the stuff. So when we find on week 3 of the trial a great piece of evidence on Ms. Satterwhite, ahh, Ms. Satterwhite, she's already testified. So while we will be diligent and we will do everything --

THE COURT: What if the Court would not excuse an expert?

MR. AUSTIN: If the Court is not going to exclude any of the experts --

THE COURT: What if the Court did not excuse the expert once --

MR. AUSTIN: Well, in my experience, at least, Judge, not having information causes me two problems. The first problem is I don't ask the right question, which sometimes I don't any way, but if I don't have the information, I don't ask the right question. But the second is sometimes I ask the wrong question, and they pull out a document. As a for instance, only in a footnote in their response did they tell us that Mr. Dasher's representation about Darlene Cowart's proffer was wrong. When were they going to tell us that information if we hadn't filed our motion to dismiss? I talked to him on the phone, he sent me an e-mail confirming it was December 2009 was a proffer session. We later filed a motion to dismiss and they later corrected

in it writing. When were we going to get that before? I'd a stood up and asked Ms. Cowart about some proffer session and I would have looked like I didn't know what I was talking about. So I worry about that kind of thing.

So for that reason, Judge, we'd ask that the documents be excluded, the witnesses associated with them be excluded. Of course, we would like the entire indictment dismissed. But, barring that, we believe that a minimum remedy is the exclusion of the documents and any testimony predicated on that.

Now, somebody like Darlene Cowart, who was mentioned in there, she wouldn't have to be necessarily excluded in mass, there could be factual things to which she could testify. Tracey Buchholz who worked at Deibel Labs, I understood they recently noticed. She's going to testify about a hot room and things. Those are factual issues, those don't require expert opinions. Surely she can testify about those kinds of things. Ms. Cowart can testify about anything that does not require an opinion and is not predicated on the documents that we recently received. And we think with -- with that, then there would be some relief afforded to the defendant, though not complete.

THE COURT: All right. Thank you.

MR. AUSTIN: Thank you, Judge.

THE COURT: Any other defendant wishing to argue? Mr. Tolley?

MR. TOLLEY: Yes.

MR. AUSTIN: Forgive me, Mr. Tolley. Judge, I would like to move this into evidence.

THE COURT: Yeah. Is there any objection to the exhibit?

MR. HEARN: We don't object to it being presented to the Court as an exhibit to their motions, but technically it is not evidence --

THE COURT: Well, I understand that's what you presented, as an exhibit to your -- your argument.

MR. AUSTIN: Yes, sir.

THE COURT: It is admitted without objection.

MR. TOLLEY: Your Honor, you know, we had a hearing and the Court asked us a couple weeks ago is there anything else and everybody was silent, and I got home the next day, and I got in the overnight mail a hard drive. And I knew -- I asked -- It has a cover letter with it and it said it was 4 gigabytes. And so I asked one of my technical folks what does that mean, and they said between 100 and 150 thousand pages. And I knew right then we were going to have a problem. So what I decided to do was -- the first thing is to try to get it open and see what it was. And it is no easy thing to open one of these

encrypted government hard drives. And then I said, well, where's the index, is there an index, is it searchable, is there an index of search terms, and it is not. And so then what I decided to do at this hearing, we copied the hard drive, and I've got the original and I'm going to put the original that they sent us into evidence because win, loose, or draw I think it has to go up with the record as to what they have done here.

I don't know why they did this, I'll be honest with you. I was so frustrated when I saw it, I didn't think that was necessary.

Is that open now, Ms. Smith? All right. Well, let me know when it is open because I can go ahead and talk to the Court about other issues.

This is not just simply a matter of lazy lawyers because the cover letter, which is Exhibit 1 to our motion number 209, I believe -- yes. 209 has the cover letter from the government, and then attached to it also, just a picture of the hard drive. But the cover letter says, in part, "This information is being disclosed pursuant to the Jencks Act for the following potential government witnesses listed below. This is a general description of the data contained on the hard drive. Do not rely on this description to ascertain the exact nature of the data on the hard drive. Please review the data directly."

So we are getting, basically -- and I trust Mr. Hearn at his word, don't take our word for it, read this material.

Well, okay. And so, when we realize how many pages it was, I knew that I could not read 100,000 pages in time for this trial, much less make any use of it. Plus there are other things to do in preparation for this trial, which is all we've been doing, is trying to get ready for this trial.

You know, I think sometimes we lawyers get kind of carried away. We start throwing things at each other. I guess we are all mad at each other now so it's time to go to trial.

But in documents 207, which was the government's initial response to our motion to dismiss and my supplemental brief, the defendant's motion is presented is dystopian view of the state of discovery. I had to go out and look up dystopian. I had no idea what that meant. It means fairy land. I am not living in a fairyland. I have been doing this 40 years, and I knew this was a problem as soon as it came across the table.

And you just -- I think counsel Bondurant made a good point. I mean, if this was just an ordinary case and Mr. Hearn came in at the last minute and he had a two page witness statement, every Court's going to let that in,

every defendant's going to have to live with that. But this is a different matter.

Now, this is Defendant's Exhibit -- Defendant Mike Parnell's Exhibit 1 is the original. Defendant's Exhibit 1 is the original.

And, Devin, can you open it for us?

MR. TOLLEY: Ms. Smith, it is open.

If you don't mind, would you come up here and kind of -- or do you need to be there?

Let me speak from over here, Your Honor.

THE COURT: All right. Make sure you are near the mike.

MR. TOLLEY: I will. This is page -- When you open this hard drive, this is what you see. Is that correct?

MS. SMITH: That's right.

MR. TOLLEY: And then is there an index contained within this? What do we get here?

MS. SMITH: You just get a list of names.

MR. TOLLEY: That's it?

MS. SMITH: That's it.

COURT REPORTER: I'm sorry. She's not using a microphone.

MR. TOLLEY: Her answer was we just get --

MS. SMITH: There's a list of names.

MR. TOLLEY: -- a list of names. And that's it?

MS. SMITH: That's correct.

MR. TOLLEY: And then if you go further, you get -- what does this represent, please?

MS. SMITH: These are the different types of files that within each folder -- named folder. You get a data file, an images file, a text file. The images file would be what we referred to earlier has the individual pages.

MR. TOLLEY: So if the Court itself were to decide to look at this, this is what the Court would see; is that correct?

MS. SMITH: That is correct.

MR. TOLLEY: Hand me that yellow piece of paper at the top right there. Thank you.

If the Court or its clerks decides to open this and look at it, I have been advised that if you put this in evidence you may want to warn the Judge or his law clerks that you can't just open this, you have to use the special inscription software and use a password, which I'm sure Mr. Hearn would be glad to provide. Otherwise if they just plug it in and reformat it, it will erase the whole thing. So I am looking at the clerk when I am saying that. But I'm going to move into evidence in support of this motion the original hard drive we received on July

1st from the government as our Exhibit 1.

THE COURT: Any objection?

MR. HEARN: Again, Your Honor, we have no objection as an exhibit. I will note for the record we have not reviewed this particular hard drive in its entirety, but I do take Mr. Tolley at his word that it is what he says it is, it's the hard drive or a copy of the hard drive we provided to them.

THE COURT: All right. So it's admitted as an exhibit without objection.

MR. TOLLEY: And Defendant's Exhibit 2 to this motion and our last exhibit is attached to the motion, and I think it should be part of the record.

MR. HEARN: No objection to that.

THE COURT: No. 2. And just what is that for the record?

MR. TOLLEY: No. 2, Your Honor, is a letter of June 30th, 2014, addressed to Mr. Bondurant, Ledford, and Tolley.

THE COURT: That's the letter you referred to earlier?

MR. TOLLEY: Yes, sir. That is correct.

THE COURT: All right.

MR. TOLLEY: You know I read Law Week every week. I've just found that in federal court it is the

best way to kind of keep up with what's happening. The United States Supreme Court -- just about the same day I got this stuff from the government, a published opinion came out from the Supreme Court in this case called Hinton versus Alabama, at 571 US, no page number yet, number 13-6440. Hinton, at first blush, may not be appositive, but this is what they said. The poor old defense lawyer in that case was appointed to represent Mr. Hinton. It was a death case, so it was a pretty big case. Mr. Hinton, who was operating in Alabama Superior Court under Alabama law, misunderstood how much money he could get for an expert witness. And the case would be humorous if it wasn't so serious. So he hired a gunshot expert for a $1,000, and the gunshot expert was a lousy witness and they lost the trial.

Eventually it gets to federal habeas corpus. And in federal habeas corpus, to my amazement, the Supreme Court -- the lower courts affirmed, affirmed, affirmed, but it gets up to the US Supreme Court, and in the strongest language possible the Supreme Court of the United States emphasized the heavy burden on defense counsel to provide adequate assistance to their clients. In the strongest language possible, the Court indicated that to do otherwise is inexcusable. And they held that -- in the Hinton case, that the trial counsel's misunderstanding of

the amount money available to him for an expert witness caused the Court to reverse the case for further proceedings.

THE COURT: That's also the case of where the trial judge had told the lawyer, you know, I think this is all I can give you, but come back if you need to.

MR. TOLLEY: Right. You got it. You read it.

THE COURT: And he never went back to him?

MR. TOLLEY: That's exactly the case.

And so my point about all this is, I was pretty shocked really that they found that to be ineffective assistance of counsel, but they did.

As Judge -- John Langford was the Chief Judge in Fulton County for as many years as I can remember, and he's a Senior Judge now, but he told me -- he's just doing habeas corpus cases now. He told me the other day, he said, well, the first thing we do is we try the case. The second thing we do is we try all the lawyers that tried the case. And that's sort of the position they've put us in. I am not mad at Mr. Hearn or Mr. Dasher or Ms. Englehart. I was irritated I confess because I knew what this late admission -- or submission was going to do. But the real issue here is no lawyer can honestly look this Court in the eye and say, I have read these hundred thousand documents and I'm ready to go to trial.

THE COURT: That's the question I asked Mr. Bondurant, I think, or either Mr. Austin indirectly is isn't the issue one of adequate time to prepare.

MR. TOLLEY: Yes. And we're not on the same page in that regard. Maybe I shouldn't be so concerned, you know, about the back door of this case. Maybe I should just say, well, it is not a problem, let's just move forward. Obviously if this Court excluded this evidence, I would be very comfortable moving forward; if the Court doesn't exclude this evidence, then Mr. Ledford and I -- By the way we went to law school together so we have known each other a long time. Mr. Ledford and I are going to have to talk out in the hall and decide whether we are going to file for a continuance or not, we've not done so. I agree with Mr. Bondurant, we need to get this case over with, but they have really put us defense lawyers in a tough spot.

THE COURT: I understand the positions, and the Court takes all that into consideration. But just as a Constitutional question --

MR. TOLLEY: Well, you notice --

THE COURT: -- the situation is, I have received information, discovery, that I say is a violation of the rules, a violation of my client's -- the defendants' Constitutional rights such that I can't be prepared to

proceed as scheduled with the case. And, implicitly, that suggests a matter of continuance. And the further question is can a defendant voluntarily exclude the idea of continuance and maintain that they -- going forward that they had a violation of their due process rights?

MR. TOLLEY: Well, I think -- I get your point. In fact, it is in my second supplemental brief in response to theirs that I filed last night at noon. I mean, it is Fifth Amendment and a Sixth Amendment issue. Fifth Amendment, due process; Sixth Amendment, effective counsel.

But I also agree with what Mr. Bondurant said. I mean, they're running head on into the right of the defendant to a speedy trial and those Constitutional provisions. It's a -- it's a dilemma, and I -- I don't say this lightly, but I think it lands in the lap of this Court and this Court will just have to make the call. It is a conflict between Constitutional provisions.

May I approach the bench, Your Honor, and give this exhibit?

THE COURT: You may do so.

MR. TOLLEY: That's all I have.

THE COURT: All right. Mr. Ledford, any other -- any other defendant added argument?

MR. LEDFORD: If it please the Court, if I may

Your Honor.

THE COURT: All right.

MR. LEDFORD: Your Honor, from the time I got into this case I began fussing about Brady issues, meaningful discovery. And I'm still fussing about it, Your Honor.

Quite frankly, I got into this case somewhat late in the game, was immediately handed a box with 2-1/2 to 3 million documents contained on the detached hard drives, and I didn't realize, but I soon found out, that it took the specialized software called Concordance in order to access these documents, the detached hard drives.

Well, I'm just a small firm, Your Honor. I represent Ms. Wilkerson, I am proud to represent Mrs. Wilkerson, Your Honor. But I want to do it, not only to the best of my ability, but so that she gets a proper defense. From day one I have been hampered. Your Honor, we were directed to contact Macon, the Public Defender's Office for some help, and that was a very good suggestion. We did it. The Public Defender's Office there, in talking about how do we access 2-1/2 or 3 million documents within a relative short period of time, referred us to an attorney in Seattle, Washington. We called him. He was very gracious, and I have told you this scenario before, Your Honor, but for the record may I say it one more time.

He referred us to California, San Francisco, to the Federal Defender's Office there, a very gracious office. They talked to us for several months about hosting. They were able, with their budget, to provide some temporary hosting of all of these documents so that we could access these documents. But apparently their budget was cut, and after we have been talking for several months about that, they then said we can't do that, Mr. Ledford. What we will do is send you our only copy of Concordance software on a laptop that we use to provide to other attorneys from time to time. You can have it for a limited period of time. I have had it for more than a limited period of time, but I have, through the help of Chris Hall, a local computer technician, who is self-employed, with his help, with Mary's help, we have begun to learn this software called Concordance.

Now, in addition to that, we developed problems though with the laptop that the Federal Defender's Office in San Francisco provided to us. That set us back. We purchased a laptop with my personal funds, and I am not asking for reimbursement on that. But what I am tying to say, Your Honor, is that we've had setback after setback, but we haven't stopped, we've kept digging, we still dig into, now, what is probably closer to 4 million documents.

Your Honor, there are two attorneys in my office.

One of us has got to stay back at the office and keep the lights turned on.

I intend to do whatever I need to do from an ethical and professional standpoint to adequately -- and more than that, to properly, to diligently, to aggressively represent Mrs. Wilkerson. But, Your Honor, there's not enough time in the day.

You know, when I first started practicing law, when the District Attorney would get up, I soon learned if he or she had a good case. All they usually needed was, figuratively speaking, one smoking gun. If they had the smoking gun to present to the Court, to the jury, they won the case. I would ask in this situation where is the smoking gun, we have 4 million documents, and somewhere in those 4 million documents there make a smoking gun, I don't know, Your Honor. Why would the government hide a smoking gun, their best evidence in 4 million documents? Why wouldn't they just produce the evidence that's relevant to the prosecution of this case? Why does it take 4 million plus documents to prosecute Mary Wilkerson? Why do they hide the smoking gun in those 4 million documents? Maybe because -- maybe the evidence, whatever it is, is favorable to Mary's defense. Maybe, maybe, the purpose is to hide the evidence that's favorable to the government in that pile of 4 million documents. And, Your

Honor, it crossed my mind maybe, just may be, there is no smoking gun, maybe, just maybe, the evidence is not there to convict any of these defendants.

Here we are on the eve of trial, a six to eight week trial, Your Honor. I am not going to be able, with my one horse operation, to read 100,000 files between now and the end of this trial. I just won't, there's just no way possible. I am not complaining about myself, Your Honor. I'm complaining about the lack of proper defense for Mary. Your Honor, that's not due process under the Fifth Amendment; that's not effective assistant of counsel under the Sixth Amendment.

Your Honor, I would say that my client runs the risk of being painted with the same paintbrush as the other two defendants, and we have no -- no argument with the other two defendants. But, Your Honor, when the jury hears all this evidence, we have only got two counts against Mary, 73 and 76, both obstruction counts, and the Court may well be thinking, the US Attorney's Office may be well saying, why do I need time to prepare a defense for those two counts. Because with all of this evidence that will come in for six to eight weeks, it is more than likely, and it's been my experience this happens, that Mary will be painted with the same paintbrush as the other two defendants. What evidence the jury may well decide is not

favorable to the Parnell brothers may be used in their minds to convict Mary. It happens, Your Honor. There is that possibility. I would say even more likely there's a probability that it will happen.

Now, Mary has only one attorney. She's represented by me, not the firm. There's only two of us in the firm, Your Honor, and hopefully as I stand here now the lights are still on. Stewart Parnell, he's an honorable man, Your Honor, and I am not making any comment on his case other than to say Mr. Austin has stated in his place before the Court this morning they don't want a continuance. And I understand their strategy and I respect that, but he also said if they have to they have 55 attorneys in that firm that will do whatever it takes to properly defend Stewart Parnell. Your Honor, there's a big difference between a firm with 55 attorneys and a firm with one attorney able to represent Mrs. Wilkerson.

I would respectfully contend, Your Honor, in closing that the defendants' joint motion to dismiss is the only way to effectively deal with this kind of strategy, this kind of conduct, whatever you may call it, on behalf of the government. Dismissal, Your Honor, in my humble opinion would be appropriate, would be the only proper way to effectively resolve this case, and protect the rights of Mary Wilkerson. But if the Court is not inclined to do

that, Your Honor, I would say that I am prepared today to file a motion for continuance. I don't have enough time to read the 100,000 documents, the 100,000 documents that may contain something that is favorable to Mary's defense. And I respectfully ask for relief today for Mary, either a dismissal of this entire a case against her or I will ask for a continuance and would request the Court to grant that for Mary.

Thank you, Your Honor.

THE COURT: All right.

All right. We are going to take a short recess, about 20 minutes, and I'll hear from the government.

(Recess)

THE COURT: All right. Let's hear the government's response.

MR. HEARN: Good morning. Good afternoon, Your Honor. With the Court's permission, I would ask the Court to allow the government to bifurcate the arguments from the motion to dismiss and the arguments regarding the expert notification. I noted in the presentation of the defendants' arguments there was some discussion about notice of experts. I don't know if they intended to wrap the two together or not, but Mr. Dasher, with the Court's permission, will address those particular issues, if the defense wants to formally address them again with the

Court.

THE COURT: That's fine.

MR. HEARN: I would ask the Court to bear with me here. We've got a binder of, I'm sure, clearly probably 200 documents. Most were presented to me for the first time today that I'm going to discuss. I'd like to begin by discussing some of the issues raised by the defendants in their presentations. The Court will notice on the screen in front of it was Mike Parnell's Exhibit 1, the hard drive that was given to defense counsel containing the Jencks material. The Court was given a quick presentation of how it appeared, what you see now are the files, and counsel clicked through to four files, one of them named images, and they clicked on images and it appeared on screen where there's a panel of images or pictures of documents, numerous ones on the one screen. What needs to be told to the Court is that's not the totality of what is accessible or how the defense can use the hard drive.

That image that you see there is not the data on the hard drive in the Concordance software database. What is not up there is the ability for the defendants to search in the Concordance database, or another software database they may be using, search by terms within those files or within all the files at the same time to find appropriate

documents they may think are relevant.

In essence, numbers don't equate impossibility here.

It is the best, efficient method that has been provided to them by the government to search through the documents using terms of their choosing to find what they think is relevant or, likewise, if they want to lay eyes on every one, it is assembled in an orderly fashion where they can quickly click through those images or documents, observe them, make a determination whether or not it's relevant, if they want to follow-up, if it's something they need to discuss.

THE COURT: Of course, Mr. Hearn, the substance of the defendants' argument is not just that they can't search it as you suggested it, but that they are having to search it now, hours before trial --

MR. HEARN: Correct.

THE COURT: -- because the government did not produce this information much earlier.

MR. HEARN: This information was produced to them pursuant to the Jencks statute, the Jencks case. For them, in fact, earlier than local rules require. They got it two weeks before trial. We believe that's a sufficient amount of time to begin searching the database. The trial is expected to last six to eight weeks. They can continue to search the database. Not all witnesses are going to

jump up and testify the first day. They're going to testify probably through the course of four weeks. The trial is going to end at approximately 2 p.m. every day. You have the remainder of the day to continue to search. And the question the Court posed the counsel for Stewart Parnell, that was never answered, was what if I don't excuse the expert. That was never answered. Well, what happens if you don't excuse the expert means the government has to make that expert remain and be available for recall.

The implication, I assume from the Court's question, is if counsel were to say I need to check the database, I want to look at some documents, and they make the proffer to the Court as to the basis for that, the Court could require the government not to excuse that witness and that would allow them additional time to look through the documents.

What they have before them now, we believe, does give them the sufficient amount of time from when they receive these documents to review them and prepare for trial. The mere fact that this was prepared two or three hundred pages, organized, analyzed, argued to the Court is evidence that they are able to use these documents and use this database, and do it in a timely manner and efficient manner.

THE COURT: A secondary question then is this, I know the government takes the position that this is Jencks Act material.

MR. HEARN: Yes.

THE COURT: Defendants say it may be Jencks Act, but they also point out what they believe to be impeachment.

MR. HEARN: Correct.

THE COURT: So assuming that some of it is impeachment is there some validity, though, to the defendants' arguments that they would have a need for that earlier than, say, purely Jencks Act material?

MR. HEARN: The documents that they have in this binder that they claim are impeachment only become impeachment material if the witness is on the stand and contradicts what's in the written statement. That's the purpose of Jencks. So they have that written statement in front of them. They are presuming a fact that has not occurred.

If you were to go with the defendants' argument then all of Jencks is all impeachment and all producible under Rule 16 or under the Court's discovery orders.

The witness gets the opportunity to say yes or no to address that issue or not address it at all. If it is the substance of their testimony, counsel can cross examine

that witness regarding the e-mail, and the witness can admit or deny that they said that, they can clarify it, they can use it any way possible. But that witness has to be up there and has to have stated something that is in contradiction to that for this to be clearly called impeachment at this state of the game. Can't do it. It's Jencks.

Another issue I want to address is the defendants express the fact that they did not have an expert that would be able to analyze the testing methodology of the FDA. And, in fact, they do and they noticed up to the government. John James Farmer, III, noticed us up on July 1st, 2013. In the description of Mr. Farmer, Mr. Farmer may testify as to historic and current testing protocols for salmonella and deviations from appropriate protocol that exist in this case. Similarly, Dr. Farmer may testify as to appropriate sampling protocol for salmonella deviations for appropriate sampling protocol that exists in this case. They've got the man. They're able to analyze the testing methodology. They're able to put somebody onto discuss what or what not the FDA microbiologists did.

Defendants' presentation began with the statement that just last night they were told that they were going to get three more CDs from the government or DVDs from the

government at this stage in the game. What the Court needs to be aware of is the rest of the story. That e-mail came from Josh Burke, the government's taint counsel on this case. And if one is to look at the header on that e-mail, you would clearly see that nobody on the trial team is notified in that e-mail. We're not copied on it, we're unaware of it. If you will read that e-mail more -- and I would encourage counsel to provide that e-mail to the Court so you can see the full story. If you read that e-mail more, you would see that those three CDs are discovery production from the law firms that the government has sought from the evidence regarding their representation of the PCA Corporation where attorney/client was waived by the bankruptcy trustee. Those CDs only just came in to the government's possession within the last week. So that's not a case, as it may have appeared at first, blush that the government is continuing to produce evidence to the defense.

Another point, the proffer letter of Darlene Cowart. As we note in our response, that was our error and we apologize, but the information given to the defense was not that she had proffered, that she had signed a proffer letter, and that was going to be something they were going to be used in Court to be, then, embarrassed. The information that was available to them from Mr. Dasher as

they asked, where is the 302 that was Darlene Cowart's proffer. And Mr. Dasher's response was I'm checking on the signed proffer letter agreement with Dr. Cowart. At that point in time it should be clear that even we are checking into whether or not what we had informed them to, and we had given them an unsigned proffer letter, whether or not that represented something that actually occurred.

The motions filed before we can get back to them so we have to inform everyone in the government's response, if we had not, we would have informed the defense personally.

And then, last, the Court -- the government does not believe that the presentation of the evidence two weeks prior to trial to the defendants constitute or would create a due process violation. The Jencks material we produced to the defendants was produced in good faith. Despite the accusations, there's no intention by the government to produce or hide Brady impeachment material in those documents, there's no intention for us to bury it in there, and defense continues to say, but it is not all Jencks. How do you know that? Well, one, I've pointed out to the Court the particularities of what makes impeachment impeachment. They are claiming on the face of a document it is impeachment material. It is not impeachment material unless you have a witness that's

contradicting themselves per what is in their written document.

Additionally, the defendants in their first motion point to two 302s, which are not required by the government to be produced but we've done so in this case. And they claim on the face of those documents of two individuals from two businesses that bought product from PCA that they are impeachment, and arguably impeachment material was the quote. No, they are not, not on their face. And we raise that in our response, and in the defendants' reply, it is unrefuted, it is unanswered. That's because it is not impeachment. That's the facts behind the conclusory statements. The defense would want the conclusory statements of there's impeachment material in here; therefore, it's a due process violation, they should have produced it earlier. The cry of impeachment material doesn't carry the day. It is the facts that support that claim and the facts here are wanting, are nonexistent.

Another exhibit in their main motion they point -- Exhibit 1, the e-mail chain involving Leslie Satterwhite or Karen Satterwhite, microbiologist for FDA. That e-mail chain, if you look at it thoroughly and then you look at the defendants' arguments, is a case of misunderstanding the facts. If you read at the entirety of the e-mail

discussing whether or not to go to Golden Peanut and do any inspections, testing, the rest of the e-mail that's not quoted in defendants' motion discusses the fact that it's not necessary to go to the two facilities that are discussed in that e-mail, which is Golden Peanut at Ashburn, Georgia, and Golden Peanut, Dawson, Georgia. And the part that's pertinent in this e-mail is discussing why not to go there is these firms only blanch peanuts, they do no roasting at all. Blanching of peanuts is simply the removing of the shell, it's still a raw peanut. It has not gone through any procedure to render it, hopefully, microbiologically free of salmonella. In a blanching facility, raw peanuts are everywhere. Raw peanuts come from the ground.

That e-mail represents common sense on behalf of the FDA, why go to somewhere where they have no kill step, where they have no HACCP control points, where they have no testing when they first get these peanuts in.

The misunderstanding occurs in the following e-mail where Leslie Satterwhite talks about PFGE matching found in a PCA product and in a ConAgra product and having a common supplier, Golden Peanut. The common supplier, Golden Peanut facility is in Blakely, Georgia. That is their roasting facility. In fact, that facility was inspected by the FDA pursuant to the investigation to

salmonella at the PCA-Blakely facility. So it's clearly a misunderstanding of the facts that the e-mails represent.

The question begins -- becomes then if we have comported with existing case law for the production of this Jencks. The statute, the Jencks case itself, and the case law is clear that we were timely in our manner, more so than the statutes require, the local rules. How is it that the defendants are arguing what they are? Because it is the only argument they have to argue --

THE COURT: Well, one of the arguments is this, that they simply would not have time to review it.

MR. HEARN: I believe they do --

THE COURT: I think I kind of pressed Mr. Austin about it, and he kind of conceded that, although it might have some negative effect on other clients and other matters in the firm, that they probably do have a number of people who could do that. But what about Mr. Ledford?

MR. HEARN: Well, Mr. Ledford, much on my part in opposition to what he said, is a great attorney, he's knowledgeable about this case.

THE COURT: He's not said he's not a great attorney.

MR. HEARN: He said he wasn't knowledgeable about this case, and he is. I have sat with him, I've talked to him many a time about facts, plea discussions.

We've even sat down with him and gave him the incriminating e-mails that show that this client had knowledge of salmonella prior to --

THE COURT: What I am talking about was the practical matter of him with a two person firm, effectively one person on this case, reviewing the number of documents that you recently produced, whether they be produced earlier or late or whatever. I know the government says it produced it early.

MR. HEARN: I think there are two points to the answer to that question, Your Honor. I believe Mr. Ledford can review the documents that will be particular -- for the documents that will be particular to his client. His client is only charged with two counts of obstruction: one denying she was aware of salmonella in the plant; two, not producing a Certificate of Analysis log to the FDA when she knew of that log. Those are the two counts. The witnesses in those two counts are Janet Grey, Bob Nelligan, other people present at the inspection, Ian Williams. Those are the three witnesses.

THE COURT: You are arguing that those could be narrowed for --

MR. HEARN: For those facts, yes.

THE COURT: -- with that type of narrow search application?

MR. HEARN: Yes. Absolutely. There's files for each of those witnesses on the hard drive. You can do the appropriate term searches for those witnesses and determine what, if anything, is in there that he would like to use when they testify.

That being said, if he still feels that he doesn't have enough time, doesn't have enough resources, as he's done previously, he can petition the Court for more resources, additional help, additional attorneys. He could also avail himself of the least harmful remedy in this situation, and that is to ask the Court for more time to review those documents. Hasn't said he wouldn't, hasn't said he has, but that's the least harmful remedy that he can avail himself of if he feels that need.

I believe Mr. Ledford can, with the assistance of his computer expert, I believe he said that his client, the defendant, has been assisting him, would be able to review these documents in a timely manner to be prepared to respond to when these witnesses testify.

THE COURT: One other question, the Court almost forgot. It is suggested that the government will continue to produce matters that the defense claims should have been produced earlier, say for instance, identifying witnesses or further expert witnesses.

MR. HEARN: There are no other expert witnesses

that we are aware of that we would identify. There's none in the back of my mind, there's none even on the edge. I would preface that with a verbal footnote, Tracey Buchholz is not an expert witness that the defendants were totally unaware of. She worked at Deibel Labs, they're familiar with her name, and they were informed that she was going to step in and testify as an expert to the same matters that Deibel, the owner of the Lab, was going to testify to.

THE COURT: Was a summary produced to the defendant of her expected testimony?

MR. HEARN: We referenced the summary that we gave them regarding Mr. Deibel in reference that she would be testifying to those same matters.

THE COURT: So a summary was provided as to the addition witness?

MR. HEARN: To Mr. Deibel, yes. And the notice for Buchholz we gave them her CV, which would only be the one distinguishing fact piece between her and Deibel.

THE COURT: Does the government have in its possession additional discovery that it has not produced that it expects to produce?

MR. HEARN: There's only one matter I'm aware of. Our expert, Dave Fryman, is currently working on a report. He is a computer forensics expert for the FBI.

And he's currently working on a final report of his review of the hard drive seized pursuant to the search warrants in this case.

THE COURT: When would you expect to produce that?

MR. HEARN: He produced a draft to us this week for review. Upon our review, I would expect that he would issue then the final -- final report, and we would -- we would do that as quickly as possible to provide to the defense.

THE COURT: Is this a witness whose actions are known to the defendants prior to now?

MR. HEARN: Yes. He was noticed up as an expert witness, computer forensics. They were provided with the summary of him. And we would anticipate that he wouldn't testify until probably the second or third week of trial, perhaps even the fourth.

THE COURT: All right.

MR. HEARN: Additionally, Your Honor, the arguments made time and time again about the numbers in this case, 100,000 documents, 100,000 images. Correct figure, approximately, is 87,000 images. When you include documents that have been duplicated -- And I'll explain that in a second. -- the number goes to approximately 97,000 images. It may be a distinction without difference

to the Court, I think it's important for the record. In computer search terms a document implies something that may have multiple pages. So a 100,000 documents would carry the implication of at least 100,000 pages, probably much more.

The duplicates I reference appear on the hard drive because we wanted to give the defense the best possible method to search for documents by witness. But there's an e-mail that is between two of the witnesses in the Jencks production, Janet Grey, Bob Nelligan. That e-mail will appear in both of their files. And there is a method to go with the software and lower that number and get down to the 87,000. But we did that purposefully so a search in Janet Grey, and not a search in Bob Nelligan, will get an e-mail that if we had arbitrarily said, well, it's between Janet Grey and Bob Nelligan, let's put in Bob's file and they only search Janet's, it is not going to appear there, and we don't want that to happen.

THE COURT: What was the purpose of the statement that I think Mr. Tolley may have referred to that they should rely on actually reviewing each of the documents? I think that's the implication of the statement. That in the cover letter that came with that production --

MR. HEARN: Our cover letter?

THE COURT: Yes, right.

MR. HEARN: The cover letter -- the statement in there is intended for them not to rely upon our description of the contents of the drive, it is not intended -- and I don't believe it says, look at every document. In fact, it would never intent -- that intent would never be there in making that statement because we're aware of the search capabilities which are faster, more efficient, more accurate than looking at a page by page document review. You can find all the documents with salmonella on them with the term search. Looking at every document for the word salmonella at some point fatigue sets in.

THE COURT: Those searches include names of witnesses?

MR. HEARN: Yes. You can search for any term. You can search -- you can exclude terms. You can say this term but not this term. It's classic search terms like Westlaw, Google.

THE COURT: I wanted to say my understanding would be the type of examinations or, rather, searches that lawyers would use and have used for the last several decades in terms of using terminology --

MR. HEARN: That's correct.

THE COURT: -- to find cases here would be to

find statement, evidence of other matters; is that right?

MR. HEARN: That is correct. And it's the same methodology that they have been using since they received our first discovery production, the same day of the initial appearance. So they are familiar with the software, they are familiar with the term searching of documents.

I want to discuss the Jencks statute itself. The argument was made by defendant Michael Parnell and then adopted by defendant Stewart Parnell that we interpreted Jencks overly broad and the focus on the arguments were on the verbatim -- the word verbatim used in the Jencks statute and that the documents produced were not verbatim and, therefore, overly broad, outside of Jencks. I guess the implication being that we constructed this to be what we would call a classic document dump I suppose.

There's more to that Jencks statute than verbatim.

Jencks discusses the statement. The statement is what relates to the subject matter of the testimony. And everything we produced under Jencks relates to the subject matter of the testimony, probably more so. It is clear from the documents you look in the binder that they -- that they are looking at internal discussions between two people at the FDA regarding edits to a report. What to include, what not to include, what facts do we have

available. They have it available to them now. They are going to be able to cross Janet Grey about it. I would think that would make a better case for the defense.

That statement relates to the subject matter. It is not a verbatim statement. Jencks talks about the statement being one -- a written statement of a witness signed, adopted, or approved. Adopted or approved are pretty broad words. If you receive an e-mail and you respond to it and you are in that e-mail chain back and forth, I suppose the argument could be made, if you wanted to get it in and call it Jencks, that those statements are either adopted or approved by that particular witness because they did not refute them or they confirmed them. So, hence, you have our Jencks discovery. That doesn't include verbatim statements, not transcripts.

And the verbatim comes from the second part of what a statement is. A recording or transcription verbatim of an oral statement. That's the only particular part that verbatim applies to.

And then the third part is Grand Jury testimony, and we produced our Grand Jury testimony long ago.

So we have not made an overly broad Jencks production. Ultimately, Your Honor, the government has not done this to try to posture itself to get a continuance in this case. We have produced the Jencks

pursuant to all of our obligations in timely -- early timely manner with enough time that the software that's available to it -- to the defense to search it and be prepared for the witnesses when they testify.

Likewise, the defendants say they don't want a continuance either.

The remedy in this situation, and the least harmful remedy to ensure a fair trial for the defendant, to ensure a fair trial for the government, the least harmful remedy is the option of more time, a continuance. The defendants have that option. They can choose it or they cannot choose it. But saying at the front end we are not choosing it does not take it off the table for consideration by the Court.

The defendants would like the Court to believe that by saying no continuance that takes that option away from the Court and, therefore, your only options left are the next least severe or the next least severe or most severe, dismissal, in the hopes that the Court would believe those arguments and, therefore, opt for the next least severe, which, in fact, is a harmful remedy. It is a beneficial one to the defense because it takes away evidence from the government, clear, relevant evidence that is admissible. The government should be allowed to present its case in the strongest method possible with the best evidence

possible. Posture the Court -- the defendants want the Court to believe its in, is that it has to only consider those options, and that's incorrect. The defendant has the option to want more time or not want more time, but they choose not more time, and I think the Court couched it correctly if the defendant chooses not to avail himself of a continuance does that mean it's still a due process violation, is there a due process violation.

I believe, in those circumstances, that the appropriate procedure would to make an inquiry of the defendant, that he's aware of the circumstances, that he's aware of the consequences of proceeding, that he's aware that his counsel made statements to the Court that they didn't feel like they could be sufficiently prepared. And knowing all that, knowing how it would affect his case, does he still choose not to avail himself to the Court of the least harmful remedy in this situation which is a continuance. But the answer is to all those questions, he understands, he understands, he understands, then I believe the defendant has waived any due process argument on that issue.

Much like a defendant can avail himself to waive himself of any other rights in the course of a trial and the Court makes inquiry of them. The right to testify in your own defense, the Court's routinely make inquiries to

make sure a defendant is going to waive that right and does it knowingly.

So, ultimately, for a fair trial for everybody involved, the government believes there's no due process violation, either in the discovery given to them or any allegations that there's nonJencks impeach Brady material in there, which we say there's not. The defendants have enough time to prepare and respond. This was given to them two weeks ago in a searchable computer database format that they are familiar with. They have shown the Court today that they are familiar with it in their presentation. The only remedy for the alleged harm for the defense -- claimed by the defense is for them to seek more time, if they so choose. We are ready for trial. They say they are ready for trial. We believe they can prepare with the time that's been given to them with the Jencks material.

MR. TOLLEY: Mr. Hearn, before you leave the stand, and, Your Honor, excuse me. I just wanted to inform the Court and Mr. Hearn before you leave the podium that we have actually filed a motion for continuance. It's the wonders of electronic world while Mr. Hearn was speaking. I wanted to make the record clear that we have filed the motion on behalf of Michael Parnell.

THE COURT: Well, you had indicated that you

might do so.

MR. TOLLEY: Well, I said I was thinking about it, but after listening to everybody and I think that's what I have to do, so it's what we have done. It is filed. It's document 212.

THE COURT: All right.

MR. HEARN: Just one more point, Your Honor, not to belabor my argument, but co-counsel pointed out that counsel for Stewart Parnell had the opportunity to actually go through each of their documents individually in their binder. I think they fall into several categories. One, Exhibit 1, I argued already, that there's a misunderstanding of the facts. It is not impeachment material, based on the Golden Peanut, one location for blanching, Golden Peanut for roasting.

Several other points, much of the material is clearly Jencks that's also claimed to be impeachment. I have already made my argument that it's only impeachment if the witness were to testify in contradiction to that statement. So of it is just clearly Jencks. And there was one occasion, it was Number 9, Your Honor, the e-mail chain that was in, I think, point 5 font, very small. There was some explanations as to e-mails in there. That's an e-mail chain that involves Ian Williams, a proposed expert by the government. The e-mails quoted to

the Court in that were actually language from e-mails that were not generated by Ian Williams but by other individuals in which Ian Williams was in the e-mail chain. Clearly the statements quoted to the Court out of Exhibit No. 9 are not Jencks because they are not statements made by our proposed witness, Ian Williams.

I believe that would sum up the categories and why we don't believe the documents represent anything else but Jencks in this matter.

THE COURT: All right. Mr. Dasher, I want to hear about the witness first so that counsel for the defendant can respond with their comments after you have made yours.

MR. DASHER: Clarification from the Court. Does the Court wish to limit this to the first expert disclosure involving Ian Williams or will this address the more recent expert disclosure on Tracey Buchholz as well?

THE COURT: I want to hear about both of them.

MR. DASHER: Yes, sir. Well, it is clear that both of the notices were given past the deadline that was set by the Court in the pretrial order, discovery order. And the defendants Stewart Parnell and Michael Parnell have objected to the disclosure and the government's use of Ian Williams as an expert witness, and I believe just Stewart Parnell has objected to the disclosure as the

Tracey Buchholz.

Again, the notices were given past the deadline. However, as to both of these experts, the defendants have failed to show how their rights have been substantially prejudiced, and I have cited a couple of cases in the government's responses. United States vs. Chastain 198 F.3d 1338, Eleventh Circuit, 1999. "Violation of Rule 16 for standing discovery order will result in reversal of conviction only if such a violation prejudices a defendant's substantial rights. In determining the proper remedy for the government's violation of discovery rules, the Court must consider how the violation affected the defendant's ability to present a defense."

"And substantial prejudice exists when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense or if the mistake substantially influences the jury." That's the Camargo-Vergara decision, 57 F.3d 993, also Eleventh Circuit, 1995, in which the Court also notes that "the purpose of Rule 16 is to protect a defendant's right to a fair trial rather than to punish the government's noncompliance." And, as a general rule, the District Court should impose the least severe sanction necessary to ensure prompt and complete compliance with its discovery orders.

If the question is, is there undue surprise to the

defendants by the disclosure of these experts at this point, the answer is simply no. Very early in the discovery process, last year, one of the most important documents in the case is what is known as the Establishment Inspection Report prepared by the FDA upon its inspection of the Blakely plant in January-February of 2009. That report is extremely detailed and it names all of the government personnel who are present, who participated in that inspection, and also the dates they were present and what their various roles were. And Dr. Ian Williams of the CDC is mentioned in that -- in that report as to what he did and what his role was.

His role was that he was there to explain to the personnel at PCA that the CDC was investigating a nationwide outbreak of salmonella, and he was there to show them what it was that led the CDC to believe the source of that outbreak was the Blakely plant. So he is explaining his investigation to Sammy Lightsey, Stewart Parnell. He's impressing upon them the importance of the CDC's work. Of course, the whole point to this is that PCA's products are still out in the public and people were still getting injured from consuming those products. So the point was to show PCA this was caused by your company, and so we need to get these products off the -- off the grocery shelves.

So he's a fact witness. Whether what he's testifying to is as for the truth of it, it's certainly he's a fact witness in that he's explaining these things to Sammy Lightsey, Stewart Parnell. We've e-mail correspondence between him and Mr. Parnell. So it is certainly relevant in that he's explaining the nature of this investigation and it bears on whether or not that investigation is being obstructed.

So there's no undue surprise about Ian Williams. I mean, he is identified very early on as having participated in this investigation. So even if he's excluded as an expert, he's still -- still a fact witness, the government contends.

But as for being an expert witness, there's -- there's, likewise, no real claim of undue surprise in that in June of last year the government supplied discovery materials, which included records from the CDC about the investigation and how it is that the outbreak strain was linked back to the Blakely, Georgia, PCA facility. And there's probably a five or six page article put out by the CDC that summarizes how that link was made.

There have been discussions between attorneys for the government and attorneys for defendant Stewart Parnell from very early on in this case about whether the government was going to try to put in evidence of

illnesses in its case. The government's initial response was we are not sure at this point. And we were asked to agree that we wouldn't attempt to put in that type of evidence, and we wouldn't do that, we told them we were considering it. And, finally, it got to the point where we were asked about it again, my response was, I think you just need to file a Motion In Limine. If you think that's evidence that should be excluded from the trial in this case, you need to file a Motion In Limine. So they have known from very early on of, you know, the possibility that evidence of the outbreak and the illnesses was something that the government was considering putting forward in the trial of this case.

So they did file a Motion In Limine. The Court heard extensive hearing on that Motion In Limine, and ruled against the defendant and ruled that that type of evidence for certain purposes could come in, in the trial of the case.

So, they have known of Dr. Williams from day one, they have known of the CDC report and the records that were sent with it since June of last year. There have been ongoing discussions about this very issue. So for the defendants to claim, well, this is unfair surprise at this point when they get a disclosure about Ian Williams a month before trial is -- it's not a surprise, there's no

surprise about it. They have known of Ian Williams, and based on these discussions we've had, they have known of the issue, which is what prompted them to file the Motion In Limine, which was ruled against them.

As far as Tracey Buchholz, the government filed a response to defendant Stewart Parnell's objection to her being used as an expert witness just this morning, so I don't know if the Court has had an opportunity to review that response or not. But, as to Ms. Buchholz, there's -- likewise, there's no surprise evidence that's being thrust upon the defendants the week before the trial that has to alter their strategy as to how to prepare for trial. Their preparation for trial is absolutely no different now than it was before the disclosure of Tracey Buchholz as a witness with the sole exception of reviewing what her qualifications are as opposed to what Mr. Deibel's are.

The disclosure that was given to the defendants in June of last year, June 17th of last year, the government disclosed its expert witnesses. It included Charles Deibel, and the disclosure provided that "Charles Deibel is president of Deibel Laboratories Group, CV enclosed. Mr. Deibel well testify as to the matters contained in the report of his interview, which have been -- which have already been provided to you including, but not limited to, the nature and characteristics of salmonella, proper

testing procedures for salmonella and other micro organisms, and the test results of laboratory testing performed by Deibel Laboratories Group on PCA's products."

There's no objection to that disclosure as not being in compliance with Rule 16(a)(1)(G). Similar language was used for the disclosure of other government expert witnesses. In fact, the defendant, in his own expert witness disclosure, basically tracks the same format as the government's, and, again, no objections are made as to, you know, there not being sufficient opinions set forth in the summary or the foundations for that opinion.

So what happened in this case is that I believe it was Friday of last week, Ms. Englehart, with the government trial team, had a telephone conversation with the attorney for Deibel Laboratories who informed her that Charles Deibel had a herniated disk and that he was having issues about being able to work his regular schedule because of that. Well, the government's investigation of this case had conducted interviews of Charles Deibel and also Tracey Buchholz, Charles Deibel being the president of the company, Ms. Buchholz is the quality assurance director, that may not be her exact title but that's -- that's essentially what she's in charge of, is quality control for the laboratories.

Government prepared reports of interviews of both of

these individuals, submitted them to the defendants on February the 28th of last year, the day of the defendant's initial appearance when the majority of the discovery materials were provided to the defendants in this case. They received those reports, and then in June of last year, they were notified that we were going to call Charles Deibel as a potential expert witness. And then after we learned of Mr. Deibel's health issues, I believe it was on Tuesday of this week when we provided notice to the defendants that we intend to call Tracey Buchholz as an expert witness and referenced Charles Deibel's, you know, disclosure. Says, "she can testify to the same matters set forth in the expert witness disclosure relating to Charles Deibel." So the defendants are in no different posture now than they were when Charles Deibel was going to be the government's witness.

So in both instances, as to Dr. Williams and as to Tracey Buchholz, the defendants have not shown -- they have argued this unfair, unduly prejudiced by this, they have argued that, but they haven't shown it. They haven't shown it in their pleadings. Based on that, the government respectfully submits there's no remedy needed as to either of those witnesses, and the government would ask that the objections be overruled and that these expert witnesses be permitted to testify.

THE COURT: All right. Thank you.

Let me do this. It is 1:00. We could hear from all of you. We are going to take an hour for lunch and come back and hear the defendant's response and determine whether there's anything else the Court needs to take up today before the Court issues a decision in this. All right. We will be in recess until 2:00.

(Lunch recess)

THE COURT: All right. We can resume now with the responses by the defendants to the government's response to the motion by the defendants to dismiss. Mr. Austin.

MR. AUSTIN: Thank you, Judge. I want to start with bit of a minor matter but it relates to the Darlene Coward proffer letter. Mr. Hearn indicated that there was an e-mail from Mr. Dasher that stated that they were checking on it. I'm sure he just inadvertently overlooked Mr. Dasher's e-mail later that said that Ms. Coward's proffer would have been the interview in December 2009, so it was an affirmative statement that, in our view, needed correction prior to the brief. But as I mentioned, that's a minor point, I just wanted to make sure it was included for the record purposes.

It seemed too that the government's position is that the documents that were produced in Exhibit A by the

defendants today do not represent impeachment evidence because a witness has not yet testified. We believe that's contrary to Brady and its progeny and every other case that demonstrates that documents themselves can be impeachment materials. Because if you follow the government's logic, there is no such thing as a document that is an impeachment document unless there's also contemporaneously live witness testimony. We would suggest to the Court that the e-mails that indicate violations of FDA protocol and BAM protocol are, in and of themselves without any live testimony, impeachment. So, the defendants then reject the idea that you cannot have impeachment testimony until you have oral testimony.

Similarly, the government seems to indicate that the defendant should avail themselves of some type of search terms to go through these documents. First of all, that's somewhat offensive to our protocol in that we do not simply search through documents by using search terms. We look at individual documents. We believe that it is the duty of counsel to try its best to look at every document unless it knows that document to be wholly irrelevant. Therefore, the idea of just simply using search terms is contrary to the philosophy of, at least, Stewart Parnell's counsel and I'm certain the others as well.

With that said, though, we would call attention to --

in Exhibit A, Number 2, the document from Jenny Scott, it is unclear to counsel for Stewart Parnell what search term would have called up this document. If we'd entered Jenny Scott, we would have gotten 71,000 documents. If we'd entered FDA, we were likely to get a whole bunch more documents. We wouldn't have entered Jenny Scott CV because we already had it. And there just aren't that many other words on this page that would have alerted us to this impeachment material. So the idea that we can just have a few search terms that will readily allow us to ascertain the important documents, in our view, is fundamentally flawed.

As to the idea that Stewart Parnell and the other defendants can simply waive their rights and go forward and that what Mr. Parnell should do is waive his rights to due process similar to other people waiving their rights and going forward, well, sure, Parnell shouldn't have to waive his rights as to anything. Mr. Parnell's rights are set by the Constitution, he has those rights. The government's actions in this case in discovery should not force him to waive one of his rights. So if it is choosing between waiving his Sixth Amendment right or his due process right, the government says, well, we waive rights all the time. Well, that's true, but they are forcing us to be waive one of his rights and we choose not

to. Instead, we ask that the Court fashion a remedy that does not force Mr. Parnell to waive either of his rights. We believe that remedy can only be dismissing the case or, albeit an inadequate remedy, keeping the documents out of evidence and all of the witnesses who rely on the documents.

As to Ms. Buchholz, the witness that was recently named as an expert witness, I remember distinctly getting the e-mail. It was, as I mentioned earlier, last Tuesday was my birthday. I had been to dinner with my family, and I had said, all right, I had promised my wife tonight is going to be the night, I'm not going to do anything with this case, I think we've pretty much prepared a lot of this material, we're ready to go, and I promise I'm not -- I'm just going to sit down here with her and my family and watch TV. Right about then, I got the e-mail noticing Ms. Buchholz as an expert witness.

So if we are talking about being unduly surprised, I think I can represent to the Court if I woke up the next morning with my hair stapled to the floor I wouldn't have been more surprised than I was to get an expert witness designation that close to trial, particularly since we had just objected to the lateness of all of their notices and their discovery violations and before responding to that we get this notice.

The idea that Ms. Buchholz and Mr. Deibel are interchangeable is not in any way evident on the face of the expert disclosures. As Mr. Dasher pointed out, the expert disclosure is general. The expert disclosure for Ms. Buchholz is the exact same one for Don Zink. It's the exact same one, essentially, for Jenny Scott, just with their names changed around. All their expert disclosures are essentially exactly the same.

Sorry, I couldn't see it.

But Charles Deibel is the president of Deibel Labs Group. Mr. Deibel will testify as to the matters (unintelligible) --

COURT REPORTER: I can't hear you.

MR. AUSTIN: -- to reports of interviews which have already been provided to you including, but not limited to, the nature and characteristics of salmonella, proper testing procedures for salmonella and other microorganisms, and the test results of laboratory testing performed by Deibel Labs Group on PCA's products.

Don Zink, he's going to testify as to matters contained in his reports of interview including, but not limited to, the nature and characteristics of salmonella, proper testing procedures for salmonella, other microorganisms, good manufacturing practices.

All these people are basically testifying to the same

stuff. But what's different about them is who they are. So, we didn't object to the way that they stated the opinion and we didn't ask for additional underlying opinion information, but what we do expect is that the person is the same person, because the general information they have provided about their opinion was so sparse that what we did was we found information about the witness. We researched Mr. Deibel, we found out who he is, we found out other things he's written, other -- other companies he's been involved with. Those are the things that we -- we looked at. So when you switch it to a different person, it creates prejudice to the defendants because the way it is set up, we've -- we've been prepared for Mr. Deibel.

THE COURT: But doesn't the government state that this person that they anticipated using at first is just simply not going to be available?

MR. AUSTIN: That may be. I don't know if it is or not.

THE COURT: Are you suggesting that because a witness becomes unavailable due to a reason outside of the control of the subpoenaing party that that should mean that no other witness could ever been called in substitution?

MR. AUSTIN: Well, I think certainly they can

call other witnesses who will testify to things similar to Mr. Deibel, and Mr. Dasher outlined some of those factual things that Ms. Buchholz might say. But in terms of opinion testimony, it's unclear to me what opinion that she's qualified to give as to how the Deibel Lab is run from the top. I mean, only Mr. Deibel can do that.

THE COURT: That, in effect, goes to her qualifications I guess you could say?

MR. AUSTIN: Yes, sir. And it could ultimately be necessary that we have a hearing to determine both Ian Williams' qualifications and do a Daubert hearing as to his methodology as well.

Dr. Ian Williams, as the government has pointed out, has been around this case all along. They say that means we shouldn't be surprised that he's now turned from a fact witness into an expert witness. But the truth is because he's been around this case so long and was not designated as an expert by the discovery deadline, we had every reason to believe he was not going to be an expert. He's not the Tracey Buchholz. He's not the substitute witness. He's not the person who's coming in when somebody else can't make it. He's a person they've known about all along, he's the person they talked to in 2009, he's the person who's been involved in this case from the beginning. So the fact that we are supposed to file a

Motion In Limine to keep him out, to me, they have an affirmative duty to notice him properly pursuant to the Court's order by July 13th. It is not up to us to file a motion to exclude the witness that they haven't even named yet. They have to properly name him. They have known about him all along. There's no excuse, basically, for them not complying with the Court's order and doing it in a timely fashion.

So, because he's been around the case all along and was not properly noticed, we are surprised and we have taken no steps prior to their notice to get our own expert on CDC protocol. Dr. Williams' testimony, the defendant anticipates it will be sweeping testimony that talks about PulseNet, it talks about the collection of this data, it's going to talk about 700 illnesses, it's going to talk about months and months and months of investigation and questionnaires that they have. I mean, he's going to provide sweeping testimony if permitted to testify. So what we would have done, had we known that he was going to testify, is we would have gotten our own expert on CDC protocol, how do these questionnaires work, how are -- what are the biases inherent in the questionnaires, who performs them, what do the tests do, how does PulseNet work, how is PulseNet reported, what a PFGE matches illustrate across the board. Those types of questions now

will all remain unanswered from the defendants' perspective because we were never given notice that a CDC expert was going to testify.

Judge, we note that during the course of counsel's argument that two of the defendants have filed a notice, a motion for continuance.

Stewart Parnell believes that the only appropriate remedy is dismissal of the case. He also believes that, short of that, the only other remedy available should be exclusion of the witnesses and exclusion of the documents related to those witnesses and a jury instruction on the discovery issues. However, counsel for Stewart Parnell believes the Court should give Ms. Wilkerson and Michael Parnell what they want, sever them out and continue their case. Stewart Parnell will go forward provided that it's agreeable with the Court that we seat a jury and once that jury is seated, we are given -- counsel is given one week continuance from that point so that we can marshal our forces, review these documents, and be ready to go. We think that will give the jury members who will be seated an opportunity to get their affairs in order. They're certainly be here for a long period of time, they need to contact employers and so forth. That would give them a week to do that. It would also give us a week to bring in whatever resources we need to bring in. We would also

request the Court's indulgence to the extent that Mr. Parnell needed to notice expert witnesses during that time. But then at the conclusion of that one week period, Mr. Parnell would be ready to go forward and we would move forward with the government in this case. Thank you, Judge.

THE COURT: All right. Further responses? I think, in effect, Mr. Tolley, I think by mentioning your motion, I think you kind of told the Court what your position is, but anything else you want to state in response --

MR. TOLLEY: No, sir. I think it's all been said.

THE COURT: All right. Mr. Ledford?

MR. LEDFORD: If it please the Court. Your Honor, if I may, I would just like to make a few concluding remarks. The government's attorneys have suggested that they have provided the names of the key witnesses that would have information pertaining to Ms. Wilkerson. They mentioned the name of Bob, I didn't catch Bob's last name and Ann and Ian Williams.

THE COURT: I'm sure they're willing to restate to you the names that they've stated.

MR. LEDFORD: Yes, sir. And we can do that later.

THE COURT: As I said, there's no dispute about your willingness to re-advise Mr. Ledford --

MR. HEARN: Certainly, Your Honor.

THE COURT: -- to those persons as perceived by the government.

MR. HEARN: Yes, sir.

MR. LEDFORD: But Ms. Wilkerson is interested in, also, other witnesses. For example, Stewart Parnell's attorneys have done a magnificent job of putting together this notebook, and it's been tendered and admitted into evidence for the purpose of this hearing as I understand. But Exhibit No. 14, Your Honor, the table of contents, and its Establishment and Inspection Report.

Now, as I understand it, this document was produced within the vast content of the 100,000 files that we received recently. This Exhibit 14 is 52 pages long, Your Honor, and it's not Jencks material in my humble opinion. It lists various names, including the name of Janet Grey, Director of the FDA in this area, who was really involved in the investigation as I understand it, but it seems to have a good bit of information -- detailed information, Your Honor.

This is an example -- only an example of what I would imagine would be within the 100,000 files that we received just approximately ten days ago, long after the deadline

for discovery had expired.

So, Your Honor, we need time. We need time to check into that 100,000 files. It may well be that there's exculpatory material in addition to these 14 exhibits that Stewart Parnell's attorneys have so diligently uncovered within just a very short period of time. But they only were able to, I think, look at about 40 pages or 40 files, and there's many more, many thousands more.

Now, I would also like to say that I did make it back to the office during lunch and on my desk is this FedEx Express. I have not opened it, Your Honor. It is from the US Department of Justice, CPV. It may well contain the privileged items that I believe Josh Burke, who is also with the US Department of Justice, has been reviewing. But whatever it may be, Your Honor, is an example. As we stand here today, things are still coming in. I would be remiss, just like the case Mr. Tolley mentioned to the Court earlier and that you had read, I have not read that case, but the US Supreme Court is looking hard at whether attorneys are effective as required under the Sixth Amendment to the Constitution. Your Honor, it's things like this. This is just an example. I have not opened this, but it came in within the hour to my office from the US Department of Justice out of Washington. I'm sure it's connected to this case.

Your Honor, if I may, with the assistance of my computer assistant, I would like to display to the Court. I would like to approach the Clerk and have her label this as Wilkerson 1. May I approach and have her mark it?

THE COURT: You may.

MR. LEDFORD: Your Honor, Defendant's Exhibit Wilkerson 1 is titled from being from the Division of Administration, the Public Health Laboratory, South Dakota Department of Health. Now, I am not sure what relevance, if any, this document may play in this case. And this document has been in our possession apparently for some time, so I am not making an issue as to late discovery on this. What I am also pointing out to the Court with this document -- Is this document displayed? Do you need it?

(Discussion off record)

MR. LEDFORD: Oh, yeah. I'm sorry. I don't want to display it, Your Honor. I'd like to show how we went about finding this. We stumbled upon it. I am not sure who found it, but it looked interesting to me, and I am not sure what role it will play in Miss Wilkerson's defense, but it is of some interest to me as her attorney.

But this Bates system that the government told the Court was a cure all for this discovery problem we had some time ago when we first had this 2-1/2, 3 million documents dumped on us and we couldn't find anything,

there was so much to look at. Well, this Bates system itself, we have discovered, is not the cure all that has been suggested.

If Mr. Hall could now -- he's running an attempt. There is a Bates number, a Grand Jury Bates number. And, for the record, I have a copy, Grand Jury Bates No. GJ-STA-H003-000003.

Now, it's been represented to us, and we had no reason to doubt it, that with a Bates number, even if it is a Grand Jury Bates number, you can find it, just put it into the Concordance software.

Well, when we found this document, in a subsequent session, we were digging through the evidence. I asked someone to bring this up, Mr. Hall, I believe, maybe it's Ms. Wilkerson, she's in there with the computers as well. But any way we couldn't bring it up, not using the Bates system. So Mr. Hall started digging. He had to use a relevant search term in order to bring this up. It took a little while, Your Honor. That's the point I am making. Whether we need this document or not, it led me to believe and realize this Bates numbered system is not the cure all that has been represented to the Court. That's just an example of what we have been involved in.

We have had quite an education in learning how to -- this has been a wild horse, to say the least, but trying

to stay on it, Your Honor. But this is an example. It is not as simple as putting in a Bates number and getting what you want. Sometimes you've got to dig the old fashioned way.

Now, Your Honor, I'll move on. I would say that when you look at the overall picture here, you know, you wonder or it could make one wonder if this was intentional on part of the government, this problems with the discovery, of accessing discovery, of the late discovery, but these are honorable men so let's not take that or make that assumption. But even if it was not by design, all these problems were not by design, including the lateness, including the receipt today of this FedEx that I just got. Even if it is not by design, I've still got a 100,000 documents I have got to look through, a 100,000 files. It may be well more than a 100,000 pages. I've got to look through them.

THE COURT: Also on the record, and I know you did not intend it otherwise, but the government has honorable men and women. You referred to them as being honorable men.

MR. LEDFORD: I apologize to the Court and I apologize to all in the courtroom.

THE COURT: I understand. That's why -- that's why I brought it to your attention because I knew that you

did not mean it as it may be taken.

MR. LEDFORD: Thank you, Your Honor, I'll rephrase the comments and like to substitute for honorable men, honorable men and women, and I do sincerely concur with that and am apologetic for making that statement.

But let me -- let me say, Your Honor, if I may, it is time for me to sit down. I am not smart enough to really suggest to the Court or to anyone what the perfect solution is. I know Ms. Wilkerson is not adequately represented or prepared for trial. It is not because we're not trying, it's not because we won't continue to try. We'll put in the time, Your Honor, but we are not ready, just plain and simple. We are not ready for the reasons that have been stated to the Court today. We have also filed a motion for continuance, docket 213, and we would not know what to suggest to the Court other than we would like to see this whole case be dismissed. We think it would be appropriate as to Ms. Wilkerson that this whole case be dismissed as to her, Your Honor, and I would also say it should be dismissed as to both Mr. Stewart Parnell and Mr. Michael Parnell as well, although I do not represent them.

However, if it is not dismissed, then we think there should be a different approach as to how it should go for Ms. Wilkerson and perhaps the other defendants or

Mr. Stewart Parnell in particular. He wishes to go forward. We do not wish to impose upon him in any way. If the Court were not inclined to dismiss this case against Mrs. Wilkerson, against the other two defendants in full, we would suggest that there's certainly -- there are other remedies, the exclusion of the evidence. The 100,000 files, if I'm thinking correctly is not an adequate remedy as pertains to Ms. Wilkerson because there may well be something in there that is exculpatory, Your Honor. We reserve the right, if we have to go to trial at some point in time, to get into that 100,000 files in an orderly, professional way. So we would suggest that if the Court is not inclined to grant the dismissal for all these defendants, that Mrs. Wilkerson's case be continued, Your Honor. Thank you.

THE COURT: All right. Madam Clerk, would you hand me that Exhibit No. 1?

This is a matter the Court to needs to address today, obviously. There are a couple matters the Court wants to consider, if you'll just be in recess for a few moments, the Court will come back and give a ruling.

(Recess)

COURT'S RULING

THE COURT: All right. The Court thinks it's appropriate that it go ahead and give a ruling orally at

this time in light of the mediacy of the trial set for Monday to begin. Of course, the Court will supplement its oral ruling by written order that will more definitively state the Court's findings.

With regard to the -- each defendant's motion for a dismissal based upon alleged misconduct by the government with regard to production of evidence in a timely fashion, with regard to the things that have been pointed out to the Court in an evidentiary way, the Court does not try to give too specific a determination as to what this information is. I think, obviously, contextually it could have an effect in terms of how it arises and how it may relate to other evidence. But at least to some extent it appears that, to the degree those things that were produced may be statements of witnesses who are expected to testify, their Grand Jury testimony, or statements they have given otherwise or things that may relate to things they may testify about at trial, at least in that instance and to that extent, the information would appear to be Jencks Act material, at least from one view.

Also the Court finds that, arguably at least, some of the production could be impeachment or at least would be useable in some way that might be helpful to the defense.

First of all, the Court found, of course, that the complained of evidence has been produced, so this is not a

case of nonproduction and the determination of a proper remedy. In other words, it is not strictly as with Stevens or some other related cases where evidence was produced at such a late time that the issue could not be not be presented to the Court in a timely way in order for the Court to determine whether there's some solution or some way of remedying the matter.

More specifically, this is a case were there has been production, and the possible lack of time has been made known to the Court as to whether or not the defendants have a meaningful opportunity to use that evidence for their purposes in preparation of their defenses for trial.

However, the Court finds there's been no particular specified or specific undue prejudice shown nor has it been shown that there's an impossibility that these matters cannot be addressed in some effective way in preparation for trial.

The record, in the Court's opinion, does not support a finding of bad faith on the part of the government with regard to the production.

First of all, there have been some -- or next of all, there's been some issues raised with regard to the matter of speedy trial and speedy trial violations. The Court, of course, reminds the parties that the parties agreed, and the Court found, that this is a complex case for

purposes of the Speedy Trial Act so, therefore, the case obviously being such does not fall strictly within the otherwise applicable parameters of the Speedy Trial Act.

However, the parties -- the defendants, rather, do suggest a speedy trial violation with regard to the Constitution, that constitutionally, they are being denied a speedy trial. Of course, these assertions come about due to the alleged late production of information, so we are talking about a matter of a few weeks, and the question is whether or not a delay at this point would result in an otherwise constitutional violation of the defendant's speedy trial rights or right to a speedy trial in the constitutional sense.

The Court notes, of course, that this case has been one that's been under active and continuing prosecution for about 18 months, I think as someone suggested, and, therefore, the type of delay that is usually concerned with constitutional delays doesn't appear based on simply the time passed from the time of the indictment until this time. And I don't believe that there are cases that suggest that the mere passage of 18 months, even without active prosecution, would necessarily result in a violation of the constitutional right to speedy trial.

More pertinent to this case is whether or not an assertion at this time of a right to a speedy trial by the

defendants followed by any further delay in the case, other than as scheduled for Monday, would result in a violation of the speedy trial right under the Constitution. Of course, the Court believes that any additional delay of a reasonable amount would be a short one, and that, in and of itself, would not be unduly prejudice -- prejudicial to any particular defendant. Also, there are other defendants who have asserted their need for additional time to prepare for trial and taking into consideration their needs as well as any desire for the defendant -- a defendant to move forward immediately, taking all those things together, I think it would not be unreasonable and it would not necessarily result in a violation of a constitutional right to speedy trial just by fact of any continuance beyond the date the case is set for trial. So the Court doesn't believe under the facts and circumstances that we find them here that there's a constitutional violation of a speedy trial right.

As the Court stated earlier, it finds that there's been an inadequate showing of conduct of the government that would require dismissal of the indictment. That is an extreme sanction, and I think the cases suggest that that's something that could be applied, therefore, rarely and for reasons that were clearly suggested that would be the proper remedy.

The Court notes also that the defendants also offer an alternative to a dismissal of the indictment, and that is at the request there be an exclusion of expert witnesses who were recently disclosed and/or their testimony that relates to their opinions.

In thinking about that, the Court does not believe, first, that the circumstances justify such an exclusion, but as a practical matter it does not believe that would be a workable or meaningful solution. It would be impractical and it would be unduly time consuming and would only extend the trial and cause further delay.

What the Court notes is, of course, that there would be an ongoing and onerous task on the part of the Court to separate alleged fact testimony from opinion evidence or testimony, there being some ongoing question as to what is relevant to each of those types of testimony and whether or not there's other information supporting the witness's testimony and/or opinion that's separate and apart from those things that were disclosed in the last productions that are being complained of. To do that would just take protracted time and would practically just stretch the case out and not be meaningful or much practical use to the Court.

In that sense, by just extending the case, would not bring the defendants nearer to receiving what they are

asking for, which is a timely and a speedy resolution of the case.

Now, two defendants in view of the Court's possible denial or dismissal of the denial of the motion to dismiss as a sanction or the alternative sanction have asked for a continuance in order that they may review this recently produced evidence.

The Court notes that this is a multiple defendant case, all the defendants were planned and intended to be tried together, and there are reasons set out in Rule 8 of the Rules of Criminal Procedure indicating, of course, that in most circumstances, including these, that defendants could be tried together. And I think they can be and should be tried together. Therefore, in effect, if there's a motion granted as to either defendant for a continuance, in effect it suggests that there should be a continuance as to all defendants.

Now, the Court notes with particularity as to the document production that has been complained of, that I think the last production was approximately two weeks ago, maybe ten or 14 days ago and I think another one preceded that by about approximately a week. Therefore, these -- that production has been available for this time period to the parties. The Court notes, although maybe not perfect, that the production is searchable by terms, and through

software that's available to all the defendants, specifically, even including the defendant Wilkerson, who also has the assistance of a technical assistance to her attorney, to search these documents.

The Court also notes that when this case is tried, it will be tried following the Court's compressed trial day, which, as you know, is from 8:00 until 2:00, 8 a.m. until 2:00 in the afternoon. So, therefore, even during the trial of this case, there will be additional time available to counsel, along with other matters of trial preparation and presentation, to continue to research these matters and to continue to review these documents. And also, because of the expected length of the trial of some eight weeks, this is additional time that the Court thinks will be available for search and for examination and good use of the information produced.

However, in an abundance of caution and in order to ensure that each defendant has additional time to review the complained of production prior to trial, the trial of the case will be continued two weeks from July 14th, 2014, to Monday, July 28th, 2014.

With regard to the complained of expert witnesses, the Court has also considered those matters. The government indicates and admits that all or some of those were late in terms of their actual notice to the

defendants. However, the Court does note that even though the actual notice as experts may have been after the time that maybe they should have been disclosed, information and identity of those parties was known and has been available to the defendants prior to that formal notice.

And, also, there's an indication that one of the witnesses notified -- noticed is one who is, in effect, not only previously known to the parties but also is now being asked to testify in substitution for a witness who is no longer available.

So strictly -- not being strictly in accordance with the schedule being accepted as true, the Court finds that there still remains adequate time available to the parties to not only review and consider the evidence that these -- and the opinions these witnesses might give, but also to seek any rebuttal witness that may be necessary. So the motion to prevent those witnesses from testifying as a sanction is denied.

As I say, I've tried to summarize very quickly the Court's thinking so the parties will know what the Court's position is and why the Court is taking the position that it is. I'll supplement that with a written order later.

This is a matter that needs to be tried. It has been pending for a while. I'm sure the defendants want to get this case resolved. The Court wants it resolved for them.

But I think, in balance, since there may be evidence that, once looked at, that may need some additional action so the Court is going to give that extra time just to be sure, but I think that the case might have been able to proceed any way on Monday, but I think all things considered, it is the better part of valor to allow the case to be continued for two weeks.

I think that will also will keep that jury panel available. Of course, there may be some jurors who may be a little bit affected. I think you all received a copy of the letter that I sent out to the jurors. And it appears that we do not have an extraordinary or inordinately large number of jurors seeking in advance to be excused, so I think that we have a good chance to get a jury if we don't get too far beyond that date. So we'll continue the case from Monday to the 28th.

Is there anything from the government that touches on -- Also the Court notes now that the government has indicated that, except for those matters that maybe coming through the taint team related to that last order the Court gave, that there's no other productions the government intends to produce.

MR. HEARN: There are no other productions, Your Honor. You may recall in my presentation I did mention the report from our computer forensics expert.

THE COURT: That I understand.

MR. HEARN: That will be forthcoming.

THE COURT: As well as also notices of other experts?

MR. HEARN: Correct.

THE COURT: All right. Okay. So that's noted for the record. Mr. Bondurant?

MR. BONDURANT: Your Honor, and I believe, and may be you just said that, I was talking to my co-counsel, there will be no further disclosure of experts?

THE COURT: That's right. As disclosed, those persons that they need to disclose.

MR. BONDURANT: Now, Your Honor, of course, since they've made two late disclosures after we find out what they are going to testify about, we might make a disclosure of an expert in response --

THE COURT: Oh, yeah, I think so. If it's in response to what they produce, yes.

MR. BONDURANT: And there might be a need for a Daubert hearing also after we know what they are going testify about.

THE COURT: Now, since some of these witnesses won't be -- I think if you -- if there's a motion for Daubert, I think I want you all to confer to see when it is that witness is expected to testify. In other words,

if it is going to be somewhere down into the case, we can -- we can do that even after the case starts because we're going to have plenty of time, nonjury time, to address those things. Obviously, if it is going to be an earlier person in the evidence, we need to address it earlier.

MR. BONDURANT: Of course, Your Honor, since we are from Virginia, if you want to hold Court on Saturday and Sunday, we will be more than happy to do that.

THE COURT: Well, you know, I have found that that's a -- that's a bit of an abuse of jurors, not the least of staff. I will tell you this, Mr. Bondurant, my reporter has been with me now some 20 years, and if we, meaning the Court and counsel, take care of our business outside of that 8 to 2, that 8 to 2 produces more transcribable testimony than a 9 to 5.

MR. BONDURANT: Yes, sir.

THE COURT: We have proven it. So, I mean, this case will get tried, it will move, but there are some things I'll talk to you all about later before we begin the case. That means we'll deal with those things like some Daubert matters may popup or matters that we can do here in the afternoon. We can go as late as we need to go and take care of them so when the jury is in that box, to the degree possible, they are hearing testimony, and that will -- that gets more actual testimony time than a broken

up day with all the other matters that go on in a typical trial on a traditional schedule.

MR. BONDURANT: Yes, sir.

THE COURT: So, in that way, I think, you know, that it's going -- even without Saturdays and Sundays, that's going to get the case moving along. That's the Court's challenge and the challenge in that way to the parties that we do our business when the jury is not here and have them here only to hear evidence. We can stay as close to that as we can, we'll get this case clear --

MR. BONDURANT: Looking forward to it.

THE COURT: -- in a reasonable time, near to the schedule that I think it has been projected for.

MR. BONDURANT: Yes, sir.

THE COURT: Mr. Austin?

MR. AUSTIN: Thanks. Just so I am clear. It is likely that the defendant, Stewart Parnell, will want to have a Daubert hearing with respect to Dr. Ian Williams, and, of course, I don't know his schedule. Would the Court's preference be to go ahead and conduct that prior to July 28th?

THE COURT: That's fine with me.

MR. AUSTIN: Okay.

THE COURT: We won't be in trial anyway, so I've got a pretty -- pretty open calendar in the mornings.

MR. AUSTIN: We are available. I'm available. Whatever, we can just schedule that with --

THE COURT: I think you all can confer with counsel for the government and then get with Ms. King, and we can set that up.

MR. AUSTIN: Thank you, Judge.

MR. HODGE: Just so I'm clear, Your Honor. We are not going to select the jury on Monday and then --

THE COURT: No.

MR. HODGE: -- come back on the 28th, we'll just select them on the 28th?

THE COURT: Right. We have the capacity to delay the jury's report until the 28th.

MR. HODGE: And then I had a few other housekeeping matters that I'll address when we're done with this.

THE COURT: All right. Anything else? Mr. Ledford?

MR. LEDFORD: Your Honor, do we need to submit our proposed exhibit list? Is there a requirement along those lines, if we have proposed exhibits that we'll need to submit those prior to the Court, a list of them?

THE COURT: You mean for trial purposes?

MR. LEDFORD: Yes, sir.

THE COURT: Yes. It is helpful to the Court so

when you all are referring to Exhibit blah blah, I'll know what you are taking about. I can look at the list and have a better idea what you are speaking of. Yes.

MR. LEDFORD: When should we do that, Your Honor?

THE COURT: I think the Friday before trial starts is good enough for me unless it is needed for some other purpose before then. I mean, almost the day of trial you can provide that to me. I mean, you can bring it when the trial starts. It is just so that I'll know because, you know, the Court never knows as much about this case as you all know, there's just no way I can. So what is an obvious document to you all is not necessarily obvious to me. So when you say that, you know, and you can point me to your exhibit with a brief description, I'll know exactly what you are talking about it. It allows the Court the opportunity to be more efficient in addressing any issues that may arise. So the day of trial is fine.

Actually, if you are talking about a Defendant's exhibit, unless you are going to be presenting it for some reason during the government's case, at the beginning of the defendant's case is early enough for me. It is just so that when you begin to refer to your documents, I'll have something that I go by, that I can reference.

MR. LEDFORD: Yes, sir. Thank you, Your Honor. May I ask can I hand this up to the Clerk, this Wilkerson's Exhibit 1 that I had referred to?

THE COURT: That you referred to, right. Is there any objection to that? I don't think there was.

MR. HEARN: We had no objection. We would ask permission to obtain a copy at some point, Your Honor.

THE COURT: That's fine, Once it's been filed. It may be filed as Exhibit 1 for the motion argument today.

All right. Anything else before we leave?

MR. TOLLEY: No, sir, Your Honor.

MR. HODGE: Yes, sir. One matter and then a couple of housekeeping issues. The matter that I wanted to raise, Your Honor, is I understand that the government intends to invoke the rule of sequestration. Mr. Parnell has family members that have been on the witness list, and I had discussions with Mr. Dasher prior to Court about whether or not he intended to call the family members or not, and the government has never been able to give me a definitive answer. They just said they may be possible witnesses. It is not our intention to call them. Clearly the family members want to be here to support their father. I think that it's patently unfair to put them on a witness list and say that they may be witnesses to

exclude them from the courtroom. This is going to be a six to eight week trial. They also live in Virginia, some of them; some of them live in Alabama. They would like to be in here to support their father and to be here. And the government also extensively interviewed the only two that I think that they would use anyway. So there's nothing at all -- in the event they do become witnesses for either the government or the defense, and, candidly, if the government doesn't call them, I can't see that we would call them, that they would be surprised by anything. And I think it's just a strong arm tactic to keep his family out of the courtroom, that's just, you know -- it's not necessary.

THE COURT: Well, before we characterize it, let's hear from the government. What's the government's response?

MR. DASHER: No, Your Honor. It is not a strong arm tactic by any means. It's Rule 615 of Rules Of evidence which governs the rule of sequestration and provides, "at a parties request, the Court must order witnesses excluded so that they cannot hear other witnesses' testimony or the Court may do so on its own. An exception would be a party who is a natural person or a person who is present a party chose to be essential to presenting the parties claim or defense, or a person

authorized by statute to be present."

But the witnesses -- primary witnesses that Mr. Hodges is referring to are Grey Adams and Stewart Adams. Grey Adams and Stewart Adams are Mr. Hodges' clients actually, and we had the issue arise early on in the case as to whether or not there was a potential conflict of his continued representation of Mr. Parnell in light of his representation of them. It was expressed to the Court at that time that they are potential witnesses. The government won't know until the case is tried how the evidence progresses, what their defenses are going to be. There's just no way to know at this point, but they are potential witnesses, and Mr. Hodges himself has not ruled out the possibility that they could be defense witnesses.

THE COURT: If a witness is subpoenaed by a party and unless and until they are told -- the Court is told that they will not be called as a witness or excused, the rule of sequestration would apply. I think that any counsel, if you have reason to know that you won't call a witness or there's a time you reach when you think that's the case, that you should so inform the Court so the person may no longer be excluded. But I can't -- I can't determine for either party its decision whether it will or will not call a witness it's subpoenaed.

MR. DASHER: Your Honor, in that regard, the

government has not subpoenaed these witnesses, but Mr. Hodges is their attorney and the government has been operating on the assumption that as their attorney and an Officer of the Court that we would simply be able to advise Mr. Hodges that we would like his client to appear as a witness.

THE COURT: Well, unless there's such an understanding, there should be a subpoena because that's the only thing that requires the Court to enforce the rule of sequestration.

MR. DASHER: Your Honor, of course, the government usually has its subpoenas issued prior to trial, but there are instances in which a subpoena is served in the middle of trial.

THE COURT: I understand that.

MR. DASHER: And I'm representing to the Court that these are potential witnesses and the government has invoked the rule of sequestration simply because that's the way cases operate. I mean, that's common in every case.

THE COURT: All I'm saying is this, that is fine. The Court is not going to second guess counsel on either side about who it intends to call or not call. All I'm saying is if there's a witness, whether they were interested in the case or not, if they can be let go about

their business because they are not going to be called, you know, I think they should be told that so they can choose to go or come if they want to. That's all I'm saying.

So what you're saying now the government has not decided they are not going to use them, right?

MR. DASHER: I'm sorry?

THE COURT: The government has not decided that they will not call those persons?

MR. DASHER: No. The government as not decided that.

THE COURT: All right. Well, Mr. Hodges' request is noted for the record as an ongoing matter until the government determines at some time prior to -- as the case progresses that they may not be called, that you so advise them, and, in that situation, then the rule of sequestration would not from that point forward apply to them, but until then, the rule would apply.

MR. HODGE: And, Your Honor, the distinction I'm hearing in the Court and the rule being articulated by Mr. Dasher is a witness. And I agree, if she is going to be a witness, but the only thing I have ever heard from Mr. Dasher is she's a potential witness, and in the informal conversations he's had with me, he says he can't see how he's going do call her. So by saying that he

can't see how he's going to call her and by referring to her as a potential witness to Your Honor, in my opinion, excluding her from the courtroom so she can't be here to support her father is -- I won't characterize it again, but I just think it is a tactic that the government is using that they shouldn't use.

And if he can in good faith tell you that he very well may call her or will call her, then I understand the rule of sequestration, and I won't argue with it. But if he is just doing it to keep her out of the courtroom, I just don't think that's fair.

THE COURT: Well, he states that he has not determined that she will not be called, and that's what has been said to the Court. The Court accepts that. The Court does not need to inquire any further into either parties decision as to the witnesses they may or may not call unless there's some other reason that the Court has an involvement with this as to whether they may be called as witnesses.

MR. HODGE: The housekeeping ones, Your Honor, we had briefly discussed about getting Court access so that the large number of lawyers here --

THE COURT: Well, let me tell you what that is, give you the short answer to that. I think I know what you are getting at. There is a shortage of officers and

Marshals for various reasons, and I've personally checked with security, and we are going to have to follow the usual policy, which the Court informs the jury of so the jury will not mistake it as some mistreatment of them or some preference to lawyers.

The lawyers and the parties will be given preference at screening. In other words, when you get to the screening, let the officers know you are an attorney or a party, and they will screen you in ahead of other people waiting. That would not apply to nonparty associates such as family. They will go through the normal screening. That's because you all have a need to be here in the courtroom in place ready to go and the jury will be advised of that. The Court thought that we might be able to bring you all in the side door, but they just do not have the manpower. They still have to screen everybody, and -- but for that reason, I would allow that but I think we'll have to do it. We want to be sure that counsel and the parties will be able to get in and that's simply by stepping up, letting them know who you are. And I'm sure after -- within a day or two, they will know who you are anyway. You will get screened ahead, and the jury will be told that you're not breaking line on them out of disrespect, but that's the way we have to do it so that you are in place ahead of trial.

Yes?

MR. BONDURANT: Your Honor, this issue actually came up in a case I had a long time ago when they first started putting metal detectors in courthouses, that was back before they did that. And, you know, to have the defense lawyers all march through a secured area and being screened and then have the US Attorneys be able to kind of go in on their own kind of creates the sense of the defense attorneys are second class citizens in the eyes of the jurors and maybe not as worthy of trust and belief as the prosecutors. So I believe since we are coming through the same door down there, perhaps for the purposes of this trial that the Assistant US Attorney should also go through screening process to create an equality in the eyes of the jury, between the counsel.

THE COURT: Well, the jury is not going to be standing down there, watching you all come in.

MR. BONDURANT: No. But they will see us coming in, and they'll see the prosecutors go through that little side door right beside there with the little key card they can get through. They'll be watching that.

THE COURT: They have access to the building because they are tenants in the building.

MR. BONDURANT: I understand that, but I'm saying of the purposes of --

THE COURT: I will tell the jury that so they won't think that you all are less than they are, that those persons are excused because they are tenants of the building and they have access to the building. All right. We can do that. I understand. That's an issue that I have heard on occasion. I may have said that on occasion myself as a lawyer.

MR. BONDURANT: In fact, the last time it happened to me back in the early '80s, the Judge bought that argument and made us go through security as Assistant US Attorneys, and I was mad at the time, but I see the great wisdom that the Judge had some 30 years later.

THE COURT: As I said, I think I may have made the same suggestion you've made on an occasion. I even had it argued as to who should sit at which table, you know.

MR. HODGE: One other housekeeping, Your Honor. Is there going to be, if we need it, a room that we can convene in, defense counsel, in the courthouse other than that courtroom during the breaks?

THE COURT: Not regularly. We just don't have the space for it. I mean, you may be able to find something you can chat for a bit, but not that you're going ot be able set up in as such.

MR. HODGE: Who would I check with to find out

--

THE COURT: I'll check into that myself, and I'll let you know.

MR. HODGE: The other thing is, at the appropriate time, we'll need at least three more chairs at this particular table for -- there's only room for the lawyers right now. We would need room for the actual defendants at the table if that's possible.

THE COURT: Well, this is not set up exactly as normal at this time. This is just the configuration that we'll be -- that we'll have that they have already completed, but there will be adequate seating for all parties and counsel and the necessary --

What I would suggest for -- particularly for jury selection, I would think that the only persons, like technical people, would not need to be present at counsel's table for that purpose, they can sit at the side. But after that, of course, you can. I think that's going to be a situation. I'll just tell you now, I think we'll probably have about -- I expect us to have about 70 jurors here that we have verified that have actually responded to the questionnaires and remain available, and we think because of a well attended sentencing yesterday, we verified we can get 70 people in here if we add a couple chairs to the short rows and maybe a couple in the

aisles there, that we can get all of them in here, and there will be a lay out for them. But there will be adequate seating for counsel --

MR. HODGE: Okay. Thank you, Your Honor.

THE COURT: -- during selection -- during trial and selection.

MR. HODGE: Thank you, Your Honor. And as far as jury selection, what is the Court's normal order of follow up? Does the government go first and then how would the order --

THE COURT: I'll recognize you and give you an opportunity to follow-up.

MR. HODGE: And then, lastly, as far as bringing in things like -- because we are going to be here for so long, I presume water is the only thing you allow in the courtroom; is that right?

THE COURT: Yes. That's true.

MR. HODGE: Do we bring our own water or will there be water provided?

THE COURT: I think you should bring your own bottled water.

MR. HODGE: Bring our own bottled water. Okay.

THE COURT: We used to have pitchers of water, but they always wound up running off the table outside of the container. So I think the bottles is easier to

control and take care of it. If somebody got desperate, we can get you a bottle of water, but I think it would be nice if you just kind of provided your own. But if you forgot it for some, really got, you know, thirsty or something, we can get you a bottle of water.

MR. HODGE: Thank you, Your Honor.

THE COURT: That would not be a problem.

All right. Any other considerations or concerns anyone has before we stand now?

(No response)

THE COURT: Well, I am a little bit disappointed, I thought we were going to get this horse out of the barn starting Monday morning, but we will be ready to do it two weeks from now.

MR. BONDURANT: Thank you for everything, Your Honor.

THE COURT: all right. Thank you. We are adjourned.

(Court adjourned)

CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS.

/s/_____
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