

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3
4 UNITED STATES OF AMERICA
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6 CRIMINAL NUMBER:
7 1:14-cr-00050-JLM
8 MYKAL DERRY, MALIK DERRY,
9
10 Pretrial Motions
11 Defendants.
12 Mitchell E. Cohan United States Courthouse
13 One John F. Gerry Plaza
14 Camden, New Jersey 08101
15 Monday, July 6, 2015
16 BEFORE: HONORABLE WOEL L. HILLMAN
17 UNITED STATES DISTRICT COURT JUDGE
18 APPEARANCES:
19 PAUL J. FISHERMAN, UNITED STATES ATTORNEY
20 BY: PATRICK C. ASKIN, AUSA
21 JUSTIN C. DANILEWITZ, AUSA
22 LAW OFFICES OF R. EMMETT MADDEN
23 BY: ROBERT EMMETT MADDEN, ESQUIRE
24 Attorney for Defendant Mykal Derry
25 Certified as true and correct as required by Title 28, U.S.C.,
Section 753 /s/ Robert T. Tate

United States District Court
Camden, NJ

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1 (Defendants present.)
2 (In open court at 10:15 a.m.)
3 THE DEPUTY COURT CLERK: All rise.
4 THE COURT: All right. Thank you. Please be seated
5 except for counsel. This is United States versus Derry.
6 May I have appearances, please?
7 MR. ASKIN: Yes. Good morning, your Honor. For the
8 record, Patrick C. Askin, Assistant U.S. Attorney for the
9 United States.
10 MR. DANILEWITZ: Good morning, your Honor. Assistant
11 United States Attorney, Justin Danilewitz, for the United
12 States.
13 THE COURT: All right. Welcome to you both.
14 MR. MADDEN: Good morning, your Honor. Emmett Madden
15 for Mykal Derry.
16 THE COURT: Yes, Mr. Madden, welcome.
17 MR. MARKOWITZ: Joshua Markowitz for Malik Derry.
18 THE COURT: Yes, Mr. Markowitz, welcome to you as
19 well.
20 All right. We have our jury scheduled to come in
21 tomorrow. We are scheduled today for purposes of ruling on
22 various pretrial motions.
23 I've reviewed the submissions from the parties, and I
24 printed out the gavelled docket so we can go through and make
25 sure that I've ruled on everything.

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1 ALSO PRESENT:

2 MARKOWITZ GRAVELLE, LLP
3 BY: JOSHUA L. MARKOWITZ, ESQUIRE
4 Attorney for Defendant Malik Derry
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1 I have an order of dismissal from the Government. I
2 haven't reviewed the indictment to match this up. Are these
3 phone counts, all phone counts?
4 MR. ASKIN: Yes, your Honor. The counts 11 through
5 125 in the superseding indictment are phone counts. All of
6 those counts involve defendant Malik Derry -- I'm sorry, all
7 of those counts involve defendant Mykal Derry; eight of the
8 counts I believe involve Mykal and Malik Derry.
9 The counts that we are asking to dismiss are phone
10 counts that only involve Mykal Derry, and we're still going to
11 proceed -- we're still asking to proceed on 41 of those
12 counts, but there's another 50 or 60, whatever, that we're
13 asking to dismiss.
14 And I went through the Government's transcript binder,
15 which is 700-and-some-odd pages, and, you know, for brevity,
16 we don't want to be here for three months. Of the six or
17 8,000 pertinent calls or whatever, we selected certain calls.
18 A whole lot of the counts that we're asking to dismiss
19 we hadn't even included the call in the binder, and it's just
20 for strategic reasons. So, in some of them, in addition to
21 ones that weren't -- the ones that weren't in the binder which
22 we're asking to dismiss, there were a few more that I just
23 thought were completely unnecessary.
24 So, we'd ask to just proceed on the 41 counts and
25 dismiss those other counts. I've gone over this with Mr.

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<p style="text-align: right;">5</p> <p>1 Madden and Mr. Markowitz, and they both consent to the 2 dismissal of these counts.</p> <p>3 MR. MADDEN: That's correct, your Honor. No 4 objection.</p> <p>5 THE COURT: All right. Mr. Markowitz?</p> <p>6 MR. MARKOWITZ: No objection, your Honor.</p> <p>7 THE COURT: All right. Today is the 6th of July?</p> <p>8 MR. MADDEN: Yes, sir.</p> <p>9 MR. ASKIN: Yes, your Honor.</p> <p>10 THE COURT: July 6th. All right. Dismissed as set 11 forth in the order.</p> <p>12 All right. So, we have -- I have a copy of an e-mail 13 that was sent by Mr. Askin to defense counsel and a link to a 14 previous letter submitted to Judge Irenas regarding the 15 testimony of Special Agent Kopp. That's one issue.</p> <p>16 We have the motion 467, which is the issue to -- the 17 motion to preclude the evidence of the Rosario assault and the 18 James murder, and there was -- well, I'll go through those.</p> <p>19 There's 734. That's just housekeeping. I'll put that 20 down at the bottom here.</p> <p>21 This is Mr. Markowitz's motion to join in 731, which 22 is -- it's a letter from Mr. Madden, which was not docketed by 23 the clerk as a motion, per se, but relates to -- it's his 24 confrontation clause argument regarding the previous orders of 25 Judge Irenas, which is really related to 467. So, I'll put</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">7</p> <p>1 issue is really two issues, the hearsay statement and then 2 whether or not the issue of the existence of a conspiracy and 3 whether or not those acts were sufficiently tied to the 4 conspiracy as to be admissible in the first trial is an issue 5 that's already been resolved, and I really need to do little 6 more than just note that. Is that the position of the United 7 States?</p> <p>8 MR. ASKIN: Judge, and I apologize if I'm being 9 thick, but I didn't follow the Court's question.</p> <p>10 THE COURT: Well, you basically said that Judge 11 Irenas, after hearing all the evidence -- he decided to wait, 12 and then after hearing all the evidence decided that this drug 13 trafficking organization used violence to enforce its 14 territory, to assault its rivals, and in doing so, admitted 15 the evidence, the videotape, and also the evidence of the 16 Rosario assault after hearing all that evidence and ruling on 17 it. And including -- was the evidence regarding the location 18 of the weapon and the bicycle part of all the Government's 19 evidence at the first trial?</p> <p>20 MR. ASKIN: Yes, your Honor. We put on -- first we 21 put on through Special Agent Kopp all the calls and text 22 messages on -- recorded over the wiretap with respect to the 23 homicide of Tyquinn James, both before and after, between 24 Malik Derry, Mykal Derry and other co-conspirators, including 25 Shaamel Spencer. Then we put on jail calls that were recorded</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>
<p style="text-align: right;">6</p> <p>1 those together.</p> <p>2 I'll probably direct that 731 be filed as a motion. 3 That will make sense to 734.</p> <p>4 Bear with me while I go through these.</p> <p>5 All right. This goes -- this is a letter to Judge 6 Irenas. There is the -- there's 733, which is a new -- which 7 is really the renewal of 467 by Mr. Markowitz, specifically 8 seeking to exclude the videotape as well as the Rosario 9 assault. So, 733 and 467 are related.</p> <p>10 And then there's the letter docketed at 735 in which 11 the Government has exercised its discretion not to offer the 12 Zaffa statement or mention the Zaffa statement in its opening 13 without prejudice to their asking for a ruling or a hearing on 14 that issue as the case proceeds.</p> <p>15 And then I have the Government's position and the 16 responses I've mentioned regarding the Rosario and James -- 17 the assault and the murder, and the Government has proffered 18 to me in their motion that Judge Irenas has ruled on this. 19 And whether or not the Derrys are tied to the -- that these 20 acts were tied to the conspiracy based on Judge Irenas's 21 previous ruling, and that whether or not the Derrys are 22 members of the conspiracy and the level of their involvement 23 is for the jury.</p> <p>24 So, Mr. Askin, let's start with -- if you could 25 summarize your position as it relates -- really the James</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">8</p> <p>1 at the Atlantic County jail, recordings and transcripts of 2 those calls referencing the murder and facts about finding out 3 what's going on with the murder investigation. Then we put 4 on, I think at a later point in the trial, three witnesses, 5 Detective Carty, Detective Caroline MacDonald and Sergeant Ian 6 Finnimore, who were the search team agents that gathered 7 evidence both at the scene of the homicide where shell casings 8 were gathered, autopsy bullets were taken out of Mr. James, 9 all of that submitted to the ballistics lab for analysis, and 10 then the search of 727 Green Street where -- a residence, Kim 11 Spellman's residence, also Kim Spellman being the girlfriend 12 of Mykal Derry, the mother of his child, that Mykal Derry used 13 to store drugs, guns, et cetera, and that was noted on the 14 wire.</p> <p>15 The day after the homicide, a little bit more than 24 16 hours after the homicide, that search for the state's search 17 warrant, we put that evidence on, 18 bricks of heroin packaged 18 similar to the stuff that was being distributed throughout the 19 case was recovered. In addition, in the dropped ceiling to 20 the residence, a .380 caliber Beretta semiautomatic handgun 21 was recovered. That gun was placed in the Atlantic County 22 Prosecutor's Office as evidence and submitted to the New 23 Jersey State Police ballistics lab where expert ballisticsian, 24 Christopher Clayton, who testified at the first trial, 25 testified he received that weapon in the ordinary course of</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>

<p style="text-align: center;">9</p> <p>1 business through a chain of custody, and he tested that weapon 2 against the shell casings through microscopic comparison.</p> <p>3 The three shell casings recovered around James's body, 4 which were in ACPO, Atlantic County Prosecutor's Office 5 evidence, that were submitted to him, it was a positive match 6 that those three shell casings came from the .380 caliber 7 handgun found in the residence of Kim Spellman and Mykal 8 Derry, thus making that clearly the murder weapon found in the 9 possession, constructive possession of Mykal Derry.</p> <p>10 Additionally, there was testimony that the two bullets, 11 two bullets recovered, projectiles that were in James's body, 12 the victim's body, recovered at autopsy, turned over to I 13 believe Sergeant Ian Finnimore or Detective Caroline McDonald, 14 both Atlantic County Prosecutor's Office detectives involved 15 in the homicide investigation, then turned over by them to 16 ballistics Clayton at the New Jersey State Police lab. He 17 was also able to determine that those bullets positively 18 matched the .380 caliber firearm as well.</p> <p>19 So, it was a combination that we submitted all these 20 calls and text messages, which we think without anything else 21 clearly show that Malik and Mykal were involved in the murder 22 of Tyquinn James. And then on top of it, the physical 23 evidence, the gun being recovered from 727 Green Street.</p> <p>24 Also, the bicycle was recovered, which matches the bike 25 on the video, I mean, in general terms, it matches it by the</p> <p style="text-align: center;"><i>United States District Court</i> Camden, NJ</p>	<p style="text-align: center;">11</p> <p>1 his person.</p> <p>2 Additionally, there are cell phone videos that show 3 Malik Derry, Mykal Derry, and other members of the conspiracy 4 inside that house. And in one of the videos, Lamar Macon, one 5 of the co-conspirators, is actually in possession of heroin. 6 I think at other cell phone photos, you see Saeed Zaffa had 7 some heroin in front of him. And that house, the interior of 8 that property is recognizable because there's certain things, 9 artwork and mirrors on the wall that you see in the cell phone 10 videos and the cell phone photos from the defendants and the 11 co-defendants that are in the after search photographs taken 12 by Detective Caroline McDonald and her colleagues.</p> <p>13 The evidence is overwhelming that Malik and Mykal Derry 14 were involved in the killing of Tyquinn James. And there's 15 testimony in the record as well that he was killed because he 16 was a drug rival. He was a Trevin Allen guy. They were at 17 war with -- and by the way, the co-conspirator who testified, 18 the Government's cooperating witness, Kareem Young, used that 19 term, I believe, we were at war. He described a series of 20 ongoing shootings. They were basically feuding over territory 21 with -- Tyquinn James was part of Trevin Allen's group. 22 Trevin Allen was in custody at the time, and there was a rift 23 between the two over, we believe, the drug territory.</p> <p>24 So, Tyquinn James was associated with Trevin Allen. 25 That was one group they were feuding with which led to the</p> <p style="text-align: center;"><i>United States District Court</i> Camden, NJ</p>
<p style="text-align: center;">10</p> <p>1 type that it's -- I guess when I was younger we referred to 2 these as girl's bikes with the --</p> <p>3 THE COURT: The slope of the top tube.</p> <p>4 MR. ASKIN: Correct. So, the slope of the top tube, 5 generally the general look of the bike, and also on the front 6 there's a white Schwinn logo that I don't think you can read 7 it on the video, but you can clearly see that there's a white 8 Schwinn logo. That bike is found, again, around 24 hours 9 later in a state search warrant executed at 307 MLK Boulevard 10 which is in the second village of Stanley Holmes Village. 307 11 MLK Boulevard was being used as what is referred to in slang 12 terms as trap house or a house for the sale and distribution 13 of heroin.</p> <p>14 In addition, your Honor, it gets better in the sense, 15 at least for the Government, that that house, Malik Derry was 16 arrested a few weeks earlier not at that house, but in the 17 vicinity of that house, and he had drugs on him, heroin on 18 him. And the heroin, some of the packets had a particular 19 stamp. As you know, heroin is stamped. Some of them had a 20 particular stamp which was of this blue star, and when they 21 searched 307 MLK Boulevard, there's the actual stamp. There's 22 drug paraphernalia in terms of packaging material, et cetera, 23 and the actual stamp that matches identically, that blue star 24 stamp, is found in the property that's only a few weeks after 25 he was arrested in the vicinity of the property with heroin on</p> <p style="text-align: center;"><i>United States District Court</i> Camden, NJ</p>	<p style="text-align: center;">12</p> <p>1 homicide directly. They were also feuding with a group in 2 Back Maryland which was another group of drug dealers across a 3 major intersection and in a different section of the city that 4 they were feuding with and constantly in shootouts with. And 5 there was a third group, which was Yachor, that's Y-A-C-H-O-R, 6 Napper, N-A-P-P-E-R. Yachor Napper was another drug dealer 7 they were feuding with. That was because word on the street 8 was Yachor Napper and his people were involved, his drug 9 associates were involved in the killing of Kamal Allen's 10 little brother who was a drug dealer, Kamal Allen being one of 11 the co-conspirators. So, there was a fight at the Tropicana 12 Casino at one point. That's not before the Court, but that 13 was another issue.</p> <p>14 But it's clear that this was in furtherance of the drug 15 trafficking conspiracy, and it's crystal clear that Mr. Mykal 16 Derry and Malik Derry were involved in it.</p> <p>17 THE COURT: All right. Mr. Askin, thank you.</p> <p>18 All right. Mr. Madden or Mr. Markowitz, who wants to 19 be heard on 467 and the related motions?</p> <p>20 MR. MADDEN: Do you want to go first?</p> <p>21 MR. MARKOWITZ: I'll go first.</p> <p>22 THE COURT: I know on Rosario you point to the fact 23 that your client was incarcerated.</p> <p>24 MR. MARKOWITZ: Yes, and I'll rely on that, your 25 Honor, that even under <i>Pinkerton</i> liability, it's certainly not</p> <p style="text-align: center;"><i>United States District Court</i> Camden, NJ</p>

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1 foreseeable that he would be involved in that, and he was not
 2 part of the conspiracy, if you buy the Government's theory, at
 3 that time.

4 With regard to the Tyquinn James murder, the one -- not
 5 getting into all of the evidence that the Government has --
 6 believes that they can prove pointing to these two defendants,
 7 there's also a wealth that I pointed out in my brief that
 8 there's no way to identify this individual. There's no DNA,
 9 no fingerprints.

10 But putting that all aside, the one thing that I think,
 11 if I read the Court correctly in its question to Mr. Askin,
 12 and if I misinterpret it, please correct me, your Honor, but
 13 talking about is that shooting a part of this conspiracy.
 14 Now, there's testimony that any rival drug dealer -- I think
 15 the issue becomes, and what I'm asking the Court to focus on,
 16 is they take this blanket term of, you know, any rival drug
 17 dealer will be dealt with with violence, and they just carry
 18 it through to anyone. There was a shooting that occurred many
 19 months before, maybe even a year before with Tyquinn James.
 20 There's no evidence to show that this beef continued on, that
 21 it hadn't stopped. And they keep saying it's in furtherance
 22 of the conspiracy, that this is how they dealt with it, and I
 23 think that's where the quantum leap is being taken by the
 24 Government that it shouldn't be admitted.

25 THE COURT: Part of my question was, it seems to me
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1 that Judge Irenas already ruled on this. He already ruled
 2 that this particular act of violence, as he did with the
 3 Rosario murder -- assault, rather, were -- after a hearing, he
 4 determined that there was sufficient evidence to admit both of
 5 those physical acts, if you will, as part of the conspiracy.
 6 And I don't know that I'm free to change that ruling.

7 MR. MARKOWITZ: Your Honor --

8 THE COURT: There's a separate issue as to whether or
 9 not the Government's proof tying your client to the conspiracy
 10 is -- or particular acts is -- well, to the conspiracy because
 11 they're not charged with murder, but -- and certainly that
 12 would be part of the calculus, but the proffered evidence
 13 seems to be fairly substantial tying both brothers to a drug
 14 trafficking organization. And the bicycle and the weapon and
 15 text messages admitted in the earlier trial, they are in the
 16 Government's view evidence of their knowledge and
 17 participation in that particular act of violence.

18 So, the hearsay statement is a different thing because
 19 I haven't heard, I haven't heard the Government proffer that
 20 Judge Irenas ruled that Zaffa was a part of the conspiracy.
 21 Did he so rule?

22 MR. MARKOWITZ: Well --

23 THE COURT: I'm sorry. I'm sorry, I apologize, Mr.
 24 Markowitz, but what's the answer to that question?

25 MR. ASKIN: That issue I don't think came up because
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1 there was no objection because Malik Derry wasn't on trial in
 2 the first trial. So, that is a little bit different here
 3 because there was no objection, and maybe if Malik Derry was
 4 on trial, there should have been an objection. So, the
 5 Government has asked to defer that because it wants to look at
 6 it closer and doesn't -- so, I don't think the judge ruled on
 7 it because I don't think it was before him.

8 THE COURT: Okay.

9 MR. ASKIN: Even though I think the evidence that Mr.
 10 Zaffa was a member of the conspiracy was overwhelming, but it
 11 didn't get to the judge.

12 THE COURT: I'm going to defer on that, but the
 13 question is, it seems to me that Judge Irenas has ruled,
 14 already ruled, after having a hearing and considering it, that
 15 these two particular acts are part and parcel of the
 16 conspiracy. Yes?

17 MR. MARKOWITZ: Yes, your Honor. The only
 18 difference, and -- yes, but the only difference that I could
 19 glean from reading the whole transcript and everything is
 20 those individuals who were on trial didn't articulate their
 21 objections in a strenuous fashion because it really didn't go
 22 to them. You know what I mean? It was not an integral part
 23 of their defense.

24 If the Court is inclined to accept Judge Irenas's and I
 25 am bound by it, then I think if that's what the Government is
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1 asking, then they should be bound that the tape should not be
 2 played in their opening, if we're going to be bound by all of
 3 his rulings, your Honor.

4 MR. MADDEN: Can I join --

5 THE COURT: The difference on that -- I'll hear the
 6 Government on that, but he's already ruled. At the time he
 7 hadn't ruled, right?

8 MR. ASKIN: That's our position, your Honor. He had
 9 to wait to rule because he was conducting the first trial and
 10 wouldn't have been in a position to see some of these things,
 11 and I think some of them were just logistics, too, but some of
 12 it was, I think, trying to wait and anticipate the evidence.

13 We're dealing with a record here of 9,000 pages. And I
 14 can tell the Court as an officer of the Court and as lead
 15 trial counsel that we're going to present largely the same
 16 case with all of these witnesses, and one would expect, since
 17 they were under oath, that they're largely going to testify to
 18 the same thing, and that, you know, the texts and the
 19 recordings are the texts and recordings. So, he's made that
 20 ruling.

21 One other thing I would say to Mr. Markowitz's point is
 22 they did argue very strenuously. I didn't attach those seven
 23 different rulings by Judge Irenas. They brought this up
 24 repeatedly. Now, granted, they were in a little bit of a
 25 different position because they didn't have the shooter. You
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<p style="text-align: right;">17</p> <p>1 know, they didn't have someone who was directly involved in 2 the homicide.</p> <p>3 Some of their arguments went to, you know, very 4 strenuously arguing that, hey, wait a second. My guy had 5 nothing to do with this, almost like Mr. Markowitz's argument 6 on the Rosario, which, by the way, I think three of the four 7 had that same argument on Rosario, that they were in custody, 8 in the first trial.</p> <p>9 And Judge Irenas rejected it because it still -- first 10 of all, here, Mykal Derry is involved in the Rosario. By the 11 way, one thing I should add to the record is the Rosario 12 incident is actually the Rosario incidents, because there were 13 to incidents. One was they initially beat him up, brutally 14 attacked him physically, and that was in October of 2010. In 15 April of 2011, after he had gone to the police, Mykal Derry -- 16 it's the Government's theory that Mykal Derry had his cousin 17 Kevin Washington shoot Mr. Rosario, resulting in his 18 paralysis.</p> <p>19 So, there were two incidents. Both of those Judge 20 Irenas admitted in the first trial; they were both admitted to 21 show the -- there were arguments, and I expect that there will 22 be arguments here from Malik Derry, that there was no 23 conspiracy; we're not members of the conspiracy.</p> <p>24 The Government's theory of the case is -- and this is 25 completely in line with <i>United States versus Gibbs</i> and <i>United</i> <i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">19</p> <p>1 try to kill him.</p> <p>2 And by the way, there's an earlier shooting of, at --</p> <p>3 THE COURT: I got it.</p> <p>4 MR. ASKIN: You got it.</p> <p>5 THE COURT: I got it.</p> <p>6 MR. ASKIN: Okay.</p> <p>7 THE COURT: I'm sorry. Mr. Madden, Mr. Markowitz was 8 interrupted by me, and I apologize. I just want to make sure 9 I hear him out, and I apologize.</p> <p>10 MR. MARKOWITZ: Your Honor, I put forth my arguments. 11 I'll yield the floor to Mr. Madden.</p> <p>12 THE COURT: All right. Thank you, Mr. Markowitz. 13 All right. Mr. Madden?</p> <p>14 MR. MADDEN: Your Honor, there's an important 15 distinction that I think is being glazed over, and that is 16 that there's a law of rule in the case which Judge Irenas made 17 rulings upon when we were all involved and doing the pretrial 18 motions, and then there's the rulings that Judge Irenas made 19 in a completely different trial with co-defendants who were 20 charged with completely -- not completely -- but many 21 different charges than our clients and, most importantly, were 22 being represented by different lawyers who had a very 23 different defense.</p> <p>24 The defense of the co-defendants in that other trial 25 was, yeah, there was a big drug conspiracy run by Malik and <i>United States District Court</i> <i>Camden, NJ</i></p>
<p style="text-align: right;">18</p> <p>1 <i>States versus Green</i>. Irenas -- Judge Irenas ruled repeatedly 2 that the Rosario incidents and the James murder were intrinsic 3 to the conspiracy and, therefore, could not be excluded 4 because they're intrinsic evidence. And this went to show the 5 nature of the conspiracy, the scope of the conspiracy, the 6 formation of the conspiracy.</p> <p>7 I mean, Rosario, the Government's theory -- and there's 8 testimony about this -- that he was assaulted, A, because he 9 had the audacity to sell drugs, heroin, that was no longer 10 coming from Mykal Derry and Trevin Allen, who were aligned at 11 that time before they split; and, B, he had the nerve to go to 12 the police and report their criminal activity. He had to be 13 silenced, so they attempted to kill him, resulting in his 14 paralysis.</p> <p>15 Tyquinn James being an associate of Trevin Allen, now 16 they're trying to keep -- and there's testimony from the 17 cooperator, and I can give you the transcripts -- they're 18 trying to keep all these guys, these rivals, out of Stanley 19 Holmes so that they can be the exclusive sellers in this -- 20 what Judge Irenas found was that it was lucrative drug 21 trafficking territory. And this went to the Government's 22 theory of the case, that they are trying to keep people from 23 competing with them in that lucrative drug trafficking 24 territory, Tyquinn James is in the way in that respect because 25 he is aligned with a different drug dealing group, and they <i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">20</p> <p>1 Mykal Derry, and they did horrible things and killed people 2 and sold lots and lots of drugs, but we weren't part of that. 3 We were just some other people who happened to be selling 4 drugs a little tiny bit on the streets at the time.</p> <p>5 Obviously, that is not going to be our defense. Our 6 defense is not going to be that our clients ran a big drug 7 conspiracy and were involved in shooting and killing people 8 but these other people who were tried earlier weren't involved 9 in it. That's completely not our defense.</p> <p>10 So, as the Court should absolutely respect the rule of 11 the law -- the rulings that the Court made when we were all 12 joined together in pretrial motions, there should be a 13 distinction made in the rulings that Judge Irenas made during 14 a trial where we weren't there, and we weren't representing 15 our clients, and our interests were not represented at all. I 16 mean, he made these rulings a month into the trial after these 17 attorneys did not, you know, argue the same things we were 18 arguing.</p> <p>19 And what will happen in this case is a large part of 20 the evidence that the jury will hear will be through Agent 21 Kopp and his testimony. Those other attorneys had reasons not 22 to object to that testimony and not to ask a lot of the 23 questions that we are going to ask. So, the evidence will be 24 different because of our defense and because of our 25 cross-examination. <i>United States District Court</i> <i>Camden, NJ</i></p>

<p style="text-align: right;">21</p> <p>1 So, I think that it is appropriate that the Court</p> <p>2 follows the rulings that Judge Irenas made, which is to decide</p> <p>3 that after you hear the evidence. Because the Government</p> <p>4 can't at the same time say this is a different trial with</p> <p>5 different charges and different jury instructions against</p> <p>6 different people but take all the rulings that we like from</p> <p>7 that trial and use those, and the stuff that we don't like,</p> <p>8 let's ignore that. You have to do what Judge Irenas did,</p> <p>9 which is said, I'll hear -- I'll decide it after the evidence.</p> <p>10 THE COURT: All right. Mr. Askin.</p> <p>11 MR. ASKIN: Your Honor, if I may respond. I think in</p> <p>12 theory Mr. Madden makes a point that's well taken, which is,</p> <p>13 that when you have these rulings by Judge Irenas, they were</p> <p>14 made -- some of them were made pretrial, and that applied to</p> <p>15 everyone, but many of the evidentiary rulings were made during</p> <p>16 a trial that these defendants and their lawyers did not</p> <p>17 participate in, and that's obviously -- no one disputes that.</p> <p>18 I think it's fair to say that Mr. Madden has a point</p> <p>19 that the Court has to take a -- maybe take a look at this in</p> <p>20 terms of these two defendants and the evidentiary rulings and</p> <p>21 how they would apply to these two defendants. But the rulings</p> <p>22 that the evidence is intrinsic, I think the Court and the</p> <p>23 Government seek to elicit or should seek to elicit from</p> <p>24 defense counsel not just in general and theory, but in</p> <p>25 practice here, what is different.</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">23</p> <p>1 people were related and that they were drug dealers who were</p> <p>2 competing against each other and that there were grudges.</p> <p>3 The agent, much of this testimony about what these</p> <p>4 relationships and what the motivation for this killing and why</p> <p>5 this killing and why this beating had to do with this</p> <p>6 conspiracy came through Agent Kopp. And again, the</p> <p>7 co-defendants' attorneys really didn't cross-examine him on</p> <p>8 those allegations. I know that we are going to vigorously</p> <p>9 cross-examine him on those allegations and on those</p> <p>10 assumptions.</p> <p>11 So, the assumptions weren't challenged at the first</p> <p>12 trial about the relationships. The assumptions will be</p> <p>13 challenged through cross-examination at this trial.</p> <p>14 THE COURT: Okay.</p> <p>15 MR. ASKIN: Your Honor, if I may respond. I</p> <p>16 understand Mr. Madden's point, but Mr. Madden's point doesn't</p> <p>17 go in the Government's estimation to admissibility. It goes</p> <p>18 to accountability in terms of whether or not these -- the jury</p> <p>19 can find, once the Court admits it, that it wasn't in</p> <p>20 furtherance. Okay? In terms of in furtherance of the</p> <p>21 conspiracy, in furtherance of 924(c), which furthered the</p> <p>22 conspiracy.</p> <p>23 But the witnesses -- first of all, I differ a little</p> <p>24 bit with what he said about Special Agent Kopp, that much of</p> <p>25 this comes from Special Agent Kopp. Some of it comes from</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>
<p style="text-align: right;">22</p> <p>1 Judge Irenas has ruled that Rosario -- the Rosario</p> <p>2 assault, the Rosario shooting, and the James shooting were</p> <p>3 intrinsic to the conspiracy, violence associated with the</p> <p>4 conspiracy to further the conspiracy for those four</p> <p>5 defendants, admittedly not for these two defendants. But for</p> <p>6 these two defendants, based on this evidence, what is</p> <p>7 different that would cause this Court to have to reexamine</p> <p>8 that ruling, number one; and, number two, on this record of</p> <p>9 thousands and thousands of pages of transcripts and hearings</p> <p>10 and all these things being considered, I understand they have</p> <p>11 the right to argue and -- but today is the day for that in my</p> <p>12 opinion, what is different, what should be changed, and why</p> <p>13 can't we decide that today?</p> <p>14 THE COURT: Okay. Mr. Madden.</p> <p>15 MR. MADDEN: And the answer to that question as to</p> <p>16 what is different is the cross-examination of the main</p> <p>17 witness, Agent Kopp. And that's what's going to be different.</p> <p>18 So, whereas these other attorneys did not cross-examine</p> <p>19 him on the assertions that the Government makes as far as what</p> <p>20 are the relationships between this Anthony Rosario and between</p> <p>21 Mr. James and between our clients, they made no arguments</p> <p>22 about that because they were conceding all of that. They were</p> <p>23 just saying, we don't have anything to do with all this. We</p> <p>24 are absolutely going to be making objections and having</p> <p>25 vigorous cross-examination about these allegations that these</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">24</p> <p>1 Special Agent Kopp and some of it comes from Kareem Young.</p> <p>2 They're both under oath saying that this was the situation,</p> <p>3 that there were rivalries between these groups, between the</p> <p>4 group led by Mykal Derry, that Kareem Young: We carried guns.</p> <p>5 We carried them all the time. We transferred guns among</p> <p>6 ourselves. We protected each other. We tried to keep these</p> <p>7 people out. They couldn't sell in Brown's Park. They</p> <p>8 couldn't sell in Stanley Holmes while we were running this.</p> <p>9 If they did, they would be shot.</p> <p>10 He can cross-examine. He can be Clarence Darrow, and</p> <p>11 maybe he is, but that's not going to change an admissibility</p> <p>12 ruling.</p> <p>13 THE COURT: His argument is a little different. His</p> <p>14 argument is that if he and Mr. Markowitz had had a shot at</p> <p>15 Agent Kopp in the 104 hearing, that Judge Irenas may have</p> <p>16 changed his ruling about the admissibility of the two Rosario</p> <p>17 assaults and the James murder.</p> <p>18 What doesn't make sense to me is why, you know -- an</p> <p>19 empty chair defense is a great defense, works on occasion, but</p> <p>20 I don't know why they would want evidence of a murder and</p> <p>21 these assaults in the case if their defense theory is they</p> <p>22 have nothing to do with it.</p> <p>23 I think to use the word -- not only did Judge Irenas</p> <p>24 rule that these two assaults and murder were intrinsic to the</p> <p>25 conspiracy, I think intrinsic in his ruling is since the</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>

<p style="text-align: right;">25</p> <p>1 evidence of the Government is that the Derrys were involved in 2 both of those things, that for me to rule differently would 3 violate the rule of the case.</p> <p>4 So -- but there's no, Mr. Madden, there's no 5 confrontation clause right on a preliminary ruling under 104, 6 correct? I don't need to have a hearing at all if I feel that 7 the proffered evidence is sufficient. That tells me there's 8 no right of -- there's no confrontation clause right to a 9 preliminary ruling on the admissibility of evidence on the 10 existence of a conspiracy and whether someone is a member of 11 it.</p> <p>12 MR. MADDEN: It's my argument, your Honor, that -- 13 and I'm sorry because I'm not quite answering your question -- 14 but it's my argument that whether that evidence -- that the 15 Court should do the same thing that Judge Irenas did, which is 16 decide whether it is admissible after having heard the 17 evidence. That's the ruling -- that's what Judge Irenas in 18 the pretrial motions said that he was going to do, and it was 19 our understanding that that was the rule of the case, and 20 that's what your Honor was going to do.</p> <p>21 And now the Government is saying, you know, we like 22 Judge Irenas's ruling in the middle of the last trial, so, you 23 know, why don't you just stick with that.</p> <p>24 THE COURT: What I said was I wanted to see a proffer 25 from the Government, and then I would decide whether or not</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">27</p> <p>1 challenge it.</p> <p>2 THE COURT: Well, the problem with that is that I'm 3 ignoring his later ruling that there was a conspiracy, that 4 these two acts -- these three acts of violence were intrinsic 5 to it, and the inherent finding that the Derry brothers were 6 sufficiently connected to it, to the conspiracy to admit it, 7 otherwise it wouldn't be part of -- it wouldn't have been 8 admissible against those other defendants.</p> <p>9 MR. MADDEN: So, every ruling that his Honor made in 10 that other trial, then the Government can go through and pick 11 each of them and say, you know what, he decided, whatever 12 hypothetical things it might be, and so your Honor doesn't 13 need to make any rulings? I mean, every hearsay objection?</p> <p>14 THE COURT: Well, that's a good point.</p> <p>15 MR. MADDEN: Right. I mean, this is a different 16 trial with different defendants and different charges and 17 different jury instructions, and all that is different. So, I 18 mean, we could -- I could go back and spend the next 12 hours 19 looking at every hearsay objection, which ones I like and 20 which one I don't, and say you're obligated by that. And 21 that's not the rule of the law, the rule of the case. That's 22 not what -- the rule of the case is that there are motions 23 when we're all involved, not after it's been severed, and if 24 there's rulings when we're not involved, that those need to be 25 followed. I agree that Judge Irenas made that ruling, but it</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>
<p style="text-align: right;">26</p> <p>1 there was a -- whether fairness required a new 104 hearing. 2 And I think that Judge Irenas ruled that there was a 3 conspiracy, as a preliminary matter under 104, ruled that 4 there was sufficient proffered evidence of a conspiracy, and 5 intrinsic to that was an -- was a finding that both Derrys 6 were a member of it, because otherwise why would he allow that 7 evidence to come in against other people?</p> <p>8 MR. MADDEN: What's important about that is that he 9 didn't make that ruling pretrial; he made that ruling prior to 10 the evidence coming in.</p> <p>11 THE COURT: Right. And I think --</p> <p>12 MR. MADDEN: Which is the only thing I'm asking from 13 the Court is to do that, is to do the same thing that -- is to 14 respect Judge Irenas's pretrial ruling, which is, I will 15 decide whether that evidence about Anthony Rosario and the 16 Tyquinn James murder and whether the videotape come in after I 17 hear the other evidence.</p> <p>18 So, essentially what he did was he said that there was 19 going to be confrontation for the 104 hearing. The 104 20 hearing will be everything that happens up until the point 21 when you, the Government, wants to bring that evidence in, and 22 then I'll make that ruling. And all I'm asking is that you 23 respect his pretrial ruling, that that's what he was going to 24 do, and do the same thing so that we have the opportunity to 25 challenge it the way the co-defendants have the opportunity to</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">28</p> <p>1 wasn't in our trial. It was in a different trial.</p> <p>2 THE COURT: Well, that's the problem the way this was 3 set up. It's the same docket number, it's the same 4 indictment, it's the same Government witnesses. It's a 5 severed trial. And your legal point is correct, that only 6 those things that are truly -- that there's a distinction 7 between the broader question of the existence of a conspiracy 8 and who was a member of it and whether an act was in 9 furtherance of it. But if a ruling is fundamental as there is 10 a conspiracy, this particular act of violence was intrinsic to 11 the conspiracy, so long as there is, and this is your related 12 argument that you're making, is that I still have a right to 13 challenge whether my client was sufficiently tied to those 14 acts of violence to warrant its admission. And the proffered 15 evidence was sufficient to convince Judge Irenas that these 16 acts were part of the conspiracy and that the -- since so much 17 of the proffered evidence included reference to, and physical 18 evidence, tying the Derry brothers, at least in the James 19 murder, to the bicycle and the weapon, that I think inherent 20 in his argument is a ruling that they were -- there was 21 sufficient evidence to go -- to allow a jury to consider that 22 evidence.</p> <p>23 So, I guess to put it differently, it would be 24 unfair -- violate the rule of the case and unfair to have 25 another 104 hearing and then decide that in a way it would be</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>

<p style="text-align: right;">29</p> <p>1 contrary to Judge Irenas's previous rulings.</p> <p>2 MR. MADDEN: If I may, your Honor, the important</p> <p>3 thing the Court said there is Judge Irenas decided based on</p> <p>4 the proffered evidence, but I don't believe that's what</p> <p>5 happened. I believe that Judge Irenas made his decision as to</p> <p>6 whether -- in other words, Judge Irenas said you're not</p> <p>7 bringing up the video, you're not bringing up Tyquinn James,</p> <p>8 you're not bringing up Ant 50 until I hear the evidence, not</p> <p>9 the proffered evidence, the evidence during the trial, and</p> <p>10 then after I hear the evidence, then I'll make the decision.</p> <p>11 He heard the evidence and then he made the decision. And I'm</p> <p>12 asking the Court to do that, just what Judge Irenas did,</p> <p>13 nothing more, nothing less.</p> <p>14 THE COURT: I get it, I get it.</p> <p>15 MR. MADDEN: To hear the evidence and then make your</p> <p>16 decision about whether it comes in or not.</p> <p>17 THE COURT: But a judge in this case, hearing that</p> <p>18 evidence, ruled it admissible.</p> <p>19 MR. MADDEN: But that was -- that wasn't a pretrial</p> <p>20 ruling and that wasn't a ruling based on proffers. That was a</p> <p>21 ruling based on evidence, and the distinction I made before</p> <p>22 is, based on evidence where we couldn't present a defense.</p> <p>23 THE COURT: Right. I understand that. That raises</p> <p>24 the question -- to me it makes the evidence more reliable that</p> <p>25 Judge Irenas heard all of it and admitted it than it would be</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">31</p> <p>1 use a colloquial term, of doing that because that will just</p> <p>2 simply require the Government to put their case on, the same</p> <p>3 as they did in the first trial, and the only difference --</p> <p>4 there is no difference. What will happen is that your Honor</p> <p>5 will stick to Judge Irenas's ruling, which is don't open on</p> <p>6 that, don't bring it up until I decide whether it is tied to</p> <p>7 this conspiracy. And then if I decide it, then you can bring</p> <p>8 it up. That is exactly what Judge Irenas's rule did, that is</p> <p>9 what his pretrial rulings ordered, and that's what I'm asking</p> <p>10 the Court to abide by, his pretrial ruling.</p> <p>11 THE COURT: All right. Mr. Markowitz, a last word on</p> <p>12 this?</p> <p>13 MR. MARKOWITZ: Judge, I think the last point that</p> <p>14 Mr. Madden made, which is, you know, the fairness question is,</p> <p>15 you know, the Government isn't unduly prejudiced if they</p> <p>16 proceeded along the same lines as the first trial, and I think</p> <p>17 we should, you know, let the witnesses take the stand and then</p> <p>18 the Court will make its ruling. I don't think it prejudices</p> <p>19 the Government that much.</p> <p>20 MR. ASKIN: Your Honor, with respect to the prejudice</p> <p>21 question, I mean, it's a question of if, as the Court points</p> <p>22 out, if it's not in doubt, then the Government should be</p> <p>23 permitted to do it. And the thing is, Judge Irenas, he made</p> <p>24 these rulings based on a couple things that are different.</p> <p>25 One is that none of those defendants were involved directly in</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>
<p style="text-align: right;">30</p> <p>1 if he just made a pretrial ruling.</p> <p>2 MR. MADDEN: Except that we weren't there.</p> <p>3 THE COURT: But you weren't there, and that raises</p> <p>4 the question whether or not -- whether -- whether there's --</p> <p>5 it's not a confrontation clause issue because there's no right</p> <p>6 of confrontation. The right is whether or not I feel that</p> <p>7 there would be a sufficient -- what likelihood there would be,</p> <p>8 after cross-examination of the witness, that I would decide</p> <p>9 differently than Judge Irenas did.</p> <p>10 MR. MADDEN: You can't predict that. I'm sorry.</p> <p>11 THE COURT: Well, I can't predict it, but every judge</p> <p>12 who has to decide whether or not to have a 104 hearing has to</p> <p>13 decide that. Right? How -- is this really something that's</p> <p>14 in doubt?</p> <p>15 MR. MADDEN: That decision was already made about</p> <p>16 whether to have a 104 hearing by Judge Irenas. He decided not</p> <p>17 to have a 104 hearing, but to hear the evidence and decide</p> <p>18 beforehand.</p> <p>19 THE COURT: Right. I'm sorry, right.</p> <p>20 MR. MADDEN: And so I'm asking that the Court sticks</p> <p>21 by Judge Irenas's ruling, which is I am not going to decide</p> <p>22 this now. I will decide this after I hear the evidence,</p> <p>23 whether there is a conspiracy and whether it comes in. That</p> <p>24 was the rule of the case. And so the Court should stick to</p> <p>25 the rule of the case. And really, there is no downside, to</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p style="text-align: right;">32</p> <p>1 the Rosario assault, Rosario shooting, or the Tyquinn James</p> <p>2 murder. So, they, in addition to the arguments about in</p> <p>3 furtherance and all of that and intrinsic, they were also</p> <p>4 making like, hey, this is very highly prejudicial for how</p> <p>5 probative it is, et cetera, number one.</p> <p>6 Number two, Judge Irenas has now made those rulings,</p> <p>7 and the Court, I think correctly, has found today that</p> <p>8 inherent in that is a finding that Mykal and Malik Derry were</p> <p>9 involved in the James murder and it was intrinsic and in</p> <p>10 furtherance of, and inherent in the Rosario rulings is that</p> <p>11 Mykal Derry, who, by the way, in the Rosario, we presented a</p> <p>12 photograph, in the Rosario assault, when they took the photos</p> <p>13 of where he was assaulted, the identification of Mykal Derry,</p> <p>14 Mykal Derry's photo identification is found in the residence,</p> <p>15 that residence was linked to him.</p> <p>16 There was also cooperator testimony that, through a</p> <p>17 co-conspirator's statement, that, yeah, he heard they did that</p> <p>18 for this reason, which was a drug related, in furtherance</p> <p>19 reason, and there was testimony about why they did the James</p> <p>20 murder.</p> <p>21 Now, none of that -- the Court asked the right</p> <p>22 question. Would any of this -- is any of this in doubt, would</p> <p>23 any of this change? Mr. Madden's skillful cross-examination</p> <p>24 coming from representing a different point of view and a</p> <p>25 different client, and Mr. Markowitz, the same thing, might</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>

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1 change the -- might change the jury's view down the line, but
2 there's no possibility that, and they can't point to
3 something, how it would change the Court's ruling on the
4 preliminary matter of a 104 admissibility. Kopp is going to
5 say the same thing, the cooperator is going to say the same
6 thing, and that gets the evidence in. And the
7 cross-examination that comes later cannot change that
8 situation. So, the Government should be able to open on these
9 things.

10 THE COURT: All right.
11 MR. ASKIN: Thank you.

12 THE COURT: I've heard sufficient argument on this
13 and I appreciate the careful parsing out of the important
14 issues here. It is certainly fair to say that Judge Irenas
15 issued two rulings which are relevant to this determination.

16 The first is that he decided at the time, not having
17 heard any evidence, that he would wait until he had heard the
18 evidence at trial to determine whether or not the Rosario
19 assaults and the James murder would be admissible by the
20 Government in proving their case of a conspiracy and -- a drug
21 trafficking conspiracy and the other charges in that -- in the
22 first portion of this trial, the first tranche of defendants.

23 But he also made a ruling during the course of the
24 trial after hearing all of that evidence that these three acts
25 of violence were intrinsic to the conspiracy and made such a

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1 finding after hearing a substantial amount of evidence tying
2 both Derry brothers to these acts. And it is the latter
3 ruling that I believe is the more important of the two in
4 terms of honoring the rule of the case.

5 For me to have a hearing again in my view would not
6 change the result and likely result in the same ruling,
7 admitting the evidence concerning these acts of violence.

8 Whether or not the Court should have a hearing or wait until
9 after hearing the evidence is within the discretion of the
10 Court, and I am convinced here on the record that Judge
11 Irenas's ruling was correct and would in all likelihood stand,
12 and the need to repeat that process unnecessary as a matter of
13 fairness. There is no confrontation clause right to
14 admissibility issues. I believe that ruling is the law of the
15 case.

16 The evidence included text messages and audio calls
17 between the two Derry brothers and other co-conspirators on
18 the night of the murder and the days following the murder.

19 There is evidence that the shooter was riding a bicycle that
20 had certain potentially identifiable characteristics. The
21 bicycle was later found in what the Government calls a trap
22 house. The evidence established that that residence was used,
23 including used by the Derry brothers, to store and distribute
24 drugs, including a cell phone video. The evidence of the
25 particular type of heroin which was tied to Malik Derry was

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1 found at that residence as well. The weapon was later found
2 at a residence that Mykal Derry shared with Ms. Spellman
3 hidden in the ceiling. Again, there were drugs found inside
4 that residence which matched the drugs that were distributed
5 by the conspiracy. So, and there are other -- there's other
6 evidence that established, that ties these various locations
7 to the Derry brothers.

8 Similarly, Judge Irenas heard the evidence on the
9 Rosario assaults and determined that violence was intrinsic to
10 the conspiracy and that these particular acts were in
11 furtherance of it, and he admitted it. So, I'm convinced that
12 that's the ruling that I should abide by, that a hearing is
13 unlikely to change the result, that there's no confrontation
14 clause right that applies to such a hearing, and I will abide
15 by that ruling, such evidence is admissible in this trial.

16 Whether or not it's -- the jury believes that the Derrys were
17 responsible for it or associated with it is what a trial is
18 for, and the vigorous cross-examination of the Government's
19 witnesses on that point will no doubt occur.

20 So, as for Mr. Zaffa and his statement and the person
21 to whom the statement was made, I make no ruling on the issue
22 of the admissibility of that hearsay statement. I don't have
23 the same proffered evidence or any prior findings by the Court
24 that show Mr. Zaffa and the cooperator to be members of the
25 conspiracy or that it was in furtherance of it. The

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1 Government candidly concedes that that precise issue was not
2 ruled on by Judge Irenas, and to that extent I am and would
3 abide by Judge Irenas's preliminary ruling to hear the
4 evidence before rendering it admissible.

5 And I'm going to do the same here. I'm going to hear
6 that evidence during the course of the trial proffered by the
7 Government and whether or not evidence that is of Zaffa's and
8 the cooperator's membership in the conspiracy and whether such
9 a hearsay statement was in furtherance of it, and then, and
10 only then, will such a ruling be made.

11 So, to the extent that Judge Irenas decided to hear it
12 after the evidence is concluded, I abide by that ruling. To
13 the extent he ruled after hearing the evidence, that decision
14 is also binding on me. I believe that I am showing proper
15 deference to both of Judge Irenas's decisions in that regard.

16 So, this rules -- I'm denying 467, which in essence is
17 a denial of 731 -- 731, which will be filed as a motion, as
18 well as 733 and 734.

19 The Government -- I'm denying without prejudice the
20 motion to exclude the statement of Mr. Zaffa until I've heard
21 the evidence at trial, of those two issues, whether the
22 speaker and the hearer were members of the conspiracy and
23 whether or not such statement was in furtherance of the
24 conspiracy.

25 Now, I need my docket list here to see whether I've

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<p>37</p> <p>1 ruled on -- is there anything else?</p> <p>2 The motion -- Mr. Markowitz's motion obviously to join</p> <p>3 in 467 was previously ruled on, and his motion to join in 731</p> <p>4 is also granted. I assume the Government has no objection</p> <p>5 to --</p> <p>6 MR. ASKIN: No.</p> <p>7 THE COURT: -- the co-defendants joining in the</p> <p>8 motions of the others?</p> <p>9 MR. ASKIN: That's correct. To the extent that they</p> <p>10 are applicable, your Honor, we have no objection. We have no</p> <p>11 objection here.</p> <p>12 THE COURT: All right. Now, what about this issue of</p> <p>13 Agent Kopp's testimony under 701?</p> <p>14 MR. ASKIN: Well, your Honor, I brought that to the</p> <p>15 attention of Judge Irenas only as a -- you know, I think it's</p> <p>16 a wise practice to bring any kind of evidentiary issue before</p> <p>17 the Court before we do so and before -- to counsel.</p> <p>18 Since we were calling him as both a fact witness and</p> <p>19 sought to elicit lay opinion testimony under Rule 701, I</p> <p>20 wanted to bring that to the attention of Judge Irenas and the</p> <p>21 four counsel representing the defendants in that case. I'm</p> <p>22 just renewing that in this trial because I think that we</p> <p>23 should just -- it is just an issue that I think the Court and</p> <p>24 defense counsel and the Government need to be aware of because</p> <p>25 there are limits to Rule 701. 701 testimony, lay opinion</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p>39</p> <p>1 Special Agent Dave McNamara of the DEA as an expert witness,</p> <p>2 and that will be in addition to the lay opinion testimony</p> <p>3 offered by Special Agent Kopp. I've also advised counsel that</p> <p>4 later on in the trial we expect that Special Agent Kopp will</p> <p>5 testify as a summary witness under -- and I don't remember the</p> <p>6 rule on summary witness -- but that's also in the rules of</p> <p>7 evidence, of course, and that will be later in the trial.</p> <p>8 There will be a need to recall Special Agent Kopp</p> <p>9 multiple times throughout the trial, but this fact testimony</p> <p>10 and lay opinion testimony will come up in his first time on</p> <p>11 the stand, which will be the first, I expect the first several</p> <p>12 days of the trial.</p> <p>13 This I don't believe is a controversial issue. I think</p> <p>14 it's sort of a black letter law issue. But the limits of lay</p> <p>15 opinion testimony are something I wanted to make the Court</p> <p>16 aware of, which is in our motion. I think we -- I hope we did</p> <p>17 a decent job of setting out what the limits are. I'm aware of</p> <p>18 those limits while I question Special Agent Kopp.</p> <p>19 What we did in the last trial is the four defense</p> <p>20 attorneys said to Judge Irenas, Judge -- and I remember Mr.</p> <p>21 Spade specifically saying -- Judge, we have no problem -- Mr.</p> <p>22 Spade was an attorney that was actually involved in</p> <p>23 representing a defendant in the Kaboni Savage case in the</p> <p>24 Eastern District, so he was very familiar with the issue.</p> <p>25 And the attorneys in that case -- these defendants'</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>
<p>38</p> <p>1 testimony, of course, is different from Rule 702, expert</p> <p>2 opinion testimony.</p> <p>3 And just so the Court is clear and defense counsel is</p> <p>4 clear, we're going to do this -- the Government intends to</p> <p>5 proceed the same way it did in the first trial, which is</p> <p>6 Special Agent Kopp will be called as -- in the beginning of</p> <p>7 the trial as the first witness. He will testify to the</p> <p>8 background of the investigation. Then we will go into the</p> <p>9 calls and the text messages, which are, you know, roughly 700</p> <p>10 and some odd pages in the binder, with exhibits, and he will</p> <p>11 provide interpretations of those calls as lay opinion</p> <p>12 testimony under Rule 701.</p> <p>13 Now, what the Government cites to in that letter brief</p> <p>14 to Judge Irenas is this exact same scenario occurred in the</p> <p>15 United States District Court for the Eastern District of</p> <p>16 Pennsylvania in two related cases, United States versus Kaboni</p> <p>17 Savage, et al., and your colleague in the Eastern District,</p> <p>18 the Honorable R. Barclay Surrick -- that's S-U-R-R-I-C-K --</p> <p>19 had occasion to rule on it in that case. The FBI agent in</p> <p>20 that case testified -- it was a wiretap case involving a</p> <p>21 violent drug gang, and he testified in the same fashion,</p> <p>22 providing factual testimony and also lay opinion, lay opinion</p> <p>23 being from the case and not through any expertise learned</p> <p>24 outside the case.</p> <p>25 The Government intends later in the trial to call</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>	<p>40</p> <p>1 attorneys can take whatever position they want -- their</p> <p>2 position was: Judge, we have no problem. We understand Rule</p> <p>3 701. We have no problem with him testifying in that fashion.</p> <p>4 We just want the Court to keep an eye on this and Mr. Askin to</p> <p>5 keep in mind the limits of Rule 701. That's the only reason I</p> <p>6 bring it to the Court's attention.</p> <p>7 THE COURT: Obviously, you have to lay a foundation,</p> <p>8 and even a properly framed question sometimes raises things</p> <p>9 beyond.</p> <p>10 So let me just ask Mr. Madden and Mr. Markowitz,</p> <p>11 assuming the laying of a proper foundation under 701 and</p> <p>12 allowing for the defense to object if the testimony strays</p> <p>13 beyond the scope of the rule, any reason why this requires any</p> <p>14 additional observation or ruling by the Court?</p> <p>15 MR. MADDEN: No, your Honor.</p> <p>16 THE COURT: All right. Mr. Madden, thank you.</p> <p>17 Mr. Markowitz?</p> <p>18 MR. MARKOWITZ: No, your Honor.</p> <p>19 THE COURT: All right. You will abide by the limits</p> <p>20 as you have recognized, Mr. Askin. You'll lay a proper</p> <p>21 foundation before any 701 testimony is admitted, and I'll hear</p> <p>22 counsel at sidebar if the foundation is inadequate or if at</p> <p>23 any point during the testimony it strays beyond the bounds of</p> <p>24 701.</p> <p>25 MR. ASKIN: Yes, your Honor, understood.</p> <p style="text-align: center;"><i>United States District Court</i> <i>Camden, NJ</i></p>

1 THE COURT: And I should mention, because Mr. Madden
2 raised, I know he thinks it's a fair argument, that having
3 admitted the two Rosario assaults, evidence of that, and the
4 James murder, that it's an admissibility issue, ultimately an
5 evidentiary issue, I suppose, or I'm not revisit -- I'm not
6 going to rely on Judge Irenas's -- we're not going to search
7 the record to find out how Judge Irenas ruled on every
8 evidentiary matter as we go forward.

9 And I think there probably is a meaningful distinction
10 between evidence intrinsic to a conspiracy and the run-of-the-
11 mill evidentiary rulings that a court makes on personal
12 knowledge and hearsay and that kind of thing. So --

13 MR. ASKIN: Agreed. And the testimony could come out
14 slightly differently. The cross-examination could be
15 different.

16 THE COURT: Right.

17 Mr. ASKIN: And I will concede to Mr. Madden, I think
18 this goes to his point, that being as the defense attorneys in
19 the first case -- and the Government recognizes this and Mr.
20 Madden has said it outright -- they took a certain view of the
21 case and of the Government's theory and, therefore, didn't
22 object to a lot of things.

23 And we understand there may be objections to a lot of
24 things, pieces of testimony that, or testimony that there
25 wasn't objection to, and the Court has to rule on all of that

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1 we look at as new. This Court is going to have to make its
2 own determinations based on what's happening either sua sponte
3 or the defense attorneys' objections in this trial, and
4 that -- we don't believe that's a law-of-the-case type of
5 thing.

6 THE COURT: All right. I think we're on the same
7 page in that regard.

8 All right. I've received various jury instructions,
9 which I appreciate. I was going to go down the motion list
10 here and make sure that I've ruled on everything.

11 467, to the extent adopted by the defense in this case,
12 is denied.

13 656 is denied without prejudice. That's the ruling on
14 the Zaffa statement.

15 733 and 7 -- 734 I believe is the motion to join.
16 That's granted.

17 733 and 731 are in essence duplicative of 467, renewed
18 467 motions, since those were motions made by the defendant in
19 the first trial. I'm denying 731 and 733.

20 I believe that those were all the pending motions.

21 Let me ask the Government to submit an order
22 memorializing that decision -- those decisions.

23 MR. ASKIN: Yes, your Honor, we'll submit it.

24 THE COURT: All right. We have street clothing
25 arranged. The courtroom has been jockeyed around since we

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1 were here last, but I believe it's all set up. This seat in
2 the back here will be for the paralegal from the -- is it
3 Cornerstone?

4 MR. MADDEN: Cornerstone.

5 THE COURT: Cornerstone, and the Government will have
6 its -- are there any technology issues? Are you going to use
7 any demonstrative evidence in your opening statement?

8 MR. ASKIN: Yes, your Honor. In fact, we gave
9 counsel for the defense and also the Court a copy of a DVD
10 that contains the Government's opening PowerPoint. We've
11 asked the -- we have asked or we will ask defense counsel to
12 take a look at that, and I guess if they have any objections
13 to anything, they can raise it with the Court before we open,
14 but Mr. Danilewitz, who will be opening for the Government,
15 has put together a PowerPoint of dozens and dozens of slides,
16 and they have it now.

17 So, if there's anything objectionable or any issues
18 they want to raise -- we don't feel it prejudices the
19 Government to give them that at this point, so we're giving it
20 to them and we're giving it to the Court, and also --

21 THE COURT: I always want it disclosed before so if
22 we're going to have an objection, we can rule on it before the
23 jury is in the jury room waiting for it.

24 MR. ASKIN: That's why --

25 THE COURT: I appreciate you turning it over to them,

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1 and they'll let me know if there's anything in there that they
2 believe is improper.

3 MR. ASKIN: All right. And technology issues, we'll
4 check with our paralegal, who is very skilled, Mr. Darragh.
5 In the last trial, he worked very well with the Cornerstone
6 guys because there needs to be some coordination. You know,
7 sometimes we're switching back and forth as to who is
8 controlling the system in the courtroom. And I'll double
9 check and Mr. Danilewitz will double check on all those
10 technology issues to try to make sure there aren't any hiccups
11 with that.

12 THE COURT: All right. Anything else I need to rule
13 on before tomorrow morning.

14 Mr. Madden?

15 MR. MADDEN: Your Honor, thank you. There was an
16 issue that came up this morning, or over the weekend, with
17 regard to Jencks material. The Government turned over some
18 fairly innocuous Jencks material, such as drug analysis and
19 that type of stuff.

20 It's my understanding, based on conversations with the
21 Government investigation, that there are witnesses,
22 co-defendants, who have given proffers and who have talked to
23 the Government and who may or may not be called as witnesses
24 by the Government, and none of their 302s or proffers or
25 anything have been turned over yet. I think it's the

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1 Government's position that they can wait until shortly before
 2 they call the witness. It's our position that we should have
 3 that before trial starts. Among other reasons, it affects
 4 opening, it affects decisions on what we're going to do and
 5 what my client is going to do.

6 THE COURT: This is one of the quirkiest things in
 7 the law because the statute says I can't, as a legal matter, I
 8 can't order them. Right?

9 MR. ASKIN: Correct.

10 THE COURT: The practice here has been for the U.S.
 11 Attorney's Office to turn it over. The remedy for late
 12 turning it over is a continuance of the trial to give the
 13 defense an adequate time to prepare. They have to have it
 14 really, despite what the statute says. So, I mean, if you
 15 turn -- so the more the Government can give, the earlier, the
 16 fairer it is, and the better for everybody.

17 I would grant a continuance if necessary to give
 18 adequate time, but where are you on the production of *Jencks*
 19 and to what extent can I count on the Government to turn over
 20 things sufficiently early to allow for adequate preparation?

21 MR. MADDEN: And I'm just talking about statements
 22 really. That's what I'm talking about.

23 MR. ASKIN: I think they're primarily or almost
 24 exclusively interested in cooperators' statements. That's
 25 what they're looking at.

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1 Your Honor, let me just say this preliminarily. With
 2 respect to cooperating -- two cooperating witnesses, Kareem
 3 Young and Maurice Thomas, who testified at the last trial and
 4 are anticipated to testify at this trial, they not only have
 5 all their *Jencks*, which I believe has been marked -- and I
 6 think Cornerstone has it -- but they actually -- including
 7 their prior testimony under oath at a prior trial, with
 8 respect to Kareem Young, not only his prior trial testimony,
 9 but his prior grand jury testimony, in addition to all the
 10 other *Jencks* documents. So they have everything for those two
 11 witnesses that the Government intends to call. They've had it
 12 for months and months and months, and that's --

13 MR. MADDEN: That's true. That's not what I'm
 14 talking about.

15 MR. ASKIN: What he's referring to specifically --
 16 and Mr. Madden, to his credit, brought up this issue with me
 17 informally before court, which I appreciate. He's talking
 18 about a particular individual that has been, A, interviewed by
 19 the Government, albeit not completely, rather briefly a long
 20 time ago, B, the Government hasn't determined whether we're
 21 going to call that individual, and, C, if we're going to call
 22 that individual, we would need clearly more time to debrief
 23 and prep that individual. Okay? And flush out his statements
 24 in terms of *Jencks*, 302, et cetera.

25 So, we're not required to turn over in advance. I

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1 understand the Court and the defense concerns that we need to
 2 turn it over if we're -- if we're going to call the witness.

3 I would back up one second and say, if we're not calling the
 4 witness, then unless -- correct me if I'm wrong -- unless
 5 there's *Brady* material in the 302, you know, unless it's a
 6 *Brady* issue, exculpatory issue, we're not required to turn
 7 over anything. Okay?

8 Now, this is a little bit of a quirk, and Mr. Madden --
 9 the quirk is that it's alleged by Mr. Madden that the witness
 10 has -- that the potential witness, the potential cooperator,
 11 has written to Mr. Mykal Derry and told him, hey, I could be a
 12 witness against you, or I'm coming as a witness, so that, you
 13 know, the cat's out of the bag I guess in Mr. Madden's view or
 14 the defense view.

15 With respect to that, though, I don't think that
 16 changes the calculation. If the Government is not going to
 17 call this guy and it's not a *Brady* issue, then we don't have
 18 to turn over anything, and I don't know why we would be
 19 required to do so.

20 THE COURT: The question is, when are you going to
 21 make the decision to call him? Do you have -- do I have a
 22 witness list from you?

23 MR. ASKIN: Well, we have a list of all those people
 24 that was rather over-inclusive.

25 THE COURT: Is he on that list?

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1 MR. MADDEN: Absolutely.

2 MR. ASKIN: Is he?

3 MR. MADDEN: He's on --

4 MR. ASKIN: I think he is because those lists
 5 generally include everyone that is going to be a witness or
 6 who might be mentioned, you know, and so I certainly think --

7 THE COURT: No. I need a witness list from you.

8 MR. MADDEN: Their list includes everybody who could
 9 possibly ever be mentioned in the case, not the witnesses they
 10 are actually calling.

11 THE COURT: I want to have a witness list from the
 12 Government.

13 MR. ASKIN: Okay.

14 THE COURT: So, you're going to have to make a
 15 decision about who you're going to call. I mean, you can
 16 include people you're potentially going to call. Let's narrow
 17 the world down.

18 MR. ASKIN: Fine. We'll put this guy's name on the
 19 list, but that doesn't mean we need to call him, right?

20 THE COURT: You don't have to. It's your case to
 21 try.

22 MR. ASKIN: Right.

23 THE COURT: But I want you to put down a list of
 24 people that you reserve the right to call.

25 MR. ASKIN: Okay.

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1 MR. MADDEN: If I may, your Honor, I believe that
2 this -- well, the person we're talking about, Tyrone Ellis, is
3 one of the alleged heads of this drug conspiracy, along with
4 my client, and so whether this person is going to testify and
5 what he is going to say is absolutely essential to this case
6 and to our defense in that the conspiracy either becomes
7 clearly as big as the Government is saying it is or maybe not
8 as big as the Government is saying it is. In other words, is
9 it 1,000 grams or is it less than that? Is it 600 grams of
10 heroin that's being sold as part of the conspiracy? This
11 person could be saying, absolutely, Mr. Derry and I worked
12 together the entire time or, as we believe, he might be
13 saying, we discontinued our conspiracy, in fact, I had
14 threatened on the phone to kill Mr. Derry.

15 And then our argument could very well become, well, at
16 that point that conspiracy, after they agree not only to break
17 up their conspiracy, but to kill Mr. Derry, then he's not
18 responsible for the drugs that person is being sold. And so
19 it goes from 1,000 grams down to a lower amount under the
20 mandatories. So, we're dealing with really important, germane
21 issues here that might be in this person's statement. So,
22 that's why we need it ahead of time.

23 MR. ASKIN: Your Honor, perhaps we can --

24 THE COURT: Let me hear from Mr. Markowitz.

25 MR. ASKIN: I'm sorry.

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1 MR. MARKOWITZ: Just based on what Mr. Madden just
2 said, that would be exculpatory evidence and we would be
3 entitled to that.

4 THE COURT: I was having the same thought. You
5 charged a certain amount, and that has ramifications for
6 mandatory minimum and maximum penalties, right, both of which
7 you have to prove to the jury beyond a reasonable doubt.

8 MR. ASKIN: Correct.

9 THE COURT: Those are elements. So, it's
10 exculpatory. If this person said he only distributed 600
11 grams in the conspiracy, then wouldn't that be *Brady*?

12 MR. ASKIN: Yeah, it would -- I'm sorry, yes, it
13 would, I think it would. So, here's the thing. This is where
14 we're in a little bit of a box here, too, and perhaps we can
15 just, I don't want to say kick the can down the road, but
16 defer this to a different date, given the fact that if Mr.
17 Ellis were to be going to be called by the Government, he
18 wouldn't be the first witness, the second witness, the third
19 witness. It is going to be a while.

20 And here is the thing, Judge. Let's assume he was
21 fully interviewed and it's unclear, we would err on the side
22 certainly of any *Brady* issue of turning it over, we haven't
23 fully debriefed this guy, and I have my notes from the
24 interview of him, the first interview of him, and I believe a
25 draft 302 that I don't believe was finalized, maybe it was and

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1 maybe it wasn't, and it's not really complete. So, if we're
2 going to go down this road at all, then the Government either,
3 A, is the Government calling him as a witness, in which it
4 needs to be turned over as *Jencks*, or B, to avoid any type of
5 a particular *Brady* situation, it just appears to me, and some
6 of this is occurring to me as we stand here talking about it,
7 that the Government needs to fully interview this guy,
8 assuming he's willing.

9 Now, the other issue I would point out is he's a
10 defendant who at this point hasn't pled guilty, although he
11 may do so soon. He's represented by counsel. His attorney is
12 Rocco Cipparone, and I believe Mr. Madden is aware of that.
13 In fact, Mr. Madden asked me --

14 THE COURT: A defendant where?

15 MR. ASKIN: He's the defendant -- when we arrested
16 the 34 people in this case, we broke the indictments, even
17 though we're claiming it's one 846 conspiracy of all the guys,
18 the Ellis guys and the Mykal Derry guys, we broke the case
19 into two separate indictments with --

20 THE COURT: Who has the other case?

21 MR. ASKIN: Judge Thompson does. Judge Irenas had it
22 and now it's in front of Judge Thompson. And everybody in the
23 Ellis indictment that's before Judge Thompson, everyone has
24 entered a guilty plea before Judge Thompson or, when she
25 wasn't available, before Judge Irenas, except Tyrone Ellis.

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1 Now, whether or not he's going to enter a plea soon, he may,
2 but that's undetermined. He's represented by counsel, and
3 even if he pleads guilty, he's got Fifth Amendment rights, and
4 they understand that.

5 So, to the extent that Mr. Ellis is willing to be
6 interviewed, further interviewed by the Government, to me it
7 would seem the prudent thing to do for the Government with our
8 agent present to interview him fully, develop that record, and
9 then determine if it's even remotely close whether or not it's
10 a *Brady* issue, in which case we would turn it over, or if
11 we're going to -- or if it's a *Jencks* issue, it's not *Brady*
12 but it's *Jencks*, we're going to use him, turn it over, and we
13 would do so as soon as possible.

14 But right now I'm in the unenviable position that I
15 don't really have a full interview of this witness. And the
16 Court might wonder, well, why is that? Well, I don't want to
17 get into too much of the Government's strategy and tactics,
18 but I didn't really, prior to coming in here today, I didn't
19 really -- I wasn't leaning towards calling this guy. So --

20 THE COURT: Do you have a plea agreement with him?

21 MR. ASKIN: We have plea agreements that have been
22 sent out to him as proposed plea agreements. None of them
23 have been signed and returned at this point, although that may
24 happen shortly.

25 THE COURT: All right. Mr. Madden.

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1 MR. MADDEN: I'm sorry. Mr. Ellis sent a letter to
2 my client saying I'm going to testify, I'm going to plead.
3 The Government has taken statements from him and talked to
4 him. I'm just asking for those 302s. I know they're saying
5 they're not finished. Finish them, get them to me. We're
6 opening tomorrow.
7 THE COURT: All right. Well, there's two issues
8 here. A, if you're aware of *Brady* information in writing or
9 an oral statement by this Mr. Ellis that's fairly
10 characterized as *Brady*, you should turn it over now and not
11 wait for a determination as to whether or not he pleads
12 guilty.
13 MR. ASKIN: Right.
14 THE COURT: Or and/or cooperates. I'm not going to
15 obligate the Government to turn over *Jencks* unless -- until
16 they determine that they intend to call him, but don't tell
17 the defense and me the night before that you intend to call
18 him because if you signed him up and he's a cooperator and
19 he's on your list and you think there's some chance you're
20 going to call him, then I think you should include it in
21 your -- some kind of rolling *Jencks* disclosure here so there's
22 adequate time to prepare.
23 MR. ASKIN: Agreed. I don't think that will be an
24 issue, but the Court raises the point of the potential *Brady*
25 issue.

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1 THE COURT: In your notes, if he said I don't think
2 those guys distributed more than 600 grams, if he made that
3 statement and you heard it or an agent heard it, it's within
4 your knowledge or certainly if -- it doesn't matter if it's
5 written down or not, it's an oral statement, you're aware of
6 it, send him a letter disclosing that. If that didn't happen,
7 then there's nothing to disclose. If there's something that's
8 arguably *Brady*, you should turn it over now.
9 MR. ASKIN: Yes, your Honor. Agreed. I'm going to
10 review today -- I'll review the 302 that was drafted to date,
11 I don't know if it's draft or final, but I don't think it
12 matters for purposes of *Brady*.
13 THE COURT: It doesn't.
14 MR. ASKIN: And I will review my own personal notes
15 which I have in the file with respect to that. If there's --
16 we'll make Mr. Danilewitz, myself and the supervisor will make
17 the determination, and if it's even close to *Brady*, we'll turn
18 it over in a letter to Mr. Markowitz and Mr. Madden.
19 THE COURT: All right.
20 MR. MADDEN: I'm sorry. Your Honor, there's one
21 other witness, potential witness I don't know if there's any
22 kind of *Brady* stuff on. Ambrin Qureshi, Am I saying that
23 right?
24 MR. ASKIN: Oh, Ambrin Qureshi.
25 MR. MADDEN: Thank you.

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1 MR. ASKIN: She is another witness who has been
2 interviewed. I haven't taken a close look at it. I'll take a
3 close look at that. We hadn't intended to call her, at least
4 at this point. So, to me it didn't seem to me to be a *Jencks*
5 issue. With respect to the *Brady* issue, I guess I'll just
6 have to review her interview, same thing, and just make sure
7 there's nothing in there that would appear to be anything
8 close to *Brady*. If it is, we'll turn it over in a letter.
9 MR. MADDEN: Thank you.
10 THE COURT: All right. Now, let's fix the schedule
11 for production of *Jencks*. I think my standard order says one
12 thing. I think it says three days before trial, actually.
13 Do you have my standard pretrial order?
14 I suppose it could be three days before the witness.
15 What's the Government's offer to the defense and the Court
16 concerning the production of *Jencks*?
17 MR. ASKIN: Judge, I think that, and I would ask that
18 this be the case, that I think three days before the witness
19 testifies would be appropriate, keeping in mind that the
20 Government's primary *Jencks* witnesses and all this *Jencks*
21 production for the people that we're clearly going to call has
22 already occurred and it occurred months ago. So, we're only
23 talking about a limited number of witnesses. And we're in a
24 position where we don't even know -- these people are sort of
25 like the, you know, to make a sports analogy, they're sort of

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1 the bench players that may not be called. They're not the
2 starters. So, we haven't even made those determinations. So,
3 I think it would be inappropriate for the Court to order us to
4 turn it over pretrial. That being said --
5 THE COURT: I'm sorry. My Rule 16 order.
6 MR. ASKIN: That being said, I do think it is prudent
7 for the Government to engage in a practice, although not
8 required by law, of turning it over at least, what is that, 72
9 hours in advance, so that they have an opportunity, a fair
10 opportunity. We're very mindful of that. We don't want to
11 dump anything on them in the last minute where they're not
12 prepared. We're going to try to avoid that.
13 THE COURT: All right. Mr. Madden. Go ahead,
14 consult.
15 MR. MADDEN: I'm curious as to how soon ahead of time
16 Judge Irenas required it to be turned over. I mean, in some
17 ways he already ruled it all to be turned over.
18 MR. ASKIN: Judge, I can tell you that we went
19 through that with Judge Irenas extensively and he turned to me
20 and he turned to the defense, including I think when Mr.
21 Madden and Mr. Markowitz were present, and said that I am not
22 required -- I cannot by law order the Government to turn it
23 over, which is a classic thing, I don't have -- the law is
24 very clear on this. However, Mr. Askin, I'd like you to turn
25 it over as soon as possible so that we don't have delays in

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1 the trial. It is the same song and dance on both sides. And
2 I, like I'm standing here today, said Judge, we'll do that
3 within the bounds of security. There have been very -- there
4 are very much security concerns here that are even beyond the
5 average drug case.

6 We've had situations, Mr. Rosario goes to the police,
7 they try to kill him. We had situations where one of our
8 informants, after tapes were turned over in this case, reports
9 to the detectives that he was beat up because you got Koose
10 jammed up, Koose being a -- Koose being a nickname for Mykal
11 Derry. So, we have some very serious security concerns.

12 In addition, your Honor, throughout the pendency of the
13 pretrial matters in this case, we have witnesses, including
14 Kareem Young, the cooperating witness, saying that Mr. Mykal
15 Derry engaged in a pattern of essentially intimidation of
16 people to try to get them not to plead guilty, and even to not
17 cooperate, not even to plead guilty because that would be
18 helping the Government.

19 So, we have a pattern in the Government's view, in my
20 mind when I'm making these decisions, of security concerns,
21 actual violence towards Government witnesses, including an
22 attempt to kill one witness in a state version of this case, a
23 related state case, the Rosario matter, one, after we turned
24 over Rule 16 discovery, a beating up by individuals believed
25 to be associated by Mykal Derry in Atlantic City of one of our

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1 informants, and a pattern, according to the cooperating
2 witness, Kareem Young, of trying to intimidate guys who were
3 in custody at the Federal Detention Center into not
4 cooperating with us, not even pleading guilty.

5 So, I just want the Court to have that background of
6 the decision-making process that I'm engaging in. That being
7 said, there are security things that are in place and can be
8 put in place, and I think three days or more before the
9 witness hits the stand, if they are going to be called to
10 testify, is an appropriate order.

11 THE COURT: All right. Well, it's not uncommon for
12 me to issue such an order. I don't know what Judge Irenas did
13 in this particular case, but three days, I can't order any
14 more, and I think it's fair under the circumstances, it's a
15 very typical time frame for such disclosure.

16 Mr. Madden, Mr. Markowitz, do you have any argument in
17 that regard?

18 MR. MADDEN: No, your Honor.

19 MR. MARKOWITZ: No, your Honor.

20 THE COURT: All right. Three days before a witness.
21 All right. What else?

22 MR. MADDEN: I have nothing else.

23 THE COURT: Mr. Markowitz.

24 MR. MARKOWITZ: Nothing else, your Honor.

25 DEFENDANT MYKAL DERRY: Pat, for the record, Malik

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1 Derry had nothing to do with the conspiracy.

2 THE COURT: Mr. Derry.

3 DEFENDANT MYKAL DERRY: I mean --

4 THE COURT: I know, I know you have your dispute with
5 Mr. Askin, but I don't want it boiling over in the courtroom.

6 DEFENDANT MYKAL DERRY: All right. You got it, your
7 Honor.

8 THE COURT: All right. Thank you, sir.

9 DEFENDANT MYKAL DERRY: I'll wait.

10 THE COURT: Mr. Derry, we're not done yet.

11 DEFENDANT MYKAL DERRY: All right.

12 THE COURT: All right.

13 Anything else, Mr. Askin?

14 MR. ASKIN: Your Honor, I can't think of anything
15 further at this time.

16 THE COURT: All right. I've issued my rulings. The
17 Government will submit an order.

18 Mr. Derry --

19 DEFENDANT MYKAL DERRY: I apologize, your Honor.

20 THE COURT: All right. We don't need that. You
21 don't need it. It's not a good situation. You've been very
22 respectful and calm during the proceedings before me. It's in
23 your best interest. I hope you will continue to do so.

24 DEFENDANT MYKAL DERRY: I apologize.

25 THE COURT: You're well represented. The fight will
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11:37 1 be fought. The evidence will be presented, and the jury will
11:37 2 do what the jury -- I need to preside over a fair trial, and I
11:37 3 need your help and cooperation to do it. Okay?

11:37 4 DEFENDANT MYKAL DERRY: You got it.

11:37 5 THE COURT: All right. Sir, thank you.

11:37 6 DEFENDANT MYKAL DERRY: Thank you.

11:37 7 THE COURT: I guess we're done. We'll see you
11:37 8 tomorrow morning at 9:15. The jury will be here at 9:30.

11:37 9 THE DEPUTY COURT CLERK: Nine o'clock.

11:37 10 THE COURT: Or nine o'clock. We're starting at 9:00.

11:37 11 MR. ASKIN: Oh, we're starting at 9:00? Okay.

11:37 12 THE COURT: Yes. I'm sorry. We're starting at 9:00.

11:38 13 MR. ASKIN: All right. So, we'll be here before
11:38 14 9:00, your Honor.

11:38 15 THE COURT: Yes, 8:45.

11:38 16 MR. ASKIN: All right. Thank you.

11:38 17 THE COURT: Very good.

11:38 18 THE DEPUTY COURT CLERK: All rise.

11:38 19 (Proceedings concluded at 11:38 a.m.)
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*United States District Court
Camden, NJ*



U.S. Department of Justice

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September 28, 2014

VIA ELECTRONIC MAIL
(To all non-sentenced Derry defendants)

Re: U. S. v. Mykal Derry et al (Dirty Block drug case).

Dear Counsel:

On September 8, 2014, the government interviewed a potential witness who knows Mykal Derry and all of the "Group One" defendants in the pending case- U.S. v. Mykal Derry, et al, Criminal No. 14-050 (JED). The witness was involved in distributing heroin with Mykal Derry in the Stanley Holmes housing complex in Atlantic City.

The witness provided information in response to questions by the government's counsel and agents. During the meeting, the witness indicated that he/she knew Raymond Mack, Kareem Bailey and Lamar Macon to be drug dealers associated with Mykal Derry, but had no knowledge of these defendants receiving heroin from Mykal Derry. The witness did indicate that he/she knew that Mack, Bailey and Macon were selling cocaine/crack cocaine in and around the Stanley Holmes housing complex in Atlantic City. The witness also told the government's counsel and agents that Kareem Bailey, in addition to selling cocaine/crack cocaine, did distribute heroin on several occasions but it was the witness' understanding that these quantities of heroin may have been coming directly from Bailey's mother, Audrey Bailey.

The witness told the government's counsel and agents that he/she had seen two different guns stored inside a "trap house" used to store and distribute heroin in the 200 block of Rosemont Place inside the Stanley Holmes housing complex. The witness described one of the guns as a black .45 caliber (semi-automatic) handgun. The witness saw the gun in a cabinet in the kitchen

APPENDIX P

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area of the residence. The witness indicated that guns were not routinely out in the open or displayed inside this residence while the witness was present.

The interview of this witness was not completed and the government's counsel is attempting to reschedule another proffer to complete the interview sometime this week and will then ask the assigned agents to draft a report of the interview (FBI "302" report). The government's counsel did not have time to ask the witness to provide detailed information about other defendants and unindicted co-conspirators and did not complete the questioning of the witness with respect to defendants Raymond Mack, Kareem Bailey and Lamar Macon.

At one point in the interview, before discussing the role of many of the defendants and the witness' knowledge of their criminal activity and associations, the witness asked AUSA Patrick Askin if "we could just *downplay* some of these guys," in an apparent reference to defendants in the Group I trial group and other Dirty Block defendants. The witness then said something about "you got the main guys" in reference to Mykal Derry, Shaamel Spencer and possibly unnamed others.

The witness has entered a guilty plea and is awaiting sentencing before Judge Irenas on a charge of conspiracy to distribute and PWID 100 grams or more of heroin, contrary to 21 U.S.C. Sections 841(a)(1) and 841(b)(1)(B) and in violation of 21 U.S.C. Section 846. The witness remains represented by counsel.

A copy of the plea hearing transcript and a copy of the FBI report of interview (302 report) will be obtained by the government when they are available and will be provided to defense counsel. The government is not disclosing the witness' identity at this point because the witness has provided incriminating information to the government about some of the defendants charged in the case (which is not required to be disclosed at this point by the Jencks Act) and as a result, may be subject to threats, intimidation and retaliation. The government is trying to strike a balance between the absolute need to meet the governments' ongoing discovery obligations under Brady and the Standing Order of the Court and the need to protect witnesses from intimidation, threats and physical danger from defendants and/or associates of the defendants who may attempt to silence the witness or improperly influence their testimony.

Please feel free to contact me to discuss the situation and with any requests for additional disclosures with regard to this witness. To conserve prosecutorial, judicial and defense resources, I would encourage you to contact me before filing any motions requesting additional disclosures with regard to this witness, to see if the parties can resolve the issues without a ruling and order from the Court.

Thank you for your time and attention to this matter.

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Very truly yours,

PAUL J. FISHMAN
United States Attorney

/s/Patrick C. Askin
By: PATRICK C. ASKIN
Assistant U.S. Attorney

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December 30, 2016

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Lawrenceville, NJ 08648

Re: *United States v. Malik Derry et al.*, Crim. No. 14-50 (NLH)

Dear Counsel:

As a follow up to our discussions and correspondence, including Mr. Gross' letter to the Court of December 20, 2016, we are enclosing the following materials:

- Ex. 1 – FBI 302 report of a November 2013 interview of Laquay Spence; and
- Ex. 2 – FBI 302 report of a March 2016 interview of Franklin Simms.

These materials supplement our previous disclosures of the FBI 302 reports of interviews of Jodi Brown and Ambrin Qureshi.

As you know, our disclosure of these materials to you is subject to our agreement that they are for "attorneys' eyes only." Furthermore, this disclosure should not be understood as a concession on the part of the United States regarding the status of these materials as *Brady* materials or, for that matter, that they are discoverable under any other applicable statute, rule, or case law.¹ Indeed, we are confident that they are not discoverable materials, but are nonetheless sharing them with you due to their potential relevance to your pending Rule 37 motion – *i.e.*, merely because of the witness' statements regarding their limited knowledge of the reasons for the murder of Tyquinn James, and/or who perpetrated the homicide.

¹ For example, Exhibit 2, contains information that was only obtained after the trial that ended in August 2015.

Should you wish to discuss this matter further, kindly let us know.

PAUL J. FISHMAN
United States Attorney

/s/ Justin C. Danilewitz
By: JUSTIN C. DANILEWITZ
PATRICK C. ASKIN
Assistant U.S. Attorneys

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3

4 UNITED STATES OF AMERICA

5 CRIMINAL NUMBER:

6 -vs-

7 1:14-cr-00050-NLH

8 MYKAL DERRY, MALIK DERRY,

9 Jury Trial

10 Defendants.

11 Mitchell H. Cohen United States Courthouse
12 One John F. Gerry Plaza
13 Camden, New Jersey 08101
Tuesday, July 7, 2015

14 B E F O R E: HONORABLE NOEL L. HILLMAN
15 UNITED STATES DISTRICT COURT JUDGE

16 A P P E A R A N C E S:

17 PAUL J. FISHMAN, UNITED STATES ATTORNEY
18 BY: PATRICK C. ASKIN, AUSA
19 JUSTIN C. DANILEWITZ, AUSA
EDMUND MALLQUI-BURGOS, AUSA

20 LAW OFFICES OF R. EMMETT MADDEN
21 BY: ROBERT EMMETT MADDEN, ESQUIRE
22 Attorney for Defendant Mykal Derry

23
24 Certified as true and correct as required by Title 28,
U.S.C., Section 753

25 /S/ Robert T. Tate

/S/ Carol Farrell

1 A L S O P R E S E N T:

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3 MARKOWITZ GRAVELLE, LLP
4 BY: JOSHUA L. MARKOWITZ, ESQUIRE
5 Attorney for Defendant Malik Derry
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W I T N E S S I N D E XWITNESSPAGE

CHRISTOPHER C. KOPP,	710
DIRECT EXAMINATION OF SPECIAL AGENT KOPP BY	710
MR. ASKIN:	

E X H I B I T I N D E XEXHIBIT NUMBERPAGE

GOVERNMENT EXHIBIT G-3A WAS RECEIVED IN EVIDENCE	733
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1 (In open court at 8:59 a.m.)

2 (Defendants present.)

3 THE COURT: All right. Please be seated. Mr.
4 Madden, Mr. Markowitz, do you need a minute with your clients?

5 MR. MADDEN: No, we're good. Thank you.

6 THE COURT: All right. Let me just mention a few
7 things and then I'll hear any issues that you want me to
8 address.

9 The jury is ready to go. They haven't been sworn, so
10 the first thing will be to swear them. I've given them
11 notepads. We had an understanding they would have notepads
12 and pens.

13 I'm going to have counsel just introduce themselves
14 again, each individually. It's been some time, so just for
15 orientation purposes. I assume there's no objection to that.
16 And then I'm going to give them my preliminary instructions
17 again. Probably take about five minutes, 10 minutes, five to
18 10 minutes. I just think the length of time that's passed, it
19 would be appropriate just to remind them of general
20 principles.

21 From now forward, as I indicated, there's no need to do
22 an all rise for me when I come in and out of the courtroom.
23 On breaks, I'll be coming in and out. The all rise will be
24 for the jury from here on in.

25 And I think there was something else I wanted to raise

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1 with you, but I guess that's all I can think of now.

2 Mr. Madden?

3 MR. MADDEN: If I may, your Honor. We have an
4 agreement on the limiting instruction as far as the drug
5 trafficking, calling it the Derry drug trafficking
6 organization or whatever it is. Initially I thought after
7 opening, but if you're going to give limiting instructions,
8 maybe it will just flow better to read that at that time, too.

9 THE COURT: Makes sense. Any objection to that?

10 MR. ASKIN: No, your Honor. And Mr. Danilewitz
11 drafted this limiting instruction, typed it up, and we went
12 over it with counsel this morning. They had a couple of minor
13 changes that the Government agrees to, and with those edits
14 made on the document, because we don't have time to go
15 upstairs and type it, I think we're all in agreement on what
16 the limiting instruction should be.

17 THE COURT: All right. Do you want to give that to
18 me?

19 MR. ASKIN: Yes, if I might approach, your Honor.

20 THE COURT: Yes. Thank you very much.

21 MR. ASKIN: Thank you.

22 THE COURT: All right. Very good.

23 Mr. Danilewitz, you'll give the opening for the United
24 States?

25 MR. DANILEWITZ: Yes, your Honor.

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1 THE COURT: And how long do you expect to be?

2 MR. DANILEWITZ: Your Honor, I anticipate it will be
3 between an hour and an hour-and-a-half approximately.

4 THE COURT: Okay. All right. We do tend to take a
5 break. We'll see how the timing goes. All right.

6 And Mr. Madden?

7 MR. MADDEN: I will not be an hour-and-a-half. Is
8 that what you're asking?

9 THE COURT: Yes.

10 MR. MADDEN: I don't have anything. I'm just
11 standing up.

12 THE COURT: How long do you think for timing
13 purposes?

14 MR. MADDEN: Not very long, 15 minutes.

15 THE COURT: Mr. Markowitz?

16 MR. MARKOWITZ: Same, your Honor.

17 THE COURT: All right. Will you be prepared to go
18 right after my preliminary remarks?

19 MR. DANILEWITZ: I will, your Honor, yes.

20 THE COURT: All right. Very good.

21 MR. MARKOWITZ: Patrick, did you need to see us?

22 MR. ASKIN: Oh, yes, I did want to -- your Honor, if
23 we're now at the issues that we want to bring up with the
24 Court, can I talk to counsel for one minute?

25 THE COURT: Yes.

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1 (Brief pause.)

2 MR. ASKIN: Your Honor, two preliminary matters that,
3 I appreciate the Court's opportunity for me to speak with
4 counsel, two preliminary matters that I discussed with counsel
5 and I'd like to bring up with the Court.

6 One is sequestration. I think the parties are jointly
7 asking for sequestration with the caveat that the Government
8 be permitted, and counsel has no objection to this, to have
9 Special Agent Christopher Kopp remain in the courtroom, and
10 his co-case agent, Special Agent Sean Yan, be permitted to go
11 in and out of the courtroom, who is handling all of our
12 physical evidence and physical exhibits. And counsel has no
13 objection to that. Other than those two Government case
14 agents, the Government is moving for sequestration. I
15 understand the defense is moving for sequestration as well.

16 THE COURT: All right. Mr. Madden?

17 MR. MADDEN: I'm sorry. We have no objection to
18 sequestration, Judge, and we have no objection -- did you
19 bring up --

20 MR. ASKIN: The two agents, right.

21 THE COURT: The two agents.

22 MR. MADDEN: No objection.

23 MR. MARKOWITZ: Nor do I, your Honor.

24 THE COURT: All right. Thank you for your agreement.

25 MR. ASKIN: With respect to the Court's request

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1 yesterday for a list of the Government's witnesses or like a
2 narrowed list of the true witness list of the Government's
3 witnesses, I've gone over this with Mr. Madden and
4 Mr. Markowitz. I don't think we're able to reach an actual
5 agreement on it, but I would like to bring this up with the
6 Court.

7 Mr. Danilewitz and I researched the case law on this
8 for the Government last night, and certainly we'll comply with
9 whatever the Court tells us to do, but we'd like to bring this
10 up.

11 In a non-capital case, as the Court is aware of, the
12 defense is not entitled to a witness list. And I don't bring
13 this up as a matter of sort of philosophy or for the sake of
14 argument but because there have been very real documenting in
15 the Government's anonymous jury motion which led Judge Irenas
16 to impose an anonymous jury or to hold that there should be an
17 anonymous jury and impose with that very specific security
18 constraints or procedures that this Court has adopted. There
19 has been a pattern of intimidation, violence towards
20 witnesses, attempts to get at witnesses, attempts to obstruct
21 the process at a lot of turns, if not at every turn.

22 And while I implicitly trust Mr. Madden and
23 Mr. Markowitz, you know, the defendants may behave; they may
24 not. They may -- you know, the best predictor of future
25 behavior as we all know is past behavior, and I have my

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1 concerns.

2 To give the Court a witness list and have that shared
3 with the defendants would highlight -- particularly given that
4 there were, 95 percent of these people testified at the first
5 trial, would highlight individuals that are cooperators or I
6 should say potential cooperators the Government may or may not
7 call. And the Government has already agreed to a procedure
8 with the Court and with defense counsel of providing *Jencks*
9 material on any witness we decide to call, you know, to refer
10 to the cooperators three days or 72 hours before that witness
11 hits the stand. And --

12 THE COURT: Why doesn't the witness list mirror the
13 *Jencks* production? Just disclose to me and the other side --
14 obviously, the disclosure of *Jencks* is a -- is an
15 acknowledgment of your intention to call them, right?

16 MR. ASKIN: Yes. So, in other words, we could take
17 off the witness list the people that we haven't produced
18 *Jencks* yet for and we haven't decided on?

19 THE COURT: And add them three days before their
20 testimony.

21 MR. ASKIN: Oh, then that's a non-issue, although we
22 will have to modify this. Because we thought the Court wanted
23 us to put on there everyone that you're --

24 THE COURT: Well, I prefer it, but it seems to me
25 that it doesn't prejudice the Government or raise any

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1 additional security concerns to have a list that mirrors the
2 Jencks production.

3 MR. ASKIN: I completely agree with the Court on that
4 point and that would solve our security concerns and then we
5 will have to produce, hey, we're going to call these other
6 witnesses three days in advance of calling them.

7 THE COURT: I just -- you know, my job, part of my
8 job here is case management, moving the thing along. I like
9 to know who is your next witness, how long are they going to
10 be, blah-blah-blah-blah, fill the day.

11 MR. ASKIN: Understood.

12 THE COURT: That's part of what I do.

13 MR. ASKIN: Understood, your Honor, understood. I'm
14 just --I'm just trying to sort of balance that with the
15 security concerns that the Government has, but the Court has
16 come up with a good suggestion that I'm okay with because
17 you're right, it doesn't cause us any security concerns. But
18 we would have to just maybe at a break retype this or delete
19 some names from there that Jencks production has not been made
20 yet, number one, and number two, these are potential
21 cooperators that we may never call.

22 THE COURT: That's fine. Mr. Madden, any objection
23 to that?

24 MR. MADDEN: No, your Honor. Thank you.

25 THE COURT: Mr. Markowitz?

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1 MR. MARKOWITZ: No, your Honor.

2 THE COURT: All right. That seems to be a fair
3 solution.

4 MR. MADDEN: Yes, your Honor.

5 THE COURT: All right. What else?

6 MR. ASKIN: One other thing to put on the record.
7 Yesterday we had -- we discussed at length on the record an
8 interview of Tyrone Ellis that was conducted, which was an
9 initial, very limited in time interview, and the defense was
10 requesting that we produce the 302 of that interview. I said
11 it might be a draft 302. It is a draft 302 prepared at our
12 request about a year after the proffer, because I don't
13 believe the agent was going to prepare it because it was never
14 completed.

15 We did produce that, and because the document is so
16 incomplete, we took the unusual step of not only giving them
17 the draft 302 but giving them the agent's rough notes, which
18 you normally don't do without in camera inspection, and also
19 giving them my notes as the Assistant U.S. Attorney conducting
20 the proffer with Special Agent Kopp. So they have all of
21 that.

22 It's been redacted but only in the fashion of family
23 members, addresses, Social Security numbers, and other stuff
24 to protect the security of individuals involved. They have
25 all that. I wasn't able to, you know, deal with this and

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1 figure it out until very late last night. Before midnight
2 last night I e-mailed it to them with an e-mail, and they have
3 those redacted documents that I have encouraged them if they
4 have any questions to contact me with respect to that.

5 But we are not -- we sent the e-mail saying that we
6 don't concede that any of this is required by Rule 16,
7 required by *Jencks*, or required by *Brady* at this point, and
8 reserving certain rights that we have. But nevertheless, in
9 an abundance of caution, based on their request, the Court's
10 comment to me if it involves quantity or some vague references
11 to quantity in there, I figure just turn it over. So I just
12 want to put on the record that they have that.

13 THE COURT: I view that as a wise course and
14 appreciate you doing it.

15 Mr. Markowitz, Mr. Madden, do you have any comments?

16 MR. MARKOWITZ: No, your Honor.

17 MR. MADDEN: No, your Honor.

18 THE COURT: All right. Let's just take a five-minute
19 break, get ready to go, and then we'll go -- if you could
20 finish by 11:00, that would be helpful. We'll take a short
21 break then, and then rough timing ought to be right up to
22 noon, and then we'll take a lunch break, and you'll have your
23 first witness ready to go at one o'clock.

24 MR. MADDEN: Thank you, your Honor.

25 MR. DANILEWITZ: We will, your Honor.

000417a

1 MR. ASKIN: Thank you.

2 THE COURT: All right. Five-minute break.

3 MR. MADDEN: Thank you, your Honor.

4 (Recess at 9:26 a.m.)

5 (In open court at 9:29 a.m.)

6 THE COURT: All right. Are we ready to proceed?

7 MR. DANILEWITZ: Thank you, your Honor.

8 THE COURT: Are we going to have a chair for you, Mr.
9 Danilewitz?

10 MR. DANILEWITZ: Yes. Thank you, your Honor.

11 Although I will be doing a lot of standing.

12 THE COURT: All right. Very good. We're ready for
13 our jury.

14 THE DEPUTY COURT CLERK: All rise.

15 (Whereupon the jury entered the courtroom.)

16 THE COURT: All right. Thank you, please be seated.
17 Good morning.

18 RESPONSE: Good morning.

19 THE COURT: Welcome back. It's been a little while.
20 We'll go over that in a moment.

21 The first order of business is to have you sworn.

22 Ms. Novoa.

23 THE DEPUTY COURT CLERK: Please stand, raise your
24 right hand. Do you solemnly swear that you will well and
25 truly try a true deliverance making the case now on trial and

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1 render a true verdict according to the law and evidence so
2 help you God?

3 RESPONSE: Yes.

4 THE COURT: All right. Thank you, please be seated.

5 All right. It has been a while, so I thought it would
6 be a good idea just to have counsel introduce themselves, and
7 then I'll give you -- go back over the preliminary
8 instructions that I gave you last time. I'm sure you remember
9 them, but they are important, and we'll repeat them just for
10 orientation -- for purposes of orientation.

11 All right. If I could have counsel introduce
12 themselves and anyone associated at their table.

13 MR. ASKIN: Yes. Thank you, your Honor. Good
14 morning, ladies and gentlemen. I'm Patrick C. Askin,
15 Assistant U.S. Attorney, and with us at counsel table is
16 Special Agent Christopher Kopp from the FBI, and at the back
17 table is our paralegal, Patrick Darragh.

18 I'll let the other attorneys at our table introduce
19 themselves. Thank you.

20 MR. DANILEWITZ: Good morning, ladies and gentlemen.
21 Assistant U.S. Attorney, Justin Danilewitz, for the United
22 States.

23 MR. MALLQUI-BURGOS: Good morning. Edmund
24 Mallqui-Burgos, Special Assistant United States Attorney, for
25 the United States.

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1 THE COURT: All right. Gentlemen, good morning.
2 Mr. Madden.

3 MR. MADDEN: Good morning. My name is Robert Emmett
4 Madden, and I represent Mykal Derry.

5 MR. MARKOWITZ: Joshua Markowitz and I represent
6 Malik Derry.

7 THE COURT: All right. Welcome and good morning to
8 you as well, gentlemen.

9 All right. Now that you have been sworn, I am going to
10 give you a repeat of the preliminary instructions that will
11 help you -- help guide you in your participation in this
12 trial.

13 As I told you previously, it is your function in this
14 case to decide the issues of fact. Your decision on the
15 issues of fact is to be based solely on evidence. Nothing I
16 say is evidence and nothing any of the lawyers say is
17 evidence. Questions by themselves are not evidence.
18 Objections are not evidence. Testimony that has been excluded
19 or which you are told to disregard is not evidence.

20 The evidence consists of the sworn testimony of
21 witnesses and of the exhibits which will be received in
22 evidence for your consideration. Also in some instances there
23 might be facts the lawyers agree to or facts which I will
24 instruct you to find.

25 Now, there are two kinds of evidence, direct and

1 circumstantial. Direct evidence is direct proof of a fact,
2 such as testimony of an eyewitness. Circumstantial evidence
3 is proof of facts from which you may infer or conclude that
4 other facts exist.

5 I will give you further instructions on these as well
6 as other matters at the end of the case, but have in mind that
7 you may consider both kinds of evidence.

8 Now, how do you decide what to believe and what not to
9 believe? Listen to the witnesses, watch them and observe
10 them, then decide whether you believe or disbelieve them the
11 same way you decide such questions in your ordinary life. Did
12 they know what they were talking about? Were they candid,
13 honest, open and truthful? Do they have a reason to falsify,
14 exaggerate or distort their testimony? Use your common sense
15 and good judgment to evaluate their testimony based on all the
16 circumstances.

17 Now, it's very important that you keep an open mind
18 throughout this case. Do not form any judgments until the
19 evidence is concluded and the case is submitted to you.
20 Remember that the evidence comes in step by step. First a
21 witness testifies on direct examination. When he or she has
22 finished, the other side has a right to cross-examine him or
23 her. And I allow what's called redirect and recross, so each
24 will have, if they choose, two rounds of questioning for each
25 witness.

1 First the Government presents its evidence, then the
2 defendant has an opportunity to present evidence. Remember
3 that there may be two or more sides to any story. You will
4 not be in a position to form any judgment as to what you
5 believe until you have heard all the evidence in the case.

6 Now, please be sure that none of your friends or
7 relatives are present in the courtroom without my knowledge.
8 It is particularly important that you do not hear from them
9 what happened during those times that you were not in the
10 courtroom, and also that you do not discuss with them what
11 happened when you were present. If at any time you see a
12 friend or relative come into the courtroom, you should be sure
13 to send a note to me through the clerk, through Ms. Novoa, at
14 the first opportunity.

15 Now, during the course of the trial, and we will be
16 here for a while, do not discuss the case among yourselves or
17 with any other person. You will discuss it among yourselves
18 only after all the evidence is in and the case is given to you
19 to discuss and decide in the jury room. Until then, keep your
20 impressions to yourselves. Do not read anything that might be
21 in the newspapers about this case or on the Internet, stories
22 or articles about anyone involved with it. Do not watch or
23 listen to any media, television, radio news programs or
24 reports about the case. Do not allow anyone to speak to you
25 about the case. Do not do any research or investigation on

1 your own about the case. Do not use a computer, cell phone,
2 other electronic devices or tools of technology while in the
3 courtroom or during deliberations. These devices may be used
4 during breaks or recess -- recesses for personal uses, but may
5 not be used to obtain or disclose information about this case.
6 You may not communicate with anyone about the case on your
7 cell phone, through e-mail, BlackBerrys, iPhones, text
8 messaging or on Twitter or through any blog or website,
9 through any Internet chat room or by way of any social
10 networking websites, including Google Plus, Facebook, MySpace,
11 LinkedIn, YouTube, all those different media sites, social
12 media sites. You may not use any similar technology of social
13 media, even if I have not specifically mentioned it.

14 Now, I mentioned before, let me take a moment to
15 explain to you that the attorneys and parties, witnesses are
16 not supposed to talk to jurors outside of these formal
17 proceedings in the courtroom, even to offer a friendly
18 greeting. So, if you happen to see any of them outside of
19 this courtroom, they will and should ignore you. Please don't
20 take offense. They will only be acting properly by doing so
21 and at my direction and order.

22 Now, in a few minutes, you'll hear the opening
23 statements. These statements are not evidence. They serve no
24 purpose other than to give you an idea in advance of the
25 evidence, what the lawyers expect you to hear from the

1 witnesses. These statements permit the lawyers to tell you a
2 little bit about what the case is all about, but only the
3 evidence comes from the witnesses and the exhibits.

4 In this regard, you may see on certain government
5 exhibits or hear from counsel or certain Government witnesses
6 references to the Mykal Derry drug trafficking organization or
7 to the Mykal Derry DTO, or references to Mykal Derry as the
8 leader of those entities. Those references do not establish
9 the existence of a conspiracy or the membership of a
10 conspiracy if one exists. The ultimate questions regarding
11 the existence of a conspiracy as alleged by the Government in
12 the indictment and its membership, if any, are for you, the
13 members of the jury, to decide based upon only the evidence
14 admitted during the course of the trial.

15 After the opening statements, you will hear the
16 testimony of witnesses. As I said, each witness will give
17 direct testimony, then he or she may be cross-examined by the
18 other side, and sometimes there will be, as I indicated,
19 redirect and recross-examination.

20 After all the evidence has been received, the lawyers
21 will then have an opportunity to sum up or give what are
22 called closing arguments. They may review the evidence and
23 make arguments to you as to what conclusions they think you
24 should or should not draw from the evidence of each.

25 Remember that those summations again are not evidence,

1 but only argument.

2 And then after those summations, I will instruct you on
3 the law. Following my instructions, you will go into the jury
4 room, review all the evidence, review the exhibits which have
5 been received in evidence, and discuss the evidence among
6 yourselves. Based on that evidence and your discussions of
7 it, you will determine your verdict.

8 Now, finally, let me clarify something you may wonder
9 about later. During the course of the trial, I may have to
10 interrupt the proceedings to confer with the attorneys and the
11 parties about the rules of law that should apply here or which
12 do apply here. Sometimes we will talk here at the bench, but
13 some of these conferences may take time. So, if it is going
14 to be lengthy, as a convenience to you I will excuse you from
15 the courtroom and you'll simply go into the jury room. I will
16 try to avoid, and I can tell you the lawyers have worked hard
17 in advance of trial, to minimize these things, but sometimes
18 things happen at trial that we can't anticipate. We really
19 try to avoid such interruptions as much as possible, but
20 please be patient if the trial seems to be moving slowly.
21 Conferences often save time for all of us.

22 At times they will be at sidebar. You will hear the
23 white noise machine. You all remember the white noise
24 machine. Please don't try to listen to what happens at
25 sidebar.

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1 Now, we've given you the notepads. If you wish, you're
2 not required, but if you wish, you may take notes during the
3 presentation of evidence, the summations of attorneys at the
4 conclusion of the evidence, and during my instructions to you
5 on the law. Remember that these notes are for your own
6 personal use. They are not to be given or read to anyone
7 else. As you see, we have a court reporter here and other
8 court reporters will be taking down the proceedings. They are
9 quite competent, I can tell you. They are transcribing the
10 testimony during the course of the trial, but you should not
11 assume that transcripts will be available for your review
12 during your deliberations. So it is important that you pay
13 attention.

14 Nor should you consider notes that you or your fellow
15 jurors may take as a kind of written transcript. Instead, as
16 you listen to the testimony, keep in mind that you will be
17 relying on your recollection of that testimony during your
18 deliberations.

19 Now, here are some of the more specific points to keep
20 in mind about note taking. Note taking is permitted, not
21 required. Each of you may take notes. No one is required to
22 take notes. Be brief, do not try to summarize all the
23 testimony. Notes are for the purpose of refreshing your
24 memory. They are particularly helpful when dealing with
25 things like measurements, times, distances, identities and

1 relationships.

2 Overuse of note taking may be distracting. You must
3 determine the credibility of witnesses. You must observe
4 their demeanor, the appearance of each person on the witness
5 stand. Note taking may not distract you from that task. If
6 you wish to make a note, you need not sacrifice the
7 opportunity to make important observations. You may make your
8 note after making such observations.

9 Do not use your notes or any other juror notes as
10 authority to persuade fellow jurors. In your deliberations,
11 give no more and no less weight to the views of a fellow juror
12 just because the juror did or did not take notes. As I
13 mentioned earlier, your notes are not official transcripts.
14 They are not evidence and they are by no means a complete
15 outline of the proceedings or a list even of the highlights in
16 the trial. They are valuable, if at all, only as a way to
17 refresh your memory.

18 Your memory is what you should be relying on when it
19 comes time to deliberate and render your verdict in this case.
20 You, therefore, are not to use your notes as authority to
21 persuade fellow jurors of what the evidence was during the
22 trial. Notes are not to be used in place of the evidence.

23 Now, do not take your notes away from the Court.
24 Please leave your notes in the jury room and they will be --
25 Ms. Novoa will give you instructions about the proper handling

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1 and securing of those notes during the course of the trial.

2 Now, at the conclusion of the trial, as part of my
3 final instructions, I will give you in detail what the
4 Government must prove in order to convict the defendants. For
5 the moment, I will ask you to remember throughout the trial
6 that the defendant is presumed innocent and the Government has
7 the burden of proving guilt beyond a reasonable doubt. The
8 indictment against the defendant is only an accusation and not
9 proof of guilt or anything else. The defendant, therefore,
10 starts out with a clean slate.

11 This burden of proof beyond a reasonable doubt is
12 different than the burden imposed on the plaintiff in a civil
13 case and is on the Government until the very end of the case,
14 and I will tell you more when I instruct you at the conclusion
15 of the trial concerning this burden.

16 For the moment, I will just say that this burden means
17 that the defendant and his lawyer need not present any
18 evidence in this case if they choose not to do so. They can
19 sit in silence throughout all of these proceedings without
20 ever saying a word, but you can draw no inference against the
21 defendant. You cannot find a defendant guilty unless and
22 until you are unanimously convinced beyond a reasonable doubt
23 of his guilt, the guilt of each, based on the evidence in this
24 case.

25 All right. I believe we're now ready to proceed with

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1 opening statements.

2 Mr. Danilewitz?

3 MR. DANILEWITZ: Thank you, your Honor.

4 THE COURT: You may proceed when you are ready, sir.

5 MR. MADDEN: May we briefly see you at sidebar before
6 opening statements?

7 THE COURT: Yes.

8 (Sidebar.)

9 MR. MADDEN: So, I wasn't able to do this because I
10 was having computer problems last night, but Mr. Grady from
11 Cornerstone looked up the order that Judge Irenas made with
12 regards to the opening statements with the Ant 50 and I
13 just -- I don't know. I'm assuming. I don't know if the
14 Court had the exact order or not, so I have the order, but
15 it's on my phone.

16 THE COURT: What's the issue?

17 MR. MADDEN: With regard to whether Rosario, the Ant
18 50 and the videotape coming in before or during opening
19 statements or whether it came in later. So, Mr. Grady from
20 Cornerstone just printed up the order, which unfortunately is
21 on my phone, but I think it's pretty clear that the Court
22 ordered that it not come in and that it only come in after the
23 evidence came in.

24 THE COURT: I recognize that.

25 MR. MADDEN: You, I know you already ruled on that,

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1 but it's just from reading it, it's a little different from
2 the discussion. I just ask the Court, I don't know if you can
3 see it on my phone or not. I can forward it to you if you
4 need me to from Mr. Grady.

5 THE COURT: That's fine.

6 (Brief pause.)

7 THE COURT: Well, I read this order, and I recall it,
8 and this was that, the two issues, whether I was going to make
9 this the law of the case or his subsequent order, that after
10 having heard the evidence, he believed it was intrinsic to the
11 conspiracy. So, it's the latter order that I view the law of
12 the case and the one that establishes the right of the
13 Government to refer to it if they choose to do so. I think
14 the record is clear. If you want to add anything additional
15 on that issue, you can. So, I'm going to allow the Government
16 to refer to that and stand by my earlier ruling.

17 MR. MADDEN: Just two things, issues for the record
18 that I'll put on right now.

19 THE COURT: Yes. The docket is 473, and it was filed
20 in this matter, 14-50. It was filed on November 14th, 2014.
21 There was a motion made not by either of the Derry brothers
22 but by another defendant in that case to exclude the evidence.
23 It was a motion to suppress evidence of violence allegedly
24 committed by co-conspirators of group 1 defendants,
25 particularly evidence regarding the murder of Tyquinn James

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1 and two separate assaults on the juvenile referred to as Ant
2 50.

3 Judge Irenas dismissed that without prejudice subject
4 to renewal within the context of the trial and specifically
5 directed that no reference to evidence of the murder of
6 Tyquinn James or the assaults on Ant 50 may be made during the
7 opening statements. Although that was his order at the time,
8 it was before he had heard all the evidence. After hearing
9 that evidence, he allowed all of that evidence in.

10 I'm not going to revisit that determination by the
11 judge as to the scope of the conspiracy, the participants, and
12 the admissibility of that evidence, even though these are
13 different defendants. I am following his lead as it relates
14 to that evidence which I don't believe has been so firmly
15 established, and that is, the evidence regarding Mr. Zaffa's
16 statement, now a cooperating witness. It has not been
17 proffered to me, and I have not seen sufficient evidence that
18 establishes Mr. Zaffa as a member of the conspiracy, that the
19 hearer was a member of the conspiracy, nor have I heard
20 sufficient evidence in my mind to establish that it was made
21 in furtherance.

22 If such evidence is introduced during the trial and the
23 Government seeks to introduce that hearsay statement, they may
24 make application at that time, do it certainly outside the
25 presence of the jury so the defense can have an opportunity to

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1 argue against it. If I feel it requires a 104 hearing, then I
2 reserve the right to do that.

3 The other issues with regard to the James murder, the
4 assaults on Ant 50 I believe have already been ruled on by the
5 judge, and redoing that process seems to me to be unnecessary,
6 in light of the proffered evidence, the findings of the judge,
7 and the evidence adduced during the first trial.

8 That's my ruling. If you want to object further, I
9 invite you to do so now.

10 MR. MADDEN: Thank you, your Honor. I'll be very
11 brief. First, I apologize for interrupting right before you
12 did your opening, but I felt like I needed to make a record.

13 THE COURT: Sure.

14 MR. MADDEN: In addition to the basis for the
15 objection yesterday, I also believe that it violates my
16 client's due process rights in not having had an opportunity
17 to participate in Judge Irenas's sort of version of a hybrid
18 104 hearing in that this evidence, he made these decisions
19 after hearing evidence in a trial that we did not participate
20 in.

21 In addition to that, we had relied on the order that
22 his Honor just now cited to in that it was our belief that
23 that would stand and that we would have the opportunity --
24 that the Government would not be opening or use in their
25 opening the murder of Mr. James or the assault of Mr. Rosario,

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1 and it was our belief that was the law of the case and that it
2 would stand in the same way.

3 And so that's our objection, that it's a due process
4 violation. Thank you.

5 THE COURT: All right. Mr. Askin.

6 MR. ASKIN: Your Honor, I would just note for the
7 record that effective July 1st, we filed on the docket an
8 extensive response to their motion which let them know exactly
9 that we were going to move for all of that evidence to be
10 admitted, and certainly as of July 1st, if they didn't
11 anticipate before that, they knew that the Government would be
12 moving to put all that evidence in, including the opening.

13 THE COURT: I think he wanted to highlight the order.

14 MR. ASKIN: I understand.

15 THE COURT: And we had a hearing on it, and I have
16 ruled.

17 Mr. Markowitz, do you want to add anything?

18 MR. MARKOWITZ: I'm just going to join in Mr.
19 Madden's statements as applicable to my client.

20 THE COURT: The ruling stands.

21 I would just say as a matter of due process, I believe
22 it essentially becomes a confrontation issue, but as a matter
23 of due process, the Court can make a preliminary admissibility
24 determination based on the proffered evidence without having a
25 104 hearing. While it's often wise to do so, it's not

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1 required. And I believe that the findings of the previous
2 jury, the rulings by Judge Irenas, the proffered evidence all
3 in combination give sufficient reliability as to the
4 Government's evidence that this issue is appropriate for an
5 opening.

6 Obviously, these witnesses will be subject to
7 cross-examination. Nothing should be -- can be assumed as to
8 the guilt of these defendants, and they have every ability and
9 right during the process of this trial to contest the
10 Government's proofs and, if they choose, put on any defense to
11 establish that they were not participants in any of the
12 alleged crimes. It is the Government's burden, remains the
13 Government's burden, and they'll have to prove their case
14 beyond a reasonable doubt before these defendants can be
15 convicted, and I think that's what due process requires.

16 MR. ASKIN: Yes, your Honor.

17 MR. MADDEN: Thank you, your Honor.

18 MR. ASKIN: Thank you, your Honor.

19 (End of sidebar.)

20 THE COURT: No sooner than I predicted that it
21 happened. But these are important matters. You will hear
22 this often. We appreciate your promptness this morning. We
23 will start a little earlier tomorrow, on time, I hope, and we
24 certainly work very hard to recognize the importance of your
25 time. We appreciate your patience and your promptness and

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1 your attention to these proceedings.

2 And Mr. Danilewitz may proceed when he is ready.

3 MR. DANILEWITZ: Thank you, your Honor. Your Honor,
4 we have two posters that we would like to just quickly put up
5 with the Court's permission.

6 THE COURT: Yes, you may. Thank you.

7 MR. DANILEWITZ: Thank you.

8 MR. MADDEN: Is the poster going to be on the screen?

9 MR. DANILEWITZ: Yes.

10 Thank you, your Honor.

11 May it please the Court, defense counsel, ladies and
12 gentlemen of the jury, this is a case about drugs, guns, and
13 cell phones. The evidence will show that both of the two
14 defendants on trial before you, Mykal Derry and his brother,
15 Malik Derry, were members of a violent heroin trafficking
16 conspiracy, that they used firearms in furtherance of that
17 conspiracy, and that they used and carried cell phones, cell
18 phones that stored a treasure trove of evidence that the
19 Government will present to you during the course of this
20 trial.

21 Now, ladies and gentlemen, as a result of these
22 allegations, the defendants are charged in multiple counts of
23 the indictment. Count 1 charges both defendants with
24 conspiracy to distribute and to possess with intent to
25 distribute one or more kilograms of heroin within 1,000 feet

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1 of a public housing project.

2 Counts 2, 3, 4, and 5 charge Mykal Derry alone with the
3 actual distribution and possession with intent to distribute
4 heroin, as distinct from the conspiracy to do so alleged in
5 count 1.

6 Count 7 charges Mykal Derry with maintaining a premises
7 for the distribution of heroin.

8 Count 10 charges both defendants with the possession,
9 carrying, and use of firearms in furtherance of the drug
10 trafficking conspiracy alleged in count 1.

11 And finally, both defendants are charged in numerous
12 counts alleging that they used cell phones in furtherance of
13 the drug trafficking conspiracy and in an attempt to
14 distribute and possess heroin.

15 Now, ladies and gentlemen, Judge Hillman is going to
16 provide you with detailed legal instructions at the end of
17 this case, and among those instructions, Judge Hillman will
18 explain the applicable law of conspiracy.

19 In simple terms, a conspiracy is an agreement between
20 two or more people to do something illegal. And the illegal
21 agreement in this case that both of these defendants were
22 members of, along with other co-conspirators, was to
23 distribute one or more kilograms of heroin within the Stanley
24 Holmes public housing project, which is located in Atlantic
25 City, New Jersey.

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1 Ladies and gentlemen, Judge Hillman is also going to
2 explain to you the concept of *Pinkerton* liability at the end
3 of this case, and the *Pinkerton* doctrine or *Pinkerton*
4 liability, not something you need to memorize, but I'd like to
5 explain to you in a little bit of detail what that means and
6 why it's relevant to your consideration of the evidence.

7 The Government is going to be presenting a lot of
8 evidence during the course of this trial and over the coming
9 weeks, not only against these two defendants, but against
10 dozens of their co-conspirators. And it's important that you
11 understand that under the *Pinkerton* doctrine, these two
12 defendants charged in the conspiracy can be held responsible
13 not only for their own conduct and their own actions, but for
14 the conduct of each of the charged -- each of the alleged
15 co-conspirators provided that their conduct is during and in
16 furtherance of the conspiracy and reasonably foreseeable to
17 these two defendants.

18 Now, let me put you at ease. Once again, this is not
19 something you need to memorize for now. Judge Hillman is
20 going to give you detailed legal instructions on the meaning
21 of the *Pinkerton* doctrine and other applicable law at the end
22 of this case. I just want to explain to you in passing why it
23 is that you're going to hear so much evidence not only against
24 these two defendants, but their co-conspirators as well.

25 Let me take a step back for a minute to explain the

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1 roles of these two individuals and dozens of the
2 co-conspirators alleged in the indictment. Ladies and
3 gentlemen, you're going to hear that Mykal Derry was the
4 leader of the violent heroin trafficking organization that I
5 described to you at the outset. You're going to hear from the
6 evidence during the course of the trial that Mykal Derry
7 arranged for these individuals at the top of the page, Kim
8 Spellman, Ambrin Qureshi, to make trips as couriers up to
9 northern New Jersey in order to acquire a quantity of heroin
10 for redistribution in Atlantic City. You're going to hear, in
11 addition, that Mr. Mykal Derry made use of these two women,
12 Rashada Allen and Jodi Brown. Each of those women have public
13 housing unit apartments that they made available to members of
14 this organization for the distribution of quantities of
15 heroin. Those public housing units, as you'll hear from the
16 evidence, became what are known as trap houses, locations from
17 which to sell or trap heroin.

18 You're also going to hear that Mykal Derry aligned
19 himself with this individual, Tyrone Ellis, a co-conspirator,
20 and like Mykal Derry, a manager in the organization. Mr.
21 Ellis used the services of Latasha Cherry and Tiarrah Turner
22 similarly as couriers to make trips up to northern New Jersey
23 and to return to Atlantic City and that South Jersey area to
24 redistribute the heroin that they acquired.

25 Mykal did this in order to distribute the heroin to

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1 lower-level distributors and dealers, including to his
2 brother, Malik Derry. And you're going to hear during the
3 course of the trial, through the testimony of Special Agent
4 Kopp and dozens of law enforcement witnesses, about how heroin
5 is distributed in the Atlantic City area.

6 You're going to hear that Mykal Derry provided that
7 heroin in bricks, which are divided up into bundles, and into
8 the bundles, divided up into individual user dosages of bags,
9 and how those bricks, bundles and bags made their way to the
10 distributors and dealers and ultimately to the end users.

11 You're also going to hear testimony about the role of
12 Malik Derry, who, like a number of other individuals, was both
13 a distributor and a dealer, and also an enforcer on behalf of
14 the drug trafficking organization.

15 In that way, Malik Derry was expected to and did
16 possess a firearm which he used on February 10th, 2013, to
17 shoot and to murder an individual by the name of Tyquinn James
18 in an execution-style killing that I'll describe to you in a
19 bit more detail later on.

20 Malik Derry was not alone. Other individuals,
21 including Terry Davis, Derreck Mack and Shaamel Spencer
22 performed the roles of enforcers for this organization,
23 carrying firearms. And you're going to hear a lot about
24 arrests that took place during the course of this
25 investigation and the recovery of many, many firearms.

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1 Now, ladies and gentlemen, the charged conspiracy
2 period goes from October 2010 to March 2013, but you're going
3 to hear from the testimony of Special Agent Christopher Kopp
4 that in the last six months of that conspiracy period, Agent
5 Kopp obtained Federal Court authorization to intercept
6 multiple cell phones, including three cell phones used by
7 Mykal Derry. He's going to explain to you that he obtained
8 Federal Court authorization to intercept four cell phones used
9 by Tyrone Ellis, and you're going to hear the Government refer
10 to those phones as Derry phones 7, 8 and 9.

11 Now, ladies and gentlemen, through the testimony of
12 Special Agent Kopp, you're going to come to understand that
13 Agent Kopp provides answers to two critical questions in any
14 wiretap investigation. The first is a question of
15 identification, and the second is a question of meaning.

16 With respect to the question of identification, how
17 does the investigator positively identify not only the user of
18 the intercepted phone that's being wiretapped, but the
19 individuals who participate in communications with that phone,
20 people who call the phone and speak to Mr. Derry, or to text
21 message him.

22 Agent Kopp is going to explain to you the multiple
23 different ways that he used to confirm positively the identity
24 of those individuals. He's going to tell you about subpoenas
25 that were sent to cell phone provider companies and the

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1 information that they provided back about the users of the
2 phones and the account holders. In many instances, those
3 individuals used their real names, enabling Agent Kopp to
4 identify them. In other instances, they provided addresses
5 that were linked to them or to people close to them.

6 In other cases, Agent Kopp and his colleagues used old-
7 fashioned surveillance. They would intercept a particular
8 call or text message regarding a drug deal or an event going
9 to take place, and they proceeded to that location in order to
10 conduct surveillance and to photograph or in some cases video
11 the conduct that took place, and in that way, they were able
12 to positively identify the participants in these conversations
13 as well.

14 In other instances, for whatever reason, individuals
15 mentioned their real name on the call. In one particular
16 instance, Ronald Davis, who was arrested during the course of
17 the conspiracy period and was calling the leader of the
18 organization, Mykal Derry, for assistance with bail, Mykal
19 Derry had been referring to him by his nickname, Black.
20 During the course of the conversation, Mykal Derry said to him
21 words to the effect, as you'll hear through the testimony of
22 Special Agent Kopp, what's your real name? And he provided
23 it, Ronald Davis. And that, too, is the kind of evidence you
24 will hear that assisted Agent Kopp in answering the critical
25 question of identification.

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1 Now, as I mentioned, there's also the question of
2 meaning. Unsurprisingly, you're going to hear a lot of coded
3 language and a lot of what is frankly, as you'll hear through
4 the testimony of Agent Kopp, street slang. It will not
5 surprise you that the members of the conspiracy, very rarely
6 would they engage in open discussions about the particular
7 conduct that they were engaged in. And so, you're going to
8 hear references to the bricks, bundles and bags that I
9 referred to earlier as buns, as walls, wizzies, sleeves, whole
10 ones. You're going to hear references to cash or money as
11 bread or chicken. You're going to hear references to drug
12 customers as flow or flows, and to those particular houses
13 that I referred to earlier, the trap houses, as the trap,
14 trizzy, trizzle, and generally to the distribution of heroin
15 as trapping.

16 You're also going to hear countless references to
17 firearms as well as ammunition. You're going to hear
18 references to blick, blicky, ratchet, pound. You'll hear
19 references to ammunition, terms such as shells, babies,
20 crayons. We'll go over some of these examples from the
21 wiretap in a few moments. You'll hear references to strap,
22 being strapped or being strizzed or strizzy, in other words,
23 armed, carrying a firearm. And you'll hear the members of the
24 conspiracy, in their virtual constant efforts to avoid law
25 enforcement detection and surveillance, refer to law

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1 enforcement as squally, pigs and task.

2 Now, let's take some time, ladies and gentlemen, to
3 review some of the key incidents and wiretap incidents during
4 the course of that six-month period that I mentioned before.
5 As we go through these transcripts which are summarized just
6 briefly for you, understand that you do not need to read each
7 and every word of these slides for now. You're going to have
8 plenty of time. You're going to hear hundreds of these calls.
9 There are thick binders that have been placed nearby you.
10 Each of those is going to contain hundreds of transcripts with
11 the full language in them. This is merely by way of example
12 to provide you with a road map of the kind of evidence that
13 you will see and hear during the trial.

14 Ladies and gentlemen, this organization in many
15 respects operated like legal businesses do. There were
16 suppliers and a clearly defined supply chain. There were
17 dealers and distributors, and sadly, there were the customers,
18 the ultimate end users of the heroin product. Unlike legal
19 organizations, you're going to hear that this organization, in
20 order to resolve its disputes, used violence. It resorted to
21 force, fists and firearms.

22 Now, you're also going to hear a lot of evidence about
23 the packaging of the heroin and the manner in which it was
24 distributed. You're going to hear that those individual bags
25 I referred to earlier, those individual user dosages of heroin

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1 frequently bear stamps that the distributors put on them, and
2 that the Government will argue to you, you'll hear through the
3 testimony of Agent Kopp, simply a manner in which they can
4 brand the heroin to make it easier to identify by the users.

5 Let's take a look at this October 5th, 2012 phone call
6 between Mykal Derry and a heroin user and distributor by the
7 name of Wallace Boston. Again, the key points that the
8 Government wants to bring to your attention, just for the
9 limited purposes of this morning, are highlighted in yellow.
10 I'm going to briefly go over those.

11 Mr. Boston says to Mykal Derry, "I need four."

12 You're going to hear through Agent Kopp that that's a
13 request for a particular quantity of heroin.

14 "What is this, Total Recall?"

15 There's some back and forth. They discuss Total
16 Recall, they discuss Louie, and they discuss Uptown. At the
17 end of the conversation, Mykal Derry says to Wallace Boston,
18 "I'm trying to tell you, my man, it's the same thing, it's all
19 the same thing."

20 In other words, you're going to hear, Agent Kopp will
21 explain, regardless of the stamp, it's the same product.

22 Wallace Boston replies, "I know it's the same thing."

23 But in essence, "these folks get it on the stamps."

24 The stamps matter to the heroin user.

25 Now, let me pause for a moment to point out to you what

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1 should be clear. In addition to the coded language and the
2 slang, you're going to hear a lot of offensive language as
3 well. The Government has decided not to sugarcoat that for
4 you, not to varnish it, but present it to you from the words
5 of these defendants in hundreds of moments, unguarded moments
6 of truth in their own words.

7 Now, you might wonder how Agent Kopp and his colleagues
8 determined that those references to Louie, to Total Recall,
9 and to Uptown refer to heroin stamps. Well, it helps perhaps
10 that Wallace Boston refers to them as stamps, but note this:
11 On September 26th, 2012, and October 18th, 2012, that call
12 that we just looked at, the October 5th, 2012 call between
13 Wallace Boston and Mykal Derry, is sandwiched by these two
14 events: A controlled purchase of heroin from Mykal Derry, and
15 October 18th, a purchase from him and a co-conspirator by the
16 name of Aree Toulson.

17 You'll hear through the testimony at trial, ladies and
18 gentlemen, that a controlled purchase is a law enforcement
19 investigative technique by which law enforcement uses an
20 undercover agent or a confidential informant to approach the
21 target of an investigation with cash in an effort to purchase
22 the drug, to recover the drug, to analyze it, to gain
23 evidence, and to further the investigation, and in that way,
24 develop the case further.

25 You'll note that on September 26th, 2012, these

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1 particular bags of heroin bore the stamp Uptown. On October
2 18th, 2012, it was stamped Total Recall and Louie the XIII.

3 Now, shortly after the October 5th, 2012 call with
4 Wallace Boston, there was this conversation between Mykal
5 Derry and Quasim Duncan. You're going to hear that during the
6 course of that call Quasim Duncan said explicitly to Mykal
7 Derry, "What's the stamp?" To which Mr. Derry responded,
8 "Bro, you be reckless over the phone, bro." Agent Kopp is
9 going to explain to you Mykal Derry was expressing a little
10 bit of frustration that co-conspirator Quasim Duncan was that
11 explicit about stamps on the phone.

12 Nonetheless, Mr. Derry said, "It's Louie, though."
13 Again, referring to the Louie stamp you saw on the prior
14 slide.

15 Now, ladies and gentlemen, as I mentioned, you're going
16 to hear a lot of evidence about the arrests of co-conspirators
17 and the recovery of lots and lots of firearms during the
18 course of the investigation. You're also going to hear that
19 during those events and incidents or shortly thereafter,
20 co-conspirators reported back to their leader, Mykal Derry, to
21 let him know that a gun had gone missing and that somebody had
22 been arrested. You're going to hear testimony that it was
23 important for members of the conspiracy to be aware of this
24 law enforcement conduct and activity, as well as the conduct
25 of drug rivals.

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1 Let's take a look at one example from October 9th,
2 2012. On that day, Mr. Mykal Derry has a conversation with
3 Leonard Allen and Rashada Allen. You will remember Rashada
4 Allen was referred to on a previous slide as one of the women
5 who provided her public housing apartment unit to Mykal Derry
6 and other members for use as a trap house. A little later on,
7 after there's a conversation between Mykal Derry and Rashada
8 Allen about acquiring a particular handgun, Mykal Derry text
9 messages Shaamel Spencer, co-conspirator, and informs him, "I
10 got a new jump-off."

11 Now, at this stage, it would be a little bit unclear
12 what the reference to a new jump-off is, but Agent Kopp is
13 going to explain to you how he gained an understanding of that
14 term and similar terminology from the context of the wiretap
15 and events and incidents like this one, and by the end of the
16 trial, you too will be able to interpret this kind of
17 terminology.

18 One minute later in a follow-up text message to Shaamel
19 Spencer, Mykal Derry is a little bit more clear. He refers to
20 the firearm by make, model and caliber as a compact 40 Glock.
21 A little later on, in a call to Quasim Duncan, who you'll
22 remember from the stamp slide a few moments ago, Mr. Derry
23 requests crayons for an auti. Mr. Duncan responds, as Agent
24 Kopp will tell you, unfortunately he only had nine millimeter
25 ammunition, not good for a .40 caliber firearm. At 1:11 p.m.,

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1 Mykal Derry then calls Raymond Mack still seeking crayons for
2 the .40 caliber firearm.

3 Now, as a result of these intercepts, Agent Kopp
4 requests surveillance on Rashada Allen, and in the top right
5 of the screen, you'll see a surveillance photo of Rashada
6 Allen walking to her mother's house with her vehicle in the
7 background. Shortly thereafter, there's a traffic stop of
8 that vehicle, and as you'll hear recovered from the back of
9 Rashada Allen's vehicle is nothing other than a compact .40
10 caliber Glock handgun.

11 What happens after that is Rashada Allen reaches out to
12 the leader of the organization, Mykal Derry, and she informs
13 him about the bad news. "I got pulled over," as you'll hear
14 when we play this recording for you. "They in it; they, they
15 found it."

16 Response from Mykal Derry: "They found it?"

17 "Yep."

18 "Dang, Shada."

19 And then you're going to hear a background statement by
20 Ms. Allen to apparently law enforcement agents saying, "What,
21 I don't have no gun in there. No, I don't. No, I don't have
22 no gun in there. You stylin'." Agent Kopp will explain that
23 that means you're lying. "I'm not doing nothing."

24 But shortly after in Government Exhibit 442, you'll
25 hear a conversation between Mykal Derry and an unindicted

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1 co-conspirator by the name of Isaiah Toulson where Mr. Derry
2 lets him know the bad news: "Shada got caught with the
3 blicky."

4 Now, ladies and gentlemen, once you've heard about the
5 incident, you've listened to the recording, you too will be
6 able to determine what Mr. Derry -- Mykal Derry meant by a
7 blicky in that context.

8 You're also going to hear testimony about multiple
9 shooting incidents in the Atlantic City area, and on those
10 occasions, too, you're going to hear about co-conspirators
11 reporting back to the leader of the organization, Mykal Derry.

12 Let's take a look at this one. On October 13th, 2012,
13 at approximately 8:25 p.m., there's a conversation intercepted
14 on the wire that you'll hear during the trial between Terry
15 Davis, Mykal Derry and Kamal Allen. Agent Kopp is going to
16 explain to you that Terry Davis was reporting, we're okay,
17 we're good. Mykal Derry responds, "Oh, all y'all low?" Agent
18 Kopp is going to explain, you keeping a low profile, you safe?

19 Terry Davis responds, "That was little bro's."

20 Now, a little later on, Mr. Derry says, "N's put in
21 some work?" Again, you're going to hear Agent Kopp explain
22 that the meaning of that is did somebody shoot someone else,
23 did they put in some work, did they shoot at someone else?

24 "Where they had slid, Back Maryland?" Kamal Allen
25 confirms this took place in the Back Maryland section of

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1 Atlantic City. You're going to hear that that was a zone, an
2 area that was essentially off-limits for members of this drug
3 trafficking organization. It was an area in which drug rivals
4 were located and there was frequent interaction between them,
5 frequent shots and gunfire.

6 "They hit something?"

7 "I don't even know yet, I don't think so, though."

8 Now, this call that took place at 8:25 p.m. is shortly
9 after. At 8:08 p.m. multiple 911 calls come in regarding
10 shots fired in the Back Maryland section of Atlantic City.
11 Multiple spent shell casings are found. Fortunately, no
12 damage, no victims are located or identified.

13 Now, while you hear all this testimony about the drug
14 dealing and drug trafficking going on, Mykal Derry and other
15 co-conspirators are working on their target practice. They're
16 actually going to a shooting range in Lakewood, New Jersey,
17 known as the Sure Shot Shooting Range and firing live
18 ammunition on that range.

19 You're going to hear testimony that not once, not
20 twice, but multiple times, three times at least that we're
21 aware of, on October 13th, October 18th, 2012, and January
22 20th, 2013, Mykal Derry and other individuals, including Kamal
23 Allen, Shaamel Spencer and Aree Toulson, went to the Shore
24 Shot shooting range, fired live ammunition, and recorded
25 themselves on cell phones doing that.

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1 In fact, at the end of this case, on March 26th, 2013,
2 when these dozens of individuals were arrested, the Government
3 recovered cell phones, obtained search warrants to search
4 those cell phones, and recovered movies, homemade movies, if
5 you will, including footage from the Shore Shot shooting
6 range.

7 You're going to hear testimony, ladies and gentlemen,
8 about an undercover FBI agent who, on October 18th, 2012,
9 rented a firearm at the Shore Shot range and stood in the lane
10 adjacent to Mykal Derry and others, and shot the firearm and
11 ended up having a conversation with Shaamel Spencer. You'll
12 hear testimony from that FBI undercover agent during the
13 course of the trial.

14 Shaamel Spencer, incidentally, did the Government the
15 favor of providing a signed release form in his actual name
16 dated October 18th, 2012.

17 Now, let's take a moment to look at just a small clip
18 from a video that was recovered from one of the cell phones in
19 which you will see Mr. Mykal Derry taking aim at a target of a
20 rat.

21 (Recording played.)

22 (Recording stopped.)

23 MR. DANILEWITZ: Ladies and gentlemen, you're going
24 to hear testimony that on that day, October 20th, 2013, there
25 was a surveillance unit outside the Shore Shot shooting range.

1 They managed to photograph Mykal Derry and others leaving the
2 Shore Shot range wearing the same clothing that he's wearing
3 in the video that you just saw that was recovered from one of
4 the cell phones searched at the end of the case.

5 Now, ladies and gentlemen, you're going to hear
6 examples of members of the conspiracy notifying their leader,
7 Mykal Derry, about the presence of law enforcement. This is
8 an example. On October 22nd, 2012, you're going to hear that
9 law enforcement entered the surveillance room in the Stanley
10 Holmes Village public housing complex where the case takes
11 place, and Shaamel Spencer text messages Mykal Derry: "I just
12 got the word they in the camera room watching. Shots was
13 fired by Sunny's." Agent Kopp will explain to you that
14 Sunny's is an establishment in the Atlantic City area, and he
15 will explain that Shaamel Spencer was letting Mykal Derry
16 know, be on the lookout. They're watching you.

17 One minute later, at 7:29 p.m., Kamal Allen has a
18 similar conversation with Mykal Derry, and he too lets him
19 know, "squally looking in," squally being one of the
20 references, slang references to law enforcement.

21 Now, in his capacity as a leader of this drug
22 trafficking organization, Mykal Derry both directed the use of
23 force against drug rivals and on occasion disciplined the
24 members of the conspiracy by limiting their use of force.

25 In particular, on one occasion, where his brother,

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1 Malik Derry, wanted to acquire a firearm because somebody in
2 Malik's terms was "acting up," Mykal Derry said, "Hold on."
3 You're going to hear testimony from Agent Kopp. Mykal Derry
4 said, that's not for use against people in the village; that's
5 for use against the enemy. Agent Kopp will explain that's for
6 use, Mykal Derry was essentially saying, against the drug
7 rivals.

8 This is the conversation on October 23rd, 2012, at 5:46
9 p.m. Malik Derry says to his brother, Mykal Derry, "You got
10 one of them things?"

11 Now, again, in the context of the investigation, Agent
12 Kopp will explain what one of them things means.

13 Mykal Derry responds, "No."

14 Malik Derry says, "I'm about to, um, I, I need it. I
15 gotta holla at Meatball." Agent Kopp will explain that's a
16 reference to Saleem Reynolds.

17 The gist of the conversation is Malik Derry says,
18 "Meatball, he actin' up. I need it."

19 And Mykal Derry says, "Man, come over here bro," and
20 does not give Malik Derry the firearm.

21 At 6:08 p.m., Mykal Derry has this conversation with
22 the brother of Meatball, the brother of Saleem Reynolds,
23 Jermaine Reynolds, and Jermaine Reynolds says, as Agent Kopp
24 will explain, essentially, what's the problem with Malik?

25 Mykal Derry responds, "Man, that N ain't doin' nothing.

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1 He's not even allowed back over there no more.

2 "I got the ratty, they know that. Like I told them,
3 ain't no ratchets comin' out of my... unless them shits
4 getting put to work on the enemy, not on nobody from the
5 village."

6 Yet another recovery of a firearm you will hear took
7 place on October 30th, 2012, from one of the enforcers of the
8 organization, Shaamel Spencer. You're going to hear that at
9 4:35 p.m. on October 30th, 2012, Shaamel Spencer lets Mykal
10 Derry know the bad news.

11 And, in fact, at the time of his arrest, you're going
12 to hear picked up on that wiretap recording an instruction
13 from an unidentified police officer to Shaamel Spencer,
14 "Interlock your fingers." Then he tells Mykal Derry, "He'll
15 call you back."

16 Well, within approximately 10 minutes, Mykal Derry and
17 Kamal Allen are having a call, and Kamal Allen, as you'll hear
18 through the testimony of Agent Kopp, is informing the leader
19 of the organization, Mykal Derry, "Buck just got bagged."

20 "For what?"

21 "For the strap."

22 And so here's another example, as Agent Kopp will
23 explain, of an incident where there's a reference to a term
24 that you may not know, but in the context of the events and
25 incidents during investigation becomes clear that strap refers

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1 to the firearm that was recovered from Shaamel Spencer. And
2 you'll see this picture and the firearm introduced during the
3 course of the trial, the strap that Kamal Allen referred to.

4 Now, on one occasion in his role as a leader of the
5 organization, you will hear evidence that Mykal Derry referred
6 a heroin user customer to his brother, Malik Derry. You'll
7 hear that on November 13th, 2012, Mykal Derry receives a text
8 message from this young woman who says, "Please, I'm sick.
9 How much do you want for six?" Agent Kopp will explain six
10 being a reference to a quantity of heroin.

11 At 11:09 a.m., Mykal Derry text messages his brother,
12 Malik Derry, saying, "I got sum flo 4 u." Flo, as Agent Kopp
13 will explain, being a reference to a heroin customer.

14 Later on, at 11:15 a.m., Mykal Derry forwards to the
15 heroin user, the customer, the digits of the phone for his
16 brother, Malik Derry. And at the end of this series of text
17 messages, the woman expresses, as Agent Kopp will explain,
18 some dissatisfaction with the quality of that particular
19 heroin.

20 You'll hear, ladies and gentlemen, that that's the
21 young woman who was requesting heroin from Mykal Derry and who
22 obtained it from his brother, Malik Derry, and she was
23 captured on a surveillance photograph during the course of the
24 investigation.

25 Now, ladies and gentlemen, you will also hear evidence

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1 about a particular corrupt bail bondsman who the members of
2 the conspiracy used during the course of the case in order to
3 obtain bail for members of their conspiracy. You will hear
4 about this November 13th, 2012 conversation between the
5 corrupt bail bondsman and Mykal Derry where the bail bondsman
6 says, "I don't know, it depends if somebody can make a pay
7 stub for her, she ain't work." In other words, a potential
8 cosigner who didn't have a job. Agent Kopp will explain all
9 of this.

10 And ladies and gentlemen, by the way, when I provide an
11 interpretation for these calls, it's not my interpretation.
12 This is all based upon the testimony that you're going to hear
13 through Special Agent Christopher Kopp. Agent Kopp will
14 explain that the bail bondsman was saying this cosigner
15 doesn't have a job. If she's going to be a cosigner, somebody
16 needs to dummy up a pay stub for her so that it looks like she
17 has a legit job.

18 On January 26, 2013, there's a conversation between
19 Mykal Derry and Kamal Allen in which Kamal Allen says, "You
20 got to call the bail bondsman."

21 "Foo," who is a reference to another co-conspirator, an
22 unindicted co-conspirator, Foo is in custody. We need to get
23 Foo out.

24 Agent Kopp is going to explain that Kamal Allen
25 proceeds to say, "We got the 25" -- a reference to \$2,500, "we

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1 got like three co-signers, and I got some work for him."
2 Agent Kopp is going to explain that in the context of the
3 investigation, and in this particular call, work is a
4 reference to heroin. And Kamal Allen later says, "Tell him he
5 want a whole wall, I got a whole wall for him, I got a whole
6 brick for him." A whole brick of heroin.

7 In his capacity as a leader of this organization, Mykal
8 Derry had conversations with his younger brother, Malik Derry
9 about, if you will, customer satisfaction. How the heroin
10 users were feeling about the product that they were being
11 supplied.

12 On November 20th, 2012, Mykal Derry text messages his
13 brother, Malik Derry, and says, "What they sayin' about it?"
14 Agent Kopp will explain, he was asking, what's the feedback on
15 the heroin?

16 At 11:27 p.m., Malik Derry responds, "I ain't hit
17 nobody yet, but I gave seed 1 for his flo." Agent Kopp will
18 explain that seed is a reference to a friend and
19 co-conspirator of Malik Derry by the name of Saeed Zaffa, and
20 Malik had given him a quantity of heroin to test on Saeed
21 Zaffa's flo, on his customers.

22 At the end of this exchange, Mykal Derry advises Malik
23 Derry, "Let the bitch mu check it out."

24 Ladies and gentlemen, you'll hear during the course of
25 the trial that "the bitch Mu," in quotes, is a reference to

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1 Jodi Brown, a woman who is a heroin user and addict, the same
2 woman I referenced before, who provided her public housing
3 apartment unit to members of the conspiracy for use as a trap
4 house.

5 On November 25th, 2012, there's this recorded
6 conversation between Jodi Brown, also known as Mu, and Mykal
7 Derry, where she is sadly informing Mykal Derry, as Agent Kopp
8 will explain, she's trying to get into detox, but she doesn't
9 have enough heroin in her system to be admitted into an
10 inpatient program. She's only got enough for an outpatient
11 program.

12 And as you will hear, Mr. Derry's response to that is
13 "that thing," a reference to a firearm, "that thing you heard,
14 I need it."

15 Now, the next day, as you see from this exchange of
16 text messages, Mykal Derry is still trying to find out about
17 customer satisfaction. "What they say about that?"

18 Malik Derry again responds, "Seed about to see now.
19 Call him."

20 Eventually, as you'll hear from Agent Kopp, Mykal Derry
21 is able to get in touch with Saeed Zaffa, and Saeed Zaffa
22 explains, "A sniffer said it was aight," meaning a sniffer
23 said it was okay. "I ain't give it to no shooters yet." I
24 haven't given it to anyone, Agent Kopp will explain, who
25 injects the heroin. I have just had a chance to give it to

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1 somebody who inhales the heroin, and they say it is okay.

2 Ultimately, Agent Kopp will explain from a text message
3 at the bottom right of the screen, Saeed Zaffa says, "They say
4 it's okay, but it ain't nothing to grab a bunch of."

5 Ladies and gentlemen, as I mentioned before, you're
6 going to hear during the course of this trial hundreds of
7 unguarded moments of truth. And in this particular one, on
8 December 3rd, 2012, after Malik Derry lets his brother, Mykal
9 Derry, know that Malik Derry is looking for that wall --
10 again, Agent Kopp will explain, an entire brick, a wall -- for
11 that flo -- Agent Kopp will explain, for a customer -- they
12 have this exchange, where Mykal Derry says, "I'm watching The
13 Wire right now man."

14 And Malik Derry responds, "Yeah I be on that, too, I be
15 watching that shit now too, you heard."

16 Mykal Derry responds, "You gotta get all the seasons."

17 And Malik responds, "I got all the seasons."

18 Well, Agent Kopp will explain to you that The Wire is a
19 reference to a popular HBO series about an actual wiretap
20 investigation, but that Mykal Derry and Malik Derry were
21 unaware at the time of this conversation that they were
22 starring in their own production.

23 On December 15th, 2012, Mykal Derry begins the process
24 of acquiring a new batch of heroin, as you'll hear during the
25 course of the trial. You're going to see that at 11:46 a.m.,

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1 he text messages a higher level supplier from the Paterson,
2 New Jersey area and says, "Diamond still on?" Agent Kopp will
3 explain the question is, is the diamond stamped heroin on
4 deck, is it available?

5 The response is, from Mark Frye, one of the heroin
6 suppliers in Paterson, New Jersey, "No Limit, same thing."

7 Well, two minutes later, you're going to hear that
8 Mykal Derry places a call to Saeed Zaffa, they have a
9 conversation, and Mykal Derry says, "You ain't have no
10 complaints off that Limit, right?" Agent Kopp will explain,
11 he's asking, no, no problems from the customers with that No
12 Limit stamped heroin, right?

13 And Saeed Zaffa, who you've heard about before,
14 responds, "Nah, hell no."

15 Mykal Derry confirms, "Oh, all right, they like that
16 shit?"

17 Saeed Zaffa says, "Yeah."

18 And then Mykal Derry responds, "I'm about to, uh, bust
19 another one, you heard." Agent Kopp will explain that's a
20 reference to going back up to Paterson, New Jersey to acquire
21 a new batch of heroin.

22 How does he know that? Well, during the course of the
23 wiretap intercept, in addition to obtaining recorded audio
24 calls and text messages, Agent Kopp, through Federal Court
25 authorization, was able to obtain what is known as cell site

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1 location information which is simply data that registers on
2 cell towers that you might have seen driving up or down a
3 highway. When a cell phone is in use, it registers on cell
4 towers, and you'll hear the testimony of an FBI expert on the
5 analysis of cell site location information.

6 This is a portion of that analysis with respect to
7 Derry phone 8, the phone number ending in 4282, on December
8 15th, 2012, after that exchange with the supplier in Paterson,
9 New Jersey, and Saeed Zaffa.

10 Derry phone 8, at 12:48 p.m., is located in the area of
11 Atlantic City, New Jersey. Later on, the phone registers on
12 cell towers further north until it's eventually in the area of
13 Paterson, New Jersey, and at a certain point the phone
14 registers on cell towers coming back down to Atlantic City,
15 New Jersey by 6:00 p.m.

16 Now, you're going to hear that to corroborate that
17 evidence, Agent Kopp had surveillance teams following the
18 couriers, including Mykal Derry, who went up to Paterson to
19 obtain the supply, and video recorded them at the scene where
20 they obtained that supply.

21 Now, after that supply of No Limit heroin is acquired,
22 in the next couple of days, December 17th, it's recovered by
23 law enforcement.

24 Ladies and gentlemen, you will hear during the course
25 of the trial about surveillance that was conducted outside the

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1 trap houses at 238 and 236 Rosemont Place, the public housing
2 units of Jodi Brown and Rashada Allen. You're going to hear
3 that on a video recording, Mykal Derry can be seen with
4 Derreck Mack and Terry Davis, two other co-conspirators, and
5 at a certain point, Derreck Mack can be seen on the video
6 positioning a .45 caliber firearm in his waist area. As a
7 result of that, law enforcement instructed Atlantic City
8 Police Department officers to approach Terry Davis and Derreck
9 Mack, and after a pursuit, Terry Davis was arrested, a 9
10 millimeter Celtic firearm was recovered from Terry Davis, and
11 a .45 caliber Ruga was recovered from Derreck Mack.

12 Tragically, during the course of that pursuit, Derreck
13 Mack pulled out his firearm -- you'll hear testimony about
14 this during the course of this trial -- and did not respond to
15 repeated requests to drop the firearm. He was ultimately shot
16 and killed in the course of that pursuit. And recovered from
17 Derreck Mack was No Limit heroin and the .45 caliber firearm
18 after he had been videoed outside the trap house.

19 Now, that same day, Malik Derry is videoed outside the
20 trap house, and you're going to see this video during the
21 course of the trial. Malik Derry is pictured walking up,
22 engaging in some interaction with Derreck Mack and Saeed
23 Zaffa, and then following Terry Davis inside the trap house at
24 238 Rosemont Place shortly before Terry Davis and Derreck Mack
25 were arrested and the firearms and No Limit heroin were

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1 recovered.

2 This is a picture, ladies and gentlemen, from one of
3 the cell phones recovered, or an SD card from within a cell
4 phone recovered at the search of Shaamel Spencer's residence,
5 that depicts members of the conspiracy posing outside 238 and
6 236 Rosemont Place, as you'll hear from the testimony of
7 Special Agent Kopp. You see to the bottom right Mykal Derry,
8 Jermaine Reynolds, Shaamel Spencer, Courtney Griffin, Kasan
9 Hayes and Lamar Macon, just some of the names that you're
10 going to hear during the course of the trial.

11 On December 24th, 2012, there was a violent altercation
12 between members of this drug trafficking organization and
13 rivals at the Tropicana Hotel and Casino in Atlantic City.
14 You're going to hear, ladies and gentlemen, that the incident
15 comes to the attention of law enforcement through a
16 conversation between Mykal Derry and Raymond Mack at 12:24
17 a.m. I'm not quite sure whether they were monitoring the wire
18 at that early hour of the morning, but at some point Agent
19 Kopp is able to recover this recording where Mykal Derry says
20 somewhat cryptically to Raymond Mack, "We need that thing up
21 here ASAP, bro, we about to get in it with Yach and them."
22 Agent Kopp will explain that Yach is a reference to a drug
23 rival by the name of Yachor Napper.

24 On that evening, Raymond Mack said, "Hey, yo, I'm on a
25 bracelet, bro." Because Raymond Mack had been arrested on

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1 December 17th related to that incident I mentioned a while ago
2 about the recovery of the firearm from Terry Davis and Derreck
3 Mack. Raymond Mack, the brother of Derreck Mack, is arrested
4 on that day. Agent Kopp will explain that he was on
5 electronic monitoring, court authorized monitoring, so he
6 couldn't make it out to the Tropicana to provide a gun to
7 Mykal Derry. Then he says, "I'm on the bracelet, enough
8 said." And Agent Kopp will explain he agrees to contact other
9 individuals in an effort to get a gun to the Tropicana Hotel
10 and Casino to make it available to Mykal Derry.

11 That same evening, according to video surveillance that
12 Agent Kopp was able to recover from the Tropicana Hotel and
13 Casino, there's this exchange between Yachor Napper, Terry
14 Davis, Terry Shiggs and Kamal Allen in one area of the casino.
15 Agent Kopp will testify about the identity of these
16 individuals, and he will explain that he was able to identify
17 these individuals because Mykal Derry had explicit
18 conversations with some of them after the incident.

19 In the day or two after this incident, he had a
20 conversation with Kamal Allen saying, "You picked up a trash
21 can?" And Kamal Allen confirmed that he did, that he picked
22 up a trash can lid and threw it at one of the co-conspirators.

23 Well, you'll hear from Agent Kopp that that's Kamal
24 Allen, that's the trash can lid that he was holding, and in
25 this frame, this screen shot from the video, you can see Kamal

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1 Allen after he's thrown the trash can lid, and Terry Davis
2 picking up a sandwich board and getting ready to throw that as
3 well.

4 You'll also hear a call intercepted between
5 co-conspirator Kasan Hayes and Mykal Derry in which Kasan
6 Hayes refers to this particular part of the incident. He
7 says, "Beyah" -- referring to the nickname for Aree Toulson --
8 and "Geez" -- Kamal Allen -- "was F'ing him up. I don't know
9 why the security guard came and F'd it up. Geez was all in
10 the N pocket though. Geez robbed while I had him in a
11 headlock."

12 And as you'll be able to see during the course of the
13 trial, Yachor Napper is held in a headlock by Kasan Hayes and
14 is robbed of several thousand dollars by Kamal Allen.

15 In another conversation after that incident between
16 Shaamel Spencer and Mykal Derry, Mykal Derry is expressing
17 disappointment that they did not have firearms available to
18 them that night. It could have gone a different way, you'll
19 hear him say during the course of the trial. And, indeed,
20 Shaamel Spencer says, expressing his own disappointment, we're
21 on camera. You'll hear the words of Shaamel Spencer. He
22 says, "N's is on camera. If they run that shit back, they got
23 Koose on camera" -- using the nickname for Mykal Derry --
24 "they got me on camera, they got you on camera, and they got
25 Mace on camera," referring to Terry Davis. "So they would

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1 have seen all of us on that tape, they would have just known
2 we was up to no good."

3 Ladies and gentlemen, you too will have an opportunity
4 to review that recording or screen shots from that recording.

5 Just a few days later, the same Raymond Mack is having
6 a conversation with Mykal Derry and informs the leader of the
7 organization, "They raided the crib I'm staying in" and "they
8 found the joint."

9 Well, from the context of that call alone, it might be
10 unclear what the joint refers to, but you'll hear testimony
11 from law enforcement officers that on the night of December
12 26th, 2012, in the early morning hours, after a call for
13 gunshots fired, Atlantic City Police Department officers
14 responded to a residence in Atlantic City. Out of the
15 residence came Raymond Mack, Ibn Abdullah and others, and
16 recovered from the residence was a loaded .40 caliber handgun.

17 Now, after the December 17th incidents involving the
18 arrest of Terry Davis and Derreck Mack outside the trap houses
19 at Rosemont Place, the organization evolves, as you'll hear
20 from Agent Kopp, and they move to a new trap house location
21 that becomes significant in the investigation. They move to
22 307 Dr. Martin Luther King, Jr. Boulevard in Atlantic City.

23 On January 1st, 2013, in this intercepted conversation
24 between Mykal Derry and Malik Derry, Malik Derry informs his
25 brother, "I'm in the trap." Mykal Derry says, "In the trap?"

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1 Where the trap at?" And Malik Derry provides the exact
2 address in this intercepted call, 307 Martin Luther King
3 Boulevard.

4 Now, just a few weeks later, ladies and gentlemen, you
5 will hear that Malik Derry was arrested in the area of 307
6 MLK, and at the time of his arrest, 14 bags, individual bags
7 of heroin were recovered with different stamps. One of those
8 stamps was this star with the smiley face. And just a few
9 weeks after that, in the day after the murder of Tyquinn
10 James, a search warrant was executed at 307 MLK, and law
11 enforcement recovered an actual stamp that matches the stamp
12 that appeared on the bags of heroin recovered from Malik
13 Derry.

14 In fact, that same day, the arrest of Malik Derry, on
15 January 17th, 2013, he discusses his arrest with his brother
16 Mykal Derry. And Mykal Derry says, "What they bag you for?"
17 Malik Derry, getting the number a little bit wrong, but close,
18 says, 15 bags. "That was in my pockets when I was leaving."

19 Now, ladies and gentlemen, you're going to see, in
20 addition to the other video recordings that I referenced
21 earlier, you're going to see examples of trap house videos,
22 videos that were made by members of the conspiracy from inside
23 the trap house with the use of cell phones. You're going to
24 see videos like this one where individuals are socializing,
25 playing dice or playing cards, in addition to selling drugs

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1 when they're not selling drugs. And you're going to hear, if
2 you listen carefully on this particular excerpt, you're going
3 to hear a reference to the trap house, and you're going to see
4 a picture of Malik Derry towards the end of it.

5 (Recording played.)

6 (Recording stopped.)

7 MR. DANILEWITZ: Ladies and gentlemen, in that video,
8 you'll see Mykal Derry, his brother Malik Derry, you'll see
9 Saeed Zaffa, Aree Toulson, Ibn Abdullah, and others engaging
10 in social activity. You're going to hear testimony that in
11 addition to the social activity, there was actual dealing of
12 heroin. You may have noticed that in the background, there's
13 a circular mirror that's quite distinctive, and that mirror
14 helps to corroborate the fact that that's 307 MLK, as you'll
15 hear through the testimony at trial. When the search warrant
16 is executed on February 11th, 2012, the investigators
17 photograph the inside of 307 MLK, and you'll see that that's
18 one of the pictures that they recover.

19 Now, in this video from one of the cell phones, you're
20 going to hear -- although it's a little bit faint, you're
21 going to see an individual by the name of Lamar Macon, one of
22 the co-conspirators, actually hold up an object and refer to
23 it explicitly as a brick.

24 (Recording played.)

25 (Record stopped.)

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1 MR. DANILEWITZ: Ladies and gentlemen, as I
2 mentioned, on February 10th, 2013, an individual by the name
3 of Tyquinn James, also known by the nickname T.Y. or T-Weeze,
4 is murdered in an execution-style killing by Malik Derry.

5 That evening began at 7:09 p.m. with an intercepted
6 call between Malik Derry and Mykal Derry on the wiretap where
7 Malik Derry says, "Bring that -- bring that because this N
8 around here."

9 Mykal Derry doesn't understand. "Who?"

10 Malik Derry explains multiple times, "T.Y., T.Y.,
11 T-Weeze, T-Weeze."

12 Eventually Agent Kopp will explain Mykal Derry
13 understands Malik Derry is referring to T.Y., a rival of the
14 drug trafficking organization. And you'll hear through the
15 testimony of Special Agent Kopp that there were multiple
16 attempts -- or through other law enforcement, there were
17 multiple attempts to kill TY over a period of time.

18 Mr. Derry identifies his location near Red Klotz. He
19 says, "I'm dead serious. I said I'm dead serious come around
20 here."

21 Mykal Derry says, "Alright."

22 A little later on, at 7:33 p.m., Malik Derry again
23 explains his location. "I'm in the back of Red Klotz bro."

24 Mykal Derry talks into the cell phone which is picked
25 up over the wiretap, "Oh he got a bike."

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1 He got a bike. You'll understand the significance of
2 that in a moment.

3 At 7:37 p.m., Mykal Derry is intercepted speaking to
4 Shaamel Spencer, and he says to Spencer, "Turn that scanner
5 on, you heard?" Agent Kopp will explain that co-conspirators
6 during the course of the conspiracy utilized police scanners
7 that enabled them to listen into law enforcement activity.

8 Mykal Derry says, "Lik. Come here hurry up." Mykal
9 Derry says to Shaamel Spencer, "Lik just splashed T.Y. you
10 heard?"

11 "Yeah, that N is gone."

12 At 8:46 p.m., in this call between Mykal Derry and
13 Malik Derry, Mykal says, "Where you at?"

14 Malik responds, "I'm in the trap."

15 Mykal responds, "I'll be over there."

16 Ladies and gentlemen, later that night, Mykal Derry
17 receives a text message from his girlfriend, co-conspirator
18 Kim Spellman who says, "First homicide of the year, head
19 shot."

20 Mykal Derry's response to Kim Spellman, "He good, he
21 acting like it's nothing, CTFU." Cracking the fuck up.

22 Mykal Derry says, "This N is a true Derry."

23 Agent Kopp obtained video surveillance of the area
24 outside the Mecca Chicken restaurant where Tyquinn James was
25 murdered that night, and you'll note a distinctive white badge

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1 on the front of the bicycle.

2 The very next day, February 11th, 2013, searches are
3 conducted. One is a search of 307 MLK where this bike is
4 recovered, a bike bearing a white Schwinn logo on the front
5 bar of the bike. And this stamp, as I mentioned, a photo is
6 shown, is taken of that distinctive circular mirror that you
7 saw from inside 307 MLK, the trap house at 307 MLK.

8 That same day, a search is executed at 727 Green
9 Street, the residence of Kim Spellman and Mykal Derry. Ladies
10 and gentlemen, recovered from that location the very day after
11 the homicide, you will hear during the course of the trial, is
12 this .380 caliber Beretta.

13 You'll hear, ladies and gentlemen, through the
14 testimony of a ballistics expert, that this
15 .380 caliber Beretta recovered from 727 Green Street
16 positively matches three shell casings recovered from the
17 scene of the TY homicide and two bullets recovered from the
18 body of Tyquinn James. .380 caliber firearm recovered from
19 the home of Kim Spellman and Mykal Derry.

20 Also recovered from that location was 18 bricks of
21 heroin; 18 bricks of heroin stamped with the stamp Mr. Nice
22 Guy and a smiley face. That will be admitted during the
23 course of the trial. Also recovered were waxine bags, stamps,
24 a grinder, a cutting agent and sifters; as will be explained,
25 implements for the distribution of heroin.

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1 Now, ladies and gentlemen, at the time of the arrest of
2 Mykal Derry and Malik Derry, and helping to confirm the
3 identification of Agent Kopp of these two individuals, their
4 cell phones are recovered at the time of their arrest.

5 And on Mykal Derry's cell phone is recovered some of
6 the text messages relating to the homicide. You'll see a text
7 message sent to Malik Derry's phone number where Mykal Derry
8 on February -- excuse me, according to the date that's there,
9 February 11th, 2013. We'll take a look at the date and take a
10 look at the time zone -- says to his brother, Malik Derry,
11 "Change up."

12 In another text message to Shaamel Spencer, Mykal Derry
13 asks, "Is he man down?"

14 Remember, Shaamel Spencer was the individual you'll
15 hear through the testimony at trial was the same individual
16 who Mykal Derry said, "Turn the scanner on."

17 He's asking Shaamel Spencer, "Is he man down?"

18 Shaamel Spencer's phone responds in a text message,
19 "I'm trying to get my scanner to work now."

20 Mykal Derry later text messages Shaamel Spencer and
21 says, "I think he is, leek, my N."

22 Ladies and gentlemen, you're going to hear about
23 another search that was conducted at the home of Shaamel
24 Spencer on February 12th, 2013, at 1610 City Place in the
25 Stanley Holmes public housing project. Recovered from that

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1 location was cash, firearm and ammunition.

2 Now, on February 14th, 2013, just days after the
3 homicide, you're going to hear this recorded jail call between
4 co-conspirator Ambrin Qureshi and Malik Derry. In that call,
5 you will hear that Ambrin Qureshi says, "Pregnant girl
6 ratted." She explains, "On Buck."

7 Agent Kopp's going to explain in his testimony that
8 Ambrin Qureshi was saying -- explaining to Malik Derry, Kim
9 Spellman, who was pregnant at the time, ratted; she gave
10 something up. She explains on Buck, Shaamel Spencer. This is
11 two days, you recall, after the search that's executed at
12 Shaamel Spencer's house.

13 Ambrin Qureshi continues, "'Cause Nikki called me and
14 told me."

15 Mykal Derry responds -- well, his initials here are
16 M.D. You'll hear that it's Malik Derry. "Oh yeah, yeah?
17 It's over. It's over," he repeats.

18 Ambrin Qureshi says, "And she gave up the joint."
19 Agent Kopp will explain that that's a reference to the .380
20 caliber Beretta firearm.

21 Malik Derry responds, "Yeah? Oh, all right. Yeah,
22 it's over. Yo that just F'd me up. Now I'm about to get the
23 roof to the max."

24 On February 17th, 2013, Mark Frye, the individual who
25 engaged in that text message exchange with Mykal Derry about

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1 the No Limit when Mykal Derry said, "Diamond still on?" he
2 responded "No Limit."

3 On February 17th, 2013, you're going to hear about the
4 arrest of Mr. Mark Frye and the recovery of 200 bricks of
5 heroin stamped Red Bull and Black Angel.

6 You're going to hear that on March 26th, 2013,
7 hundreds, hundreds of law enforcement agents fanned out to
8 different locations in the pre-dawn hours in Atlantic City,
9 New Jersey, and executed searches, like this search at the
10 residence of Aree Toulson, recovering a firearm and heroin.

11 This search at the home of Franklin Simms recovering a
12 loaded firearm, ammunition, and drug packaging paraphernalia,
13 including stamps.

14 You'll hear about this search at the residence of Saeed
15 Zaffa, a recovery of cell phones, packaged heroin, and a .40
16 caliber bullet, .40 caliber ammunition.

17 You'll hear about this search at the home of Latasha
18 Cherry, the girlfriend of Tyrone Ellis, the recovery of about
19 \$37,000, multiple cell phones, and a Glock handgun.

20 Ladies and gentlemen, you'll hear about other incidents
21 during the course of the conspiracy period, but not within the
22 six-month period of the wiretap investigation, including on
23 October 30th, 2010, the violent assault by Mykal Derry and
24 other individuals of a young man by the name of Anthony
25 Rosario. You will hear testimony during the course of the

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1 trial that Anthony Rosario had the audacity to sell heroin in
2 this organization's turf without acquiring it through Mykal
3 Derry, and he paid a price, as you will hear during the course
4 of the trial.

5 You will see evidence about this controlled purchase of
6 heroin from Mykal Derry on November 23rd, 2012, among other
7 purchases, lots of them.

8 Ladies and gentlemen, it's safe to say you are going to
9 see and hear a lot of evidence during the course of this
10 trial: search warrant evidence, cell phone exams, records
11 from cell phone service providers, cell site location
12 information, controlled buys, expert witness testimony,
13 seizures of guns during the wiretap, testimony from law
14 enforcement witnesses, and a cooperating witness or two.

15 As I said at the outset, this is a case about drugs,
16 guns, and cell phones. At the end of the trial, the
17 Government will have an opportunity to come back before you
18 and summarize the evidence, and at that time we will ask you
19 to return the only verdict supportable by this evidence, and
20 that is a verdict of guilty for both defendants on each and
21 every count.

22 Thank you.

23 THE COURT: All right. Mr. Danilewitz, thank you.

24 All right. We've reached the point in the morning
25 where it's appropriate for us to take a short break. We'll

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1 have the jury to the jury room. After the conclusion of that
2 break, you will hear opening statements from the defense.

3 You will hear this from me often. It's an important
4 reminder. Please keep an open mind. You have not yet heard
5 any evidence. Please don't discuss the case among yourselves.
6 And we'll see you back in 10 minutes.

7 Ms. Novoa.

8 THE DEPUTY COURT CLERK: All rise.

9 (Whereupon the jury exited the courtroom.)

10 THE COURT: All right. Thank you, please be seated.

11 All right. And who will go first, Mr. Madden,
12 Mr. Markowitz?

13 MR. MARKOWITZ: Mr. Madden will go first.

14 THE COURT: All right. See you back in 10 minutes.
15 We should be able to finish by noon. Does that make sense?

16 MR. MADDEN: Yes.

17 MR. MARKOWITZ: Absolutely, your Honor.

18 MR. ASKIN: And we'll have a lunch break at noon
19 roughly, your Honor?

20 THE COURT: Yes.

21 MR. ASKIN: Okay. Thank you.

22 THE COURT: All right. Very good.

23 (Recess at 11:05 a.m.)

24 (In open court at 11:20 a.m.)

25 (Defendants present.)

1 THE DEPUTY COURT CLERK: All rise.

2 (Whereupon the jury entered the courtroom.)

3 THE COURT: All right. Thank you. Please be seated.

4 All right. Mr. Madden, do you wish to make an opening
5 statement?

6 MR. MADDEN: Yes, please, your Honor.

7 THE COURT: You may proceed when you're ready, sir.

8 MR. MADDEN: Thank you, your Honor.

9 You've seen the Government's strategy. Their strategy
10 is to overwhelm you and to scare you. They say they don't
11 want to sugarcoat or highlight things like curse words and
12 then they highlight them in yellow up there. They play a
13 video that they say is Mykal Derry shooting a gun. They turn
14 the volume all the way up and they play it for you, boom,
15 boom, boom. That's their strategy in this case. Their
16 strategy is to show you certain things, highlight certain
17 things, and hope to scare you and hope that you just see that
18 and you don't look at the nuances and you don't look at all
19 the facts of their case.

20 Their case is based on two things. The first is
21 assumptions, assumptions by who -- the agent here, the Special
22 Agent Kopp here, and he's here today and he's going to get up
23 and testify. And you heard that from the Government. You
24 heard that Agent Kopp is going to interpret this and he's
25 going to explain that and he's going to tell you what this

1 means. And even in the opening statements, you see how much
2 they are relying on this agent and they're hoping that you'll
3 do the same thing. They're hoping that he will lead you and
4 you'll let him lead you down the yellow brick road and you
5 don't notice the man behind the curtain at the end, and
6 they're hoping that you just listen to his interpretation of
7 everything as opposed to listening to it and doing what the
8 judge tells you is your job as jurors.

9 The judge will tell you very clearly that as jurors
10 your job is to listen to all the facts and think of them
11 critically and analyze them and evaluate them and think what
12 does this mean, what is actually happening here. Your job is
13 not to be led down the yellow path by Agent Kopp and have his
14 interpretations be the true meaning of what everything is. If
15 we listen to what the Government says, any word that Agent
16 Kopp decides means a gun, means a gun. There were seven,
17 eight different words up there at random that he just pulls
18 out, yeah, that means a gun, that means a gun, that means
19 drugs, that means drugs.

20 Agent Kopp, he doesn't have some special degree here in
21 slang, but he's going to tell you what he says all these words
22 mean, and they just want you to listen to that and believe
23 that, and they just want you to let him fill in all these
24 blanks. And he's going to tell you who lives where and who's
25 related to who and who dates who, and they just want you to

1 believe all of that and to follow him down that path.

2 Well, what you need to realize is there are gaps, there
3 are lots and lots of gaps in this evidence that can be filled
4 in one way and one way only, and that's by assumptions,
5 assumptions based on what Agent Kopp says. And you'll hear
6 that Agent Kopp, he's the head agent in this case, and what
7 does that mean? That means that he is the person who is
8 running -- who is overseeing all of these people in Atlantic
9 City, and this is his case, this is his baby. And when you
10 look at it and when you think, can we listen and believe
11 everything he says blindly? Can we listen to every single
12 interpretation and definition that he gives of every phone
13 call and every relationship, can we just listen to that?

14 What you need to realize is this is his baby, this
15 case. He's put all this together. He's sitting here with the
16 lawyers now. He's their star witness in this case. This is
17 his career. This is what he's made it on and this is his
18 pinnacle here. And so can we just take what this man who is
19 basing his whole career, who is hoping that this can be his
20 shining star, can we just take what he says as gospel truth?
21 Or do you do what you're told to do, do what you've taken an
22 oath to do, and that is listen to the evidence critically and
23 don't let them just fill in the gaps for you. You decide
24 whether these gaps can be filled in.

25 The second thing that this is based on -- besides

1 assumptions and assumptions made by the Government, it's based
2 on confidential witnesses or witnesses who come out. These
3 are people who the Government purposely charged with crimes
4 with the hope that they would flip and that they would come in
5 and say what the Government wants them to say. And these are
6 big witnesses who are up here on these charts, who they have
7 purposely charged and they've called leaders, and these people
8 are looking at these serious charges and what's going to
9 happen? They're going to get up and they're going to testify,
10 and this is based on their testimony and their version of the
11 events. And not surprisingly, these people who pled guilty
12 who have become witnesses for the Government are going to say
13 exactly what the Government wants them to say. And they're
14 going to say all kinds of horrible things about what was going
15 on, but what you need to remember and what you need to think
16 about is these are people with a lot to lose. It's not their
17 career on the line, but it's their life and what's going to
18 happen to them next, because they've all pled guilty to really
19 serious federal crimes, and they're all hoping that by getting
20 up and telling you what the Government wants them to tell you,
21 that they're going to get out of jail time, that they're going
22 to cut a break from this. That's what they're all hoping.
23 And that's what this case is based on. You're going to
24 hear a lot of tapes and you're going to hear -- you're going
25 to see some horrible videos and some horrible things and

1 you're going to hear some horrible language, and the
2 Government hopes that that scares you, that that overwhelms
3 you, that you say, oh, my God, it just must be true what
4 they're saying. And they're going to hope that you don't
5 critically look at the evidence, but that's your job to do.
6 And they're going to hope that you let the agent interpret
7 everything you want.

8 By way of example, you look at this chart here. All
9 right? They didn't get this chart from Mykal Derry's house.
10 They didn't go into his plan for his business and bring this
11 chart out. This is a chart that the agent and the Government
12 wrote up. And this little thing here, Mykal Derry drug
13 trafficking organization, that's not some established name of
14 this drug trafficking organization. That's a name that the
15 agent made up. And so he puts it on a chart that he makes up
16 and he puts the name up there that he makes up. Why does he
17 do that? Because he wants you just to take his word for
18 everything. He wants you just to say, all right, well, that
19 must be the truth because it's written down by a federal
20 agent.

21 The judge has already told you and the judge will
22 continue to tell you, just because the Government and the
23 agent gets up and says things, like this is the Mykal Derry
24 drug trafficking organization, means nothing. It is the
25 evidence that means something. And that's what you need to

1 listen to, and not to their assumptions and their charts and
2 their little captions on the top where they call it the Mykal
3 Derry drug organization. You will never hear a single
4 telephone conversation or tape of anybody referring to this as
5 the Mykal Derry drug trafficking organization.

6 So, you must ask yourself why, why is it so important
7 then that the Government has to have this big chart where they
8 have this fake name that they made up? It's so important
9 because they want to turn your mind from the beginning. They
10 want to show you videos of scary people using the N word,
11 shooting guns and calling people bad names, and they want you
12 to assume that that means that he's the head of their drug
13 trafficking organization.

14 I say their drug trafficking organization because this
15 is one that Agent Kopp and the Government has come up with,
16 this is one that they have pieced together. Without his
17 interpretations and without his filling in the gaps, this is
18 just a bunch of people in Atlantic City in the projects who,
19 some of them are doing bad things and some of them are
20 involved in stuff and some of them aren't, but the thing that
21 makes this into a drug trafficking organization is the
22 assumptions of the agent, and you as the jury need to not
23 blindly follow them down that yellow brick road, make your own
24 analysis and listen to the evidence critically. And then at
25 the end of the day, if you do that, then you will find Mykal

1 Derry not guilty. Thank you.

2 THE COURT: All right. Mr. Madden, thank you.

3 All right. Mr. Markowitz, would you like to make an
4 opening statement?

5 MR. MARKOWITZ: I would, your Honor.

6 THE COURT: You may proceed when you're ready, sir.

7 MR. MARKOWITZ: Counsel for the Government, Mr.
8 Madden, your Honor, if it pleases the Court, this case begins
9 with an indictment. And in this case, Mr. Danilewitz laid out
10 what the three charges were, conspiracy to distribute and
11 possess 1,000 grams of heroin in the Atlantic City area.
12 Also, there is a count for discharge of a gun in relation to
13 the conspiracy, and finally the phone counts. But what's
14 interesting about that indictment, and it gets this whole case
15 rolling, is the time frame. It starts in October 2010 and it
16 ends in March 2013.

17 There was a formal proceeding with regard to that
18 indictment, and Malik Derry, before a judge, got up and they
19 read this whole indictment, and he pled not guilty. And the
20 reason that he pled not guilty is because he's not guilty of
21 being a member of any conspiracy. In fact, for a good
22 portion, 34 months while this conspiracy was going on, he has
23 been incarcerated from January 20th, 2010, and he was released
24 October 20th, 2013. That's 34 months.

25 You've heard these acts of violence against Anthony

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1 Rosario. You've heard acts of violence against the Tropicana.
2 Nowhere is Malik Derry there. You've heard all kinds of
3 seizures of guns. I believe -- I counted them up, maybe there
4 was 15 or 20 seizures of weapons that the Government said we
5 had all kinds of law enforcement from Atlantic City, a task
6 force, not one gun linked to Mr. Derry.

7 What is Mr. Derry? What's this case about for him?
8 Why isn't he guilty? Why is he not involved? Why is he not
9 part of this conspiracy? Because, and the judge will instruct
10 you, all he is is a small time drug dealer. He's a buyer and
11 seller of drugs, and that does not make you a member of a
12 conspiracy.

13 What's more important, they played that tape of the
14 five or six friends getting together at 307 Martin Luther King
15 Boulevard. Like Mr. Madden said, they put all of this kind
16 of, look at this tape, it's a tape of five men who have known
17 each other, who grew up together, who are playing dice. Is
18 there anything sinister about that? No, just five friends
19 hanging together. And the judge will instruct you, just
20 hanging out with your friends, a mere presence if there's some
21 drugs there, doesn't make you a member of a conspiracy.

22 Like Mr. Madden pointed out, this isn't Apple, this
23 isn't Sony, Ford Corporation. All it is is their wish list.

24 And just to show you, they have at the top suppliers.
25 Well, you're going to hear from Agent McNamara. We don't

1 manufacture heroin in the United States. It comes from
2 overseas. So, I'm sure there are larger suppliers and I'm
3 sure there are more people. This is where they chose to cut
4 it off. There's a bigger picture here, and when you look at
5 the bigger picture, all you're going to see is Malik Derry as
6 a buyer and seller of drugs.

7 Mr. Madden touched on it briefly and it's interesting,
8 there's cooperators, and you're going to hear from them, and
9 they've made plea agreements. There's nothing improper about
10 that. But one of the things that everyone always says is the
11 Government, you know, doesn't find these people. It takes it
12 as they come.

13 But when you hear, after you hear their direct
14 examination and listen to their cross, and that's one of the
15 things I want to emphasize about how a trial goes, you must
16 give everybody an opportunity to let the Government do their
17 direct and let the defense do its cross, because it will
18 elicit information that will discredit these witnesses and it
19 will give you a bigger picture. And that is critical to this
20 trial.

21 But as I referred before, they say we don't find them,
22 we just take them as they come. However, the most important
23 thing, these guys are smart. They know the deal. They have
24 lawyers. And as my mother once said at my sophomore prom,
25 make sure you dance with the girl who brought you to the prom,

1 and I guarantee you these individuals are dancing with the
2 Government because they know what's in their best interest.

3 Now, you heard reference -- you saw that tape of the
4 Tyquinn James alleged murder. There is nothing -- they have
5 found no evidence linking that gun to Mr. Derry. There's no
6 evidence linking anything. It's all innuendo. It's all
7 pieced together. And there's nothing to show that he had
8 anything to do with that Tyquinn James murder.

9 In fact, you're going to hear evidence in the beginning
10 of the conspiracy whereby somebody else shot at Tyquinn James.
11 Mr. Derry was in jail.

12 And you have to remember, these are two separate cases.
13 They join them together, but it's United States versus Malik
14 Derry, and all the evidence is going to show is that Malik
15 Derry is a small-time drug dealer. Basically purchases drugs,
16 sells drugs, nothing more.

17 You heard about his arrest on January 17th, 2013. What
18 was he doing? He's out on the street, hustling small
19 quantities of drugs, and two police officers unrelated to this
20 investigation arrest him. Very small quantity.

21 But what didn't we find in that investigation? He
22 never had a gun. He gets arrested on February, I believe it
23 is either the 10th or the 11th. Does he have a gun on him?
24 No. There's nothing linking him to any gun, any violence.

25 One of the things that's very difficult, and I was

1 trying to work it around, is, you know, we talk about, he was
2 incarcerated, and we talk about that he was arrested for
3 selling small quantities of drugs, and that, yes, he purchased
4 them from his brother. That does not make you a member of the
5 conspiracy. But there's an old adage that says where there's
6 smoke, there's fire.

7 One of the things that we did in this whole process --
8 and I want to thank you because it's long and it's arduous,
9 you're given questions beforehand -- but the one thing that
10 both the Government, the defense, the defendants know, we got
11 a jury who said, I'm going to keep a clean slate. I'm not
12 going to have any preconceived notions of guilt or of
13 innocence. I'm going to listen to the evidence.

14 And that's the one thing that I believe everybody in
15 this courtroom believes, and you can't -- you have to take the
16 evidence, and that is the evidence of the conspiracy. Is
17 Malik Derry a part of this conspiracy? The evidence will show
18 he is not.

19 Is he -- did he use a gun in furtherance of this
20 conspiracy? You'll find no gun. You won't find him at the
21 gun range. They played that videotape, and you hear the
22 firing, and they had an undercover agent in there. You will
23 never see Malik Derry the three times that they videotaped
24 them at the shooting range. There's nothing to show that he
25 ever had a gun.

1 When you go through all of the evidence and you hear
2 all of it and you let the Government -- you hear their
3 presentation, you let Mr. Madden and I do our job, you will
4 find not even beyond a reasonable doubt, which is an
5 incredibly high standard, you will have no doubt that Malik
6 Derry is not a part of this fantasy drug organization. He is
7 a person who is just a small seller and buyer of drugs, not
8 involved, no violence, no anything. You will find that he is
9 not guilty of what this indictment charges him.

10 Thank you.

11 THE COURT: All right. Mr. Markowitz, thank you.

12 All right. If I could see counsel at sidebar for one
13 moment.

14 (Sidebar.)

15 THE COURT: All right. Well, we've finished a little
16 earlier than I anticipated. We could -- their lunch is going
17 to get here about 12:15. So, that's a half hour from now. I
18 can give them a longer break, dismiss them now, or we can
19 start in with testimony. I don't know what the preference is.

20 Your assumption was you would start at 1:00, and we'll
21 just take a break and let them know and have them let us know
22 when they're ready, and if it's a little earlier than 1:00,
23 then we can do that, too.

24 MR. ASKIN: I prefer to do that. I'll do whatever
25 the Court wants, but I prefer to do that.

