

APPENDIX 4

1 THE WITNESS: Yes.

2 THE COURT: So would it be fair to say that he was
3 Mirandized informally in every respect except advising him that
4 anything he said could and would be used against him in a court
5 of law?

6 THE WITNESS: Yes.

7 THE COURT: Mr. Kelley, do you have anything further
8 on this point alone? I'm going to -- you're going to have an
9 opportunity to redirect him before the jury, but I'm coming
10 back to this point. Do you have anything that you wish to
11 examine him on?

12 MR. KELLEY: No, I do not, Your Honor.

13 MR. GOLDEN: I do, one thing. If you look at page 5
14 of your report, the second paragraph, apparently Mr. DeVillers
15 and Agent Lauber had stepped out of the room.

16 THE WITNESS: Yes, sir.

17 MR. GOLDEN: Do you remember why they stepped out of
18 the room?

19 THE WITNESS: No, I do not.

20 MR. GOLDEN: Could it have been to caucus about what
21 was going on in the interview? It wasn't like one had to go to
22 the bathroom and the other one went with him or anything like
23 that.

24 THE WITNESS: I don't know.

25 MR. GOLDEN: It does say in the second sentence that

1 after they came back in, Mr. Holt was asked, What really
2 happened? And it was explained to him that this was his chance
3 to tell us what really happened on the night in question.

4 Apparently, they -- there was some concern about what he
5 was saying or the truthfulness or the accuracy?

6 THE WITNESS: Yes, sir.

7 MR. GOLDEN: At that point, this was their way of
8 saying, okay, want another shot at telling us what happened?

9 THE WITNESS: Yeah, telling us the truth.

10 MR. GOLDEN: And they didn't go back over any of the
11 things that he was advised before he began, in terms of his
12 ability to leave or not talk or anything like that, correct?

13 THE WITNESS: No, he did not.

14 MR. GOLDEN: Okay. Thank you.

15 THE COURT: Well, there's nothing in the record before
16 the Court at this time that, factually, would negate what I
17 found previously in my order on the motion to suppress. At
18 this point in the record, it seems that he was -- he understood
19 that -- or at least on the record before me, he understood that
20 he was free to leave. There was no custodial interrogation, as
21 far as the case law is concerned, and so there was no
22 requirement for him to be Mirandized. And so the law of the
23 case, as reflected in my November 12th, 2015, order still
24 stands.

25 But it comes perilously close to amounting to a

1 constitutional violation. I'll put it to you like this,
2 Government -- and I had the same -- had this been essentially
3 the same as it was when I considered this, I don't know whether
4 the outcome would have been the same.

5 And let me tell you what I mean by that. I'll tell you
6 what I don't like about this, because I'm not going to impose
7 the sanctions of the exclusionary rule. But for anyone who was
8 involved in this type before, I will tell you what my thinking
9 is so that in the future maybe we won't have to resort to this
10 prophylactic measure.

11 What bothers me is that he was subpoenaed to come in to
12 testify to the grand jury. It seemed that you knew that you
13 might question him, but you -- the real reason he was coming
14 down was to provide DNA and a photograph. If he was just
15 coming down to provide DNA and a photograph, we're all good.
16 But if you knew that you were going to question him, at the
17 very least, I believe he should have been Mirandized.

18 The case law doesn't necessarily say it. But this case,
19 to me, it had the same feeling, Mr. DeVillers, of *Brewer vs.*
20 *Williams*. If I remember it from law school, certainly you
21 remember it from law school because you're much younger than I
22 am so your mind is probably not as bad as mine for memory. But
23 I remember that was a right-to-counsel case. They were driving
24 in Iowa. The defendant was in the back seat. Two detectives
25 were taking him from -- maybe from Cedar Rapids to Des Moines

1 or something like that. But his lawyer had instructed him not
2 to answer questions -- to be asked questions and for him not to
3 answer any. So they didn't ask him any questions but they
4 started talking about how unfortunate it was that the young
5 lady wouldn't get a Christian burial. And they kind of cajoled
6 him into making statements.

7 Now, I don't believe for a moment that you cajoled
8 Mr. Holt into making a statement. But I don't believe that --
9 because you have personal credibility with me, Mr. DeVillers.
10 And I wouldn't rest a rule on the prosecutor's or any
11 particular lawyer's or any actors in the criminal justice
12 system's personal credibility. I think that the better rule is
13 if you're going to question somebody in those circumstances,
14 then it doesn't hurt anything to either Mirandize him or to
15 record it.

16 It baffles me that you typically will use a recording
17 device to record a statement that really amounted to a
18 confession, but when no one had batteries in this building
19 where there are numerous recording devices and there are
20 stores, and batteries aren't cost-prohibitive, that nobody got
21 a battery. It just baffles me.

22 It doesn't rise to the level of a constitutional
23 violation. Let me just say that it rises to the level of poor
24 judgment. You know, we all know how some things may not be
25 illegal but might reflect poor judgment. Well, it reflects