Appendix - A

UNITED STATES, Appellee, v. JOHN ASMODEO, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
2019 U.S. App. LEXIS 6590; __ Fed. Appx. __
No. 18-339-cr
March 5, 2019, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of New York (Briccetti, J.).

Counsel FOR APPELLANT: COLLEEN P. CASSIDY, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: MARCIA COHEN Assistant United States Attorney (Lauren Schorr, Daniel B. Tehrani, Assistant United States Attorneys, on the brief), for Geoffrey S. Berman United States Attorney for the Southern District of New York, New York, NY.

Judges: PRESENT: GUIDO CALABRESI CHRISTOPHER F. DRONEY, Circuit Judges, STEFAN R. UNDERHILL, Chief District Judge.*

CASE SUMMARY District court did not err in finding that the discovery of the CD was sufficiently attenuated from the illegal search to permit its admission because an intervening circumstance disrupted causal chain between search and discovery of the CD. Witness's voluntary production of CD constituted intervening circumstance weighing against suppression.

OVERVIEW: HOLDINGS: [1]-The district court did not err in finding that the discovery of the CD was sufficiently attenuated from the illegal search to permit its admission because an intervening circumstance disrupted the causal chain between the search and the discovery of the CD. The witness's voluntary production of the CD constituted an intervening circumstance weighing against suppression. The long delay between the search and discovery of the CD also suggested a weak causal connection between the two events and undermined the potential deterrent value of suppression.

OUTCOME: Orders affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Reviewability > Waiver
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

Waiver, the intentional relinquishment or abandonment of a known right, extinguishes an error and obviates plain error review. Forfeiture, the failure to make the timely assertion of a right, does not.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

APPENDIX - A

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Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review

Where a criminal defendant forfeited an argument by failing to raise it below, the appellate court may still review the district court's decision for plain error.

Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation

Conducting a custodial interrogation after an illegal arrest in a congenial and non-threatening manner does not in and of itself disprove that the police acted in bad faith.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress

On appeal from the denial of a motion to suppress, the appellate court reviews legal conclusions de novo, findings of fact for clear error, and mixed questions of law and fact de novo.

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Attenuation

To determine whether evidence is sufficiently attenuated from an illegal search to be admitted, the appellate court first considers the purpose and flagrancy of the official misconduct. The appellate court looks to the presence of intervening circumstances and the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation

In light of the substantial social costs of applying the exclusionary rule, the appellate court favors exclusion only when the police misconduct is most in need of deterrence, that is, when it is purposeful or flagrant.

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Attenuation

An intervening independent act of a free will may purge the primary taint of an illegal search.

Opinion

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the district court entered on March 7, 2017, and September 6, 2017, are **AFFIRMED.**

Defendant-Appellant John **Asmodeo** appeals from the district court's orders dated March 7, 2017, and September 6, 2017, denying his motion to suppress evidence. On appeal, **Asmodeo** contends that certain evidence should have been excluded as the product of the government's illegal search of his home. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.**{2019 U.S. App. LEXIS 2}**

BACKGROUND

On April 22, 2014, law enforcement officials of the United States Department of Homeland Security ("DHS") applied for a warrant to search the residence at 166 See Avenue, Mahopac, New York, which was affiliated with an Internet Protocol ("IP") address that had been used to download child pornography. A Justice of the Court of the Town of Carmel, New York, issued a warrant to search the residence, identified as a "2 story multi family home with brick on the bottom and vinyl siding on top with an entrance in the front and side," and to seize a number of electronic devices and documents. App'x at 31. The home at 166 See Avenue had two units, an upstairs apartment and a downstairs apartment. Later, it was determined that Kelly Whelan lived in the second floor apartment, while her nephew, the defendant John **Asmodeo**, lived in the first floor apartment. The warrant did not describe which unit could be searched. The affidavit supporting the issuance of the warrant identified three IP addresses, none of which was the IP address identified in the warrant, and identified Whelan as the subscriber of one of the addresses. Neither the affidavit nor the warrant mentioned **Asmodeo** by name.

The following**{2019 U.S. App. LEXIS 3}** day, federal and local law enforcement officers executed the warrant at 166 See Avenue. First, they entered the second-floor apartment of Kelly Whalen and then proceeded to search the first-floor apartment of **Asmodeo**. Upon finding evidence of child pornography on Asmodeo's computer, the officers arrested him.

At the Town of Carmel police station, DHS Special Agent Christopher McClellan conducted a videotaped interrogation of **Asmodeo**. The agent gave a *Miranda* warning and **Asmodeo** stated that he was not willing to waive his rights. Nonetheless, McClellan continued to question him, and he eventually disclosed substantial information concerning his involvement with child pornography.

During the interview, **Asmodeo** disclosed that his devices contained child pornography downloaded from the internet. He also described two videos that he filmed and had stored on his computer. **Asmodeo** filmed the first video of himself having sexual relations with his "friend Jess" when, he said, he was sixteen years old and she was fourteen (the "Jess Video"). App'x at 614. He told McClellan that the Jess Video could be found on his computer in a folder entitled "girls," and repeatedly denied having shared it with any person**{2019 U.S. App. LEXIS 4}** other than the victim in the video. **Asmodeo** stated that he filmed the second video using a hidden camera to record the nine-or ten-year-old daughter of a friend changing into and out of a bathing suit in the bathroom. DHS Supervisory Special Agent John Mirandona later conducted a forensic search of Asmodeo's electronic devices, looking specifically for the video filmed in the bathroom. The search revealed five videos of a ten-year-old girl changing in the bathroom filmed on separate occasions (the "Bathroom Videos").

The search also revealed more than 3,000 pornographic images and 20 pornographic videos of children, downloaded from the internet and stored on Asmodeo's devices.

Asmodeo was first charged in New York state court, and then, on February 3, 2015, the government filed a criminal complaint in the Southern District of New York, charging **Asmodeo** with attempted sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) and (e), in relation to the Bathroom Videos, and receipt and distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1), in relation to the images and videos downloaded from the internet. On June 1, 2015, an indictment was returned charging **Asmodeo** with one count of attempted sexual**{2019 U.S. App. LEXIS 5}** exploitation of a child in connection with the Bathroom Videos and one count of receipt and distribution of child pornography in connection with the internet images and videos.

In February 2016, **Asmodeo** moved to suppress both the evidence seized from his house and his

post-arrest statements to McClellan. On June 30, 2016, about one month before the court was scheduled to hear those motions, DHS Special Agent Steven Mullen and Detective Sergeant Michael Nagle of the Carmel Police Department interviewed Eve Condon, the mother of Asmodeo's son. Nagle learned about Condon and her son through police reports concerning unrelated child sexual and domestic abuse incidents. He first contacted Condon shortly after **Asmodeo** was arrested in order to arrange an interview of her son to determine if he had been exposed to the child pornography found in Asmodeo's home. A few minutes after Nagle and Mullen concluded the June 2016 interview, Condon called to give them a compact disk she had located containing a copy of the Jess Video (the "CD"). Later review of the CD revealed that **Asmodeo** was twenty years old at the time it was filmed and the victim was twelve.

On July 27, 2016, a grand jury returned**{2019 U.S. App. LEXIS 6}** a superseding indictment charging **Asmodeo** with one count of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) and one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), in relation to the Jess Video on the CD. The government advised the court that it had decided not to defend the search of Asmodeo's home and electronic devices, and would not offer the evidence obtained from the search or the defendant's post-arrest statements at trial, thereby mooting the February 2016 suppression motions. The government also advised the court that the two counts in the superseding indictment were different from the ones in the original indictment. The new counts related to the Jess Video, and not the Bathroom Videos or the internet images and videos.

Asmodeo then moved to suppress the CD of the Jess Video as the fruit of the poisonous tree of the illegal search. The court held a hearing on the motion in January 2017. Mirandona testified that during his forensic search of Asmodeo's devices, he used keywords that are "intrinsically indicative of child pornography," App'x at 368, and did not use the search term "girls." He testified that he either did not see the Jess Video or that, if he did see it, it**{2019 U.S. App. LEXIS 7}** would have been "of less interest," App'x at 392, because he was focused on finding images of prepubescent children, and the victim in the Jess Video appeared to be a teenager.

Mullen and Nagle also testified about their June 2016 interview with Condon. Mullen testified that they requested the interview to ask her to describe Asmodeo's apartment and other general questions. Mullen also testified that

> At almost the conclusion of the interview, Ms. Condon advised us that . . . [t]here had been some infidelity between them. And at the end, she said [**Asmodeo**] gave her a CD and said this is basically what I was doing while we were together, and she [told us] . . . she would be willing to turn it over to us if she could find it.App'x at 446. Mullen and Nagle both testified that it was Condon who first mentioned the existence of the CD. Mullen asked Condon to call them if she found the CD, and then Mullen and Nagle left. Two to three minutes later, Condon called Nagle to tell him that she had found the CD, and Mullen and Nagle returned to her house to pick it up.

On March 7, 2017, the district court issued an oral decision denying the motion to suppress. The court rejected the government's argument that the CD was**{2019 U.S. App. LEXIS 8}** obtained from an independent source, but held that the CD was "too attenuated to warrant suppression." App'x at 747. The court assumed, without deciding, that the original search was conducted in violation of the Fourth Amendment. It found, however, that this illegal search of Asmodeo's apartment and electronic devices was "neither purposeful nor flagrant" and instead was the "result of sloppiness and laziness." App'x at 744-45. It further found that the 2016 discovery of the CD was remote in time from the 2014 search and that Condon's voluntary production of the CD was an intervening event that broke the causal chain.

On May 1, 2017, defense counsel requested that the court reopen the suppression hearing to

examine Mirandona and other government witnesses concerning whether other computer evidence found in the search revealed the Jess Video. The court reopened the suppression hearing on June 13, and heard further evidence. On September 6, 2017, the court issued an oral decision adhering to its prior ruling because the new evidence did not alter its conclusion that the discovery of the CD was too attenuated from the illegal search to be considered tainted fruit of the search.

Asmodeo and the government entered into a conditional**{2019 U.S. App. LEXIS 9}** plea agreement under which he agreed to waive his appellate rights except with respect to the denial of the motion to suppress. **Asmodeo** waived his right to indictment and pleaded guilty to Count One of a superseding information, charging sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) and (e) in connection with the CD (containing the Jess Video). On January 31, 2018, the court sentenced him to the mandatory minimum sentence of 15 years' imprisonment, to be followed by 10 years' supervised release.1

DISCUSSION

On appeal, **Asmodeo** contends that the discovery of the CD was not sufficiently attenuated from two instances of allegedly illegal conduct of the government: (1) the search of Asmodeo's home and electronic devices, and (2) the interrogation of **Asmodeo** at the police station. Before reviewing the merits of the appeal, we address the government's threshold contention that **Asmodeo** forfeited the latter argument concerning the interrogation.2

I.

The government contends that **Asmodeo** forfeited the argument that the CD is the fruit of the poisonous tree of the allegedly illegal interrogation by failing to raise it below. In his reply brief on appeal, **Asmodeo** argues not only that the**{2019 U.S. App. LEXIS 10}** discovery of the CD is the product of the interrogation, but also that the flagrancy of the interrogation bears on the flagrancy of the search, because the interrogation was itself a fruit of the search.

The government is correct that Asmodeo's briefing on the motion to suppress before the district court focuses principally on whether the discovery of the CD derived from the search and makes only one reference to disclosing the Jess Video during the interrogation. **Asmodeo** also did not argue below that the flagrancy of the interrogation bears on the flagrancy of the search. Accordingly, **Asmodeo** forfeited those arguments for appellate review.3

Where a criminal defendant forfeited an argument by failing to raise it below, we may still review the district court's decision for plain error. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). As described more fully in the following section, Asmodeo's statements to McClellan did not lead investigators to Condon or give them any reason to believe that she held relevant evidence. Therefore, it was not plain error for the district court to conclude that the discovery of the CD was too attenuated from the allegedly unconstitutional conduct to warrant suppression.

There is also little support in**{2019 U.S. App. LEXIS 11}** decided cases for Asmodeo's contention that the government's conduct following an illegal search may exacerbate the flagrancy of the search for the purpose of attenuation analysis. The only decision he cites to support that contention stands for an entirely different proposition. *See United States v. Reed*, 349 F.3d 457, 465 (7th Cir. 2003) ("Conducting a custodial interrogation after an illegal arrest in a congenial and non-threatening manner does not in and of itself disprove that the police acted in bad faith."). In the absence of existing relevant controlling or persuasive authority, it was not *plain* error for the district court here to focus on the flagrancy of the search and not the interrogation.

II.

Asmodeo invokes the "fruit of the poisonous tree" doctrine to argue that the government's allegedly illegal search led it to interview Condon and thus tainted the evidence it obtained from her. On appeal from the denial of a motion to suppress, we review "legal conclusions de novo," "findings of fact for clear error," and "mixed questions of law and fact" de novo. *United States v. Bershchansky*, 788 F.3d 102, 108 (2d Cir. 2015) (internal quotation marks and citations omitted).

To determine whether evidence is sufficiently attenuated from an illegal search to be admitted, we first consider "the purpose**{2019 U.S. App. LEXIS 12}** and flagrancy of the official misconduct." *Utah v. Strieff*, 136 S. Ct. 2056, 2062, 195 L. Ed. 2d 400 (2016) (quoting *Brown v. Illinois*, 422 U.S. 590, 604, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)). We also look to "the presence of intervening circumstances" and the "'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search." *Id.* (quoting *Brown v. Illinois*, 422 U.S. at 603-04).

The district court assumed, without deciding, that the search of Asmodeo's home was conducted illegally because the warrant did not specify the apartment to be searched-although it identified the residence as a multifamily home-and contained multiple errors, including identifying a different IP address in the warrant from the ones identified in the affidavit supporting the warrant. **Asmodeo** also argues that the officers acted flagrantly in presenting the warrant application to a town court justice, who may have been less likely to catch the mistakes than a federal magistrate judge. The district court concluded that the problems with the warrant were "neither purposeful nor flagrant" and instead were the "result of sloppiness and laziness." App'x at 744-45. In light of the "substantial social costs" of applying the exclusionary rule, *Hudson v. Michigan*, 547 U.S. 586, 594, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (quoting *United States v. Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)), we "favor[] exclusion only when the police**{2019 U.S. App. LEXIS 13}** misconduct is most in need of deterrence-that is, when it is purposeful or flagrant," *Utah v. Strieff*, 136 S. Ct. at 2063. In view of the many errors in the warrant, we cannot say that the officers' misconduct was insignificant or that suppression would not deter similar conduct.

However, any deterrent value of suppression is significantly diminished because an intervening circumstance disrupted the causal chain between the search and the discovery of the CD. *See Brown v. Illinois*, 422 U.S. at 598 (observing that "an intervening independent act of a free will" may "purge the primary taint" of an illegal search) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). The district court concluded that Condon's unanticipated production of the CD was an intervening circumstance that weighed against suppression. That conclusion is amply supported by the record. Nagle first learned of Condon's existence not through **Asmodeo**, but through an unrelated police report. The district court credited Nagle's and Mullen's testimony that they interviewed Condon not to find evidence of Asmodeo's illegal activities, but instead to learn more about his background and residence, and **Asmodeo** does not challenge that credibility finding. It was Condon who first brought up the existence of the CD, and neither Nagle nor**{2019 U.S. App. LEXIS 14}** Mullen knew that Condon had a copy of the Jess Video. The officers left Condon's house without the CD, instructing her to call if she found it. She did so minutes later, and the officers returned to pick it up. From those facts, there is no question that the district court did not err in concluding that Condon's statement was voluntary in the sense that it was not coerced or obtained by fear. *See United States v. Snype*, 441 F.3d 119, 135 (2d Cir. 2006) (concluding that host's voluntary consent to search her apartment for evidence of guest's crime was intervening act of free will sufficient to purge taint of illegal search that had occurred only twenty minutes before because the fearful atmosphere created by the search had dissipated).

The fact that **Asmodeo** described the Jess Video during the interrogation and told McClellan where to find it in his electronic files is not sufficient to reject the district court's conclusion that the search did not lead law enforcement to seek a copy of the Video from Condon. In fact, during the interrogation, **Asmodeo** specifically and repeatedly denied having given the Jess Video to anyone other than the victim. Accordingly, Condon's voluntary production of the CD constitutes an intervening circumstance weighing**{2019 U.S. App. LEXIS 15}** against suppression, as the district court found.

The long delay between the search and discovery of the CD also suggests a weak causal connection between the two events and undermines the potential deterrent value of suppression. Law enforcement officers searched Asmodeo's apartment on April 23, 2014. Nagle and Mullen interviewed Condon more than two years later, on June 30, 2016. The significant gap between those events supports the district court's finding that the search did not directly lead to the interview because, if the search or interrogation pointed law enforcement officers to evidence in Condon's possession, they likely would have immediately scheduled the interview or requested the evidence during their initial meeting with her in May 2014.

Weighing all three factors together we conclude that the district court did not err in finding that the discovery of the CD was sufficiently attenuated from the illegal search to permit its admission.

* * *

We have considered Asmodeo's remaining arguments and find them to be without merit. We **AFFIRM** the March 7, 2017 and September 6, 2017 orders of the district court denying the Asmodeo's motion to suppress.

Footnotes

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1

The district court also dismissed all counts of both indictments.

2

While the government uses the term "waiver" in its brief, it argues in substance that **Asmodeo** *forfeited* the argument by failing to raise it, rather than intentionally waiving it. *See United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) ("Waiver-the intentional relinquishment or abandonment of a known right-extinguishes an error and obviates plain error review. Forfeiture-the failure to make the timely assertion of a right-does not." (internal quotation marks and citations omitted)).

3

Asmodeo did, however, address the interrogation to the extent that it formed a link in the causal chain leading the government from the initial search to the interview with Condon. We address that argument below.

Appendix - B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 Cr. 327(VB)

JOHN ASMODEO,

Defendant.

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White Plains Courthouse
White Plains, N.Y.
March 7, 2017
10:20 a.m.

Before:

THE HONORABLE VINCENT L. BRICCETTI,

District Judge

APPEARANCES

LAUREN SCHORR and MARCIA COHEN
Assistant United States Attorneys

TROY A. SMITH
Attorney for Defendant John Asmodeo

P R O C E E D I N G S

THE CLERK: The United States of America v. John Asmodeo.

Will counsel please state your appearances for the record, beginning with the government.

MS. SCHORR: Lauren Schorr and Marcia Cohen for the government.

MR. SMITH: Troy Smith for John Asmodeo, who is present.

THE COURT: Have a seat.

The reason I adjourned this from I think it was February 28 or 27, whatever it was, is because I was determined to be prepared to resolve the pending motion at the next conference, and I knew I wasn't going to be ready on February 28, or whatever date was, so that's why we adjourned it. I appreciate everybody is here today.

Off the record for a moment.

(Discussion off the record)

THE COURT: The first question I had was, I got a letter on February 22 from the government, which was copied to Mr. Smith. It's actually two letters. There's a letter dated February 22 saying that the government respectfully writes to request permission to file the enclosed letter, and then there's another letter.

I'm just curious why would you do it that way? Why

wouldn't you just file it on ECF? There's nothing wrong, of course you can file the letter, but why did you do it in a bifurcated way?

MS. SCHORR: Your Honor, after we submitted our brief, we wanted to request permission out of an abundance of caution.

THE COURT: It didn't say that in your cover letter, but I understand now. In other words, it was in the nature of a supplemental submission, and you wanted my permission to be able to make a submission.

MS. SCHORR: Correct, your Honor. It was a little bit of an issue separate from what was in our post-hearing brief.

THE COURT: Not really.

MS. SCHORR: Well, just as to this particular issue regarding credibility.

THE COURT: Credibility is at the heart of it. How is it separate? It's part of the issue. But anyway, I don't want to waste time. The answer is yes, of course you can file it. I have no problem with that.

So, why don't you file it on ECF so that it's on the docket, all right?

MS. SCHORR: No problem.

THE COURT: Okay.

Does anybody have anything to add to anything that they had previously submitted? There's a voluminous record, to say the least, here, but does anybody want to add anything to what

was previously said?

By the way, Mr. Smith, since this letter was submitted after the government had submitted its brief, if there is anything you want to say about that, you're welcome to do so.

You spoke about it. You addressed the credibility issues in your post-hearing brief.

MR. SMITH: Yes, sir.

THE COURT: But if there's anything more you want to say, this would be the time to do it. I want to give you that opportunity. You don't have to. I'm just asking if you want to.

MR. SMITH: No, your Honor. Thank you.

THE COURT: Does the government have anything further to add?

MS. SCHORR: No, your Honor.

THE COURT: I am prepared to rule on the motion, and I'm going to read my ruling into the record.

Before the Court is the defendant's motion to suppress a compact disc obtained by law enforcement officers on June 30, 2016. The defendant contends that the CD - I'll refer to it as the "CD" - should be suppressed because it is the tainted fruit of an unlawful search of the defendant's home in 2014.

For the reasons that I will state on the record in a moment, because I find that the 2016 discovery of the CD is too attenuated from the 2014 search to be considered tainted fruit

of the search, the motion is denied. The relevant facts are as follows:

On April 22, 2014, a town justice in the town of Carmel, New York, issued a search warrant to search a two-storey multi-family home at 166 See Avenue in Mahopac, New York, for evidence of possession of child pornography. Even though the warrant described the premises as a "two-storey multi-family home," it did not specify any particular residential unit within the home within which the child pornography might be found. In addition, neither the warrant nor the warrant application mentions John Asmodeo by name. The only person mentioned in the application is Kelly Whelan, who, according to the application, subscribed to an Internet protocol, or IP address, located at 166 See Avenue. That IP address, according to the application was linked to multiple digital files which depicted or contained child pornography. And because the IP address was uniquely linked to a computer or other device connected to the Internet, the warrant application concluded that there was probable cause to believe evidence of child pornography would be found at 166 See Avenue.

It should be noted that the warrant application contained what the government characterizes as "multiple typographical errors." For example, the warrant application identifies the IP address to which Whelan subscribed as 96.232.81.122, but in an attachment to the application which

specifies the "particular things to be seized," the IP address is identified as 108.54.27.79; and also as 108.54.17.91; and in the search warrant itself, the IP address is identified as 69.119.43.6. These varying descriptions are, of course, problematic because it was a unique IP address linked uniquely to a particular device connected to the Internet which constituted the probable cause to search 166 See Avenue, yet there were four different numbers or four different IP addresses described in the warrant application and the warrant.

In any event, a town justice in Carmel issued the warrant, which was presented by the Putnam County District Attorney's Office. The warrant application itself was signed by Agent McClellan of the Department Homeland Security, Homeland Security Investigations.

Now, on April 23, 2014, a number of federal and local law enforcement agents executed the warrant at 166 See Avenue. The lead or case agent was Agent McClellan. As I've just mentioned, he was the person who had signed the application, that's Christopher McClellan. He's a special agent in the U.S. Department of Homeland Security and Homeland Security Investigations.

According to a written report made by one of the agents who participated in the search, Detective Joseph LoPiccolo of the Carmel Police Department, the agents initially made contact with Ms. Whelan who lived on the second floor with her family.

She told them that Asmodeo lived downstairs on the first floor.

Agents entered Asmodeo's apartment, examined items on Asmodeo's computer, and ultimately conducted a thorough search of his apartment. After finding what the agents concluded was child pornography, Asmodeo was taken into custody and transported to the Carmel Police Department.

At the Carmel PD, Agent McClellan and others conducted a custodial interrogation of Asmodeo, during which Asmodeo admitted downloading child pornography from the Internet. He also admitted that he had hidden a camera in the bathroom and made video recordings of a young girl undressing in the bathroom. The custodial interrogation was videotaped.

Asmodeo was later charged first in state court and then subsequent to that in federal court. The initial federal indictment charged Asmodeo with attempted sexual exploitation of a child and receipt and distribution of child pornography.

Asmodeo thereafter moved to suppress the evidence seized pursuant to the search warrant, as well as his post-arrest statements. The asserted basis for the motion to suppress the physical evidence was the warrant's failure to describe with particularity the place to be searched in violation of the Fourth Amendment. Specifically, the warrant failed to specify the dwelling unit within the multi-family home as to which the probable cause to search existed. And the defendant also contended that the law enforcement officers who

obtained the warrant and conducted the search knew, before seeking the warrant, that the home had multiple, distinct dwelling units, and yet failed to disclose that fact to the judge who issued the warrant.

Defendant's argument was that the agents only had probable cause to search Ms. Whelan's dwelling unit because she was the one who subscribed to the IP address to which the child pornography was linked, and there was no other evidence pointing to Asmodeo being involved in the possession of child pornography or that the child pornography would be found in his separate apartment. In other words, according to Asmodeo, the agents (1) did not have probable cause to search Asmodeo's apartment; (2) knew they had probable cause only with respect to Whelan's separate apartment, not the entire multi-family home; and (3) deliberately failed to disclose these facts to the issuing judge so that they could get a warrant for the entire building, not just Whelan's apartment.

Now, if all of this were true, according to Asmodeo, not only would there be a lack of particularity, but the agents could not claim to have relied in good faith on the validity of the warrant.

The government vigorously opposed the motion to suppress. Ultimately, the Court scheduled an evidentiary hearing on the motion for August 1, 2016; however, on July 27, 2016, the government advised the Court by letter that "Based on

the applicable law and all of the facts and circumstances now known to the government, the government has decided not to defend the search and will not offer in our case-in-chief the evidence obtained from the search or the defendant's post-arrest statements."

In the same letter, the government advised the Court that the grand jury had returned a superseding indictment charging the defendant with two counts. The first count charged sexual exploitation of a child in 2002; and the second count charged possession of child pornography in 2005.

The charges in the original indictment are not included in the superseding indictment. According to the government, the charges in the superseding indictment are based on a compact disc - in other words, a CD - that the investigating agents obtained on June 30, 2016 from a third party, a woman named Eve Condon. Also, according to the government, the CD contains video files of Asmodeo at age 19 engaging in sexual intercourse with an 11-year-old girl.

After he was arraigned on the superseding indictment, the defendant filed a motion to suppress the CD obtained from Condon on the ground that it is evidence derived from the unlawful search of Asmodeo's apartment on April 23, 2014; in other words as "fruit of the poisonous tree," under *Wong Sun v. United States*, 371 U.S. 471 (1963).

In opposing the motion, the government did not

explicitly concede that the evidence seized on April 2014 was unlawfully seized, but argued that even assuming that it was unlawfully seized, it should not be suppressed because the CD was obtained from a source independent from the unlawfully seized evidence.

The Court conducted a suppression hearing on January 10 and 11, 2017, at which Homeland Security Agents John Mirandona and Steven Mullen, as well as Carmel Detective Michael Nagle testified for the government. Brian Stofik, a digital forensics expert, testified for the defense.

Subsequently, both sides submitted post-hearing briefs. And of course, as we mentioned earlier, the government also submitted a letter dated February 22, 2017 regarding one of the witnesses at the hearing.

I will note that in its post-hearing brief, the government does not claim that the April 23, 2014 search was lawful, nor does it use the phrase "even assuming that the evidence was unlawfully seized" as it did in its brief in opposition to the motion submitted prior to the hearing. Instead, the government's post-hearing brief simply refers to the "unlawful 2014 search of Asmodeo's home." That's from document 65 in the ECF docket on page one.

The question then is whether I need to make a formal ruling with respect to the defendant's original motion to suppress, which, of course, contended that the search warrant

failed to describe with particularity the place to be searched and further contended that the agents knew before seeking the warrant that the home had multiple, distinct dwelling units, yet failed to disclose that fact to the issuing judge.

The answer to that question is that I do not need to make such a formal ruling. The instant motion to suppress the CD is being decided on the assumption that the 2014 search and seizure was unlawful. In other words, the defendant is not prejudiced by my not making a formal ruling on the original motion to suppress. Indeed, both parties are in the same position they would be in if I had formally granted the earlier motion. In any event, for the remainder of this bench ruling, I will refer to the April 23, 2014 search as unlawful.

But the fact that the 2014 search was unlawful does not necessarily mean the recovery of the CD from Eve Condon in June 2016 was unlawful or that it should be suppressed.

As I said earlier, for the reasons I will discuss in a moment, I find and conclude that the suppression of the CD is not appropriate because the 2016 discovery of the CD is too attenuated from the 2014 search to be considered fruit of the poisonous tree.

As to the government's alternative argument, and actually, it was their principal argument prior to hearing in January. They have changed that because of the post-hearing brief. The government's focus was on the attenuation issue and

alternatively argued independent source. In any event, as to the government's alternative argument that the CD was obtained from an independent source, I am not persuaded.

In any event, the denial of the motion based on the doctrine of attenuation is the basis for my decision in the case, not the independent source doctrine.

Now, first let me say that I found all of the witnesses who testified at the suppression hearing, both the government and the defense, to be generally credible. This includes Agent Mirandona, whom I questioned closely about this statement that if he had seen the "Jess" file at the time of his initial preview of the computer seized from Asmodeo's home, that video would not have been of particular interest to him because the girl in the video did not appear to be a prepubescent, preadolescent child. And he said that this was because she had breasts and pubic hair. Parenthetically, the "Jess" file is the video on the CD obtained from Condon that allegedly depicts Asmodeo having sex with an 11-year-old girl. The same video file is also contained on one of the computers seized from Asmodeo's home.

Mirandona also testified that if he knew the person depicted in the Jess video was an 11-year-old girl, it would be of interest, but because he didn't know her identity and because she appeared to be a post-pubescent teenage girl of questionable age, it was not the kind of file that would take priority at the

time of the search for images of obviously chargeable child pornography; that is, images of obviously prepubescent children engaging in sexually explicit activity.

In context, this testimony was not dishonest or otherwise not credible. At the time of his initial preview of the seized evidence, Mirandona credibly testified he was focused on finding images of prepubescent children engaged in sexual acts and also focused on finding the homemade bathroom videos that Asmodeo had told the agents about.

That being the case, Mirandona's testimony that the "Jess" file, had he seen it, would not have been of particular interest, was credible. Moreover, Mirandona would also credibly testify that at the time he was conducting, in effect, a triage preview of an enormous amount of digital evidence seized from Asmodeo's home - digital files contained on 16 different computers or other electronic devices.

The bottom line is that to the extent I previously made an adverse finding as to Mirandona's credibility, that finding is retracted.

Now, in addition to the factual findings I've already made, what happened following the April 23, 2014 search is as follows: First, during his post-arrest interview, Asmodeo not only said he had downloaded child pornography and had surreptitiously videotaped a young girl undressing in a bathroom, he also said the agents would find a video of Asmodeo

at age 16 having sex with his girlfriend who was then 14. He identified the girlfriend as Jess and said the video was in a computer folder labeled "girls," and that the "girls" folder was on the computer that Asmodeo and the interviewing agent referred to as the "server behind the wall." I think those words actually were spoken by the agent according to the transcript that I referred, but Asmodeo also acknowledged that they were both talking about the same thing, in other words, the server behind the wall.

Importantly, during the interview, Asmodeo did not mention Eve Condon or say that he had given Condon a CD containing the "Jess" file, or any other video files. Altogether, 16 electronic devices seized from Asmodeo's apartment were imaged and reviewed by Agent Mirandona who was the supervisor of the Computer Forensics Unit of the Homeland Security Investigations Division of the Department of Homeland Security.

To image a device means to make a forensic copy of the device for further investigation. Mirandona previewed each of the forensic images looking for, as I said earlier, images and videos of prepubescent children engaged in sexual activity or lasciviously displaying their genitalia. He was also looking for the homemade bathroom videos that Asmodeo had said he made. Agent McClellan, the case agent, had told Mirandona about the bathroom videos.

On one of the devices identified as the Antec tower, Mirandona found videos of a little girl undressing in the bathroom, as well as sexually explicit images of children. He also found sexually explicit images of children on several other devices. On one of the devices identified as the HP tower, Mirandona did not find sexually explicit images of prepubescent children during his preview. He also did not find the "Jess" file on the HP tower.

Given the volume of digital evidence he was processing and the fact that he was using keyword searches that are "intrinsically indicative of child pornography," I find his testimony to be credible. Had Mirandona had more time to examine the HP tower, or if he had searched using the keywords "girls" or "Jess," he may have found the "Jess" file, but he didn't, and his testimony to that effect was credible.

Ultimately, Mirandona identified more than 3,000 still images of child pornography and more than 20 videos of child pornography on the various devices he reviewed. These items were all included in a report called an FTK report that Mirandona prepared for Agent McClellan. The forensic images of the 16 devices were not turned over to Agent McClellan, although Mirandona maintained custody of all of the seized evidence.

Meanwhile, in May 2014, Detective Nagle, who testified at the hearing, and who was involved in the search at 166 See Avenue on April 23, 2014, contacted Eve Condon to set up a

forensic interview of a child she and Asmodeo had in common. Nagle wanted to determine whether the child was ever exposed to child pornography while in Asmodeo's home. Nagle identified Condon from a 2012 police report relating to an alleged sexual abuse of the child at 166 See Avenue committed by the child's cousin, who was also a minor at the time. On May 28, 2014, Nagle and other law enforcement officers interviewed the child. Nagle also met with Eve Condon that day.

On two or three occasions thereafter, Condon called Nagle to get updates on the Asmodeo investigation. Nagle credibly testified that Condon did not mention the CD either at the May 28, 2014 interview or in the follow-up telephone call she had with Nagle.

In January 2015, Agent Mullen took over as the case agent in the Asmodeo case. Mullen credibly testified that he reviewed the evidence made available to him by the computer forensics unit, including the still images and videos of child pornography identified by Mirandona, as well as the bathroom videos. He also reviewed Asmodeo's videotaped post-arrest statement.

In June 2016, at the request of Agent Mullen, Detective Nagle contacted Eve Condon to set up an interview. Mullen and Nagle interviewed Condon at her home on June 30, 2016. According to Mullen, the purpose of the interview was to get more details about the layout of 166 See Avenue in preparation

for the suppression hearing then scheduled for August 1, and also to gather additional evidence about Asmodeo and his interests, activities, and associates in preparation for trial. Mullen credibly testified that Condon's name was not mentioned in any of the material he had reviewed from the search executed on April 23, 2014.

Near the end of the interview on June 30, 2016, Condon told Mullen and Nagle that while she and Asmodeo were together, there had been "some infidelity between them." She volunteered the fact that Asmodeo had given her a compact disc and said, meaning Asmodeo had said, that it showed what he was doing when they were together. Nagle testified that Condon said Asmodeo said he was giving her the CD so as to come clean about all the girls he had cheated on her with. Condon also told the agents that she didn't know if she still had the CD, but she would look for it.

Shortly after the agents left Condon's residence, Condon called Nagle and said she had found the CD and asked if the agents wanted it. The agents went back to the house and Condon handed them the CD, which is the subject of the instant motion to suppress.

One of the folders on the CD is labeled "Jess," and that folder contains the video files that the government contends depicts Asmodeo, at age 19, engaging in sexual intercourse with an 11-year-old girl. When Mullen and Nagle

viewed the files on the CD the next day, Nagle recognized the girl on the "Jess" videos as someone who had lived near the Carmel police station. He confirmed her identity by looking at Mahopac Middle School yearbooks kept at the police department.

Mullen and Nagle both credibly testified that when they went to interview Condon, they were not looking for the CD or the files or videos contained on the CD. In addition, Mullen credibly testified that prior to receiving the CD from Condon, he had never seen any of the images or videos on the CD and was not aware that Condon possessed any images given to her by Asmodeo. Nagle also credibly testified that he did not know the images or videos on the CD existed prior to obtaining the CD from Condon.

Subsequently, in other words, subsequent to this June 30th receipt of the CD, Agent Mirandona compared the contents of the CD with the 2014 FTK report and the other materials given to Agent McClellan in 2014. He credibly testified that the six forensic images, meaning the images of the six different electronic devices -- we're using the word "images" in two different ways here. Sometimes I'm using it to describe a particular photo or video, but in this context, I'm using it to describe the image of the computer. So, he credibly testified that the six forensic-imaged computers he reviewed in 2014, from which all of the material made available to McClellan and Mullen was obtained, did not contain the files on the CD.

When Mirandona compared the files on the CD to the files on all 16 of the electronic devices obtained in the April 23, 2014 search, he located two folders named "Jess" on the HP tower, and together, those folders contained the contents of the "Jess" folder on the CD turned over by Condon. In other words, the "Jess" video files on the CD were also contained on the HP tower; however, as I said earlier, Mirandona credibly testified that when he conducted the triage preview of the HP tower in 2014, he did not find the "Jess" folders or files.

The exclusionary rule, when applicable, prohibits the use of improperly obtained evidence at trial, including evidence obtained in violation of the Fourth Amendment. The rule applies to evidence obtained as both a direct and indirect result of an unlawful search and seizure; thus, under *Wong Sun v. United States*, and numerous other cases at every level of the federal court system, the exclusionary rule applies to evidence actually seized in an illegal search, as well as to the discovery of other evidence derived from the primary evidence commonly referred to as the fruit of the poisonous tree.

There are, however, several well-established exceptions to the exclusionary rule, one of which is the attenuation doctrine. Thus, exclusion of the evidence is not required when the connection between the illegal conduct of the police and the discovery of the evidence sought to be suppressed has "become so attenuated as to dissipate the taint," *Nardone v. United States*,

308 U.S. 338, 341 (1939). When the connection between the illegal search and the subsequent discovery of evidence "becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost," the subsequently discovered evidence should not be excluded. And that's a quote from *Brown v. Illinois*, 422 U.S. 590, 609 (1975).

What this means is that even if the challenged evidence would not have been discovered but for the unlawful police conduct, only when the challenged evidence "has been come at by exploitation of that illegality" must it be excluded. *Won Song v. United States*, 371 U.S. at page 487.

As the Supreme Court recently held in *Utah v. Strieff*, "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance." That cite is 136 S.Ct. 2056, 2061 (2016).

Here, the connection between the unlawful 2014 search and the agent's discovery of the CD in June 2016 is remote and was interrupted by an intervening circumstance, namely Condon's unsolicited turnover of the CD; thus, the attenuation doctrine applies, and the CD should not be excluded at trial. First of all, more than two years elapsed between the April 2014 search and Eve Condon's volunteering of the existence of the CD on June 30, 2016. This lengthy passage of time demonstrates a lack of temporal proximity between the unlawful search and the

recovery of the CD. In other words, the connection between the search and the recovery of the CD is remote.

Now, it is true that Detective Nagle, who was working on the case, met with Condon in May 2014 and that he would not have done so had Asmodeo not been identified as having possessed child pornography at 166 See Avenue as a result of the April 2014 search. But Nagle didn't interview Condon looking for evidence to use against Asmodeo; he met with her only because Condon and Asmodeo had a child in common and Nagle wanted to see whether their child had been exposed to child pornography in Asmodeo's home.

At the time, and at the time of the June 30, 2016, interview of Condon, none of the investigating agents or officers knew anything about the CD, or that Condon possessed it. Asmodeo had not mentioned either the CD or Condon in his post-arrest statement, the videotaped custodial interrogation at the Carmel police station; and Condon did not mention the CD in her 2014 meeting with Nagle or the two or three follow-up phone calls she had with Nagle. Moreover, nothing in the evidence seized in 2014 referred to Condon or to the existence of the CD, and the agents did not even find the "Jess" files on the HP tower until after Condon had turned over the CD to Mullen and Nagle.

Indeed, the agents did not interview Condon on June 2016 in an effort to locate the CD; rather, they wanted to

get more details about the layout of 166 See Avenue and gather additional evidence about Asmodeo's interests, activities and associates. At the end of the interview, Condon volunteered that Asmodeo had given her a CD, supposedly to clear the air about his infidelity during their relationship. Only then did she provide the CD to the agents.

Under these circumstances, exclusion would not be appropriate because, as stated in the LaFave Search and Seizure Treatise at Section 11.4(a), and this is from the Fifth Edition of the LaFave Search and Seizure Treatise, "It is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus, it could not have been a motivating force behind it. It follows that the threat of exclusion could not possibly operate as a deterrent in that situation."

As the Supreme Court has said in various contexts, the "exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." That's from *Herring v. U.S.*, 555 U.S. 135, 141 (2009). And *Herring* was quoting from *United States v. Leon*, 468 U.S. 897, 909 (1984). Plainly here, if I were to exclude the CD, it would not result in appreciable deterrence.

Finally, while the discovery of the CD is connected in a but-for sense to the illegal search of 2014, I believe that the police misconduct here was neither purposeful nor flagrant;

rather, it was a result of sloppiness and laziness. It was sloppy and lazy because while both the warrant and the warrant application stated that 166 See Avenue was a multi-family home, the warrant application did not provide any details about the number or location of dwelling units in the house.

The warrant application and the warrant also contained multiple different IP address numbers, which the government has characterized as typographical errors. It doesn't really matter. The point is, that's sort of the quintessential example of sloppiness or laziness.

Moreover, the warrant application was presented to the town justice by the Putnam County DA's office. One would think that the Putnam County DA's Office, presumably, including an assistant district attorney, would notice the fact that the warrant said multi-family home, but didn't actually describe any dwelling units, specific dwelling units, or notice these "typographical errors," but evidently, they did not, which is another example of sloppiness and laziness.

And neither the district attorney nor the town justice seemed to notice the fact that the warrant and warrant application both referred to a multi-family home without providing any details regarding the number and location of the dwelling untiles within the house.

On the record presented here, I am not aware of any evidence that the agents deliberately withheld from the town

justice their knowledge that the house had multiple, distinct rooms. There is some evidence that the local police officers involved in the investigation knew there were at least two dwelling units; specifically, a police report has been submitted as part of the record, I believe it was attached to Mr. Smith's post-hearing brief, but I've seen it on other occasions, as well, but specifically, the police report from the 2012 incident involving the alleged sexual abuse of Condon's and Asmodeo's child, but there is no evidence this knowledge was withheld from the town justice in order to gain some sort of advantage.

Ironically, had the warrant and warrant application explicitly stated that 166 See Avenue was a single-family home, thus, arguably concealing the agent's knowledge that it was a multi-family home, the defendant could have made a stronger argument that the agent's misconduct was purposeful and flagrant. If that had been the case, the theory would have been that it would make it easier to get a warrant to search the entire house if the agents made it appear that it was a single-family home even though they knew it had two dwelling units, but that's not what happened here.

If anything, the accurate description of the premises as a multi-family home, without particularly describing where within the premises the evidence would be found, undercut the validity of the search. It didn't make it more likely that the agents would get the warrant; it made it less likely that they

would get the warrant. They did get the warrant. But describing it as multi-family without specifying the number of dwelling units and where the evidence would be found undercut the validity of the warrant arguably and made it less likely that they would get the warrant.

In any event, the failure of the agents to spell out in the warrant application the particular dwelling units that existed and where within the premises the evidence would be found is likely what led the government to decide not to defend the search on the eve of the scheduled suppression hearing because of the lack of particularity, which is explicitly required by the Fourth Amendment.

The bottom line is that the connection between the unlawful search and the recovery of the CD is remote in time and was interrupted by the intervening circumstance of Eve Condon's voluntary turnover of a piece of evidence which the agents previously knew nothing about; and there's no evidence the unlawful search itself was the product of purposeful or flagrant police misconduct. The discovery of the CD in 2016 was too attenuated to warrant suppression.

Let me add a brief comment about the independent source argument. The government argues that the independent source doctrine provides an alternative basis for denying the motion to suppress. As I said earlier, I do not believe that an independent source doctrine applies here and that's because

here, the search in April 2014 is what led the agents to focus on and investigate Asmodeo, and the investigation of Asmodeo led the agents to Eve Condon, both in May 2014 and in June 2016. And Condon led the agents to the CD. Thus, the agents' acquisition of the CD was not independent of the unlawful search in 2014.

Had the agents not been aware of Condon at all and had Condon, without being first interviewed by the agents, called them on the phone and said, in effect, "I heard about your investigation and I have something you might be interested in," well, then, the CD would have been obtained from an independent source, but of course that is not what happened here.

In any event, because the discovery of the CD was too attenuated from the 2014 search to warrant suppression, the motion is denied on the basis of the attenuation doctrine, not on the basis of the independent source doctrine, and I will issue a one-sentence written order today confirming that the motion has been denied.

As far as I'm aware, that resolves all outstanding issues that are pending, so I want to figure out where we go from here. It seems to me that where we go from here is we need to go to trial.

Does the government want to speak to that?

MS. SCHORR: I think that's right. I think the next step would be just setting a trial date.

We have not conferred with Mr. Smith as to when both sides are available. We can do that now or hear when the Court has availability.

THE COURT: Mr. Smith, from my prior experience, has a rather busy trial schedule - good for him - but we have to figure out a time when he's available to do this.

I wouldn't think that this trial would take very long. You basically have one piece of physical evidence. I don't know how you're going to try your case, but I can imagine you might call the girl depicted in the video. You might call Eve Condon. I don't know. You might call the agents who recovered it, but it strikes me as a pretty short trial.

MS. SCHORR: I think that's right. We would expect no more than a week.

THE COURT: That seems twice as long as what I would expect.

How long does it take to present one piece of evidence, one piece of physical evidence? We'll plan on a week, but I can't imagine it would take that long.

MS. SCHORR: I think it's likely it could go quicker, but by the time you pick the jury -- there are several witnesses, but as you know, there isn't a voluminous list of witnesses or exhibits, but we would mark it as a week just to be safe.

THE COURT: I understand. I'm fine with that.

Mr. Smith, what would you like me to do now? I can set a date, or certainly I'm willing to adjourn this for a relatively short period of time, maybe a couple of weeks, without setting a date, so that you could process all of this ruling; although, obviously, you recognized that I might deny the motion or I might grant the motion, but I've denied it. You knew that I might deny it. It might give you an opportunity to discuss how you want to go forward with your client now that this motion has been decided, because there is another alternative, of course, which exists in every case, which is some sort of negotiated pretrial disposition of the case.

Mr. Asmodeo has an absolute right to trial. If that's what he wants, he's going to get it, but the circumstances have now been clarified as to what he's facing. So, if you want to take some time to discuss that with him and, if appropriate, discuss it with the government, then I'm willing to do that, as well.

What would you like to do?

MR. SMITH: You took the words out of my mouth. I actually would request that perhaps we adjourn it for a short date for me to be able to meet with Mr. Asmodeo. I'm on trial at the moment, so getting to the facility immediately will be difficult.

Perhaps if you could adjourn it for two to three weeks, that would be ideal.

THE COURT: I have no problem with that. I just think that the circumstances have -- not that these were unforeseen circumstances, but they have been clarified.

MR. SMITH: Yes, sir.

THE COURT: Now that they have been clarified, I think you and your client have every right to say, okay, here's what we now have to deal with, how should we deal with it, which could include, not required, but which could include discussions about a disposition prior to trial. So, I would say we should put it over for three weeks.

I assume you don't have a problem with that.

MS. SCHORR: That's fine, your Honor.

THE COURT: Let's see. Today is March 7.

THE CLERK: Tuesday, the 29th?

THE COURT: That's okay. We can do Wednesday, the 29th.

THE CLERK: Is the afternoon good?

MR. SMITH: Yes.

THE CLERK: 2:30?

MS. SCHORR: That's fine, your Honor.

MR. SMITH: Yes, your Honor.

THE COURT: I'll put the matter over until Wednesday, March 29, at 2:30 p.m. And if the matter is not resolved at that point, then I definitely would set a trial date.

Just for counsel's information, I have an even ten

trials scheduled over the next few months -- actually nine -- scheduled over the next few months. The tenth one is not scheduled until February 2018. But one of those trials is a three- to four-week criminal trial scheduled for June 12, which my instinct at this point is that it's not going to happen. I'm reasonably confident that that case is going to get resolved before that date. So, I think you ought to be thinking about mid-June, the middle to late June, although I'm not setting a date right now. I don't even have it available right now, but you should be thinking about it.

MR. SMITH: Obviously, we can discuss that when we meet.

Just so your Honor is aware, Ms. Schorr and I actually have a trial scheduled in April, and I have other matters as well, but we should discuss that specifically.

THE COURT: I'm talking about late June; I'm not talking about April.

MR. SMITH: I understand.

THE COURT: That's here in White Plains or Manhattan?

MS. SCHORR: Before Karas.

THE COURT: That's fine. Of course, I'm not going to schedule it at a time that you're actually already scheduled. We'll work around that.

MR. SMITH: Yes, your Honor.

THE COURT: I'm telling you I think I'm going to have

this window of opportunity between mid-June and mid-July.

MR. SMITH: I understand.

THE COURT: After that, it's problematic, because I have another trial in late July. I'm going to be away in August, or at least part of August. I have a trial the first week of September, the third week of September, the first week of October.

MR. SMITH: Yes, your Honor.

THE COURT: That's just reality. It's not your fault, but I'm saying this is what's on my docket. Keep all of that in mind, okay?

Wednesday, March 29 at 2:30. Is there anything else that we need to do today, other than exclude time under the Speedy Trial Act?

MS. SCHORR: No, your Honor.

MR. SMITH: No, your Honor.

THE COURT: Ms. Schorr.

MS. SCHORR: The government would move to exclude time under the Speedy Trial Act until March 29, 2017, so that the parties can discuss a possible disposition of this matter in advance of trial and the defendant can have an opportunity to decide how to proceed now that the motion to suppress has been decided.

THE COURT: Any objection?

MR. SMITH: No, your Honor.

THE COURT: The Court excludes time under the Speedy Trial Act from today through and including March 29, 2017. I find that the ends of justice served by granting the requested continuance outweigh the best interests of public and the defendant in a speedy trial for the reasons stated on the record by Ms. Schorr.

Thank you very much. I do appreciate, by the way -- I should say this. I know that the litigation of suppression motions - plural - has been going on in case for at least a year, maybe more than that, I think. And there are some unique circumstances here and that's resulted in multiple, multiple submissions. We had a two-day hearing.

I want to tell counsel that I think they have all done a terrific job, and I appreciate the hard work and effort that everyone has put into this case.

It's not over, but even to this point, there's been an unusual amount of work, which explains why the case, even though it was indicted in I want to say the spring of 2015, does that sound about right, meaning it's getting close to two years old, is two years old, there's just been a lot going on in this case. And I want to tell counsel how much I appreciate the hard work and professionalism.

(Continued on the following page)

I'll see you March 29 at 2:30.

THE CLERK: All rise.

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Certified to be a true and correct transcript of the stenographic record to the best of my ability.

Sabrina A. D'Emidio

U.S. District Court
Official Court Reporter

Additional material from this filing is available in the Clerk's Office.