

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

|                          |   |
|--------------------------|---|
| JOSE IGNACIO GORIS       | ) |
| PETITIONER               | ) |
|                          | ) |
| V.                       | ) |
|                          | ) |
| UNITED STATES OF AMERICA | ) |
| RESPONDENT               | ) |

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## **United States v. Goris**

United States Court of Appeals for the First Circuit

November 27, 2017, Decided

No. 17-1104

### **Reporter**

876 F.3d 40 \*; 2017 U.S. App. LEXIS 23893 \*\*; 2017 WL 5663479

UNITED STATES OF AMERICA, Appellee, v.  
JOSÉ IGNACIO GORIS, Defendant, Appellant.

**Prior History:** **[\*\*1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. Mary M. Lisi, U.S. District Judge. Hon. John J. McConnell, Jr., U.S. District Judge.

**Disposition:** Affirmed.

### **Core Terms**

district court, cocaine, recording, jury instructions, discovery, grams, sentence, materiality, instructions, distribute, kilogram, beyond a reasonable doubt, additional discovery, abuse of discretion, discovery request, claim of error, technology

### **Case Summary**

#### **Overview**

**HOLDINGS:** [1]-The district court did not abuse its discretion during defendant's trial on a charge alleging that he attempted to possess 500 grams or more of cocaine with intent to distribute, in violation of 21 U.S.C.S. § 841(a), when it denied defendant's motion under Fed. R. Crim. P. 16 to examine the original recording of a conversation defendant had with an undercover agent and software the Government used to generate and store that

recording; [2]-Evidence defendant submitted in support of his motion did not show that additional discovery he requested would have enabled him significantly to alter the quantum of proof in his favor; [3]-There was no merit to defendant's claim that the jury was misled by the district court's instructions regarding their duty to determine, beyond a reasonable doubt, whether he attempted to possess at least 500 grams of cocaine with intent to distribute.

### **Outcome**

Judgment affirmed.

### **LexisNexis® Headnotes**

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > Discovery by Defendant

#### **[HN1](#) [📄] Abuse of Discretion, Discovery**

A district court's determinations under Fed. R. Crim. P. 16 are reviewed for abuse of discretion. However, an abuse of discretion will not be found unless an objecting party can show prejudice.

Criminal Law & Procedure > ... > Discovery

by Defendant > Reports of Examinations & Tests > Appellate Review & Judicial Discretion

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > Discovery by Defendant

Evidence > Burdens of Proof > Allocation

### [HN3](#) **Abuse of Discretion, Discovery**

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > Scope of Disclosure

In order to uphold a district court's denial of a request for additional discovery, the United States Court of Appeals for the First Circuit does not demand epistemological certainty that no discoverable information was withheld from a defendant. If, say, a defendant's discovery request is grounded in a speculative theory, a district court's decision to deny that request is not an abuse of discretion.

### [HN2](#) **Reports of Examinations & Tests, Appellate Review & Judicial Discretion**

In criminal cases, standard types of discovery are routinely exchanged shortly after arraignment, without the necessity of any motion. [Fed. R. Crim. P. 16\(a\)](#) and [\(b\)](#); D.R.I. R. Cr. 16. Where circumstances warrant, however, a defendant may seek additional discovery. To that end, Fed. R. Crim. P. 16 provides that, upon a defendant's request, the Government must permit the defendant to inspect data, tangible objects, or copies or portions of any of those items if the item is within the Government's possession, custody, or control and the item is material to preparing the defense. [Fed. R. Crim. P. 16\(a\)\(1\)\(E\)](#). A defendant, as the moving party, bears the burden of showing materiality. The U.S. courts of appeals have displayed remarkable uniformity in concluding that it is not enough that what is sought bears some abstract logical relationship to the issues in a defendant's case. Rather, a showing of materiality requires some indication that pretrial disclosure of the information sought would have enabled a defendant significantly to alter the quantum of proof in his favor. That significant alteration may take place in a myriad of ways, such as uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > Discovery by Defendant

### [HN4](#) **Abuse of Discretion, Discovery**

When a defendant does little more than speculate as to what his discovery request may yield, an appellate court simply cannot hold that a district court abused its discretion in denying the defendant's request for additional discovery.

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > Discovery by Defendant

### [HN5](#) **Discovery & Inspection, Discovery by Defendant**

Under Fed. R. Crim. P. 16, a defendant has no absolute right, on demand, to require a court to help him independently confirm the integrity of materials produced in discovery.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Trials > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

### [HN6](#) [↓] **Standards of Review, Abuse of Discretion**

In the context of jury instructions, a preserved claim of error alleging that the judge gave the jury a faulty interpretation of the law is normally reviewed de novo. In contrast, a preserved claim of error alleging that the judge did not adequately explain the law or explained it in confusing terms is normally reviewed for an abuse of discretion. Unpreserved objections of either stripe are reviewed only for plain error.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Trials > Jury Instructions

### [HN7](#) [↓] **Standards of Review, Abuse of Discretion**

Jury instructions are meant to furnish a set of directions composing, in the aggregate, the proper legal standards to be applied by lay jurors in determining the issues they must resolve in a particular case. A reviewing court is tasked with examining whether those instructions, taken as a whole, show a tendency to confuse or mislead the jury with respect to the applicable principles of law. So long as that standard is satisfied, a district court's choice of phrase is largely a matter of discretion.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

### [HN8](#) [↓] **Particular Instructions, Elements of Offense**

To require a trial court to bloat each statement in a jury instruction by incorporating within it all the details of a charged offense is to deny the jury not only the clarity of properly segmented instructions but also the benefits of proper syntax.

Criminal Law & Procedure > Trials > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

### [HN9](#) [↓] **Trials, Jury Instructions**

Jury instructions must be read as a whole, not in some sort of splendid isolation. Thus, a single sentence in a court's jury instructions cannot be yanked from its contextual moorings and construed in a vacuum. Rather, a reviewing court must consider whether jury instructions, taken as a whole, are reasonably likely to have misled the jury.

**Counsel:** Robert B. Mann, with whom Robert B. Mann Law Office was on brief, for appellant.

Donald C. Lockhart, Assistant United States Attorney, with whom Stephen G. Dambruch, Acting United States Attorney, was on brief, for appellee.

**Judges:** Before Lynch and Selya, Circuit Judges, and Levy, District Judge.\*

**Opinion by:** SELYA

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\* Of the District of Maine, sitting by designation.

## Opinion

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[\*43] **SELYA, Circuit Judge.** Defendant-appellant José Ignacio Goris, convicted of a drug-trafficking offense in the aftermath of a government sting, strives to convince us that he should be granted a new trial based on denied discovery and alleged instructional error. We are not persuaded: after articulating the standard for materiality pertaining to discovery in criminal cases (a matter of first impression in this circuit), we uphold both the district court's denial of the requested discovery and its jury instructions. Accordingly, we affirm.

### I. BACKGROUND

We briefly rehearse the relevant facts and travel of the case. In the late spring and summer of 2014, the defendant was the target of an elaborate sting operation undertaken by [\*\*2] the Drug Enforcement Administration (DEA). Believing himself to be communicating with a representative of a "reputable" drug trafficker (an oxymoron of the first order), the defendant had extensive discussions with an undercover DEA agent regarding his purchase of one to five kilograms of cocaine. The "reputable" drug trafficker had previously provided the defendant with subpar product. Once bitten, twice shy, so the defendant dealt cautiously with the trafficker's supposed representative (the undercover agent). While the defendant repeatedly told the undercover agent that his goal was to purchase from one to five kilograms of cocaine, he insisted that he could not make a large purchase without first testing the product.

At a meeting in the agent's car, the defendant explained that he wanted to take one kilogram of cocaine and test it. If the sample proved satisfactory, he would then consummate the purchase. Reaching back behind the seat, the

defendant handled a dummy kilogram that had been placed there by the agent and said, "that feels good." Later in the day, the two men met inside a home improvement store and made arrangements for the final handoff: the defendant would remove a [\*\*3] brick of cocaine (approximately one kilogram) from the agent's car and take it home for testing.

The test never came to pass. After the defendant retrieved the brick (the dummy kilogram, as matters turned out) from the agent's car, he was arrested on the spot. A federal grand jury subsequently charged him with attempting to possess 500 grams or more of cocaine with intent to distribute. See 21 U.S.C. § 841(a)(1).

In the course of routine pretrial discovery, the government produced materials [\*44] making clear its intention to offer at trial the recorded conversations between the defendant and the undercover agent, including the conversation that occurred on the day of the defendant's arrest inside the home improvement store (the August 14 recording). The defendant moved for additional discovery related to the August 14 recording, but the district court (Lisi, J.) denied his discovery motion on two grounds, finding that materiality had not been shown and that the information sought was proprietary in nature. For reasons not relevant here, the case was reassigned to a different trier and, immediately before the start of trial, the defendant effectively renewed his discovery motion. The district court (McConnell, [\*\*4] J.) refused to revisit the earlier ruling.

At trial, the defense sought to persuade the jury that the defendant never actually intended to purchase the cocaine but, rather, merely wanted a sample of the drug for testing. The defense also suggested that the August 14 recording had been manipulated by the government and could not be considered credible. The jury was unconvinced: it found that the defendant had attempted to possess

500 grams or more of cocaine with intent to distribute. Judge McConnell imposed a five-year term of immurement and this timely appeal followed.

## II. ANALYSIS

In this venue, the defendant, represented by new appellate counsel, advances two claims of error. First, he argues that the district court abused its discretion in denying his motion to examine the original of the August 14 recording and the software that generated and stored it. Second, he finds fault with the district court's instructions regarding the jury's duty to find, beyond a reasonable doubt, that the defendant had attempted to possess 500 grams or more of cocaine with intent to distribute. We discuss these claims of error sequentially.

### A. Discovery.

We begin with the defendant's complaint that the district **[\*\*5]** court improperly denied his request for additional pretrial discovery. That request was brought under [Federal Rule of Criminal Procedure 16](#), and [HN1](#)<sup>↑</sup> a district court's determinations under [Rule 16](#) are reviewed for abuse of discretion. See [United States v. Correa-Alicea](#), 585 F.3d 484, 493 (1st Cir. 2009). We caution, though, that an abuse of discretion will not be found in this context "unless the objecting party can show prejudice." [United States v. Chiaradio](#), 684 F.3d 265, 276 (1st Cir. 2012) (citing [United States v. Spinosa](#), 982 F.2d 620, 631 (1st Cir. 1992)).

[HN2](#)<sup>↑</sup> In criminal cases, standard types of discovery are routinely exchanged shortly after the arraignment, without the necessity of any motion. See [Fed. R. Crim. P. 16\(a\)-\(b\)](#); D.R.I. R. Cr. 16. Where circumstances warrant, however, a defendant may seek additional discovery. To this end, [Rule 16](#) provides that, upon a defendant's request, "the government

must permit the defendant to inspect . . . data, . . . tangible objects, . . . or copies or portions of any of these items, if the item is within the government's possession, custody, or control" and "the item is material to preparing the defense." [Fed. R. Crim. P. 16\(a\)\(1\)\(E\)](#). The defendant, as the moving party, bears the burden of showing materiality. See [United States v. Carrasquillo-Plaza](#), 873 F.2d 10, 12 (1st Cir. 1989).

Although our court has not yet defined "materiality" in this context, we do not write on a pristine page. The courts of appeals have displayed remarkable uniformity in concluding that it is not enough that what is sought **[\*\*6]** "bears some abstract logical relationship to the issues in the **[\*45]** case." [United States v. Ross](#), 511 F.2d 757, 762 (5th Cir. 1975). Rather, a showing of materiality requires "some indication" that pretrial disclosure of the information sought "would have enabled the defendant significantly to alter the quantum of proof in his favor." [Id. at 763](#); accord [United States v. Caro](#), 597 F.3d 608, 621 (4th Cir. 2010); [United States v. Jordan](#), 316 F.3d 1215, 1251 (11th Cir. 2003); [United States v. Graham](#), 83 F.3d 1466, 1474, 317 U.S. App. D.C. 418 (D.C. Cir. 1996); [United States v. Maniktala](#), 934 F.2d 25, 28 (2d Cir. 1991); [United States v. Marshall](#), 532 F.2d 1279, 1285 (9th Cir. 1976). This significant alteration may take place in a myriad of ways, such as "uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." [United States v. Lloyd](#), 992 F.2d 348, 351, 301 U.S. App. D.C. 186 (D.C. Cir. 1993) (citations omitted).

[HN3](#)<sup>↑</sup> In order to uphold a district court's denial of a request for additional discovery, we do not demand epistemological certainty that no discoverable information was withheld from the defendant. See [United States v. Rosario-Peralta](#), 199 F.3d 552, 559 (1st Cir. 1999). If,

say, a defendant's discovery request is grounded in a speculative theory, a district court's decision to deny that request is not an abuse of discretion. See id.

Here, the defendant premised his request for additional discovery on the notion that the government had doctored or otherwise manipulated the recorded conversations supporting its case (and, specifically, that the August 14 recording had been edited). The district court prudently convened an evidentiary hearing to give the **[\*\*7]** defendant an opportunity to put some flesh on this bare-boned allegation. At the hearing, defense counsel introduced expert testimony from a former law enforcement officer that, based on his experience with recording technology, the moment when the background noise fell to zero in the August 14 recording might suggest that the recording had been modified. On cross-examination, though, the witness's experience with recording technology proved to be of little value: despite his years in the field, he was unfamiliar with the type of recording technology employed in this case and had never used that technology.

This lack of familiarity was a critically important datum. As explained in an affidavit submitted by the government in the district court, the recording system used in this case allowed agents to record communications digitally on a secure, web-based platform, which the recording officer accessed through a cellular connection. Once a recording was initiated, a unique file would be created in the database. This file could be accessed for playback

through a web-based platform, but could not be deleted or modified. That the recording technology relied on cellular transmissions left **[\*\*8]** it at the mercy of the strength of the cellular signal and, thus, explained the poor quality of the resulting recordings (including the background noise falling to zero at times).

Nor was the expert's lack of familiarity the only infirmity in the defendant's proffer. At the hearing, the defense offered no specific evidence of what the defendant purportedly had said in the "missing" portions of the August 14 recording. This gap in the proffer is telling because the defendant was available to testify at the discovery hearing and presumably could have supplied the missing information.

Viewed against this backdrop, the district court hardly can be faulted for denying the discovery request. With the district court's endorsement of the credibility of the government's affidavit, the undermining of the defense's expert testimony, and the absence of any attempt to fill in the purportedly missing portion of **[\*46]** the recorded conversation, it cannot plausibly be said that the district court abused its discretion in concluding that the requested discovery would not have tipped the balance on any relevant issue. Put another way, the defendant failed to provide some indication that allowing the discovery **[\*\*9]** request "would have enabled [him] significantly to alter the quantum of proof in his favor."<sup>1</sup> [Ross, 511 F.2d at 763](#). Consequently, the district court's determination that the defendant had failed to show materiality was well within the encincture of its discretion.<sup>2</sup> See id. at 762; see also Rosario-Peralta, 199

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<sup>1</sup> The defendant claims that he should have at least been given access to the original version of the August 14 recording stored in the database so that he could compare it to the copy he had received from the government. But granting this request in the absence of some indication of tampering would be highly unorthodox: [HNS](#)  under [Rule 16](#), a defendant has no absolute right, on demand, to require the court to help him independently confirm the integrity of materials produced in

discovery. In the case at hand, we are satisfied that the district court did not abuse its discretion when it denied even this limited request based on its acceptance of the government's affidavit indicating that the file could not have been edited.

<sup>2</sup> Since we conclude that the district court did not abuse its discretion in ruling that the defendant failed to show materiality, we need not address the district court's alternative holding that the additional discovery should be denied because the defendant's request involved the production of proprietary

[F.3d at 559](#) (explaining that [HN4](#) [↑] when an appellant does "little more than speculate" as to what his discovery request may yield, an appellate court "simply cannot hold that the district court abused its discretion" in denying the request).

## **B. Jury Instructions.**

The defendant's second claim of error implicates the district court's instructions regarding the jury's duty to determine, beyond a reasonable doubt, whether the defendant attempted to possess at least 500 grams of cocaine with intent to distribute. The importance of the drug-quantity finding cannot be overstated: it triggered a mandatory minimum sentence of five years. See 21 U.S.C. § 841(b)(1)(B).

[HN6](#) [↑] In the context of jury instructions, a preserved claim of error alleging that the judge gave the jury a faulty interpretation of the law is normally reviewed de novo. See United States v. Sasso, 695 F.3d 25, 29 (1st Cir. 2012). In contrast, a preserved claim of error alleging that the judge did not adequately explain the law or explained it in confusing terms is normally **[\*\*10]** reviewed for an abuse of discretion. See United States v. Ranney, 298 F.3d 74, 79 (1st Cir. 2002). Unpreserved objections of either stripe are reviewed only for plain error. See United States v. Deppe, 509 F.3d 54, 58 (1st Cir. 2007).

Although these nuanced standards of review are sometimes difficult to apply, we are spared any such difficulty here. The government has agreed, at least for argument's sake, both that the defendant's claim of instructional error was preserved and that appellate review of that claim is de novo. We proceed accordingly.

[HN7](#) [↑] Jury instructions are meant to "furnish

a set of directions composing, in the aggregate, the proper legal standards to be applied by lay jurors in determining the issues that they must resolve in a particular case." United States v. DeStefano, 59 F.3d 1, 2 (1st Cir. 1995). A reviewing court is tasked with examining whether those instructions, "taken as a whole, show a tendency to confuse or mislead the jury with respect to the applicable principles **[\*47]** of law." United States v. Phath, 144 F.3d 146, 149 (1st Cir. 1998) (quoting United States v. Fulmer, 108 F.3d 1486, 1494 (1st Cir. 1997)). So long as that standard is satisfied, the district court's choice of phrase is "largely a matter of discretion." DeStefano, 59 F.3d at 2.

In order to convict the defendant, the jury had to find beyond a reasonable doubt that he attempted to possess 500 grams or more of cocaine with the intent to distribute. The defendant concedes that, at several points during its **[\*\*11]** jury instructions, the district court accurately delineated these requirements. But in the defendant's view, these correct statements were obscured beyond redemption by two other statements that the district court made. We turn to these other statements.

To begin, the district court told the jury:

For you to find Mr. Goris guilty of this crime, you must be convinced that the Government has proven each of the following things beyond a reasonable doubt: First, that on August 14th, 2014, Mr. Goris attempted to possess 500 grams or more of cocaine; second, that Mr. Goris did so knowingly and intentionally; and third, that he did so with specific intent to distribute cocaine over which he had actual or constructive possession. Now, it's not necessary for you to be convinced that Mr. Goris actually delivered the cocaine to someone else or that he made any money out of the transaction. It is enough for the

government to prove beyond a reasonable doubt that he attempted to possess what he believed was cocaine and that he intended to transfer it or some of it to someone else.

The defendant complains that the last sentence in this passage makes no mention of the need to prove that he had attempted **[\*\*12]** to possess 500 grams or more of cocaine.

This complaint lacks any semblance of merit. The sentence complained of was plainly an elaboration on the preceding instruction provided by the court. [HN8](#)<sup>(↑)</sup> To require a trial court to bloat each statement in a jury instruction by incorporating within it all the details of the charged offense is to deny the jury not only the clarity of properly segmented instructions but also the benefits of proper syntax. We discern no error.

The second statement upon which the defendant harps occurred in a passage in which the district court told the jury:

Let me finally now define knowledge of the controlled substance. The Government must prove that the offense involved a particular type and quantity of drug and that Mr. Goris knew, believed, or intended that the offense involved 500 grams or more of cocaine. However, the Government does not have to prove that Mr. Goris knew, believed or intended that he was distributing or attempting to possess with intent to distribute that particular drug type or that particular quantity. However, the Government must prove beyond a reasonable doubt that Mr. Goris knew, believed or intended that the offense involved 500 grams or more **[\*\*13]** of cocaine.

The defendant spotlights the third sentence in this passage, arguing that it "completely undercuts" the court's correct instruction about the government's burden of proving the offense.

We do not agree. Read in context, the third sentence was likely an attempt by the district court to clarify for the jury that the government did not have to prove any exact drug quantity (say, 525 grams) beyond a reasonable doubt. In the last analysis, though, we need not decide whether this single sentence, read apart from the rest of the court's charge and stripped bare of context, might be erroneous. **[\*48]** [HN9](#)<sup>(↑)</sup> Jury instructions must be read as a whole, not in some sort of splendid isolation. See [United States v. Pennue, 770 F.3d 985, 990 \(1st Cir. 2014\)](#). Thus, a single sentence in a court's jury instructions cannot be yanked from its contextual moorings and construed in a vacuum. See [United States v. Gomez, 255 F.3d 31, 39 \(1st Cir. 2001\)](#) (rejecting claim that single sentence in otherwise "meticulous" instruction constituted error and explaining that claim "focus[ed] the lens of inquiry too narrowly"). Rather, a reviewing court must consider whether jury instructions, taken as a whole, are reasonably likely to have misled the jury. See [Phath, 144 F.3d at 149](#).

In this case, the district court repeated, over and over again — including **[\*\*14]** immediately before and immediately after the challenged sentence — that the government had to prove beyond a reasonable doubt that the defendant knew, believed, or intended that the offense involved 500 grams or more of cocaine. The defendant readily admits that the district court properly explained the jury's obligations several times throughout the course of its jury instructions. So, too, the verdict form accurately conveyed that drug quantity was an element of the offense. Amidst this bevy of accurate statements, an argument that the challenged sentence altered the meaning of the instructions trenches on the frivolous. This is simply not a case where the jury was reasonably likely to have been misled by the court's instructions. See, e.g., [Pennue, 770 F.3d at 990](#) (finding fact that "erroneous instruction was followed immediately by a

correct instruction" weighed in favor of conclusion that jury was not reasonably likely to have been misled as to applicable law).

### III. CONCLUSION

We need go no further. We hold that the district court's decision to deny the defendant's [Rule 16](#) motion was not an abuse of discretion. We further hold that the district court's jury instructions, taken as a whole, were not erroneous. **[\*\*15]** Consequently, the judgment of the district court is

**Affirmed.**

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End of Document

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

\*\*\*\*\* \* CRIMINAL ACTION  
UNITED STATES OF AMERICA \* 14-108ML  
\*  
VS. \* MAY 7, 2015  
\*  
JOSE IGNACIO GORIS \* PROVIDENCE, RI  
\*\*\*\*\* \*

BEFORE THE HONORABLE MARY M. LISI  
DISTRICT JUDGE  
(Defendant's Motions)

**APPEARANCES:**

FOR THE GOVERNMENT: PAUL F. DALY, JR., AUSA  
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Court Reporter: Denise P. Veitch, RPR  
One Exchange Terrace  
Providence, RI 02903

1       7 MAY 2015 -- 11:00 A.M.

2               THE COURT: This is the matter of the United  
3 States versus Jose Goris. The matter is before the  
4 Court this morning on two motions filed by the  
5 Defendant.

6               The first is his motion to dismiss the  
7 Indictment for, as he terms it, "outrageous government  
8 conduct," and that is Docket Number 17. The Government  
9 has filed its response to that motion. And as the  
10 Defendant himself acknowledges, he has a very heavy  
11 burden in order to successfully prosecute such a  
12 motion.

13              I find that the Defendant has not met his burden  
14 of demonstrating what he terms "outrageous government  
15 conduct" in this case, and so I deny that motion  
16 essentially for the reasons as set forth in the  
17 Government's memorandum in opposition.

18              Next is the Defendant's motion, at Docket  
19 Number 30, for discovery beyond that which has already  
20 been provided to him. Essentially, in this motion he  
21 seeks access to a database, including a hard drive,  
22 computer storage discs, and digital media that captured  
23 and stored recorded conversations; although, as I  
24 understand it, he is essentially really only interested  
25 in one such recorded conversation which occurred on

1 August 14th of 2014 at the Lowe's store in Cranston,  
2 Rhode Island. That's the real focus of his concern,  
3 because that was the day that the Defendant was  
4 arrested.

5 In order to meet his burden on that motion, the  
6 Defendant has an obligation to demonstrate at the very  
7 least that the information sought is material and  
8 necessary for his defense.

9 In order to bolster his claim that he needed  
10 this information, the Defendant presented the testimony  
11 of an expert witness, Mr. Ken Bell, who is well known  
12 to the Court from his previous employment as a member  
13 of the Rhode Island State Police, since he testified  
14 before this Court on at least one matter that I can  
15 recall.

16 Mr. Bell is now retired from the State Police  
17 and teaches and also has a consulting company wherein  
18 he does some computer forensic work, and he did that  
19 work in this case with regard to that recording of the  
20 conversation between Mr. Goris and the undercover agent  
21 on August 14th at the Lowe's store.

22 Mr. Bell testified as to the efforts he made to  
23 reduce background noise and enhance the tape recording,  
24 and he also went so far as to manipulate it in such a  
25 way with equipment that he has where he could visualize

1 the conversation.

2 Having done all of that, he determined that  
3 there was a very brief -- I think he said it was less  
4 than a second or a second -- gap in what he was calling  
5 floor noise or background noise, and he opined that  
6 that gap indicated to him that the tape had been  
7 edited. If we were to stop there, clearly the Court  
8 would have great concern.

9 However, Mr. Bell also was quite candid in  
10 testifying on cross-examination that he had not been  
11 advised, until just before he took the witness stand  
12 yesterday, that the equipment utilized by the  
13 undercover agent in this case to record that  
14 conversation on August 14th is much more sophisticated  
15 than the technology that Mr. Bell was familiar with at  
16 the time that he was still with the Rhode Island State  
17 Police, and it was only yesterday that he learned that  
18 the means of making that recording is far different  
19 from what he assumed was the case; and that is, that  
20 the person who was having the conversation was in a  
21 position to manipulate the recording of the  
22 conversation.

23 In fact, what we now know, and what Mr. Bell  
24 learned for the first time yesterday, was that the  
25 technology utilized by the undercover in this case is

1 far different from what Mr. Bell had assumed was used  
2 in this case.

3 As set forth in the affidavit of Jose Garcia,  
4 which was submitted without objection, the means  
5 utilized by the undercover agent in this case required  
6 him to wear some sort of a device which did not itself  
7 record anything, but, rather, transmitted over cellular  
8 lines the conversation which then was connected to a  
9 database, and that initiated the recording.

10 As Mr. Garcia says, those recordings then are  
11 date and time stamped so that they can be retrieved at  
12 a later time. The officer who initiates the contact  
13 can only then terminate the contact, and each time he  
14 does so it creates a new file on that database.

15 At paragraph four of his affidavit, he says:  
16 Once created, a file's contents can be accessed only  
17 for playback. They cannot be deleted, nor can they be  
18 altered once they are created.

19 That was all news to Mr. Bell. As I said, he  
20 provided his expert testimony based on an assumption,  
21 which he learned only yesterday was incorrect in terms  
22 of the technology that was utilized.

23 So, first with respect to whether or not the  
24 Defendant has met his burden of demonstrating the  
25 materiality of the evidence or of the information that

1 he now seeks pursuant to Rule 16, I find that he has  
2 not met his burden of demonstrating that having access  
3 to the database, having access to the device that was  
4 utilized is material to his presenting an adequate  
5 defense in this case.

6 And there is a second reason in this case why  
7 the Court will not order it, and that is this is, as  
8 Mr. Bell conceded, very new technology. It's  
9 proprietary in nature, and, according to Mr. Garcia's  
10 affidavit, is available now only to credentialed law  
11 enforcement officers. It is password protected on the  
12 database. And so I believe that it is proprietary and  
13 should not be divulged. So, for those reasons the  
14 motion for discovery and preservation of evidence is  
15 denied.

16 May I see counsel, please.

17 MR. BERETTA: Judge, just for the record,  
18 Defendant's objection to the ruling on both counts.

19 THE COURT: It's not necessary.

20 MR. BERETTA: I understand.

21 THE COURT: Okay.

22 (Bench conference held off the record.)

23 (Adjourned)  
24  
25

C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify  
that the foregoing pages are a true and accurate  
transcription of my stenographic notes in the  
above-entitled case.

/s/ Denise P. Veitch

-----  
Denise P. Veitch, RPR

November 2, 2015

-----  
Date

# United States Court of Appeals For the First Circuit

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No. 17-1104

UNITED STATES

Appellee

v.

JOSE IGNACIO GORIS

Defendant - Appellant

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Before

Howard, Chief Judge,  
Torruella, Selya, Lynch, Thompson,  
Kayatta and Barron, Circuit Judges, and  
Levy, \* District Judge

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## ORDER OF COURT

Entered: January 8, 2018

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:  
/s/ Margaret Carter, Clerk

cc: Robert Barney Mann  
Jose Ignacio Goris  
Paul Francis Daly Jr.  
Donald Campbell Lockhart

---

\* Of the District Court of Maine, sitting by designation.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

\* \* \* \* \* C.R. NO. 14-108ML  
\*  
UNITED STATES OF AMERICA \*  
\*  
VS. \* MAY 6, 2015  
\* 2:00 P.M.  
\*  
JOSE IGNACIO GORIS \*  
\*  
\* \* \* \* \* PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,  
DISTRICT JUDGE

(Motion for Discovery and Preservation of Evidence)

APPEARANCES:

FOR THE GOVERNMENT: PAUL F. DALY, JR., AUSA  
U.S. Attorney's Office  
50 Kennedy Plaza  
Providence, RI 02903

FOR THE DEFENDANT: VICTOR J. BERETTA, JR., ESQ.  
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Providence, RI 02909

Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR  
One Exchange Terrace  
Providence, RI 02903

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I N D E X

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1       6 MAY 2015 -- 2:00 P.M.

2               THE COURT: This is the matter of the United  
3 States versus José Goris. The matter is before the  
4 Court this afternoon on the Defendant's motion for  
5 discovery and request for preservation of evidence.  
6 This is Docket Number 30. The Government filed its  
7 response I believe yesterday, and that is at Docket  
8 Number 36.

9               So, Mr. Beretta, have you had an opportunity to  
10 read the Government's response?

11              MR. BERETTA: I have not, your Honor, but  
12 Mr. Daly just began to explain it to me before the  
13 judge -- before you entered the courtroom.

14              THE COURT: You haven't read it?

15              MR. BERETTA: No. I left my office yesterday,  
16 it wasn't there. I was in court all afternoon. I have  
17 not seen it, but Mr. Daly just asked that a copy be  
18 made so that I can read it.

19              THE COURT: Do you have a copy for him,  
20 Mr. Daly?

21              MR. DALY: I don't have one in hand, your Honor.  
22 He can view mine, your Honor.

23              (Pause)

24              MR. BERETTA: I've read it, your Honor.

25              THE COURT: Okay.

1 MR. BERETTA: Thank you. I'm prepared to  
2 proceed.

3 THE COURT: I noticed, Mr. Beretta, that when  
4 you filed your motion, you neglected to file any sort  
5 of a memorandum of law.

6 MR. BERETTA: That is correct, your Honor.

7 THE COURT: How do you wish to proceed?

8 MR. BERETTA: May I be heard briefly before I  
9 call a witness? Thank you.

10 Judge, on March -- your Honor, as the Court is  
11 aware, the history and travel of the discovery in this  
12 case has created some problems.

13 On March 23rd, this motion for discovery and  
14 preservation of evidence was filed because after  
15 numerous requests by telephone, by fax -- by e-mail, by  
16 letter and actually by a formal motion served on the  
17 United States Attorney's Office and filed with the  
18 Court, the Defendant in this case had been told  
19 repeatedly that a tape of interest, a very important  
20 audio recording of interest, did not exist.

21 THE COURT: This was the August 14th?

22 MR. BERETTA: This was the August 14th, 2014,  
23 audio recording of an incident which took place in  
24 Lowe's Home Improvement store on Garfield Street in  
25 Cranston.

1           If my memory is correct, the request spanned a  
2           timeframe of about four to five months, and there were  
3           numerous. Each request was met with the same answer:  
4           We've given you everything.

5           THE COURT: I understand all of that,  
6           Mr. Beretta. What I'd like you to focus on today is  
7           the basis you claim -- the legal basis that you now  
8           claim you're entitled to the information that you're  
9           seeking in this motion.

10          MR. BERETTA: Yes, your Honor. On March 16th,  
11          as the Court is also aware, I was presented with a  
12          disk, a disk that the Government asserted captured this  
13          conversation inside Lowe's on August 14th of 2014  
14          between the Defendant and an agent working for the  
15          department or the DEA task force. That recording was  
16          of horrible quality.

17          Now, in comparison to the 12 -- that's my  
18          description, but I will ask that the recording be  
19          entered as an exhibit later, your Honor; but the  
20          recording was inaudible at times. It was tough to  
21          decipher. The conversation appeared disjointed, that  
22          there wasn't a logical flow.

23          So based on that, the Defendant hired an expert.  
24          Based on an expert's analyzation and review of that  
25          recording, I'm pressing this motion. The evidence I'm

1 seeking based on what I've been told by an expert is  
2 material and relevant to Mr. Goris' defense.

3 THE COURT: None of that's in your motion. None  
4 of what you say now provides a basis for me to grant  
5 the motion.

6 MR. BERETTA: The motion was filed  
7 preliminarily, your Honor, because I was concerned that  
8 certain things could be destroyed.

9 The motion was filed a few days after I was  
10 given the tape. It was filed and served on the United  
11 States Attorney's Office out of an abundance of caution  
12 because I didn't want certain storage disks or a  
13 computer database that may have contained the original  
14 voice recording, the original audio recording, to  
15 somehow disappear. That's why there's no memorandum  
16 here.

17 I assert that the evidence that I'm seeking and  
18 the material that I'm seeking to discover and asking  
19 the Government to produce is material and relevant  
20 under the rule.

21 I'm alleging that it's reasonable considering  
22 the history that we've had with this discovery process  
23 in this particular case and these recordings.

24 And I'm suggesting that based on what I intend  
25 to supplement my motion with today, which is the

1 testimony of an expert witness who has analyzed this  
2 tape, that this motion for production of these  
3 particular items is not only important but it's  
4 justified.

5 The evidence includes -- as the Court has said,  
6 there is no memoranda, but it includes the digital  
7 device which recorded this conversation. My  
8 understanding is that digital device transfers the  
9 conversation to a certain central database.

10 We're asking that we be able to review that  
11 device. We're asking that we have a chance to review  
12 the hard drive, and again --

13 THE COURT: The hard drive of what?

14 MR. BERETTA: The hard drive which stored the  
15 recordings, audio recordings in this case, the storage  
16 system where these recordings went and any storage disk  
17 which the original recording from the personal digital  
18 recorder was transferred to before it ultimately ended  
19 up on the disk that we got.

20 THE COURT: Okay. And you say your expert is  
21 going to provide testimony today that will provide a  
22 basis for your claim here?

23 MR. BERETTA: If I'm allowed to make an offer of  
24 proof at this time.

25 THE COURT: No. I think you ought to put your

1 witness on. Your witness is here, isn't he?

2 MR. BERETTA: Well, that was -- my offer of  
3 proof is that my expert is here, and that's exactly  
4 what he will testify to.

5 THE COURT: Well, if he's here, we may as well  
6 hear from him, not from you.

7 Mr. Daly, do you have any problem with  
8 Mr. Beretta presenting his expert witness on the  
9 motion? I know you've objected to his claim, but do  
10 you have any problem with him putting on a witness to  
11 substantiate his claim here?

12 MR. DALY: No, your Honor.

13 THE COURT: Okay. Call your witness,  
14 Mr. Beretta.

15 MR. BERETTA: Ken Bell, your Honor. The defense  
16 calls Ken Bell.

17 **KEN BELL, DEFENSE WITNESS, SWORN**

18 THE CLERK: Would you please state your name and  
19 spell your last name for the record.

20 THE WITNESS: My name is Ken Bell, last name  
21 spelled B-E-L-L.

22 THE COURT: You can have a seat, and you're  
23 going to need to speak directly into the microphone.

24 THE WITNESS: Sure.

25 MR. BERETTA: May I proceed, your Honor? Thank

1       you.

2                   **DIRECT EXAMINATION BY MR. BERETTA**

3       Q.     Mr. Bell, good afternoon.

4       A.     Good afternoon.

5       Q.     Mr. Bell, what is your occupation presently?

6       A.     I currently have a consulting business in which I  
7       specialize in computer forensics and also litigation  
8       support.

9       Q.     And your place of employment is located where?

10      A.     It's a home-based business.

11               THE COURT:    I'm sorry?

12               THE WITNESS:  It's a home-based business.

13      Q.     And prior to this new employment, were you  
14      employed anywhere before that?

15      A.     Yes.  I have another couple of jobs.

16      Q.     Tell me about the most recent job before this.

17      A.     Sure.  So I'm an adjunct professor at Salve Regina  
18      University.  I teach in the master's program.  And  
19      through that I teach cyber security, cyber  
20      intelligence-related classes.

21               THE COURT:    Where's this?

22               THE WITNESS:  Salve Regina University.

23      A.     I also help to develop curriculum for the  
24      universities, several universities.

25      Q.     And prior to that, was there employment?

1 A. Yes. I'm also currently employed at Raytheon as a  
2 director in the chief technologies office.

3 Q. Were you ever a member of the Rhode Island State  
4 Police?

5 A. Yes, I was.

6 Q. Tell me about that. What position did you hold in  
7 the Rhode Island State Police?

8 A. Sure. So I did a little over 20 years at the  
9 Rhode Island State Police. I started off as a road  
10 trooper, and in my last assignment I was actually a  
11 detective sergeant supervising the Computer Crimes  
12 Unit.

13 Q. Could you briefly describe what computer crime  
14 entails.

15 A. Sure. So Computer Crimes Unit, we conduct  
16 investigations specifically related to child  
17 pornography, child exploitation.

18 We also assist not only all state, local and  
19 federal agencies in the State of Rhode Island with  
20 digital -- all types of investigations that have a  
21 digital component to them.

22 Q. And by digital component, what do you mean?

23 A. Could be anything from analyzing a cell phone to  
24 downloading video to analyzing video, audio. It could  
25 be computer forensics. It could be phone forensics.

1 So any type of investigation where there was digital  
2 media involved that needed to be analyzed.

3 Q. Have you received or have you completed any  
4 academic degrees in this area?

5 A. Yes, I have.

6 Q. And what are those?

7 A. So I have a bachelor's of science from Roger  
8 Williams University with a concentration in  
9 administration of justice and a minor in computer  
10 information systems.

11 Q. Do you have any specialized training in that area?

12 A. I also have an advanced degree from Norwich  
13 University in information assurance, concentration in  
14 digital forensics and incident response.

15 Q. Is there a certification procedure in the area of  
16 computer forensics and digital audio forensics?

17 A. So I have a certification in digital forensics,  
18 that's correct.

19 Q. And out of where? Who certifies it?

20 A. So I'm certified by the International Association  
21 of Computer Investigative Specialists.

22 Q. Do you do any teaching or lecturing in the field  
23 of computer forensics and digital audio forensics?

24 A. Computer forensics, yes, I do.

25 Q. Where?

1 A. So I've been certified to teach by the National  
2 White Collar Crime Center. So I've taught at a lot of  
3 different locations throughout Rhode Island and also  
4 throughout southeast Massachusetts and taught a lot of  
5 police officers from throughout New England on a couple  
6 of different courses that I'm certified to teach  
7 through the National White Collar Crime Center.

8 Q. Is it fair to say that in the course of your  
9 employment and your specialty, you've had occasion to  
10 examine computer hard drives --

11 A. Yes.

12 Q. -- for evidence contained?

13 A. Yes, it is.

14 Q. Is it also fair to say that in the course of your  
15 employment that you've also analyzed digital audio  
16 recordings?

17 A. That is correct.

18 Q. What about digital videos, have you also analyzed  
19 digital videos?

20 A. Yes, I have.

21 Q. Have you ever testified in court before, Mr. Bell?

22 A. Yes, I have.

23 Q. And do you recall the number of times?

24 THE COURT: Well, as an expert or as -- in his  
25 past life I would imagine he's testified before. In

1 fact, I think he testified in a case I had a few years  
2 ago, didn't you?

3 THE WITNESS: Yes, I did.

4 Q. As the judge -- as an expert, Mr. Bell.

5 A. Yes, I have.

6 Q. How many times, if you recall?

7 A. I would say more than five.

8 Q. And has any of that testimony involved computer  
9 crimes, computer forensics, audio analyzation and  
10 digital audio analysis?

11 A. Yes, it has.

12 MR. BERETTA: May I approach the witness, your  
13 Honor?

14 THE COURT: You may. Well, show Mr. Daly what  
15 you have.

16 MR. BERETTA: I already provided it to him, your  
17 Honor.

18 Q. Mr. Bell, showing you what you have provided me  
19 and indicated was your curriculum vitae --

20 THE COURT: Are you going to try to put that in?

21 MR. BERETTA: I am.

22 THE COURT: Why? He's just testified to his  
23 credentials. I don't need it.

24 MR. BERETTA: All right.

25 THE COURT: Let's simplify things, Mr. Beretta.

1 Let's get right to it.

2 MR. BERETTA: Your Honor, pursuant to the  
3 applicable rule in this case, I'm tendering Mr. Bell as  
4 an expert on computer forensics.

5 THE COURT: Any objection?

6 MR. DALY: No, your Honor.

7 THE COURT: See, that simplifies it,  
8 Mr. Beretta.

9 MR. BERETTA: I'm trying to get used to the  
10 process here, your Honor. It's a little different  
11 across the street. May I proceed, your Honor?

12 THE COURT: Go ahead.

13 MR. BERETTA: May I have this marked.

14 THE COURT: It's not premarked?

15 MR. BERETTA: No, your Honor.

16 THE COURT: Defendant's A. That's for ID at  
17 this point.

18 MR. BERETTA: Correct.

19 (Defendant's Exhibit A marked for ID)

20 Q. Mr. Bell, I'm showing you what's been marked as  
21 Defendant's A for identification. Are you familiar  
22 with that?

23 A. Yes, I am.

24 Q. Was that CD provided to you several weeks ago?

25 A. Yes, it was.

1 Q. And have you had a chance to examine that CD?

2 A. Yes, I did.

3 Q. Can you tell us or can you tell the Court, what is  
4 on that audio CD?

5 A. So there are three different recordings in a  
6 digital format.

7 Q. Did you listen to all three of those digital  
8 recordings in your --

9 A. No, I did not.

10 Q. -- process? Why not?

11 A. I was tasked to listen to the recording that  
12 related to a conversation at Lowe's, so I narrowed the  
13 focus and the scope of my investigation just to that  
14 one recording.

15 Q. And how were you able to narrow your focus to the  
16 one recording involving the conversation between the  
17 Defendant and Agent José Garcia inside of Lowe's?

18 A. When I met with you, you told me which recording  
19 it was. And, in fact, when I listened to it, it seemed  
20 to fit the same description of the recording that you  
21 had described.

22 Q. Okay. Would that recording include -- would the  
23 recording involving the conversation in Lowe's between  
24 the Defendant and Agent Garcia be date-stamped and  
25 time-stamped on the disk?

1 A. When you look at the name of that recording, it  
2 does appear to be consistent with the date and time.

3 Q. And did you listen to that particular portion of  
4 the file, the entire file?

5 A. Yes, I did.

6 Q. Why?

7 A. Because that's what my investigation was focused  
8 on.

9 Q. And what were you trying to determine by listening  
10 to it?

11 A. So I was trying to determine basically if there  
12 had been any edits to that audio.

13 Q. And as you were listening to it, did you pay  
14 particular attention to the quality of the sound on  
15 that recording?

16 A. Yes, I did.

17 Q. What did you find as to the quality of the sound  
18 on that recording?

19 A. So some of the quality was pretty clear, and other  
20 parts were not so clear.

21 Q. And what did you do once you --

22 THE COURT: Hold on one second. Did it matter  
23 who was speaking? It's a conversation between two  
24 people.

25 THE WITNESS: Sure. So it was pretty poor on

1 both sides. So it was clear on the detective's side or  
2 the undercover's side at some points. It was also poor  
3 on what he was saying at some points. It was also poor  
4 on what the Defendant was saying, and it was also clear  
5 at points.

6 Q. Was that the beginning of your analysis of the  
7 audio?

8 A. So I listened to that audio several times to start  
9 off.

10 Q. Did you do anything else as part of your analysis  
11 of the audio on that date?

12 A. Sure. I also tried to reduce some of the  
13 background noise related to that audio, and I also did  
14 some enhancement of the volume as it relates to that  
15 audio.

16 Q. Were you capable of doing that? Did it assist you  
17 in your analysis?

18 A. Yes, it did.

19 THE COURT: Well, hold on a second. You asked  
20 him two questions. He said he tried to reduce  
21 background noise. Were you able to do that?

22 THE WITNESS: Yes, I was.

23 THE COURT: And you said you tried to enhance  
24 the volume. Were you able to do that?

25 THE WITNESS: Yes, I was.

1 THE COURT: Okay.

2 Q. And did that assist you in your continuing  
3 analysis?

4 A. Yes, it did.

5 Q. Would you tell us what you did next.

6 A. So another part of doing audio analysis is  
7 actually looking at the audio visually. So I used  
8 several or a few, I shouldn't say several, I used a  
9 couple of tools that also allowed me to look at that  
10 audio and do a visual inspection of the audio.

11 Q. I'm sorry. Before you looked at the audio, in  
12 listening to the tape, as you were listening, did it  
13 appear to be a complete conversation related to the  
14 issue that the undercover and Mr. Goris were talking  
15 about?

16 A. In my opinion, no, it did not.

17 Q. So in your opinion the conversation that you heard  
18 on the audio was incomplete, or describe it in your --

19 A. I would say that the conversation didn't flow the  
20 way I would expect it with the activity that I was told  
21 that took place that day.

22 Q. So what did you do next after you listened to it  
23 closely?

24 A. So next I looked at it visually.

25 Q. Tell us what that means. Tell the Court what that

1 means, please.

2 A. So basically I have a specialized program or a few  
3 programs that will actually take audio and actually  
4 visualize that audio and visualize sound, and then that  
5 allows me to visually inspect audio which assists in my  
6 analysis of audio.

7 Q. Are you aware of the term "spectrograph"?

8 A. Spectrograph, spectrogram. So basically it's when  
9 you take audio and actually visualize it. That's  
10 what -- when you're looking at audio and you'll be  
11 looking at a spectrum of sounds.

12 Q. And did you do that here?

13 A. Yes, I did.

14 Q. Why?

15 A. In looking at audio, certain -- in listening to  
16 audio, certain things will take place in fractions of a  
17 second; and to the natural ear, it's pretty hard to  
18 determine any changes. However, when you actually look  
19 at audio visually, it's pretty clear-cut when there's  
20 different changes.

21 Q. And as you reviewed this audio visually, did you  
22 see anything that piqued your attention?

23 A. Yes, I did.

24 Q. And what was that?

25 A. At one point in the conversation I see that --

1 I'll give you a little background. So when you make an  
2 audio recording, there's basic sound noise or a floor  
3 noise that comes in.

4 So that floor noise could be made from anything  
5 from the device you're actually using to make that  
6 recording, so from the microphone, but a lot of it also  
7 goes to the background noise that's in that location  
8 where you are. So that's going to give you what they  
9 call a noise floor.

10 So that should be consistent throughout a  
11 recording where there's actually like an audio of --  
12 for example, if we're sitting here in this courtroom, I  
13 should have a consistent sound floor throughout this  
14 whole recording as we speak.

15 Q. Was the tape that you analyzed in this particular  
16 matter consistent throughout the recording?

17 A. So I really focused on just the portions of that  
18 tape where the undercover was actually in a  
19 conversation with the Defendant; and during that, there  
20 is one point that I can definitely see a dramatic  
21 change in the noise floor.

22 Q. Does that mean anything to you?

23 A. In my opinion, it means that the audio was edited  
24 at that location.

25 Q. Is that your opinion based on your years of

1 training?

2 A. That's correct.

3 Q. And study and experience?

4 A. And also this investigation, that's correct.

5 Q. Again, what does that complete absence of floor  
6 noise or background noise indicate?

7 A. So I said that it was a dramatic change in the  
8 floor noise, and that indicates that there has been an  
9 edit to that audio tape.

10 Q. An edit?

11 A. That's correct.

12 Q. So you're suggesting that this tape was altered?

13 A. My investigation shows that it was changed.

14 Q. You've used body wires in prior employment?

15 A. Yes, I have.

16 Q. Is it common to edit a recording from a body wire  
17 or alter it before it's downloaded into the main  
18 database? We're talking an audio recording now.

19 THE COURT: You're talking in general or in  
20 police practice?

21 MR. BERETTA: In law enforcement practice.

22 A. I would say it's not common, but there are times  
23 when you have to do some sort of analysis where you  
24 might enhance it. And if doing something along those  
25 lines, you should document that and you should make

1 sure that you preserve the original and submit both.

2 Q. Were you shown an original copy of this particular  
3 audio recording when you were asked to undertake this  
4 examination? Were you provided one?

5 A. I was given a copy that was provided on that CD.

6 Q. Is it fair to say, then, it's not common practice  
7 to alter -- in law enforcement, it's not common  
8 practice to alter or edit an audiotape without doing  
9 the things that you just told us should be done, some  
10 type of notice and preservation of the original?

11 A. I would say that it's not common.

12 Q. Is it permissible?

13 THE COURT: Well, Mr. Beretta, I don't know what  
14 that means.

15 Q. Was it permissible --

16 THE COURT: And, by the way, it's best if you  
17 not lead your own witness.

18 Q. Besides the examination or analysis you've  
19 conducted thus far, is there anything else that can be  
20 done in regards to this audio recording that could help  
21 you in determining whether it has been altered or  
22 edited?

23 A. Yes.

24 Q. And what is that?

25 A. To conduct a forensic analysis of the original

1 media that was used to actually record the conversation  
2 and to conduct a forensic analysis of any digital media  
3 that was -- that was used to either transfer, store or  
4 duplicate that original audio recording.

5 Q. In your opinion, is that important in this case?

6 A. Yes, it is.

7 Q. Why?

8 A. Because that would allow me to analyze the  
9 original audio recording against the audio recording  
10 that is on this tape to determine what was actually  
11 altered.

12 Q. Getting back to the segment or portion of the  
13 audio recording where you said there was, I don't want  
14 to say a complete absence, but a reduction in floor or  
15 background noise or an absence of floor --

16 A. Dramatic change.

17 Q. Dramatic change. Do you recall whether that came  
18 at an important part of the conversation between  
19 Mr. Goris, important in the terms of a drug sale,  
20 between Mr. Goris and the agent for DEA?

21 MR. DALY: Objection, your Honor.

22 THE COURT: Sustained.

23 Q. Did it come in the portion of a conversation  
24 between Mr. Goris and whomever he was speaking with or  
25 whomever was speaking to him where the discussion

1 involved narcotics?

2 A. There was a discussion concerning narcotics.

3 THE COURT: Well, I don't know that that answers  
4 the question. He asked you a really specific question,  
5 I think. Maybe you didn't understand it because it was  
6 sort of three questions in one.

7 The real question is -- you can move that. You  
8 say you found a spot on the tape. I'm not going to use  
9 computer language.

10 THE WITNESS: I'll try not to, also, your Honor.

11 THE COURT: You found a spot on the recording  
12 where you say there's this reduction in background  
13 noise.

14 THE WITNESS: That's correct.

15 THE COURT: Which you attribute to that tape  
16 having been edited.

17 THE WITNESS: That's correct.

18 THE COURT: And I think what he's asking you is,  
19 what were they talking about at that point? The whole  
20 thing is about narcotics. So what were they talking  
21 about at that precise point?

22 THE WITNESS: So I'd have to listen to it, but I  
23 think it was something along the lines of trust and  
24 also -- so there was a conversation where the Defendant  
25 was saying that he kind of trusts the undercover, and

1       then it moves into -- I'd have to listen to it again,  
2       but I know that at one point my mental note of that  
3       point is that at some point I can hear the Defendant  
4       talking about how he trusts the undercover.

5               THE COURT:   Okay.   And how long a gap is there?

6               THE WITNESS:   I mean, it's not even a second.  
7       It's a millisecond.

8               THE COURT:   So the gap in the noise is less than  
9       a second?

10              THE WITNESS:   It's definitely less than a  
11       second.

12              THE COURT:   Okay.

13       Q.    In terms of real time, does that gap suggest that  
14       there was only an edit of a millisecond?

15              MR. DALY:   Objection, your Honor.

16              THE COURT:   Sustained as to form.

17       Q.    Tell us what a millisecond gap means in an  
18       audiotape.

19       A.    So wherever there's an edit, you're kind of  
20       missing that piece of audio.   That audio could be a  
21       second.   That audio could be two days.

22              So when you edit something out, you're taking  
23       and you're putting two segments of a conversation  
24       together.   So the actual time that that edit, even  
25       though looking at -- if you listen to it, it's very

1 hard to even know that it's there; but when you look at  
2 it visually, to a trained eye you can see it very  
3 easily.

4 Q. So the fact that you're saying it may have been a  
5 millisecond long doesn't mean that what's missing from  
6 the tape was only a millisecond worth of conversation;  
7 is that correct?

8 A. That is correct.

9 THE COURT: But you don't know how long it is?

10 THE WITNESS: No, I do not.

11 THE COURT: How long was the whole tape?

12 THE WITNESS: Under 20 minutes, and then the  
13 conversation between the undercover and the Defendant  
14 is probably less than five minutes.

15 Q. And just to go over it one last time, it would be  
16 beneficial to your analysis and examination if you  
17 could examine the hard drive, the storage disks and the  
18 personal digital device that was used, used to record  
19 this conversation?

20 A. That is correct.

21 MR. BERETTA: No further questions at this time,  
22 your Honor.

23 THE COURT: Mr. Daly?

24 **CROSS-EXAMINATION BY MR. DALY**

25 Q. Good afternoon.

1 A. Good afternoon.

2 Q. The recording that you listened to from  
3 August 14th of 2014 was in what format when you  
4 listened to it?

5 A. It was a digital format. So my recollection says  
6 WAVE format, which is a digital format.

7 Q. Are you certain of that?

8 A. I have a little note that I could check to make  
9 sure.

10 Q. Do you have it with you?

11 A. Yes, I do.

12 MR. DALY: If he may, your Honor, check a note.

13 THE COURT: Yes.

14 A. Okay. I have it.

15 Q. And does that assist your recollection as to the  
16 format of the file?

17 A. Yes, it does.

18 Q. What type of file was it?

19 A. It's a WAVE file.

20 THE COURT: WAVE as in the ocean?

21 THE WITNESS: W-A-V-E, yes, WAVE; but the file  
22 extension that would identify that would be .wav.

23 Q. And that WAVE file was on a disk that was provided  
24 to you by Mr. Beretta; is that right?

25 A. That's correct.

1 Q. And did you know the manner in which that original  
2 recording was created?

3 A. No, I did not.

4 Q. So you were presented with a WAVE file and a disk  
5 and asked to conduct an analysis. Is that pretty much  
6 the facts that you had when you started?

7 A. There was some more detail, but that's correct.

8 Q. When you began your analysis, did you look at the  
9 entire length of the recording to determine how long  
10 the recording was?

11 A. I did.

12 Q. You told the Court already you don't recall, but  
13 would you agree with me that 16 minutes and 51 seconds  
14 sounds about right?

15 A. I would say that it was less than 20 minutes,  
16 absolutely.

17 Q. Would you have a record of the entire length of  
18 the recording?

19 A. No, I do not.

20 Q. But you don't disagree with me that 16 minutes and  
21 51 seconds could be the amount of time of the  
22 recording?

23 A. That's correct. I don't disagree.

24 Q. And do you recall where along those 16 minutes and  
25 51 seconds of the recording that there's a dramatic

1 drop in the background noise?

2 A. Yes, I do.

3 Q. And what point is that?

4 A. So at -- there's a point where the Defendant is  
5 speaking to the undercover, and he says along the lines  
6 of something like "I trust you."

7 Q. And do you know at what time does that occur?

8 A. I have my computer with me, so --

9 Q. I'm sorry?

10 A. I said I have my computer with me, also, with the  
11 document. So I have a way to display that. So I could  
12 very easily show the Court if you want to see it.

13 Q. But you don't have an independent memory of when  
14 that occurs, though?

15 A. It wouldn't take me long to find it.

16 Q. After the -- and somewhere near the point where it  
17 drops off, the Defendant uses the word "trust." That's  
18 your memory; right?

19 A. Absolutely.

20 Q. And after the dramatic drop in the background  
21 noise, who is the person speaking when the recording  
22 continues?

23 A. The Defendant.

24 Q. And what is the word that he's using there?

25 A. I'd have to take a look at it.

1 Q. Did you examine the recording to see whether the  
2 words after the dramatic drop in the background noise  
3 flowed from the words that preceded the dramatic drop  
4 in the background noise?

5 A. Yes, I did.

6 Q. And what did you find?

7 A. In my opinion, I wouldn't think that it was part  
8 of the same conversation.

9 Q. Okay. Why not?

10 A. In my opinion, it's almost as if the Defendant's  
11 words kind of drop off and it picks up in another total  
12 different location.

13 Q. And so what's he saying?

14 A. I'd have to listen to it again. I've listened to  
15 this tape so many times that I'd actually have to -- it  
16 would be tough for me. I have it here.

17 It would be tough for me to just -- it would be  
18 tough for me to try to, you know, recreate the words  
19 off the top of my head.

20 Q. You know -- did you know at the time that you  
21 examined the recording that it was made inside the  
22 Lowe's Home Improvement store on Garfield Avenue in  
23 Cranston?

24 A. Yes, I did.

25 Q. Did you know any of the circumstances surrounding

1       how that recording occurred?

2       A.    No, I did not.

3       Q.    As you appear here today to testify, do you have  
4       any better knowledge as to how that recording was made?

5       A.    Yes, I do.

6       Q.    When did you obtain that knowledge?

7       A.    Just while I was sitting in the courtroom.

8       Q.    As we spoke just before you testified?

9       A.    That's correct.

10      Q.    And I imparted to you at that time, did I not,  
11      some of the circumstances surrounding the recording?  
12      Is that correct?

13      A.    Yes, you did.

14      Q.    And you know now that that recording which  
15      occurred inside Lowe's was the product of a device worn  
16      by an undercover officer inside of Lowe's transmitting  
17      a cellular signal to a data -- to a database which  
18      stored the recording at a remote location. You  
19      understand that today; right?

20      A.    That's what you told me.

21      Q.    Okay. And you understand, then, that the  
22      transmission -- excuse me, the transmission from the  
23      conversation to the database relies upon a cellular  
24      signal. You understand that today now, too; right?

25      A.    I'd have to take a look at the device, but I'm not

1 familiar with that technology; but I would very much be  
2 willing to take a look at it.

3 Q. You're not familiar with that?

4 A. With a recording device going over a cellular  
5 signal?

6 Q. Yeah.

7 A. No. That's some pretty new stuff. We didn't have  
8 that.

9 Q. It's something, then, that you would not be able  
10 at this time to conduct a forensic examination upon;  
11 correct?

12 A. Of which device?

13 Q. On a device which transmits a cellular signal to a  
14 recording database.

15 A. So I'd have to look at it. So one thing I would  
16 have to look at, the first thing I would have to look  
17 at, if that device had any ability to store any digital  
18 media resident on that device.

19 So that would be the first thing that I would  
20 look for. Even though things transfer and transmit, a  
21 lot of these devices will also have internal memory.

22 Q. And if this were a device where the recording was  
23 entirely made at a remote database separate from the  
24 device itself, would you be capable of examining the --  
25 a device like that based upon your training and

1 experience?

2 A. So I look at a lot of different digital media.

3 Media changes all the time. So basically what I would  
4 look for in that case is to examine that device to see  
5 if it had any ability to store media digitally.

6 Q. And in order to determine whether or not the  
7 recording was made at the database by this device, you  
8 would have to learn the process of how a recording is  
9 made and sent through a -- excuse me, how a recording  
10 which is sent from a cellular signal is made; correct?

11 A. So in that case, if that recording is on the  
12 database, that's usually going to be some sort of  
13 digital media, so a hard drive, a RAID device, which is  
14 a series of disks that they use to make a large amount  
15 of storage.

16 So that would be just like the forensics of any  
17 other storage device that's related to computing  
18 related to digital media. That would be the same type  
19 of forensic.

20 Q. I'm not talking about the database now. I'm  
21 talking about the device which transmits the cellular  
22 signal. That you have no experience with. We agree on  
23 that; right?

24 A. I haven't seen the device.

25 Q. But you've said now that you don't have any

1 experience with devices which send a cellular signal to  
2 a recording database to assist in the recording or  
3 communications?

4 A. So phones is something that's commonly used to,  
5 you know, make recordings at remote locations that are  
6 using the cellular signal.

7 So the device in particular here I don't think I  
8 have any experience with; but when we talk about  
9 examining digital media that transmits voice and audio  
10 through a cellular signal, I have a lot of experience  
11 examining those type of devices.

12 Q. Let's focus for a minute, then, on the database.  
13 Are you aware of how the recorded communication was  
14 stored on the database?

15 A. No, I am not.

16 Q. If the device which captured the communication  
17 transmitted a cellular signal to a database which then  
18 created a file which was 16 minutes and 51 seconds long  
19 and the recording which you examined was 16 minutes and  
20 51 seconds long, Defendant's Exhibit A, what exactly  
21 would you be looking for if the recordings are the  
22 entire -- are the exact same length?

23 A. So I would just look to ensure that they were  
24 consistent. So there's a lot of different things when  
25 it comes to digital media. So there's something that's

1       called hashing a digital file, and that's equivalent to  
2       like a fingerprint or DNA.

3               So I could use specialized software that would  
4       create a digital fingerprint of that file, and if  
5       one -- even if it was the same length, if one piece of  
6       that data was changed, it would give a totally  
7       different hash value.

8               So even if it was the same exact time and same  
9       exact length, if one digit within that file or one  
10      piece of that file was changed, the hash value would be  
11      totally different.

12      **Q.**    If it's 16 minutes and 51 seconds of recording on  
13      the database and 16 minutes and 51 seconds of recording  
14      on the disk that you were provided, you're going to see  
15      the same length recording; right?

16      **A.**    That's correct.

17      **Q.**    Now, when you -- when the transmission is made  
18      from the device to the recording database, it's sent  
19      across a cellular signal. You've learned that today;  
20      right?

21      **A.**    That's correct.

22      **Q.**    And that recording that exists now in the database  
23      depends on that signal being maintained from the device  
24      to the recording database, assuming that the process  
25      works as I've explained it; right?

1 A. That would sound consistent.

2 Q. And if that signal were to drop for even a  
3 fraction of a second but the call -- the integrity of  
4 the call remained, there would be a gap in the  
5 background noise; isn't that true?

6 A. I don't have experience with that. I'd have to  
7 actually conduct tests.

8 Q. Do you disagree with the principle?

9 A. The principle sounds like it's probable, but I'd  
10 have to conduct my own tests to see.

11 MR. DALY: Thank you, your Honor.

12 THE COURT: What test would you perform?  
13 Assuming it is as Mr. Daly says, the officer is wearing  
14 some sort of a device.

15 THE WITNESS: Sure.

16 THE COURT: That device transmits what he's  
17 hearing across cell lines in the middle of Cranston to  
18 a database somewhere out there.

19 THE WITNESS: Sure.

20 THE COURT: What test would you perform in order  
21 to isolate whether or not there was a break in the cell  
22 transmission, which is not an uncommon thing?

23 THE WITNESS: Sure. Your Honor, I'd have to say  
24 that I've come here today, I've just learned of the way  
25 the device actually works. So, I mean, I would even --

1 first would like to even see the device.

2 THE COURT: I guess what you're telling me is,  
3 you can't tell us today what test you would do.

4 THE WITNESS: Absolutely not.

5 THE COURT: Okay. All right.

6 Mr. Beretta?

7 MR. BERETTA: One follow-up, your Honor.

8 **REDIRECT EXAMINATION BY MR. BERETTA**

9 Q. Mr. Bell, would it be important to you, though, to  
10 analyze this device and the hard drive that the things  
11 were stored on to firm your opinion?

12 A. That's correct.

13 Q. And in doing that, it's not outside the realm of  
14 possibility, considering the cell breaks and  
15 considering the fact that this was being transmitted  
16 over cell, cell lines, that this tape had been edited?

17 It's still your opinion that there was an  
18 alteration or an editing of this tape; would that be  
19 fair to say?

20 A. What I saw during my analysis was a dramatic  
21 change in the floor noise; and through my experience, I  
22 would contribute that towards editing.

23 Today I was told that there's a whole different  
24 way that, you know, this device was actually  
25 transmitting and how these files were created. This is

1 all new evidence to me, but the -- with the information  
2 I had at the time when I did my analysis, I saw a  
3 dramatic change that would definitely lead me in my  
4 opinion to believe that there was an edit at that  
5 location.

6 THE COURT: If I understand you correctly, so  
7 based on the information you were provided when you did  
8 your analysis, were you assuming that this was a device  
9 that the undercover was wearing that actually stored  
10 the information?

11 THE WITNESS: So I've conducted several  
12 undercover --

13 THE COURT: I guess that's a yes or no.

14 THE WITNESS: I would have to say I did not  
15 know.

16 THE COURT: What did you think it was? What  
17 were you told that it was?

18 THE WITNESS: Well, I was told that it was a  
19 personal recording device that the undercover  
20 maintained possession of.

21 THE COURT: Okay. Thank you.

22 Q. Mr. Bell, would it be necessary to see this device  
23 in order to determine whether it could store, in fact,  
24 the original conversation?

25 A. Yes, it would be.

1 MR. BERETTA: Nothing further. Thank you.

2 THE COURT: Mr. Daly, anything further?

3 MR. DALY: No, your Honor. Thank you.

4 THE COURT: You may step down.

5 THE WITNESS: Thank you.

6 THE COURT: Mr. Beretta?

7 MR. BERETTA: The Defendant renews its

8 request --

9 THE COURT: Do you have any other witnesses?

10 MR. BERETTA: No, your Honor.

11 THE COURT: Mr. Daly, are you intending to put  
12 any evidence on?

13 MR. DALY: Your Honor, not beyond the affidavit  
14 that was filed yesterday with the Government's motion  
15 or with the Government's response. Excuse me.

16 THE COURT: This is from Mr. Garcia?

17 MR. DALY: Yes, your Honor.

18 THE COURT: Do you have that, Mr. Beretta?

19 MR. BERETTA: I do. Yes, your Honor.

20 THE COURT: Okay. Argument?

21 MR. BERETTA: Your Honor, thank you. I believe  
22 I preceded my presentment of evidence with my argument.  
23 It remains the same, your Honor.

24 THE COURT: Okay.

25 MR. BERETTA: It is necessary --

1 THE COURT: You don't have to repeat it.

2 MR. BERETTA: But it is necessary and material  
3 and relevant to this Defendant's defense.

4 THE COURT: Mr. Daly?

5 MR. DALY: Your Honor, as set forth in the  
6 Government's response filed yesterday with the Court,  
7 there are really three reasons why the Government  
8 believes that this motion for discovery and inspection  
9 should be denied.

10 The first is that the Government contends that  
11 we have complied with our Rule 16 requirements by  
12 providing the materials to the Defendant. And,  
13 further, with regard to the database on which these  
14 recordings were stored, that is not property which is  
15 within the care, custody or control of the Government.

16 THE COURT: Well, that one's not going to fly,  
17 Mr. Daly, because these are contractors to you. So you  
18 can control them if you want to. Let's get to the  
19 other two points.

20 MR. DALY: Your Honor, with regard to  
21 materiality, it's the Government's position that there  
22 is not evidence before the Court which would establish  
23 that the lost communication, if there were any, would  
24 be material to the outcome of this case. And we say  
25 that because even the defense expert suggests that this

1 might be a fraction of a second which was lost, if it  
2 was.

3 And so I would suggest to the Court that there  
4 is no evidence before this Court that there was a  
5 material loss of evidence there that would justify the  
6 Defendant's request to examine either Government  
7 property or the property of a private vendor working at  
8 the request of the Government.

9 Thirdly, your Honor, it's the Government's  
10 position that this request should be denied because to  
11 allow the Defendant to examine this property and to  
12 allow his expert to examine this property would invade  
13 what the Government believes, your Honor, are sort of  
14 the means and methods of collection of evidence used in  
15 investigations.

16 And particularly here it's the Government's  
17 position that this was a sensitive investigation --  
18 investigative technique. I think the best evidence of  
19 that came through the Defendant's expert. Ken Bell is  
20 widely regarded as an expert in the field. I've worked  
21 with him before. The Court's heard him.

22 THE COURT: I heard him in a civil case.

23 MR. DALY: But his resume speaks for itself.  
24 He's very highly regarded within the field, and he  
25 didn't even know this method existed to collect

1 evidence. So I would suggest to the Court that this is  
2 a sensitive investigative --

3 THE COURT: He knows now.

4 MR. DALY: He knows now, and so does the  
5 Defendant as well, your Honor. So does the world, I  
6 guess, at this point.

7 But for that reason, your Honor, further  
8 exploration of this recording device the Government  
9 contends would reveal sensitive investigative  
10 techniques.

11 THE COURT: Mr. Beretta had the disk marked, but  
12 then nobody did anything with it.

13 MR. BERETTA: I'm trying to locate it, your  
14 Honor.

15 THE COURT: Does anybody have any objection to  
16 my listening to it?

17 MR. DALY: No, your Honor.

18 MR. BERETTA: No, your Honor.

19 THE COURT: I have a feeling I'm going to hear  
20 it at some point anyway.

21 MR. BERETTA: We do not. Did I take it?

22 THE COURT: Is it on the witness stand?  
23 Patrick, check.

24 THE DEFENDANT: Your Honor, it's nothing new.  
25 It's been disappearing for seven months.

1 THE COURT: Mr. Goris.

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: Be quiet.

4 MR. BERETTA: May I approach your clerk, your  
5 Honor?

6 THE COURT: Mr. Daly, do you have any objection  
7 to Defendant's A being a full exhibit for purposes of  
8 this hearing?

9 MR. DALY: No, your Honor.

10 THE COURT: So that I can listen to it.

11 MR. DALY: Certainly, your Honor.

12 (Defendant's Exhibit A admitted in full)

13 THE COURT: Now my next question is, how do I do  
14 that? Will it play on any --

15 MR. DALY: It is a WAVE format, your Honor. I  
16 assume most computers have the ability to play WAVE  
17 format, maybe.

18 THE COURT: My technical support person will  
19 assist me with that.

20 Just give me a minute. I'm checking with my  
21 schedule. Are counsel available Thursday morning at  
22 11:00?

23 MR. DALY: Yes, your Honor.

24 THE COURT: I'll give a decision then.

25 MR. DALY: Yes, your Honor.

1 MR. BERETTA: Yes, your Honor.

2 THE COURT: Okay. Hopefully back up in  
3 Courtroom 1. Thank you.

4 (Adjourned)

5 \* \* \* \* \*

6 C E R T I F I C A T I O N

7

8

9 I, Karen M. Wischnowsky, RPR-RMR-CRR, do  
10 hereby certify that the foregoing pages are a true and  
11 accurate transcription of my stenographic notes in the  
12 above-entitled case.

13

14 July 31, 2015

15 Date

16

17

18 /s/ Karen M. Wischnowsky

19 Karen M. Wischnowsky, RPR-RMR-CRR  
20 Federal Official Court Reporter

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