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1 (Court in Session at 9:25 a.m.)

2 THE COURT: Good morning. I apologize for the delay.
3 We're on Case No. 08-26. If counsel would state their appearance
4 for the record.

5 MR. RHODES: Rudolph Rhodes for the Government.

6 MR. BOHLING: And Curt Bohling also for the United
7 States.

8 MR. BANNWART: Anthony Bannwart for Defendant Troy
9 Solomon and Defendant Delmon Johnson.

10 MR. LEWIS: Chip Lewis and Mary Grace Ruden for Troy
11 Solomon, Your Honor.

12 MR. OSGOOD: John Osgood on behalf of Dr. Elder, who is
13 present, Your Honor.

14 THE COURT: All right. Before we get started, one of
15 the reasons for my delay is Mr. Bohling had sent me via e-mail, I
16 think something he had sent to everyone, the plea agreement and
17 the cooperation letter. Do you have those? Okay. I had waited
18 to print those out until this morning and my office has no
19 printing capability today. So, we were trying to resolve that
20 issue, but someone else was able to get that. And, Dorothy,
21 could you just let Stacy know you were able to print this off?
22 Thank you. All right. We have a number of issues to take up
23 today. First off, we apparently have a motion for a continuance
24 that has been recently filed and so I'm interested on what the
25 various attorneys say about that. Mr. Lewis, you filed that

1 motion, so if you want to address that.

2 MR. LEWIS: Certainly, Your Honor. As we've made the
3 Court aware over the course of the -- is it okay if I stand here,
4 Your Honor, or would you prefer me --

5 THE COURT: Oh, no. That's fine. You just need to make
6 sure that you move the microphone, we are recording this, to make
7 sure that we can hear you.

8 MR. LEWIS: We have experienced difficulties in getting
9 a conclusion to the universe of, that is, discovery. The
10 Government continues to work investigating their case or
11 preparing for trial. I don't want to inappropriately term
12 whatever their work is. But the problem is we continue to get
13 new witnesses added to the list. Last week we were informed that
14 the DEA in Houston, where the discovery, that is, that was taken
15 from Ascensia Pharmacy, Mr. Solomon's pharmacy, that there was a
16 14th box to review. Agent Overton, Connie Overton, was said to
17 be the gatekeeper of that evidence and we couldn't review it
18 without her present. So, we made arrangements, once she got back
19 in town, to view it on the first available date, which was
20 yesterday. That 14th box contains an estimate of several
21 thousand prescriptions -- the actual either prescription or a
22 duplicate of a prescription that was purportedly taken from the
23 Ascensia offices when the search warrant was executed a couple of
24 years ago. Our problem is within that material we have located
25 several examples of exculpatory information. Specifically, there

1 were prescriptions that were in this box that were labeled
2 "Duplicates." And the exculpatory nature of that is, Your Honor,
3 the Government's theory is many of these prescriptions were
4 fraudulent patients that didn't ask for this medicine,
5 prescriptions were filled in their name, et cetera. It appears
6 that the vetting process that Mr. Solomon had set up at Ascensia
7 would catch anything that looked to be a duplicate and flag that.
8 And that's what in that Box 14. Now, upon reviewing that box, it
9 leads us to be very concerned and bring to the Court's attention
10 that there is no Bates label, there is no catalogue and there is
11 no index of any of these boxes. So, we have no ability to point
12 out, without making a copy, tendering it to the Court and
13 tendering to the Government, any of these specific pieces of
14 evidence. Given the lack of cataloguing and the very late nature
15 of evidence that we've found, that is one of the reasons the
16 interest of justice dictate we have the opportunity to properly
17 investigate, look through this material and see if we find other
18 exculpatory items.

19 THE COURT: And let me just stop you there. I guess I'm
20 not -- the last couple of sentences you indicated that because of
21 the Bates or a catalogue, all you could really do is give the
22 Court copies of things. I guess I'm unclear of what you were --
23 I mean, if you have a copy of it and can use it at trial, I guess
24 I'm not following what that difficulty is.

25 MR. LEWIS: Yes, ma'am. An ability to reconcile any

1 problems in the discovery that we have with the Government, we
2 need to be able to identify what document, for instance, we have
3 the problem with or we have a question about. There is currently
4 no ability to do that.

5 THE COURT: Well, when you say you have to reconcile
6 problems with the documents, I mean, what problems do you have
7 that you need to reconcile?

8 MR. LEWIS: Well, the specific example from yesterday
9 when we found these duplicate prescriptions that are flagged and
10 not filled, if the Government is aware of more of these we need
11 to be able to point out to them the examples that we have found
12 to see if they do exist. We have to date received not one piece
13 of paper in the way of *Brady* material from the Government. That
14 alone gives us pause. But on the heels on that, we have asked
15 repeatedly to get a copy of, for lack of a better word, hard
16 drive. There was a computer brain that operated surveillance
17 cameras at Ascensia. This computer system and the cameras that
18 were run by this computer system were in operation prior to the
19 seizure and taken on the day of the seizure. Although we've been
20 asking for it for a couple of years, Agent Overton tells us
21 yesterday that she's not aware of any such computer hard drive
22 that would have recorded all of the images on videotape.

23 THE COURT: Well, let me stop you there. I mean, I
24 don't really want to go down the road of talking about things
25 that you've been asking for for a couple of years, because the

1 Court is always available to resolve discovery disputes. And we
2 would expect that, if there are materials that need to be
3 produced that the defense thinks they are not getting, the time
4 to raise those issues is certainly not the pretrial conference
5 immediately before the trial. So, I have had no written motions,
6 I've had no request for a telephone conference. I have had
7 nothing from any of the defense counsel suggesting discovery
8 isn't being produced.

9 MR. LEWIS: Your Honor, just to bring to the Court's
10 attention, I had previously personally filed a Motion to Dismiss
11 based on the discovery abuses in the case and the Court, in a
12 well-reasoned opinion, denied that request given the fact that
13 the state of our law in this district and across under the
14 Supreme Court jurisprudence, the prophylactic nature of *Brady*.
15 We're not using it pretrial that I continue in cases around the
16 country to urge that because it seems like a much more efficient
17 way of going about it after trial on the converse. However, that
18 aside, the biggest problem we have, and that necessitates a
19 continuance, Your Honor, is when we were in court last in April
20 of 2009, the Court asked the Government about the universe of
21 discovery, what it is, do we have everything, et cetera. The
22 Government told the Court thereby us folks that were sitting over
23 here at this table that they were -- their investigation was
24 complete, the universe had been identified, words to that effect.
25 On Friday last, June 26, 2009, the Government tendered to all

1 counsel for the defendants several interviews of what they said
2 were new witnesses. When we got these reports, the DEA-6s, the
3 interviews were actually conducted before the last pretrial
4 conference at which the Government said the universe of discovery
5 is complete. I asked the Government by e-mail about Box 14 and
6 these witnesses and Mr. Rhodes very politely answered me that
7 they did intend to use both the evidence from Box 14 and these
8 new witnesses that were -- (someone sneezes) bless you --
9 tendered to us on June 26th of 2009.

10 THE COURT: And how many witnesses?

11 MR. LEWIS: I know of two new witnesses, Your Honor, in
12 the correspondence they sent us.

13 THE COURT: So, your contention is that you need a
14 continuance because there are two new witnesses and an additional
15 box of documents that has not been produced?

16 MR. LEWIS: And lastly, Your Honor, yesterday Agent
17 Overton tendered to Mr. Bannwart a compact disk purporting to be
18 still photographs from the search and some additional documents.
19 She did not describe what those documents are. And Mr. Bannwart
20 has, as he got on a plane yesterday to come here, has not had the
21 opportunity to review this disk. I don't want to leave that out
22 because I have no idea what's on the disk, Your Honor. That is a
23 fair summary of the items we need to review, investigate and to
24 properly prepare the case for trial, Your Honor.

25 THE COURT: All right. I mean, who wants to speak next,

1 whether we've got other defense counsel that want to weigh in on
2 this before I ask for Mr. Rhodes or Mr. Bohling to give us their
3 take on this?

4 MR. BANNWART: Your Honor, Anthony Bannwart, attorney
5 for Mr. Johnson and Mr. Solomon. The only things that I would
6 add, having been present yesterday at this meeting with Ms.
7 Overton shortly before we got on the plane to get here, is that
8 the issue regarding cataloguing that Mr. Lewis was referring to
9 is the difficulty matching the things from these tens of
10 thousands of pages of documents and items produced by the
11 Government to the 379 items listed on their exhibit list. They
12 say that they're going to use a prescription, but we don't know
13 from whom, what date -- well, actually they do tell us what date.
14 But there are hundreds of prescriptions on those days. We're
15 having difficulty matching whatever it is they're trying to
16 describe in their exhibits list to whatever is in these boxes and
17 boxes of information. And quite frankly, our fear is that when
18 trial comes around, they'll be able to produce a document, claim
19 it as an exhibit, and we'll have absolutely no way of verifying
20 whether or not it was in the box.

21 THE COURT: All right. Mr. Bohling, Mr. Rhodes.

22 MR. OSGOOD: Well, Your Honor. Excuse me.

23 THE COURT: Okay.

24 MR. OSGOOD: Whether it adds to the mix or not, my
25 client does not desire a continuance.

1 THE COURT: Okay.

2 MR. OSGOOD: We're ready to go. That's not a demand for
3 speedy trial, mind you. That's just an objection to the Motion
4 for Continuance.

5 THE COURT: Okay. All right. Mr. Rhodes.

6 MR. RHODES: Your Honor, in November 2008, the
7 Government sent a letter to defense counsel notifying them about
8 physical evidence that was located and seized at Ascensia
9 Pharmacy and that they could contact the DEA Office in Houston.
10 In March, they made an appointment to review that evidence. It
11 was subsequently learned that one particular box was not
12 available when they were there to inspect the evidence. On May
13 15th, I sent an e-mail to Mr. Lewis to let him know that there
14 was one particular box that you didn't get an opportunity to look
15 at, and I described that box to him. On June 17th, I received an
16 e-mail from Ms. Ruden stating that she wanted to look at the box
17 and any other evidence at DEA, but that Ms. Overton was out of
18 town, wouldn't be back until late June. I subsequently found out
19 that Ms. Overton was coming back on June 24th. And I tried to
20 make arrangements between June 17th and June 24th for them to see
21 the box. But their group supervisor recommended that we wait
22 until Connie returns on the 24th, because she is the case agent,
23 she knows what's going on, she can ensure that they get the
24 proper evidence so that we don't find ourselves in a position
25 where they did not receive the proper evidence to look at and

1 review. So, I subsequently e-mailed Ms. Ruden back. I told her
2 in the e-mail Ms. Overton would be back in about one week. In
3 the meantime, you can make an appointment as early as the 24th or
4 the 25th or the 26th to look at that box. They decided to wait
5 until the 24th when Ms. Overton returned. They made the
6 appointment for June 29th and that's why they've learned that
7 information.

8 THE COURT: Well, let me just stop you right there.
9 They indicated that you intend to use material out of this box.

10 MR. RHODES: That is true.

11 THE COURT: All right. Well, I mean, could you have
12 produced -- I assume then there are copies of material out of the
13 box other than in Houston with Ms. Overton.

14 MR. RHODES: Right. What we are waiting for, for them
15 to review the box, then we were going to have the box shipped up
16 to Kansas City.

17 THE COURT: All right. You didn't have copies of what
18 you -- I mean, why couldn't at that point you have sent them
19 copies of what you intend to use out of the box?

20 MR. RHODES: Because they were given an opportunity to
21 look at the box.

22 THE COURT: Well, I understand.

23 MR. RHODES: Okay.

24 THE COURT: But ultimately they've got to look at the
25 box. But I'm just saying, had you already pulled out what you

1 intended to use out of that box?

2 MR. RHODES: We had pulled out some of the items that we
3 intended to use. That is correct.

4 THE COURT: All right. So, you had copies up here?

5 MR. RHODES: We have copies of certain items that we may
6 intend to use, correct. Yes.

7 THE COURT: And you could have tendered those to them.
8 It wouldn't have been the full box, but you could have at least
9 said here is what we've pulled out as material we're going to
10 use.

11 MR. RHODES: True.

12 THE COURT: Okay. But you didn't do that.

13 MR. RHODES: We did not do that.

14 THE COURT: All right. Well, what's your position with
15 respect to their request for a continuance?

16 MR. RHODES: We're not opposed to the continuance with
17 respect to them needing more time to look at the box. But at the
18 same time we don't want to have two trials. So, we want to make
19 sure that, if there is a continuance, the continuance is for all
20 parties and not just two of the three.

21 MR. OSGOOD: Your Honor, I'd like to add something, and
22 I don't know -- I'm accepting the Government at their word. I
23 grouched all along about discovery in the ongoing case in Houston
24 against Dr. Peter Okose. In fact, the court has a matter pending
25 right now on items I subpoenaed from the Texas Medical Board.

1 Subsequent to the last hearing they produced some 46, I believe,
2 and then the two more that co-counsel has alluded to, Reports of
3 Interview. These interviews were all conducted in April and
4 March of 2009, and they are all similar. They used a
5 questionnaire and questioned patients identified as patients of
6 Dr. Peter Okose. My client is not mentioned in a single one of
7 those so I didn't -- I'm not concerned about those reports in
8 particular. But I still have lingering questions about the
9 original Okose investigation. And I'm told that I've got
10 everything. But by the same token, I've been led to believe all
11 along that there was an Okose and is an Okose investigation in
12 the Houston DEA Office and they have selectively revealed a few
13 reports that apparently carry the same number as that
14 investigation. But that total file has never been made available
15 till just now. I kept waiting and I didn't file any motions
16 because they were spoonfeeding me these March and April reports.
17 I thought maybe I'd get some more reports on the Okose
18 investigation, but I never have. So, I'm taking Mr. Rhodes for
19 his word that there apparently are no such reports. But if they
20 indict Okose later, then we're square in the middle of a big
21 *Brady* issue. So, it's part and parcel of the discovery issue in
22 this case where they're running two cases in two districts.

23 MR. BOHLING: If I may take that, Your Honor?

24 THE COURT: Yes.

25 MR. BOHLING: Mr. Bohling. Yes. There is an ongoing

1 investigation in Houston that involves Dr. Okose. I think all
2 parties know that at this point. That is an investigation by the
3 Houston U.S. Attorney's Office and Houston DEA. We have no
4 control over it. So, our only choice is to review the material
5 in their file and provide material as we think is relevant to
6 these defendants, which, you know, is something that we're doing
7 even though their investigation is still open. So, to some
8 extent we're impairing our own law enforcement interest by doing
9 that. I can represent to you that we've reviewed the documents
10 in the -- the witness interviews in that file. We have provided
11 a substantial number of witness interviews in that file to
12 counsel. And as receive, as DEA Kansas City receives new witness
13 interviews from the Okose investigation that is ongoing, where we
14 believe that they are relevant, we provide them to counsel. I
15 think that's our only choice. We don't generate them. We can't
16 stop them from being generated. And they will be generated until
17 that investigation is done. I have no idea when that will be.
18 That's not anything within the purview of Mr. Rhoades and myself.
19 That is the Houston folks. Now, a continuance may help in the
20 sense that they will be further down the road in the Okose
21 investigation. But we'll very mindful of our *Brady* obligations.
22 And we have been reviewing the materials in the Houston case for
23 *Brady* in this case. And as I've noted, we have provided a
24 substantial number of documents from that case and continue to do
25 so on an ongoing basis. That's all we can do.

1 THE COURT: The two witness interviews that were
2 provided after our last discussion here, are those out of the
3 Houston investigation or are those out of this investigation?

4 MR. BOHLING: Those are from the Houston investigation.

5 THE COURT: All right.

6 MR. BOHLING: Ms. Waterson tells me. And I know we have
7 provided a substantial number of recent interviews. They are
8 doing -- they are in the process of doing interviews right now.
9 And just to be clear on another point, part of what these
10 interviews are going to is the issue of somewhat related to the
11 issues in our case where there are prescriptions being filled by
12 the Ascensia Nutritional Pharmacy where the patients who received
13 those prescriptions, in this case, what we're talking about with
14 these interviews from Dr. Okose, never went to Ascensia
15 Nutritional Pharmacy. They went to another pharmacy and had
16 their prescriptions filled by another pharmacy. Yet the same
17 prescription is also being filled by Ascensia Nutritional
18 Pharmacy without any relationship with that particular patient.
19 That is what -- and to go back to something that Mr. Lewis said.
20 The prescriptions in Box 14 that say "Duplicate," that's exactly
21 what's happening there, except they're happening in Missouri.
22 They are prescription that ANP is filling through our Missouri
23 pharmacy that are also being -- that are being filled by these
24 patients somewhere else. In other words, there's a real patient
25 who gets a prescription. They go to a local pharmacy in Houston

1 and get their prescription filled. Yet somehow that same
2 prescription, a duplicate of that prescription, has ended up in
3 ANP's records and is being filled through the Missouri pharmacy,
4 which is directly relevant to our case, without any relationship
5 with that patient and where the patient has already filled that
6 prescription elsewhere. So, that's clearly important evidence
7 and that's why we wanted to make sure that the gentlemen got to
8 see that box. Although we did tell them back May, mid-May that
9 it was available.

10 THE COURT: Well, when they went to view the boxes, I
11 mean, was it represented that they were looking at everything
12 that they had?

13 MR. BOHLING: There was an unfortunate -- what Mr.
14 Rhodes is talking about is, that particular box was out to be
15 copied by the Houston people and we didn't know it until late.

16 THE COURT: And did they -- and they weren't told we've
17 -- this is everything except one box that's out being copied?

18 MR. BOHLING: Because we -- they weren't told because we
19 didn't know. We did not know that box wasn't there for them to
20 look at until after they had come to look at it the first time.
21 So, as soon as we found that information out, of course, we were
22 concerned. And so that's when Mr. Rhodes told them, I believe in
23 mid-May, that that box was available and they should go look at
24 it. And then it was an unfortunate confluence of events that
25 obviously, you know, if they had had the opportunity to go see it

1 in mid-May Ms. Overton would have been there. But they did not
2 have that opportunity until later, which is fine, I understand
3 that. But unfortunately, Ms. Overton had annual leave and was
4 out of the office at a month later in mid-June. So, that's how
5 we got to where we are now.

6 MR. LEWIS: Your Honor, if I may, very briefly? In
7 deference and defense of these gentlemen, in most out-of-
8 jurisdictional cases such as what we have here, with this Okose
9 investigation, which I can represent to the Court, Stuart Burns,
10 the local U.S. Attorney there who's running that investigation,
11 has told me point blank there is going to be an indictment if the
12 grand jury sees it the way I do. He just doesn't know when. And
13 I don't think that's a state secret as the Government said. I
14 know Mr. Burns very, very well and I can vouch for him in this
15 court. He's a very honorable and truth-telling man. So, I think
16 it's coming. I don't know when. But in any multi-jurisdictional
17 investigation and when we have -- that's why we have United
18 States attorneys that are designated to coordinate multi-
19 jurisdictional investigations, because what we have, Your Honor,
20 is the agent who's done a large part, the laboring oar of the
21 work here in Kansas City is a diversion investigator named
22 Waterson. Agent Waterson is copied on all of these DEA-6s. I
23 can see the Government's attempt to pay attention to the Okose
24 case because they have their, for lack of a better word, local
25 case agent being copied on the reports. The failure is in that

1 coordination. And we are getting whipsawed on our end by the
2 fact there is a continuing investigation going on. And I
3 understand the Government is not going to shut down their
4 investigation for this trial. However, the evidence that is very
5 important and germane to the courtroom that we're in right here
6 in Kansas City, necessitates that we have the proper opportunity
7 to investigate this information. I'm not trying to say the
8 Government is intentionally hiding the evidence. They may very
9 well be not getting copied, the communication may break down.
10 But the problem is we face a number of counts with substantial
11 penalties and time in the United States Penitentiary. We need a
12 chance to see all this evidence, investigate it before we start
13 the trial.

14 THE COURT: One issue that, I guess, has been alluded to
15 that I guess I'm concerned about is there's an indication that
16 the Government's exhibit list has approximately 379 exhibits. Is
17 that correct?

18 MR. RHODES: It is correct, Your Honor.

19 THE COURT: All right. And some of them apparently are
20 described as prescriptions from a particular day? Is that, I
21 mean, is that a fair characterization?

22 MR. RHODES: Well, for the most part we did give Bates
23 numbers for most of our prescriptions.

24 THE COURT: Well, that's what I was going to ask you.

25 MR. RHODES: And so we did do Bates numbers for most of

1 our exhibits, a few we did not. And we were going to eventually
2 try to amend the exhibit list to be more specific on some of the
3 other matters that were -- that appear not be clear.

4 THE COURT: Well, let me make this inquiry because there
5 was a reference to a lack of Bates numbers. Did you Bates number
6 all of the documents or only the documents that you've pulled out
7 to use as exhibits?

8 MR. RHODES: We Bates most of the documents -- or all
9 the documents have numbers, but some of the Bates numbers are
10 newer numbers that we have to verify, which would call for an
11 amended exhibit list.

12 THE COURT: You're talking about the documents you're
13 using?

14 MR. RHODES: Right. The documents we're using. All the
15 documents that we're going to be using -- well, most of the
16 documents that we're going to be using will have a Bates number
17 attached --

18 THE COURT: That --

19 MR. RHODES: -- to it.

20 THE COURT: You see, what they're saying is that, at
21 least I thought what you were saying is, let's just take the
22 example there may be a lot more documents. But there's 14 boxes
23 of documents. If those documents aren't Bates numbered, then
24 when you go to use a document, how do they know they've actually
25 seen it, that it's been produced out of these thousands of

1 documents if you're only Bates numbering the ones you're going to
2 use? Do you see my -- what my concern is? Because they're
3 saying right now if you describe something as a prescription from
4 a certain date, they're saying there may be a lot of
5 prescriptions from that date. And for them to be able to go back
6 and say, oh, yeah, we will produce this document during
7 discovery. I mean, do you see what my concern is --

8 MR. RHODES: Yes. I --

9 THE COURT: -- going to be at trial?

10 MR. RHODES: Yes, I understand. What we intend to do is
11 give all the documents, to the extent possible, most of the
12 document to the extent possible, numbers. And then we will
13 provide a hard copy of those exhibits to the defense counsel so
14 they can see exactly which ones we're talking about. So, that
15 that would assist them as far as which exhibits that we intend to
16 introduce --

17 THE COURT: Yeah. That's really not my issue. What
18 they're saying is out of these 379 documents, say Document 20 is
19 a prescription from a certain date, how do they know which box it
20 came out of, where it is if they really had it, if the documents
21 that were produced to them weren't Bates numbered if all your
22 Bates numbering is the exhibits.

23 MR. RHODES: All the documents that are listed in the
24 exhibit list have a Bates number to it. Or most of the documents
25 listed there have a Bates number to it. They can go there and

1 look at the Bates number and pull up that document and what we're
2 talking about as it stands right now on that exhibit list.

3 THE COURT: Yeah. I don't know. Maybe I'm --

4 MR. OSGOOD: I have --

5 THE COURT: I understood your concern to be a little bit
6 different and I'm not sure that Mr. Rhodes and I are
7 communicating.

8 MR. OSGOOD: I can add some insight into this though
9 because I catalogued them all by Bates stamp number. Their Bates
10 stamp numbers quit -- their Bates stamp numbers were on the
11 original disclosure and went through about 16,000, Your Honor.

12 THE COURT: Okay.

13 MR. OSGOOD: And everything after 16,000 was not Bates
14 stamped. We got in e-mails as attachments. I went ahead and
15 Bates stamped numbered those sequentially myself. Now, obviously
16 my sequence is arbitrary. But I added a JRO and picked up the
17 Bates number JRO dash, but that's not going to be the same Bates
18 stamp number that they're assigning now, it's going to be a
19 different Bates stamp number because that's the Bates stamp
20 number I assigned to it because they weren't Bates stamped. So,
21 after about 16,000, after that initial round of discovery, their
22 Bates stamps stopped. So, I don't know if that's helpful.

23 THE COURT: But I guess my concern is, for example, if
24 you've got, you know, more than 16,000 documents, and we're
25 talking about them using 379, I assume what I thought you were

1 alluding to is you're concerned that at trial you want to make
2 sure that the document being used is one that's actually been
3 produced to you in the documents?

4 MR. LEWIS: Exactly, Your Honor.

5 MR. OSGOOD: And I did exactly what you're talking
6 about. I looked at the lower numbers on their exhibit list and
7 they do correspond to Bates stamp numbers that I have catalogued.
8 If you go beyond 16,000, any number above about 15,500 or
9 something, it's a new number and I don't have a corresponding
10 number for that exhibit.

11 MR. LEWIS: And, Your Honor, you have hit the nail on
12 the head. The problem is when they -- when the DEA took this
13 material in, it's become painfully obvious and it's clearly not
14 these gentlemen's fault, they weren't there. This was not
15 organized, catalogued or Bates numbered as it should have been.
16 I can see that the Government, probably through the direction of
17 these lawyers, is attempting to solve that problem. But out of
18 14 boxes we're talking about well in excess of 50,000 documents.
19 That's being conservative. If we only have a third of those
20 Bates labeled, the Court has identified the colossal problem
21 we're going to have in ever identifying with any particular
22 reliability that they -- we have, in fact, had the opportunity to
23 view those documents. And the latest round of documents, this
24 Box 14 that were reviewed yesterday, they are not Bates labeled
25 at all.

1 THE COURT: All right. And have you seen Box 14, Mr.
2 Osgood? I know you said you had Bates numbered -- you've got
3 your own numbering system.

4 MR. OSGOOD: I'm not as concerned about it as co-counsel
5 is because they're from Ascensia Pharmacy, and obviously I want
6 any that's going to be culled out as an exhibit I want to see
7 those, the actual exhibits.

8 THE COURT: Right.

9 MR. OSGOOD: I'm not overly concerned about that box
10 containing exculpatory material to my client. But obviously I
11 want to see any exhibits and I want copies of them. Now, I'm
12 assuming I've got some of those copies, but I can't identify
13 them, because they just sent me attachments. And I'm looking at
14 the exhibit list now and, for example, 16,761 to 17,037, Exhibit
15 #60, is going to be items that I cannot identify from that number
16 because that's a new Bates stamp they've added to it subsequent
17 to disclosure. Now, for example, Exhibit #63 is 11,575 to
18 11,682. I've got that Bates stamp number from the original
19 disclosure so I can --

20 THE COURT: So, you can go back to Exhibit #63 and say,
21 let me go to my document 11,575 and make sure that I've got that?

22 MR. OSGOOD: Exactly. I've got it. And I've shared
23 that with co-counsel.

24 THE COURT: Okay.

25 MR. OSGOOD: So, we've got -- actually -- I actually

1 named the failed the Bates stamp sequence numbers so they're very
2 easy to look at. And they're online in a place where only the
3 defense counsel can look at them.

4 THE COURT: Well, I --

5 MR. OSGOOD: So, we've got that.

6 THE COURT: Out of the exhibits that then have been
7 identified to you, I mean, how many do you have problems with
8 where there isn't, you know, a Bates stamp number on the
9 documents that were produced to you?

10 MR. OSGOOD: That's the one question I can't answer
11 because they've jumped around on the exhibit list and they're not
12 in sequence, so I'd have to count the numbers that begin above,
13 for example, 15,500, 16,000, something like that. Whatever that
14 last cut-off number was. I can check.

15 THE COURT: Okay. Well, I just --

16 MR. OSGOOD: Any number above that I don't have.

17 THE COURT: Right. And the reason I was addressing that
18 to Mr. Lewis and Mr. Bannwart, I mean, this seemed to be kind of
19 their concern that they had raised. I understand you --

20 MR. OSGOOD: Well, it is mine, too, because I want to be
21 able to identify the exhibits before I see them here in court.

22 THE COURT: Right.

23 MR. BANNWART: Right. And then just to kind of flesh
24 out what you're saying, Your Honor. Our concern is if this box
25 was just recently discovered, there is absolutely no way it was

1 included in the Bates stamps that were produced to us a year or
2 two ago.

3 THE COURT: Well, I think they're agreeing that it
4 wasn't.

5 MR. BOHLING: Well, it wasn't -- it wasn't recently
6 discovery, but it was in Houston.

7 THE COURT: Right.

8 MR. BOHLING: So, we didn't have access to it to Bates
9 stamp it. That's why that we ask that counsel (inaudible).

10 THE COURT: Well, of the -- there are 14 boxes of
11 documents in Houston, correct? Or there were?

12 MR. BOHLING: Yeah. I believe that's approximately --

13 MR. RHODES: Uh-huh.

14 MR. BOHLING: Is that right, Rudy?

15 MR. RHODES: Yeah.

16 MR. BOHLING: That sounds about right.

17 MR. BANNWART: That's correct, Your Honor.

18 MR. BOHLING: Yes.

19 THE COURT: All right. And were any of those document
20 Bates stamped numbered?

21 MR. BOHLING: No.

22 MR. RHODES: No.

23 MR. BOHLING: Because they were kept in Houston. They
24 were part -- they were gathered by the Houston investigators and
25 they weren't part of something we did.

1 THE COURT: Okay. So, the only thing that was Bates
2 stamped numbered were documents that were gathered by the office
3 here?

4 MR. BOHLING: Correct. That's my understanding, yes.

5 THE COURT: And out of your 379 exhibits, how many are
6 out of these 14 boxes that weren't Bates stamped numbered?

7 (Off Record Talking)

8 MR. BOHLING: About a hundred Mr. Rhodes thinks. So, I
9 mean I understand the problem. I think I understand the problem
10 the Court is identifying. I think it's probably incumbent upon
11 us to work with the defense to make sure we identify what the
12 exhibits are obviously and what their providence is. I mean, I
13 understand the problem you're talking about.

14 THE COURT: Well, I just don't want Judge Gaitan to get
15 in a trial where everybody is arguing about I've never seen that
16 exhibit before --

17 MR. BOHLING: No. I would --

18 THE COURT: -- and where did it come from and --

19 MR. BOHLING: We would not want that either. And I
20 would agree that, you know, it would be in all of our interests,
21 and certainly in our interest as the Government, to make sure
22 that everybody is on the same page about what the exhibits are
23 and that they have, in fact, seen them. I'm confident that
24 they've all been produced in discovery. That's not something
25 that I'm worried about, but I want them to know that. So, we

1 will work with them to make sure that happens.

2 MR. LEWIS: Your Honor, we talked about Exhibit #63.
3 I've pulled it up here. For example, that is a DEA-6 that begins
4 with Bates stamp number 11,318 and it runs through that Document
5 11,880. So, it had approximately 500 documents attached to it.
6 And then Exhibit #63 on their list is identified as 11,575 to
7 11,682. I'm assuming those are prescriptions it culled out of
8 that DEA-6 that were attached to the DEA-6. And so those should
9 be able to be easily identified.

10 THE COURT: But I think that highlights the problem too.
11 I mean, to the extent that you're only taking one or two
12 documents of the exhibit out of --

13 MR. LEWIS: Exactly.

14 THE COURT: -- you know, for example, if this interview
15 had 500 pages attached to it and you're only using a couple of
16 them, I mean, that's something I assume counsel will want to know
17 so you can put it in the context of the whole document?

18 MR. BANNWART: You would assume correctly.

19 MR. OSGOOD: They're using a little over a hundred on
20 that Exhibit #63 out of 500.

21 THE COURT: All right.

22 MR. LEWIS: It appears. That it would be 575 to 682,
23 which is around a hundred. And there, of course, 500 attached to
24 it. It's an eight-page statement, I believe.

25 MR. BANNWART: And our position is that every single

1 document, item, whatever that's been discovered in this case and
2 is germane to it needs to have a Bates stamp number to it, not
3 only so that the Government can use it, but so that we can refer
4 to it in our defense.

5 THE COURT: Well, let me just say this. I mean, we're a
6 little late in the game to say we've go back and Bates stamp
7 number everything. But I do think that this may be the kind of
8 case then where the exchange of disclosures is even more
9 important, and maybe further in advance of trial, so that if
10 there's a document that doesn't have a Bates stamp number you can
11 tell them what production or what e-mail or what box it came out
12 of and then they can go verify that.

13 MR. BOHLING: Understood. Yeah. I agree with you a
14 hundred percent. That would be the way to do it, so.

15 THE COURT: And can that be done between now and July
16 20th?

17 MR. BOHLING: Yes. I think so. It's not that, I mean,
18 I don't -- I mean 379 is -- I mean, I know there are a lot of
19 documents, but it's not by any means the biggest document case
20 I've ever seen. I think we can do it.

21 THE COURT: Well, no. I understand that. But it's just
22 it's kind of how the documents have been handled and the fact
23 that you've got this Houston thing going on too.

24 MR. BOHLING: I would say again, we are on record as not
25 opposing the continuance.

1 THE COURT: Okay. So, you don't oppose the continuance?

2 MR. BOHLING: Right. I mean, they only caveat to that
3 is obviously we want to have one trial.

4 THE COURT: Okay.

5 MR. BOHLING: And I don't think any of these problems
6 are solved if we try to have a trial on the 20th and another one
7 later. So, that's our caveat. But we understand the issues and
8 we're willing to agree to a continuance.

9 MR. LEWIS: Your Honor, one point, because I think you
10 fleshed this out, and the Government has been very helpful this
11 morning. The problem with the boxes in Houston are, and what I
12 was whining about earlier, to term it properly, is when we find
13 some things that in our position are exculpatory in all deference
14 to the obscenity line that when we see it we know what it is,
15 there's always a disagreement to some extent what might be
16 *Brady* and what might not be. To not burden the Court, but to try
17 to rectify this with the Government, when we find those documents
18 in Houston, we have no ability to do that, because we can't take
19 a Bates number and say, gentlemen, we found these, are there
20 other documents like Bates stamp 38,421. The way the DEA is set
21 up in Houston we don't have the ability to say, sir or madam,
22 who's supervising us, can we have a copy of this. That would be
23 another way to solve the problem when we have identify a document
24 that we need to talk to the Government about.

25 THE COURT: Well, he's saying -- you're saying you're

1 not being able to get copies of the documents?

2 MR. BOHLING: No, Your Honor. Our letter to them
3 specifically said that they -- if they contacted AUSA Burns to
4 get -- they would be able to get photocopies of any document that
5 they wanted. That was the whole purpose of having them look is
6 to make a record of what they needed.

7 MR. LEWIS: And the problem is, in talking to Stuart
8 Burns about these 14 boxes, Stuart Burns, and he's not here so I
9 certainly don't want to speak for him, he can't identify them
10 because they haven't been Bates labeled. So, we can't -- we can
11 say copy all 14 boxes.

12 THE COURT: Well, can you put tags on them and say these
13 are the things we want copies of?

14 MR. LEWIS: That's what we did back in March for a few
15 of the items. We have gone through and reconstructed, found
16 those items ourselves. But there's got to be some ability, for
17 instance, if they would allow us while onsite to have one of the
18 DEA persons copy these, we're being very judicious. We're not
19 asking for them to copy thousands and thousands of documents.
20 It's a ton of documents and only a handful, probably less than 50
21 to 100 are the ones we care about.

22 MR. BANNWART: I'm probably not as forgiving as Mr.
23 Lewis, because there are so many documents and so much
24 information contained in those 14 boxes and it, again, and I'm
25 not sure that this is germane to the continuance necessarily.

1 But, for example, in Box 14 the over 10,000, I think,
2 prescriptions contained in that box, a vast majority of them are
3 from a Dr. Okose. And if they're planning -- I don't understand
4 how they're planning on using them in this case and how that's
5 going to tie into the Houston case and how we're going to have
6 these two separate investigations and trials continuing with our
7 clients in Missouri and boxes of evidence in Houston being used
8 and on a separate case involving a different doctor, as this case
9 continues to progress.

10 THE COURT: All right.

11 MR. BANNWART: We have apparently three defendants in
12 Houston, a fourth person being indicted in Houston with all of
13 this thousands of pages of evidence in Houston, and we're
14 continuing to have to come up here to fight over what should be
15 produced up here.

16 THE COURT: All right. I mean, I think I understand
17 kind of the issue about the documents in Houston. And I think
18 we've got kind of sidetracked. There was also an issue of two
19 witness interviews that you felt had just been produced recently.
20 And were those people that were interviewed recently and were
21 they interviewed by folks in Houston or here?

22 MR. BANNWART: According to the DEA-6, they were
23 interviewed on March 20th of 2009. They were produced to us or
24 sent to us on June 26th of 2009, more than three months later.
25 The investigating agent was Connie Overton, who is the

1 investigating agent for virtually everything in this case, along
2 with Ms. Waterson. Ms. Waterson was copied on these reports.
3 Yet again, for the umpteenth time, we were not given these
4 documents in a timely manner. And this Court has addressed this
5 with the Government several times before and yet it continues to
6 happen.

7 THE COURT: And where were these witnesses? Where are
8 these witnesses located?

9 MR. BANNWART: They're in Houston, as with most of the
10 witnesses.

11 THE COURT: And, I mean, what is it about their
12 interviews, I mean, do you need to talk to them, do you need to
13 do follow-up investigation or what is it that causes you to think
14 that these two witness interviews cause you to need more time?

15 MR. BANNWART: And actually, Judge, we're calling it two
16 interviews. I think it's two reports. Actually, in one of the
17 reports several people were kind of interviewed at the same time.
18 But these people basically say that they did not have their
19 prescriptions filled, that they don't know the people involved
20 and they have various disparaging remarks regarding defendants in
21 this case and Dr. Okose, who's the subject of the investigation
22 in Houston.

23 MR. OSGOOD: If I might, Your Honor. What happened was,
24 remember I filed a motion arguing that this Police Officer
25 Knowles should not be allowed to testify as an expert about

1 street distribution because there was no evidence in the case
2 that any of these drugs ever reached the street. So, what they
3 did was they either, in this case or in the Houston case, called
4 down and asked them to do investigations of Dr. Okose's patients.
5 So, they went out and they interviewed some 46 people originally
6 using a questionnaire and asked questions such as, when you went
7 over to Dr. Okose's office, how long did you spend with him, what
8 happened when you went in his examination room, and when you left
9 did anybody on the street try to buy the drugs from you or buy
10 your prescription or trade drugs with you. Some responded in the
11 affirmative and some responded in the negative and some were
12 somewhere in the middle. These 46 interviews were conducted in
13 March and April of 2009, after my motions were filed and my
14 objections to this Knowles testifying was done. So, I read that
15 as some attempt to bolster the argument that he should be allowed
16 to testify as to street distribution. Now, I just filed a --
17 Friday, tried to, or Monday, I guess, a request for a *Daubert*
18 hearing on him and we have a motion in limine pending on him.
19 But anyway, these 46 interviews appear to be directed to that.
20 The additional two are of a similar vein. Those original 46 were
21 not disclosed, even though they were done in March and April,
22 until May, I believe. So, we still didn't get them timely. And
23 they were there and there was no explanation. If you look at the
24 dictation dates, they were dictated a week or so after they were
25 done, and we get them in May. And now we're still getting,

1 trickling in. So, I don't know how many patients they've
2 interviewed and how many more are going to trickle in.

3 MR. BANNWART: And I think that's going to be a
4 continuing problem as long as we have a concurrent investigation
5 in Houston.

6 MR. BOHLING: May I address that?

7 THE COURT: Yes.

8 MR. BOHLING: That's true. As I noted, there is a
9 concurrent -- there is an investigation in Houston that we have
10 no control over. I can assure Mr. Osgood that his motion had
11 nothing to do with their investigative tact, because we are not
12 discussing that with Mr. Burns or Ms. Overton. That is, that the
13 issues are similar in their investigation, I suppose as to ours.
14 But the ideas for the questions they asked are totally ours. To
15 give the Court -- as to the timing, the fact that the interview
16 occurs on a particular day, that the actual Report of Interview
17 is then done later and then there's a distribution that gets to
18 Ms. Waterson here in Kansas City even later. So, I assure the
19 Court and counsel that, as soon as we become aware of these
20 interviews, we're providing them. I would note that they are not
21 necessarily even Rule 16 discoverable material. We are -- that
22 they are witness statements. They are not necessarily Rule 16
23 discoverable, so we are providing them, in some cases at least,
24 in excess of Rule 16's requirements and we're trying to do so as
25 expeditiously as we can, as we learn about them, which is not

1 necessarily, even necessarily close to the date on which they
2 occurred since they are not being done by us or our
3 investigators. Again, I have no control, had no control over the
4 Houston investigation. It is true that they are going to
5 continue to investigate their case. That they will probably come
6 up with information that's relevant here and we will provide it
7 to them as we get them, which is all we can do in that case.
8 Part of the background of this is we -- I think Mr. Burns
9 believed in good faith that he was going to have an indictment at
10 a much earlier juncture than is true. So, when we started this
11 process we believed that the two cases were going to be more on
12 an even track and that did not happen. They got behind. So, I
13 am --

14 THE COURT: And do you have any idea where they are in
15 their track in terms of are they about to conclude their
16 investigation?

17 MR. BOHLING: I don't. I don't. The scope of their
18 investigation is much, much bigger than ours -- much, much bigger
19 than ours. So, and we've just simply given up asking that
20 question. That is, we, you know, we would -- I mean, we just
21 don't know. And I think even if Mr. Burns were here he probably
22 couldn't give you an answer to that question today as I
23 understand it.

24 MR. LEWIS: I asked him last week, Your Honor, and he
25 gave me the same answer. And what it raises is a very novel

1 point that I invite the Court to weigh in on. If Dr. Okose was
2 indicted, we would probably have a reason for joinder, a joint
3 trial. They may even file it as a superseding indictment. There
4 is a great prejudicial effect specifically, and I'm speaking for
5 Mr. Solomon alone, in this parallel investigation, and this is
6 how it plays out. We try this case up here for a couple of weeks
7 when the Court says it's time to try this case and Mr. Solomon is
8 either acquitted or not convicted, there's a hung jury or
9 something. They go ahead and return the indictment in Houston on
10 Okose and join Mr. Solomon. But what they're doing by a slow
11 investigation, intended or not intended, is prejudicing Mr.
12 Solomon's rights. Frankly, Your Honor, he can't afford much more
13 of this. And if there is going to be another case, it's
14 certainly within the supervisory powers of this Court to say,
15 hey, let's do something on a related case. It's clearly related,
16 we continue to get discovery on it, or let's not. It's not fair
17 to the defendant. But that's a whole other issue. I understand.
18 It's just something I certainly should be in the mind of the
19 Court in making some of these decisions. And while I try to be
20 very deferential to the strategies and the decisions that these
21 lawyers are making, it's the United States of America, Your
22 Honor. It's not Kansas City, it's not Houston. It's *The United*
23 *States of America vs. Troy Solomon*. They charged with the
24 coordination, responsibilities and whatever -- I'll skip the
25 pejoratives. But they are required, as the United States of

1 America, to solve these problems. Not to have the defense come
2 in here and have to whine about them or the Court to scold
3 anybody about them. It is incumbent upon the United States of
4 America to solve these problems.

5 MR. BANNWART: And to some extent, Judge, first, I want
6 to second that on behalf of Mr. Johnson as well. But it goes
7 back to the, at least, I think I filed two motions to transfer
8 for this very reason. The cost of this is just getting
9 incredibility prohibitive for our clients especially in light of
10 a concurrent investigation in Houston that apparently involves
11 documents related to them as well. It just doesn't make any
12 sense for us to be pursuing two cases in two different
13 jurisdictions, especially when the ongoing investigation is in
14 Houston, the defendants are in Houston, the lawyers are in
15 Houston. Apparently most of the evidence is in Houston. There's
16 another defendant who is apparently going to be indicted in
17 Houston along with some other people. These patients, these 46
18 interviews, plus the two most recent ones, were all conducted in
19 Houston. So, these potential witnesses are all in Houston. And
20 yet, our clients are having to fly up here because the United
21 States of America has two other defendants who have pled out up
22 here.

23 THE COURT: All right. Before we get to -- well, I'll
24 tell you what. Let's go just through just kind of some of our
25 standard pretrial motions. I do know that there are a lot of

1 motions in limine that are pending and obviously that's something
2 I'll be talking to Judge Gaitan's office about. Let's turn to
3 the trial witnesses and exhibits, unless there's something that
4 someone wants to say about one of the pending -- about any of the
5 pending motions. All right. Because at the end I do want to
6 come back to the motion on counsel issue. I think there were
7 some documents that were filed. But let's go ahead and go
8 through everything else because that really doesn't pertain to
9 Mr. Elder and he can be excused at that point in time. If the
10 case does go to trial in July, how many witnesses will the
11 Government have?

12 MR. RHODES: Twenty-five with stipulations, fifty
13 without.

14 THE COURT: And what kinds of stipulations make the
15 difference between the 25 and 50.

16 MR. RHODES: Mind if I sit, Your Honor?

17 THE COURT: Yeah. No. That's fine.

18 MR. RHODES: Stipulation regarding telephone records,
19 institutions insured by FDIC, Bank of America records, Washington
20 Mutual Bank of America, chain of custody, Wells Fargo bank
21 records, Allen Bank of Trust.

22 THE COURT: And have all of those stipulations been
23 provided to defense counsel?

24 MR. RHODES: One stipulation has been provided and the
25 others will be given to them today.

1 THE COURT: Okay. I haven't gone back to look at the
2 order in this case. Normally, we ask that you provide those
3 stipulations to the other side in advance of this proceeding so
4 that, you know, everyone will have had a chance to look at them
5 and we can talk about, you know, are they going to be able to
6 stipulate or not. I think the actual trial order in this case
7 asked that you provide those to opposing counsel no later than
8 the Friday before the pretrial conference. So, I don't know, I
9 mean, just based on his general description, do defense counsel
10 have any idea whether these are going to be things they can enter
11 into or not?

12 MR. OSGOOD: I would stipulate to bank records and
13 telephone records. I will not stipulate to the authenticity or
14 chain of custody of any of the materials that they have seized in
15 either location under any circumstances.

16 MR. BANNWART: Your Honor, we would stipulate,
17 Defendants Johnson and Solomon, as to the telephone records. We
18 haven't received the other stipulations I don't believe.

19 THE COURT: So, we can't really --

20 MR. OSGOOD: I don't have bank stipulations either.

21 THE COURT: Yeah. And I understand that, but --

22 MR. OSGOOD: I'm assuming those are --

23 THE COURT: But assuming that those are in order, you're
24 not going to have any problems stipulating to bank records?

25 MR. OSGOOD: No, no, not -- no. Bank custodian, I don't

1 have any problem with that.

2 MR. BANNWART: We probably don't have a problem with
3 stipulating to the bank and stuff.

4 THE COURT: And I understand. I'm not asking you to
5 confirm until you actually see the stipulations.

6 MR. BANNWART: Right. I'm in a little bit of a bind
7 there.

8 MR. OSGOOD: And again, I have a little bit of concern
9 that the Government checked, if you're not using, for example,
10 Rostie financial document pulled from the seizure of that place
11 down there that they're claiming is a official bank record. I
12 got problems with anything came out of Rostie's files.

13 THE COURT: As opposed to from subpoenaed from the bank?

14 MR. BANNWART: Correct.

15 MR. OSGOOD: If they subpoenaed them from the bank and
16 confirmed that is a duplicate record, I don't have any problems
17 with it.

18 THE COURT: Right. Okay. That's what you're saying
19 you're willing to stipulate to.

20 MR. OSGOOD: Yes. I don't want any --

21 THE COURT: And do you have any idea, Mr. Rhodes, the
22 bank stipulations that you're going to be providing to them, are
23 they based on records you obtained directly from the financial
24 institution or from search and seizure of some other defendants'
25 files?

1 MR. RHODES: From the bank, Your Honor.

2 THE COURT: Okay. Okay. Now, what about chain of
3 custody from your standpoint?

4 MR. BANNWART: We aren't going to stipulate to any chain
5 of custody --

6 THE COURT: Custody.

7 MR. BANNWART: -- for anything.

8 THE COURT: Okay.

9 MR. BANNWART: Especially since we haven't seen what
10 they're talking about.

11 THE COURT: Yeah. And do you have any idea of your
12 stipulations, how many are chain of custody versus these
13 telephone, bank record stipulations?

14 MR. RHODES: You mean how many witnesses there will be
15 pertaining to that?

16 THE COURT: Yeah. I mean, I'm just -- you said 25 with
17 stipulations --

18 MR. RHODES: Yeah.

19 THE COURT: -- and 50 without them.

20 MR. RHODES: Yeah.

21 THE COURT: So I'm just trying to --

22 MR. RHODES: I would say probably at least about ten or
23 so.

24 THE COURT: Ten related to what?

25 MR. RHODES: The chain of custody.

1 THE COURT: Okay. So, if there are no stipulations on
2 that, we're up to at least 35 witnesses. Would that be fair to
3 say?

4 MR. RHODES: Yes.

5 THE COURT: Okay. What about exhibits from the
6 Government?

7 MR. RHODES: Four hundred.

8 THE COURT: And we've kind of had a discussion about
9 that. From the defendants' standpoint, how many witnesses are we
10 talking about?

11 MR. OSGOOD: I endorsed 33, Your Honor. And I don't
12 have the benefit of the Government's witness list. I assume
13 probably half of those or better are going to be Government
14 witness, but I don't know. So, 35, I'm sorry. I added -- the
15 other day I added another six witnesses.

16 THE COURT: And when you say you don't have the benefit
17 of the Government's list.

18 MR. OSGOOD: They haven't filed an exhibit list -- I
19 mean, a witness list yet.

20 MR. RHODES: Yes, we have. We filed it.

21 THE COURT: I started to say I think the deadlines --

22 MR. RHODES: Yeah.

23 THE COURT: We wanted you to have everything like that
24 before this conference.

25 MR. OSGOOD: If it is, I'll have to go back and check

1 that. I didn't think I saw it.

2 MR. LEWIS: I thought they filed one in advance of the
3 last pretrial conference.

4 MR. RHODES: We did.

5 MR. LEWIS: But that is obviously --

6 MR. OSGOOD: That was some time ago.

7 MR. LEWIS: Right. That's obviously changed some. I
8 don't know how much --

9 THE COURT: Right. Have you filed an updated list?

10 MR. RHODES: No, we have not filed an amended list.

11 THE COURT: Okay. I mean, do you intend to do that?

12 MR. RHODES: Yes, we do. In light of -- with the chain
13 of custody of events as well as any other witness, so, yeah.
14 That will be filed.

15 MR. OSGOOD: And there's these additional witnesses from
16 the March/April time frame. So, I can't tell you precisely, but
17 I'd say I've got upwards of 15 or 20 for sure depending on who
18 they call. On the chain of custody, too, I don't want to
19 unnecessarily burden the Court and slow this thing down to a
20 snail's pace. I'm not going to object, for example, on chain of
21 custody from a lab technician or I mean a person pulling
22 something out of the file and signing for it on that day and
23 putting it back and that kind of thing. I want a major chain of
24 custody, and I would not object at trial if Ms. Overton went down
25 and pulled a document out of the file and looked at it and signed

1 the sheet and put it back in the file. As long as there's a
2 complete chain from the seizure to the office to court that kind
3 of thing. Am I making myself clear on that?

4 THE COURT: Well, but you want them to prove that up,
5 you're saying, at trial?

6 MR. OSGOOD: Yes. But I don't expect them to call every
7 person that signed the in/out sheet while they're working this
8 stuff.

9 THE COURT: Right. Okay.

10 MR. OSGOOD: I don't need all those people.

11 THE COURT: Right.

12 MR. OSGOOD: That would be ridiculous.

13 MR. LEWIS: Our witness -- (clearing throat) pardon me,
14 Your Honor. Our witness list is rather short. It is also
15 dependent upon these patient interviews and how many of these
16 folks the Government intends to call, Your Honor. Because for
17 every patient that they have that may say I didn't get my
18 prescription filled at Ascensia, we have identified and
19 interviewed, at least one, if not two, for every one of those
20 persons. We are not going to sandbag the Government and list 150
21 patients and their addresses so that we spend the taxpayer's
22 dollars of the United States of America for them to go out and
23 interview those folks. What we are entertaining and would like
24 the Court's direction on are picking a couple of those patients
25 and asking for leave of court to take their depositions in

1 Houston to cut down on the enormous expense of having those folks
2 flown and put up here in Kansas City. So, to answer your
3 question, but to make sure the Court is mindful of that, we have
4 a less than ten folks that would be on our list. We might say,
5 just to be safe, 10 to 15. We would rely on both the
6 Government's witness list, they may be some of our witnesses, or
7 Mr. Osgood's. We have gone through his list and agreed on some
8 folks that we jointly believe will be necessary. So, our list
9 will be by far the smallest.

10 THE COURT: I know you said you were going to update
11 your list, Mr. Rhodes. Are these patients that were identified
12 in these recent interviews, these 46 individuals, are any of
13 those going to be on your witness list?

14 MR. RHODES: Yes, Your Honor.

15 THE COURT: And are they on your witness list right now?

16 MR. RHODES: No, they're not.

17 THE COURT: Well, when were you planning on, again, the
18 deadline for filing the witness list was, you know, in advance of
19 our conference so we could talk about it.

20 MR. RHODES: Yes. I --

21 THE COURT: When do you plan to file that?

22 MR. RHODES: This week, Your Honor.

23 THE COURT: All right. The exhibits, you've indicated
24 roughly 400, and I think that's what we've been having a
25 discussion about. What about on behalf of the defendants?

1 MR. OSGOOD: We could probably anticipate about 50 to
2 75.

3 THE COURT: Okay. And what about on behalf of Solomon
4 and Johnson?

5 MR. BANNWART: Your Honor, we would represent that there
6 are probably, at this point without -- I don't know how we -- how
7 do I say this? Excluding the 14 boxes in Houston, we have
8 probably five to ten. However, that will change dramatically or
9 could change dramatically based on what we get out of those 14
10 boxes. And also, Judge, I want to --

11 THE COURT: But, I mean, you've already had access to 13
12 of the 14 boxes.

13 MR. BANNWART: Correct.

14 THE COURT: And do you have -- have you -- have they
15 made copies of those items for you out of those boxes?

16 MR. BANNWART: I don't believe copies have been made.

17 MR. LEWIS: A few of the documents that we tabbed in
18 there to be copied we've found in other sources, so.

19 THE COURT: But when you tabbed them -- so, you've
20 tabbed documents out of these boxes but you don't have copies
21 yet?

22 MR. BANNWART: Of some of them, yes.

23 THE COURT: And when are you going to be getting those
24 copies?

25 MR. BANNWART: We've requested them, Your Honor.

1 THE COURT: Well, I guess what I'm -- I understand --
2 let me direct this to Mr. Rhodes and Mr. Bohling. I mean, I
3 understand the documents are in Houston, but you evidentially
4 have had no trouble getting what you wanted out of those boxes?

5 MR. RHODES: Yeah. That correct, Your Honor. And they
6 also had an opportunity, they still have an opportunity to make a
7 copy, whatever they want to from those boxes.

8 THE COURT: Well, but they're saying they've tabbed
9 things and they don't yet have the copies?

10 MR. RHODES: They -- I guess they haven't asked to get
11 the copies yet, Your Honor. I'm not there with them when
12 they're --

13 THE COURT: Well, I don't think they would have tabbed
14 them if they hadn't said that these are what we want copies of.
15 I guess, you know, my concern is I understand you're saying these
16 are the Houston boxes. But to the extent you're using them and
17 making copies of things that you want to use, I mean, I think
18 you've got some obligation to make sure that they likewise have
19 access no different than if it was a box in your office.

20 MR. RHODES: Your Honor, they have not requested a copy.
21 They've been given an opportunity. Ms. Overton said they have
22 not asked for a copy of anything at this point. If they asked
23 for a copy, they would get a copy. I don't know about this
24 tabbing or what's going on. I'm tabbing this, and if they don't
25 communicate to her I would like to get a copy of this tab, that

1 part I don't know about. But they have not requested a copy.

2 MR. BANNWART: First -- no. Go ahead, Chip.

3 MR. LEWIS: Very briefly, Your Honor. What we've done
4 on the previous visits, Agent Overton wasn't there. They allowed
5 some of the other folks from the -- either her group or in the
6 office to -- they know nothing about it. They are very nice
7 gentlemen who have said we know nothing about this case. Just
8 mark whatever it is you want marked and we'll give it to Agent
9 Overton when she returns. So, that's what we did with the folks
10 there on the ground in Houston. And if it's --

11 THE COURT: And did you tell them if it was marked you
12 wanted a copy?

13 MR. LEWIS: Yes, ma'am.

14 MR. BANNWART: Yes.

15 MR. OSGOOD: Your Honor, they have not filed a witness
16 list *per se*. They filed a Document 150, Government Notice of
17 Expert Witness Testimony and they listed one, two, three, four,
18 five, six, seven, eight proposed experts. You groused at them
19 about the fact that that was an insufficient list because it
20 didn't say what those experts were going to testify to.

21 THE COURT: Yeah. That's totally inadequate. We had
22 that discussion before.

23 MR. OSGOOD: But the point is, that's the only witness
24 list they've filed. Unless they --

25 MR. RHODES: Your Honor, I don't have the document in

1 front of me, but we filed --

2 MR. OSGOOD: What's the document number?

3 THE COURT: Yeah. Tell me -- I've got the filed pulled
4 up here on my computer and you all -- we now have Internet access
5 here. You're welcome to bring your computers with you --

6 MR. OSGOOD: I do.

7 THE COURT: -- if you don't have paper copies of the
8 files.

9 MR. OSGOOD: What's the document number?

10 MR. RHODES: It's Document 145, Your Honor.

11 MR. OSGOOD: All right. I do have that.

12 MR. RHODES: Okay.

13 MR. OSGOOD: That was recently filed.

14 THE COURT: No, 145 wouldn't be a recent document?

15 MR. OSGOOD: One forty-five?

16 THE COURT: It's a --

17 MR. RHODES: No. That's been the whole statement.

18 There's a witness list, but not an amended witness list.

19 THE COURT: Yeah. It was the -- it was filed December
20 5th of '08.

21 MR. OSGOOD: First Proposed Witness List. I do have
22 that. Okay. I can compare that then to the one I've got.

23 THE COURT: But again, it -- okay. Things have changed
24 quite a bit in this case since you've filed that. And so, I
25 mean, the plan is when the Court issues that trial order, it

1 doesn't say file something by March 1st. It's all geared to ten
2 days in advance of the pretrial conference, the Friday before the
3 pretrial conference, so that as these deadlines change, this is
4 the pretrial conference date, by last Friday or whatever date is
5 in that order we would have expected the witnesses that you plan
6 to use at this trial, not back in December. I mean, to the
7 extent there has been all this additional discovery, I mean,
8 that's -- we needed you to file your stipulations by last Friday.
9 We needed you to file your witness and exhibit lists for this
10 coming trial in advance so we could talk about them here today.
11 And we could talk about is there somebody new that they don't
12 know on there.

13 MR. RHODES: Uh-huh.

14 THE COURT: But when you say you're going to be amending
15 it, then that doesn't -- I don't know how you're going to amend
16 it and we can't really have those discussions today. The witness
17 lists -- and to me this is kind of late in time -- but the
18 witness lists were to be filed no later than the Friday prior to
19 the pretrial conference, and the exhibit lists. And so have you
20 filed an amended exhibit list?

21 MR. RHODES: No, I have not, Your Honor. They have a
22 witness list that's been filed in advance of this pretrial
23 conference.

24 THE COURT: But not the one you plan to use.

25 MR. RHODES: I guess I'm -- the witnesses on that

1 witness list I do plan to use.

2 THE COURT: Okay. All right.

3 MR. RHODES: Okay.

4 THE COURT: And so, if --

5 MR. RHODES: But as time goes, I may add a witness or
6 two, just like they're going to be adding witnesses. So far we
7 have three witnesses. They said they might have ten. They're
8 going to be adding some more witnesses.

9 THE COURT: Okay. But here's the point. I understand
10 that after your witness list is filed the Friday before the
11 pretrial conference, some new information may come to your
12 attention. The intent is that after we have this conference, the
13 only things that you would be adding are things that you didn't
14 know about today that we couldn't talk about today. But I hear
15 you saying, at least I thought you were saying, that there has
16 been developments this spring, since December 5th of '08, that
17 you plan to file on an amended witness list.

18 MR. RHODES: Right.

19 THE COURT: And what I'm saying is, those developments
20 that you know about today, that you knew about last week, that
21 needed to be filed so we could talk about it here today.

22 MR. RHODES: Right. No. I understand that. I
23 understand that.

24 THE COURT: And I guess I'm just trying to --

25 MR. RHODES: Well, I don't want to just put down a list

1 of witnesses just to give them hard -- to be -- to put down a
2 whole list of witnesses for them to go research when I'm trying
3 to determine whether or not we're going to actually use this
4 witness for me to put it on the list. That's what I'm doing.

5 THE COURT: Right. And I appreciate that. But if you
6 haven't been able to make that determination by the date your
7 witness list is due, then I think what happens is you've got to
8 put them done and then in this conference we'll talk about, okay,
9 you've got, you know, a hundred people on there and they don't
10 have time to go interview them and that would be our discussion
11 today. Who are you really going to use and, therefore, who do
12 they really need to talk about? And likewise, you know, their
13 list of witnesses may kind of change depending on what they've
14 seen on your list.

15 MR. RHODES: I understand your point, Your Honor.

16 THE COURT: All right. So, we don't have a final
17 exhibit list, or even one that's been amended, based on
18 developments this spring?

19 MR. RHODES: Well, the exhibit list was filed this
20 Friday so that's an up-to-date --

21 THE COURT: Okay.

22 MR. RHODES: Yeah.

23 THE COURT: So, you have filed something?

24 MR. RHODES: Yes.

25 THE COURT: Okay.

1 MR. RHODES: Yes.

2 MR. BANNWART: I do have one other concern to voice with
3 the exhibit list, Your Honor.

4 THE COURT: All right.

5 MR. BANNWART: There are -- I'm going to call it dozens
6 of numbered exhibits that just say "Reserved" next to them.
7 They're kind of randomly dispersed throughout the exhibit list.

8 THE COURT: Well, what is your -- what number if your
9 exhibit list, the new exhibit list? Do you know?

10 MR. BANNWART: It's Document 232, Your Honor.

11 THE COURT: Thank you. Let me turn to it. Okay. For
12 example, Document 13, 14, 15, 16, 17, 18 all say "Reserved."

13 MR. BANNWART: Correct. And that's -- that -- there is
14 many, many more throughout. I'm not sure what that means.

15 THE COURT: Can you address that?

16 MR. RHODES: Given the new numbering system of
17 sequentially numbering all of the documents, whenever we may use
18 an exhibit from like an prescription pile, we may need to give
19 that a number, a separate number. So, we reserve that spot. So,
20 if they see a group of prescriptions 1 through 10, if we
21 subsequently need to use one of those 1 through 10 to give that a
22 number immediately near the subject matter that we're talking
23 about. So, that's why that's being reserved, for sake of
24 numbering at trial.

25 THE COURT: Okay. You don't have anything in mind

1 necessarily to put there right now? I'm sorry. I'm not
2 following you.

3 MR. RHODES: Right.

4 THE COURT: If you're going to use it now, it ought to
5 have a number.

6 MR. RHODES: Uh-huh.

7 THE COURT: And so I guess I'm a little unclear. For
8 example, you're saying that Exhibits #13 through #18 you have
9 reserved in case there is something in #1 through #12 that you
10 need to add to that subject matter. Is that --

11 MR. RHODES: Right. In an effort to try to keep the
12 exhibits close near to each other rather than putting everything
13 at end, you know, as far as moving all the exhibit numbers up.
14 Otherwise, we'll always keep changing exhibit numbers when we're
15 -- if we do some of the stipulations. Stipulations refer to
16 certain exhibit numbers. So, otherwise, when there's a change
17 we'll be able to admit an exhibit that is pertinent to that issue
18 or be around that issue.

19 THE COURT: So, you're anticipating -- all these blanks
20 you're anticipating are documents that you don't currently have
21 marked as exhibits that you think something may unexpectedly come
22 in?

23 MR. RHODES: Right. It could be a report that may be
24 used regarding that exhibit, not to be introduced as evidence,
25 but to refresh memory or such. That's why that's being left

1 open.

2 THE COURT: Okay. So, those aren't for exhibits that
3 you actually intend to offer and admit, but for documents that
4 you may have witnesses refer to?

5 MR. RHODES: Right. For the most part, yes. But there
6 may be a situation where, but we would be more specific, where we
7 are labeling the box as a number, but then there may be various
8 prescriptions pulled from that box that would be used.

9 THE COURT: Oh, now, let's back up. You're saying
10 you've marked like whole boxes as exhibits?

11 MR. RHODES: That's -- well, yeah. You've got to -- not
12 a whole box. I'm saying we was going to mark one box as an
13 exhibit, yes.

14 THE COURT: And how many documents were in that box?

15 MR. RHODES: About 10,000.

16 THE COURT: Okay. I don't think that's going to work.
17 I mean, I think we need to have -- I mean, if you're planning on
18 using an exhibit, you need to have it marked. And if you even
19 think you may want it as an exhibit, I think you mark it and then
20 our discussion here, I mean, say you have 500 exhibits marked and
21 you really only intend to use a hundred, then our discussion here
22 today can narrow down and highlight for defense counsel what it
23 is you're really going to use. But I wouldn't ever suggest that
24 you mark a box with 10,000 documents as an exhibit and then plan
25 to reserve numbers for things you may want to pull out of that

1 box at trial. I just -- I don't think that would be workable.
2 And maybe I'm missing something.

3 MR. RHODES: Uh-huh.

4 THE COURT: And maybe you've done that in the past and
5 it's worked. But I mean what -- the idea is going into trial
6 that each side knows, and this goes for the defense as well, who
7 the witnesses are and what exhibits are being used so people
8 aren't running around rummaging in these boxes of documents to
9 find exhibits. In other words, I'd expect everybody there at
10 counsel table, those exhibits that you're going to use at trial,
11 those exhibits that they're going to use, if there is some
12 document they think counters a document that you're going to
13 offer with a witness, they need to know you're going to use that
14 so that they can have their -- basically organized in boxes or
15 notebooks or however they want it organized, so the trial will
16 move along quickly. And so I guess I'm -- you know, I don't mean
17 to be missing something here. But if there's something you think
18 you're going to need rather than reserve it, we need to put it on
19 this list. Because if you have, you know, say that Document 13
20 is being talked about and then there are some subsets to it, I
21 mean, you could always do 13-A, B, C and D and keep it right
22 there with that document.

23 MR. RHODES: That's the problem. They eliminated -- the
24 new rule says no more A, B, C and D.

25 THE COURT: Okay. I am aware of that.

1 MR. RHODES: Okay.

2 THE COURT: Okay.

3 MR. RHODES: Okay.

4 THE COURT: All right. Well, we may -- you may -- and I
5 don't know if they, and I'll have to go back and look at that
6 rule and talk to Judge Gaitan at a case like yours. But I think
7 their concern is that, you know, we need to have a pretty good
8 idea of what exhibits are going to be used at trial.

9 MR. RHODES: No. I understand.

10 THE COURT: All right. From the defendants --

11 MR. OSGOOD: Your Honor, excuse me.

12 THE COURT: Yeah.

13 MR. OSGOOD: I went ahead and compared their witness
14 list to my witness list. I have 16 people that they have not
15 listed on their list.

16 THE COURT: Okay.

17 MR. OSGOOD: So, that would -- of the 35 I endorse, it
18 would be 16 potential other witnesses.

19 THE COURT: Okay. What about exhibits for the various
20 defendants? The Government says they have about 400.

21 MR. OSGOOD: I think I said 50 to 75.

22 THE COURT: Okay.

23 MR. OSGOOD: Those are going to be professional
24 documents and graduation certificates and things like that.

25 THE COURT: And are these documents that are in addition

1 to documents that they've produced and that are on their list?

2 MR. OSGOOD: I think so, yeah. These are --

3 THE COURT: So, you've made sure that you've --

4 MR. OSGOOD: These are his background information --

5 THE COURT: Okay.

6 MR. OSGOOD: -- and the résumé and they're --

7 THE COURT: And you've given them copies of your
8 documents?

9 MR. OSGOOD: I have given them a sizeable amount of
10 discovery sometime ago that's Bates stamp numbered.

11 THE COURT: Right.

12 MR. OSGOOD: And I think most of that is in there, but I
13 will double-check to be sure that I don't --

14 THE COURT: If there is anything you plan to use, then
15 you need to get it to them.

16 MR. OSGOOD: I will. But I gave them an extensive
17 amount of discovery months ago. It was all Bates stamped.

18 THE COURT: All right.

19 MR. BANNWART: Your Honor, not including rebuttal
20 exhibits obviously, we're thinking ten at most at this point.

21 THE COURT: For both Solomon and Johnson?

22 MR. BANNWART: Yes, ma'am.

23 THE COURT: All right. Is the case definitely for
24 trial? I know our date may be, you know, at issue. But in terms
25 of -- the parties are all planning to go to trial?

1 MR. OSGOOD: Absolutely for Mr. -- or Dr. Elder.

2 MR. BANNWART: Yes for Defendants Solomon and Johnson.

3 THE COURT: Okay. And how long, Mr. Rhodes, are you
4 anticipating the Government's case, including jury selection,
5 will take?

6 MR. RHODES: About seven business days, Your Honor.

7 THE COURT: Okay. What about from the defense
8 perspective?

9 (Off Record Talking)

10 MR. LEWIS: Your Honor, I think the Government's
11 estimate -- is that for their case-in-chief?

12 MR. RHODES: Yes.

13 MR. LEWIS: I don't think any more than two or three
14 days in addition.

15 THE COURT: And the seven days, does that include jury
16 selection, like a half day for jury selection?

17 MR. RHODES: Yes, Your Honor.

18 THE COURT: All right. So, two weeks?

19 MR. RHODES: Yes, Your Honor.

20 THE COURT: Okay. All right. We've talked about the
21 stipulations that you're working on. Unusual questions of law, I
22 know we've got a lot of motions in limine out there and I'm not
23 sure that this is the time to kind of start talking about those.
24 But is there anything that isn't briefed right now that the
25 parties view as an unusual issue that either you plan to file

1 something on or your concern could be an issue at trial?

2 MR. OSGOOD: I filed it already yesterday. It's the
3 time crunch that I'm thinking about on the issue of a *Daubert*
4 hearing on this police officer that wants to testify like he's a
5 doctor.

6 THE COURT: Okay.

7 MR. OSGOOD: That's the only one I can think of that
8 would require immediate attention and maybe a hearing. And I
9 don't know whether Judge Gaitan does his own *Daubert* hearings, I
10 assume, or does the Court do them?

11 THE COURT: I'll have to speak to him and we'll have to
12 see. But I would assume that that --

13 MR. OSGOOD: It's a -- it's a fairly focused --

14 THE COURT: -- it's probably his first preference --

15 MR. OSGOOD: It's a fairly focused focus issue, I think,
16 with this police officer.

17 THE COURT: But that's briefed.

18 MR. OSGOOD: Yes.

19 THE COURT: And I appreciate you calling that to my
20 attention that it may need immediate attention. Are there any
21 other issues that aren't briefed right now that the parties are
22 concerned about?

23 MR. LEWIS: The only one I see potentially on the
24 horizon, Your Honor, is if the Government intends to ask the
25 Court for an instruction on willful blindness or deliberate

1 ignorance. As the Court's, I'm sure well aware, there's a lot of
2 split among the circuits and even some recent developments that
3 I'm painfully familiar with out of the *Enron* cases that I tried
4 regarding that. This case seems to cry out from, if I were still
5 prosecuting, for a deliberate indifference instruction. It would
6 help us to know that going in and proposed jury charges and
7 arguments as to why it should or should not be included.

8 MR. RHODES: We're still discussing that. Instructions
9 will be filed on that matter when due.

10 THE COURT: I was just looking at the -- okay. All
11 right. Anything else? Any other motions in limine that people
12 haven't filed?

13 MR. BANNWART: I don't know if the Court considers this
14 under the heading that you've just laid out, but we do have an
15 issue. We filed an objection to the Government's notice to use
16 prior criminal conviction. I'm not sure if the Court had heard
17 or seen those documents. Also, there may be an issue regarding
18 spoliation that we want to raise of evidence.

19 THE COURT: Okay. The objection to the use of the prior
20 convictions, what document number is that? Do you have that
21 handy?

22 MR. LEWIS: 236, Your Honor.

23 THE COURT: Okay. And the spoliation, what issue is
24 that and how soon are you prepared to brief that?

25 MR. BANNWART: We discussed this issue with Ms. Overton

1 yesterday. There are some documents and items that are missing
2 from the 14 boxes that we believe were seized that may be
3 exculpatory. Agent Overton said that she would look for those.
4 She did provide us with this CD, which was part of the missing
5 information. But the rest of it she's looking into so I can't
6 tell you definitely until we speak with her and give her an
7 opportunity to look into the items that are missing.

8 THE COURT: Have you raised the issue with Government
9 counsel?

10 MR. BANNWART: You know what, I don't recall if we have.

11 THE COURT: All right. Well, I mean, I think that --
12 and I understand, because Ms. Overton may be in charge of the
13 documents down there, but I would think in terms of indicating
14 that you think documents are missing that may be exculpatory, you
15 need to be addressing that to the attorneys up here.

16 MR. BANNWART: I'm just saying that off the top of my
17 head I can't remember if I wrote a letter about it or not.

18 THE COURT: All right. Well, I think that's something
19 then you need to immediately --

20 MR. BANNWART: Yes, ma'am.

21 THE COURT: -- address with them. All right. The
22 witness and exhibit lists we've kind of talked about. The
23 deadline really was the Friday before the pretrial conference.
24 So, I guess what the parties really need is a fairly quick
25 ruling, you know, hopefully today or tomorrow. I don't know if

1 Judge Gaitan is available. But I'll be talking to him about the
2 request for a continuance, understanding -- I understand your
3 position, Mr. Osgood -- and we'll be letting you know. But
4 otherwise, I mean, if the case is going to trial in July, you're
5 going to have to get those on file right away. The exhibit
6 index, *voir dire* and jury instructions all need to be filed by
7 noon on Wednesday, July 15th if this case is going to trial on
8 the July 20th docket.

9 MR. BOHLING: I did have one more issue, Your Honor.

10 THE COURT: Yes.

11 MR. BOHLING: Just to make the Court aware. Defense
12 counsel had already mentioned the possibilities and depositions
13 of witnesses they were interested in.

14 THE COURT: Yes.

15 MR. BOHLING: I am aware that there is one Government
16 witness, Ada Johnson, who, through counsel, has indicated to us
17 that she has some ongoing health issues. And so we may be asking
18 to depose her and I will, you know, discuss that with defense
19 counsel. I'm not sure that there would be an objection. Again,
20 I -- once the motion to continue issue came up, then that may
21 affect whether that's an issue or not. So, I thought I would see
22 how that came out before I finalized her deposition.

23 MR. LEWIS: And we'll gladly work with the Government on
24 that, Your Honor. That brings up one point that I don't want to
25 forget. I know the Court has a lot of business to take care of

1 today. I contacted Professor Taheri who was at our last pretrial
2 conference when the Johnsons testified to approach him about
3 getting a chance to interview them, meet with them, et cetera.
4 And I must tell the Court I was shocked at his response. He told
5 me that he did -- he couldn't ethically speak to me, that he had
6 been instructed that it would be unethical. Now, I certainly
7 don't think Mr. Bohling or Mr. Rhodes would instruct the
8 professor on that. And I've sweated over how to approach this.
9 I wrote him a letter. I told him to please call the counsel for
10 the Government. I'm confident these gentlemen would assure you
11 there's nothing wrong with speaking to me. It's my duty to
12 attempt to speak to these folks. And I went out of my way to
13 insulate Mr. Solomon from that given what we had at the last --

14 THE COURT: Right.

15 MR. LEWIS: -- occurrence. I haven't heard back from
16 you him on my letter. I've left two other messages. It's very
17 disconcerting that Miss -- either one of the Johnsons are getting
18 counsel that is clearly wrong. I would like the Court's
19 permission, and if the Government could agree to this, for me to
20 write a little more pointed letter that I will send to the
21 Government first, that says a witness is allowed to talk to
22 either side. They can choose to talk or they can refuse to talk,
23 but it's my duty to ask them to talk.

24 THE COURT: Right. But you were asking -- you were
25 directing your inquiries to their counsel, correct?

1 MR. LEWIS: Yes, Your Honor. I'm concerned that he's
2 not even communicating that.

3 THE COURT: And he indicated he could not ethically talk
4 to you.

5 MR. LEWIS: Or they on their behalf or anything. And it
6 was bizarre to say the least. He hung up on me after I said,
7 Professor, I'm not trying to get you to do something your clients
8 don't want to, I'm just asking you to -- if I can visit with you
9 or you'll ask them if I could visit you and he hung up on me.

10 THE COURT: Well, I don't know what --

11 MR. BOHLING: Mr. Taheri has also articulated some legal
12 theories to us that we haven't agreed with in the past. So, it's
13 not isolated to Mr. Lewis. I'd be happy -- I will be speaking to
14 him about the deposition issue. I'd be happy to speak to him
15 about this issue. I have no confidence that anything I say will
16 make any difference on his outlook on any issue.

17 MR. LEWIS: And I trust Mr. Bohling in that. I --

18 MR. BOHLING: But I'd be happy to -- I want to assure
19 you that we've had no communication with him at all about his
20 clients' obligation or non-obligation to speak with any other
21 party in the case.

22 MR. OSGOOD: If I may, Your Honor? I don't have any
23 problem taking her deposition for discovery purposes. I will not
24 agree to taking her deposition to use it in lieu of her
25 appearance in court under any circumstances whatsoever because

1 she is an essential key witness as far as the defense is
2 concerned for Dr. Elder. And I don't know that I would even be
3 able to ask the right questions until I heard Pleshette Johnson
4 testify and some of the other key people in this case. So --

5 THE COURT: But you don't have any control over who they
6 call first. I mean, they could --

7 MR. OSGOOD: I don't. I don't. But, you know, I can
8 always retain her as a witness if she's here. And I've got her
9 endorsed as a defense witness. So, I'm not willing to agree
10 under any circumstances that deposition testimony can be
11 substituted for her, absent a showing under the law that there is
12 imminent possibility of death or absence of the witness, the
13 requirements that are required under the rule.

14 MR. BANNWART: And this --

15 THE COURT: Well, but if they make that showing under
16 the rule, then I think, you know --

17 MR. OSGOOD: Well, I'm stuck with it, I guess.

18 THE COURT: Yeah.

19 MR. OSGOOD: Yeah. But I think there needs to be that
20 proper showing that she is subject to imminent death or absence
21 as a witness justifying taking a deposition. Because normally
22 you can't take a deposition in federal court.

23 MR. BANNWART: And this goes to what Mr. Lewis addressed
24 to the Court earlier. We're going to have that problem with a
25 lot of people. We have, you know, nine or ten witnesses, none of

1 whom are in Missouri, who we need to testify, but whom our
2 clients really can't afford to put up here for two weeks and fly
3 up here.

4 THE COURT: Yeah. And I will say this, I mean, I don't
5 know if you all have checked this out. I understand that you're
6 retained. But I think at some point, you know, if your clients
7 are in a position to make a showing that they're unable to afford
8 the cost to bring the witnesses up here, then, you know, you can
9 make that showing and even, I think, in a situation where you're
10 retained, I mean, you were retained some time ago, the Court can
11 enter an order authorizing the Marshals to transport witnesses
12 here. So, I mean, that's an alternative to the, you know,
13 deposition.

14 MR. BANNWART: Okay, Judge.

15 MR. LEWIS: Your Honor, just to -- I didn't want to keep
16 standing while Mr. Osgood had a point or Mr. Bannwart. I will
17 trust Mr. Bohling, if he will agree to let me write a little more
18 to-the-point letter, copy him on it and say, in fact, I've spoken
19 with the Government, all we're asking you to do is please
20 communicate to the clients our desire to interview them. They
21 have the right to say, no, thank you. The reason I bring it up,
22 Your Honor, is we were, through another third party we were told
23 that either one or both of the Johnsons had some misgivings. I
24 don't know if the misgivings were about their counsel or if they
25 were about the process. But it obviously piqued my interest to

1 reach out and try to talk to them. Again, I have no reason --

2 THE COURT: Well, I mean, I think you can talk to Mr.
3 Bohling and figure it out, and if he has no objection to that
4 kind of letter, that's fine. If he wants to mention it to him,
5 that's fine. I don't know that the Court has to be involved in
6 that particular issue.

7 MR. LEWIS: The only reason I bring it up is crossing
8 this hurdle in a couple of prior cases we, in fact, went to the
9 court and had a letter that the court signed off on. I don't
10 hope it comes to that, but just to let you know I don't want to
11 spring it upon you but the interchange was so bizarre that I was
12 almost rendered speechless as to exactly what to say to this
13 gentleman to make sure the Johnsons are at least getting the
14 message.

15 MR. BOHLING: I was just going to note for the record
16 that as represented to me by Mr. Taheri, Ms. Johnson was supposed
17 to have surgery this month. I will say, in all candor, that I
18 have the sense that she's less than excited about coming to
19 Kansas City to testify. So, I don't know how much that is
20 playing into this, probably some. So, I understand Mr. Osgood's
21 position, and I will try to clarify, because, frankly, we have
22 asked for clarification on her medical condition and have not
23 received it.

24 THE COURT: All right.

25 MR. BOHLING: So, I will try to clarify that. But it

1 would -- it might possibly be somewhat relevant to the motion to
2 continue, that all parties probably want this witness. It has
3 been told to me that this was the month when she was supposed to
4 have surgery.

5 THE COURT: June or July?

6 MR. BOHLING: July.

7 THE COURT: All right. And do we know what kind of
8 surgery she's having?

9 MR. BOHLING: It's unspecified female problems.

10 THE COURT: All right. Okay.

11 MR. BOHLING: That's all I know.

12 THE COURT: All right. Anything else before we get to
13 the issue that I wanted to address concerning the, you know,
14 conflict of interest or alleged conflict of interest that's been
15 raised by the Government?

16 MR. OSGOOD: I have nothing, Your Honor.

17 THE COURT: All right.

18 MR. BANNWART: Nothing, Your Honor.

19 THE COURT: Then, Mr. Osgood, I mean, I don't know that
20 this issue really concerns you or Dr. Elder. You're certainly
21 free to leave at that time.

22 MR. OSGOOD: If you want us to leave, we'll leave. But
23 I'm not sure that I wouldn't prefer to sit --

24 THE COURT: Okay.

25 MR. OSGOOD: -- and listen to goings on.

1 THE COURT: Well, at some point we may get to issues --

2 MR. OSGOOD: Sure.

3 THE COURT: -- where we have to ask people to leave, but
4 certainly, I don't know, at the outset I think everyone is aware
5 of the motion and is --

6 MR. OSGOOD: We may adjourn to the gallery, but --

7 THE COURT: All right.

8 MR. OSGOOD: -- I do want to know what's going on.

9 THE COURT: All right. As I recall, the way this
10 transpired there was the motion to address the conflict. There
11 was a response. There was a hearing. There was a further reply
12 from the Government, and I believe the Government's reply came
13 after the hearing. And I say that because one of the issues that
14 the Court was concerned about was the issue raised as to what
15 happens when one lawyer is jointly representing two clients and a
16 plea offer is made to one client, but not to the other and what
17 kind of conflict situation does that raise. The response to that
18 hypothetical, I believe, at the hearing was that hasn't happened
19 yet. So, subsequent to the hearing, the Court did become aware
20 in the Government's reply that a plea offer had been extended to
21 one of the defendants. I did not get any response to that from,
22 I don't believe, from Mr. Bannwart. I think Mr. Lewis filed
23 something, but I don't believe Mr. Bannwart did to address that
24 particular issue. In preparation for this hearing and to alert
25 everyone that the Court viewed this as a significant issue, I did

1 ask Government counsel to provide to the Court under seal copies
2 of the documents that it referenced in the pleading, the plea
3 agreement and the supplement to the plea agreement. And so I
4 guess I'm interested when you look at the case law in this area,
5 joint representation, I think there is great concern when you get
6 to this stage of the proceeding, particularly where a plea offer
7 has been made to one defendant as to whether that really creates
8 the kind of conflict that we always worry about at the outset of
9 these cases when we address it under the Rule 44(c) proceeding.
10 So, I guess, Mr. Bannwart, I'm interested in why you think this
11 does not, or if you still think this doesn't create a conflict,
12 and if not, why not. And to the extent anyone feels the need to
13 address either documents that have been filed under seal or
14 whatever I'm happy to excuse people from the courtroom.

15 MR. BANNWART: Sure, Your Honor. And I'm not sure if
16 what I'm going to say is one of those issues, but it's not, and I
17 have not responded to the Government's plea offer, specifically
18 out of deference to the Court not wanting to jump in and do
19 something that might offend the Court while the issue is still
20 kind of up in the air. But I have been given explicit
21 instructions by my client to reject it.

22 THE COURT: Well, but the real issue is not whether your
23 client wants to reject it, as I understand, but how you go about
24 providing advice to a client when you're representing two
25 clients. And whether or not that client ultimately determines to

1 reject the plea agreement, I don't think is dispositive of the
2 question. If you look at the cases, the issue is how can you
3 possibly give them the kind of advice that we required, have
4 effective assistance of counsel when you have a loyalty to two
5 clients at the same time in the same case?

6 MR. BANNWART: The -- and I don't mean to sound, you
7 know, flippant about it, but my clients maintain that they didn't
8 do anything, so there hasn't been much of a conflict in deciding
9 how to present their defense. However, in light of that, Mr.
10 Lewis is there as a backup in the event that there is some kind
11 of issue regarding whether or not I am giving Mr. Solomon proper
12 advice, he has Mr. Lewis to consult with. And I'm sure they have
13 done that. And I have not been a party to every conversation
14 that they have had and nor have --

15 THE COURT: Well, where does that leave Mr. Johnson?

16 MR. BANNWART: Mr. Johnson is -- Mr. --

17 THE COURT: I mean, that's the whole point. I mean, if,
18 and, you know, the Government's position all along has been the
19 fact that we have Mr. Lewis in here for Mr. Solomon just
20 highlights maybe the problem that is confronting, you know, the
21 Court. I mean, I am very reluctant to interfere with a party's
22 Sixth Amendment right to counsel. But where there is the
23 potential for these kinds of issues and issues to be raised down
24 the road, if you look at the cases where plea offers are made, in
25 many, many, many of the cases that alone is sufficient to warrant

1 a court saying there is a conflict such that, you know, both
2 sides have to have independent counsel. And I guess I'm
3 wondering what makes your case different than those cases that
4 have been reported in the circuits around the country?

5 MR. BANNWART: Well, I don't believe that the motion in
6 limine, which is how this last reply or response was couched,
7 cites any of that law. Our previous responses address those
8 issues. They, our clients have waived that issue. They
9 presented a knowing waiver. They've actually come to this Court
10 and testified concerning that and they've offered to do it again
11 if the Court so desires. The fact that there is, in fact, a
12 plea, actually this plea offer, and the Court has had an
13 opportunity to review it, is fairly hollow. There is no real
14 plea being made. It's been made for the sole purpose of
15 excluding me from this case for some reason. And I don't know
16 what that reason is. Initially, it was because we, I guess,
17 believed that I was the judge or that I was going to be some kind
18 of a fact witness, but the witnesses in our prior hearing
19 dispelled that notion. Our clients have made a knowing waiver
20 with the advice of, in Mr. Johnson's case one lawyer, in Mr.
21 Solomon's case two lawyers. Thus far, there has been absolutely
22 no issue presented to this -- no issue in fact presented to this
23 Court. I know that the Government raised an issue about how we
24 might proceed at trial. But quite frankly, when we were here for
25 the previous hearing, I thought things ran very smoothly with the

1 way that the questioning proceeded. We don't anticipate nor
2 foresee any problem proceeding to trial the way that they are.
3 You asked us earlier if we intended to proceed to trial and every
4 defendant answered yes. With that, with the Sixth Amendment and
5 our clients' knowing waiver, we don't believe that there is --
6 and with the knowledge that are clients are pleading not guilty
7 and are maintaining their innocence, there is no real conflict.
8 The conflict that's being raised is a hypothetical that they
9 tried to make real by giving us a hollow plea offer.

10 THE COURT: All right. I guess I'm interested in the
11 Government response to the idea that it's a hollow plea offer and
12 I'm also interested in having you address the issue of does your
13 plea offer anticipate that the defendant to whom the plea offer
14 is being made would provide testimony against the other
15 defendants in the case. And if you think again that to address
16 this issue we need to ask folks to leave the courtroom, I'm happy
17 to do that.

18 MR. BOHLING: That would probably be best, Your Honor.

19 THE COURT: All right. I think if, Mr. Osgood, your
20 client, anyone else who's not here with these people need to go
21 ahead and leave the courtroom. Yeah. You're with Gaitan's
22 office, right?

23 MS. POWERS: Yes.

24 THE COURT: Yeah. No. In fact, if you want to come up
25 here and sit, that's fine. You don't --

1 MS. POWERS: Oh, this is fine.

2 THE COURT: -- need to sit back there. Oh, okay.

3 MR. BOHLING: To answer your second question first, yes.

4 THE COURT: And, I mean, are we okay then with Mr. Lewis
5 and Ms. Ruden and Mr. Solomon being here?

6 MR. BOHLING: Yes. I think so.

7 THE COURT: Okay.

8 MR. BOHLING: They would know all the facts anyway, I'm
9 sure. To answer your second question first --

10 THE COURT: Okay.

11 MR. BOHLING: -- yes. It would, of course, envision
12 testimony against other defendants. I would say that factually
13 these two defendants, from the Government's perspective, are in
14 very different situations. And we believe the evidence will show
15 that Mr. Solomon has a major role, the major central role in the
16 conspiracy. That he is the, essentially the center of the
17 conspiracy. And Mr. Johnson is in no way situated like that.
18 That he is someone who helps Mr. Solomon, that he has a discrete
19 role in the conspiracy but is not the major planner and organizer
20 in the same way that Mr. Solomon is. So, we see these two
21 defendants as being situated very differently. I don't think
22 this is a hollow plea offer in any sense. This is made because
23 we do believe that there are distinct differences. While we are
24 confident that Mr. Johnson has information that he can impart if
25 he were to speak to us truthfully, that would be helpful to the

1 Government's case in a substantial way. And Mr. Johnson would
2 benefit substantially from this participation if it came out, as
3 the Government believes it might, in that, he could earn himself
4 a 5K. He is facing, you know, substantial jail time under the
5 charges, but --

6 THE COURT: What kind of jail time is he facing under
7 the charges.

8 (Off Record Talking)

9 MR. BOHLING: Twenty-seven to thirty-six months.

10 THE COURT: I'm sorry, what?

11 MR. BOHLING: Twenty-seven to thirty-six months
12 incarceration. So, he would have an opportunity to decrease that
13 by a substantial margin.

14 THE COURT: And when you say by a substantial margin,
15 any estimate?

16 MR. BOHLING: Well, I think traditionally that our
17 courts have generally looked at it with full cooperation about 50
18 percent, I think is, you know, we obviously know that's up to the
19 judge, but I think that would be a reasonable loadstar amount in
20 our district.

21 THE COURT: Okay.

22 MR. BOHLING: And I'd like to speak to the issue of --
23 there's a very real conflict here, it's obviously complicated by
24 Mr. Lewis' participation, but even putting that aside, Mr.
25 Bannwart simply cannot ethically speak to Mr. Johnson about the

1 advantages of this plea agreement because to do so would be to
2 violate his duty to Mr. Solomon. He certainly cannot counsel Mr.
3 Johnson about the advantages of testifying against other
4 defendants. And, of course, that notably would be Mr. Solomon,
5 without violating his duty to Mr. Solomon. And certainly Mr.
6 Lewis only represents Mr. Solomon.

7 THE COURT: Right.

8 MR. BOHLING: So he cannot do that.

9 THE COURT: And I don't know that that's a waiveable
10 conflict. I mean, I certainly have not seen any case law that
11 would suggest when you're an attorney representing two
12 defendants, a plea agreement is extended to one with an offer of
13 reduced penalties for going forward with the plea, particularly
14 if it involves cooperation. I don't know that anyone thinks
15 that's a waiveable conflict.

16 MR. BOHLING: It's a fundamental process, Your Honor,
17 because you can't waive something that your own attorney cannot
18 ethically talk to you about.

19 THE COURT: Right.

20 MR. BOHLING: He can't get this information. If Mr.
21 Bannwart has talked to him, then he's violated his duty to Mr.
22 Johnson, which would be in itself a large issue. But I'm
23 confident that he has not violated his duty to Mr. Johnson. And
24 so as a process matter, Mr. -- I'm sorry, to Mr. Solomon. As a
25 process matter, Mr. Johnson cannot get the kind of legal counsel

1 that he needs to know, to make an intelligent and informed
2 decision about whether or not to take this plea.

3 THE COURT: Now, let me ask you this question. I
4 haven't seen this addressed in the case law. What is the
5 Government's view as to where the parties would be situated if an
6 independent attorney was appointed to address the plea offer to
7 Mr. Johnson with the idea that if he still wanted to go to trial,
8 then he'd back to joint representation?

9 MR. BOHLING: I have specific concerns about that in
10 this case because I think it puts a form of pressure on Mr.
11 Johnson. He would not be truly independently represented. And
12 so his -- I think that again puts kind of an externality on the
13 process that ought not to be there, for him to get that kind of
14 advice and consider it. If, in fact, the catch is well, if you
15 make this decision you go with this attorney, you can make this
16 decision, you go back to Mr. Solomon and this attorney. I think
17 that's an issue of some importance here.

18 THE COURT: Well, while your motion was raised this
19 spring, the actual plea offer, I don't think the Court became
20 aware of it until maybe late April, early May.

21 MR. BOHLING: Right. Right.

22 THE COURT: We wanted to give parties an opportunity to
23 respond to it. But my concern is if you -- I mean, if you are,
24 in fact, correct that Mr. Johnson needs separate counsel, what
25 does that do, given the kinds of documents that we've talked

1 about today to the trial of this case and for those defendants
2 that want to press forward with trial, you know, where does that
3 leave us?

4 MR. BOHLING: Obviously, that's problematic. And so I
5 understand that issue. I would say though that I am -- I remain
6 very, very concerned about the other aspect of this
7 representation, which is Mr. Lewis' independent representation of
8 Mr. Solomon. I am still convinced that that is a process error
9 of the first order. That that institution -- that essentially
10 there is no waiver, effective waiver for Mr. Johnson because Mr.
11 Solomon has waived nothing because he has a separate attorney who
12 is obligated to do Mr. Solomon's bidding without regard to Mr.
13 Johnson's interests. With that in the case, I believe there is
14 no effective waiver of joint representation because the
15 representation here is joint only for one person, Mr. Johnson.
16 For Mr. Solomon that's not the case. I am very concerned that
17 that is a process error of the first magnitude that would cause
18 any trial we have anyway to be reversed on appeal. And so I
19 believe that there's really no choice in this case, no matter
20 what the consequence is.

21 MR. LEWIS: And I apologize, Mr. Bohling, I didn't mean
22 to cut you off. Your Honor, I put in my reply originally the
23 very point the Court is making, the need for independent counsel,
24 if the Court decides there is a need, is to properly advise Mr.
25 Johnson as to his options, this plea agreement that the

1 Government has tendered versus a trial. It would appear to me
2 that could obviously be accomplished as the Court has just, I
3 think, rhetorically ask by appointing someone independent of the
4 process to explain to Mr. Johnson the paths that he has to choose
5 from. If Mr. Johnson persists in his innocence and his choice of
6 going to trial and he wants to exercise his Sixth Amendment right
7 with Mr. Bannwart after he has been independently advised and
8 this Court is satisfied that that is his voluntary solution, I
9 believe that would cure any conflict or any concern the Court may
10 have, because that's what this is really about is --

11 THE COURT: Yeah. The problem with that approach though
12 is that it assumes that a defendant only has one day, you know,
13 Day X, to make that choice. And as you discover either
14 additional documents, the 15th box of documents, the documents
15 from within boxes that we don't know about yet or even during
16 trial where somebody hears testimony they hadn't anticipated then
17 it doesn't allow that defendant to ever change his mind --

18 MR. LEWIS: And I think that's --

19 THE COURT: -- with advice of counsel.

20 MR. LEWIS: And what I've seen before and what I might
21 suggest to the Court is, if the Court is of the mind to appoint
22 independent counsel to advise Mr. Johnson about this decision,
23 plea or trial, that that independent counsel would necessarily
24 need to meet with the Government, with Mr. Bannwart, so that they
25 have all sides of pros and cons of this case where the evidence

1 is strong, whether it might weak, what the possible defenses are.
2 As the Court very properly lays out, that's not a 15-minute
3 conversation or a one-day thing. That is something that is going
4 to take, if the Court decided that would be a prophylactic
5 remedy, something that could take some time. I see that.
6 However, Your Honor, I think -- the problem I see is that Mr.
7 Bannwart has done yeoman's work over the last couple years in
8 representing both Mr. Solomon and Mr. Johnson. That has been
9 both of their choices of who they want to represent them. And to
10 give this Court a full picture of my involvement, Mr. Solomon
11 came to me some months ago and asked me about assisting if this
12 case went to trial. I told him that I would be happy to do so,
13 laid out the terms of my engagement. I'm here to try the case
14 and try the case alone. I'm not here to plea bargain. I've had
15 that conversation with Mr. Solomon and I won't initiate the
16 privilege because it's not necessary. But this is not a
17 situation that was borne out of distrust of Mr. Bannwart. Quite
18 to the contrary. This is a situation that was borne out of will
19 you come try this case. This is a case that I think that Mr.
20 Solomon is well-served in thinking the more the better. This is
21 a very complex case. So, with that said, I think the Court can
22 fashion a remedy that does not emasculate Mr. Johnson's Sixth
23 Amendment right to counsel.

24 THE COURT: All right. Mr. Bannwart, I guess I'm
25 interested in how you think you can provide independent advice,

1 free of any conflict, to Mr. Johnson about a plea agreement that
2 would give him a good deal for providing information to the
3 Government?

4 MR. BANNWART: I have provided Mr. Johnson with the
5 advice that I would have provided any client. Mr. Johnson
6 understands it. I would encourage this Court if it has any
7 doubts to speak with Mr. Johnson and Mr. Solomon *in camera*, out
8 of the hearing of the Government. They have knowingly and
9 intentionally waived the right to separate counsel. And thus
10 far, you know, they've talked about this plea agreement, but if I
11 remember, and I know that there has been an amended one submitted
12 to the Court. But if I recall the terms of the, you know, he had
13 -- Mr. Bohling had indicated that Mr. Johnson's sentence could
14 potentially be reduced by 50 percent. Well, that's not even
15 spelled out in the agreement. They haven't interviewed Mr.
16 Johnson. They don't have a proffer for Mr. Johnson, I don't
17 believe, at least not since I've been his attorney. They don't
18 know what he's going to say, how he's going to say it. This is
19 all a ruse in order to get me bumped off of the case for reason.
20 And it's being done on the eve of trial which would further
21 create problems and prejudice for Mr. Johnson as well as Mr.
22 Solomon. And there is no doubt in this case that we have
23 presented thus far and continued to present a joint defense. In
24 fact, as this Court is aware, Mr. Johnson and Mr. Solomon worked
25 together at Ascensia Pharmacy. Anything that they did one is

1 going to have had knowledge that the other had. Mr. Solomon is
2 Mr. Johnson's boss.

3 THE COURT: All right. Anything else on this issue from
4 either side?

5 MR. BANNWART: No, Your Honor.

6 THE COURT: Anything further from the Government?

7 MR. BOHLING: I just -- no, Your Honor. I don't see how
8 it would be possible for Mr. Bannwart to give Mr. Johnson
9 independent advice that would not violate his duty to Mr.
10 Solomon.

11 THE COURT: All right. Well, it looks like the first
12 issue, although we have many, many of them that I'll need to do
13 is to talk to Judge Gaitan's office about the continuance request
14 and we'll get back with everyone. So, I guess, I mean, if
15 there's nothing further, we'll be in recess.

16 MR. LEWIS: Your Honor, one thing. Just a moment of
17 clarification and I apologize. I heard you talk about the date
18 of July 15th, and I did hear proposed jury instructions.

19 THE COURT: I'm sorry. That would be the Wednesday
20 before trial and traditionally that would be the exhibit index.
21 That's the thing that the --

22 MR. LEWIS: Court reporter.

23 THE COURT: -- court reporter fills out. That has to be
24 filed, *voir dire* and the jury instructions.

25 MR. LEWIS: Thank you, Your Honor.

1 THE COURT: All right. We'll be in recess.

2 (Court Adjourned at 11:20 a.m.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/s/ Lissa C. Whittaker
Signature of transcriber

July 7, 2009
Date