

1 APPEARANCES CONTINUED:

2 On behalf of Defendant Price:

3 BERNARD GRIMM, Esquire
4 Washington, D.C.

5 On behalf of Defendant Ward:

6 DAVID SCHERTLER, Esquire
7 ROBERT SPAGNOLETTI, Esquire
8 Washington, D.C.

9 On behalf of Defendant Zaborsky:

10 THOMAS CONNOLLY, Esquire
11 Washington, D.C.

12 P R O C E E D I N G S

13 DEPUTY CLERK: Calling the co-defendant status
14 hearing matter, the United States versus Joseph Price,
15 2008-CF1-27068; Dylan Ward, 2008-CF1-26906; and
16 Victor Zaborsky, 2008-CF1-26997.

17 MR. GRIMM: Good morning, Your Honor. Good
18 morning, Your Honor. Bernie Grimm on behalf of Mr. Price.

19 MR. SPAGNOLETTI: Good morning, Your Honor.
20 Robert Spagnoletti for Mr. Ward.

21 MR. SCHERTLER: Your Honor, good morning.
22 David Schertler for Mr. Ward.

23 MR. CONNOLLY: Your Honor, good morning.
24 Tom Connolly for Victor Zaborsky.

25 MR. SCHERTLER: And all our clients are here,
Your Honor.

1 THE COURT: What happened to Mr. Onorato?

2 MR. SCHERTLER: He's milling around on some other
3 case, but I've got Mr. Spagnoletti standing in if that's
4 all right.

5 THE COURT: I hope he can do it.

6 MR. KIRSCHNER: Good morning, Your Honor.
7 Glenn Kirschner and Pat Martin for the United States.

8 MR. MARTIN: Good morning, Your Honor.

9 THE COURT: Good morning to everyone. I wish I
10 could -- I don't think there are enough seats. If there
11 were, you could have them. Maybe there are. If you can
12 find seats, you're welcome to sit down.

13 I'm not in a position to have an evidentiary
14 hearing or even extensive argument on the remaining
15 discovery disputes that are the subject of defense motions
16 and Government oppositions. I've done little more than
17 skim your pleadings as they've come in during the week
18 because I've had other things I've been working on.

19 There are a couple of issues that I think we
20 might be able to profitably discuss today. Um, there's one
21 other matter that I need to discuss with defense counsel ex
22 parte for a minute, um, and I do think that we should
23 probably schedule something, um, which Mr. Kirschner refers
24 to as an IPA hearing. It doesn't matter to me what we call
25 it, but I get the sense that one of the remaining discovery

1 problems is that there are still some biological material
2 that needs to be tested, and the Government has
3 been reluctant to do it because if they do, it might
4 exhaust the material and would thereafter then prevent the
5 defense from doing independent testing. And that's not --
6 not a unique problem. It comes up from time to time, and
7 the way it's usually handled -- maybe it can be done in
8 this case -- is as to those specimens where there's a high
9 risk that it will be exhausted with the first test used,
10 the parties sometimes can agree on an independent lab to do
11 it, um, and then the defense exercises their right to have
12 it independently tested by testing it jointly at the same
13 time as the Government tests it. I don't know whether
14 that's a feasible alternative in this case, but, otherwise,
15 it's a problem because the Government wants to test it, and
16 once they do, there may be nothing left. So I don't know.
17 If you have another suggestion as to how to handle that,
18 I'll be glad to consider it.

19 That's one example of something that I think we
20 can discuss maybe even today, but, otherwise, we need to
21 put it on the agenda at a full IPA hearing or whatever one
22 wants to call it.

23 Do you have another idea of what we need to
24 accomplish today?

25 MR. KIRSCHNER: I think, Your Honor, given the

1 sort of paper that's been filed back and forth, and I think
2 as recently as yesterday, your clerk had informed me that
3 there was another 50-page filing from the defense which we
4 then pulled up off of CourtView yesterday and haven't even
5 made our way through that whole thing.

6 THE COURT: I hope it's not the one that was
7 filed ex parte because that one, you're not supposed to
8 see.

9 MR. GRIMM: I think it was our reply to
10 their opposition motion to compel.

11 THE COURT: I did see that. That's the one I
12 haven't had a chance to read thoroughly either.

13 MR. KIRSCHNER: Here's what I would suggest: We
14 can certainly take up topics regarding consumability of a
15 relatively few number of items that I think pose that
16 concern. It may be that, um, we can sit down with the
17 defense and agree to joint testing. We're certainly
18 amenable to that.

19 Um, and then I think we do have to kind of set a
20 schedule moving forward that will -- perhaps if the Judge
21 is -- if the Court's available on some successive Friday
22 afternoons or two where we can devote an hour or two --

23 THE COURT: For a long time.

24 MR. KIRSCHNER: Yes, sir. To dealing with the
25 Bill of Particulars and some of the discovery

1 disagreements, many of which I think will either have been
2 mooted out. Some of them, not all of them, will be mooted
3 out as we continue to provide discovery. Um, or there will
4 be, um -- at least we'll be able to narrow the focus of the
5 disagreement and then offer it to the Court.

6 And I would invite counsel -- I think, um, their
7 105-point chart I think is sort of helpful, and we tried to
8 fashion our response by using their 105-point numbering
9 system just as a matter of convenience for the Court. I
10 would think it would be productive if we could sit down
11 maybe sometime next week because the Government doesn't
12 want to delay this any longer than it has to be delayed.
13 But we appreciate that the defense needs what it needs so
14 it can make some tactical decisions about what experts to
15 employ to the extent they haven't already done so.

16 So I would propose that maybe we can come up with
17 a time next week, sit down with defense, and actually go
18 through that 105-point list or at least however many
19 outstanding disagreements there may be, come up with some
20 agreements, agree to disagree on some things, and narrow
21 the focus of an evidentiary or at least an argument on the
22 motion to compel in this next couple of weeks.

23 THE COURT: Well, that's what I was hoping
24 everybody would agree to. I'm not prepared to deal with it
25 today anyway, but -- and I need to set aside more time than

1 I have this morning to do it if we have to do it. But what
2 would be helpful to me is to get as few disputes as
3 possible and then those that are really in dispute,
4 authorities as to why you say it's discoverable and why
5 they say it's not, um, and then be able to rule on a legal
6 issue rather than just people arguing about things.

7 MR. GRIMM: Your Honor, I don't think we've ever
8 had any objection to proceeding in that fashion. We have
9 sent dozens of letters as you can see and gotten very
10 little response to it. When we filed the motion to compel,
11 then we got some discovery responses. But we're more than
12 happy to sit down with Mr. Martin and Mr. Kirschner and
13 discuss what's really in dispute and what's not and what I
14 think can be resolved to narrow the issues for the Court.

15 I think we have the motion to compel discovery
16 outstanding, there's a motion for Bill of Particulars. I
17 think there are issues raised by the IPA hearing. Those
18 are probably the three things that are ripe for some kind
19 of court hearing now, but I'm happy to meet with the
20 prosecutors. We're happy to meet with the prosecutors
21 before that and then set some dates where the Court can
22 listen to what is really in dispute and make some
23 decisions.

24 THE COURT: I'm looking to make sure I brought --
25 um, let me ask a couple of questions that might advance the

1 inquiry some. I'm not sure it will, but I'll try. There
2 is -- there appears to be a dispute -- I'm not sure what
3 the significance of it is on either side's -- from either
4 side's point of view -- about whether Mr. Price did or did
5 not tell the authorities that his brother had a key to the
6 house. Um, one of these is -- part of that is a discovery
7 dispute, and part of it is, um, um -- well, let me leave it
8 at that.

9 You allege in the overt acts in the indictment --
10 the grand jury alleges that Overt Act No. 14 is that on or
11 about August 3rd, 2006, Defendant Price concealed from law
12 enforcement authorities that his brother, Michael Price,
13 had keys to the residence at 1509 Swan Street, and I'm
14 going to put aside for a minute Overt Act No. 17 which I
15 have separate questions about. One of the things I thought
16 I picked up in the defense motions is that they claim that
17 he did not only give it but write it down on a list.

18 Both things can't be true, um, and you say we're
19 not -- in your response to the discovery demand, you say
20 we're not aware of any such list. Does that mean you've
21 given up every -- every possible source of, um, who would
22 have it?

23 MR. KIRSCHNER: We would never give up. We have
24 done everything we can, and we did it again, Your Honor, in
25 response to seeing that information offered by

1 Defendant Price. Of course, just because Defendant Price
2 said it doesn't make it so, but I think more pointedly,
3 when you look at the videotaped interview, non-custodial
4 interview of Mr. Price on August 2nd and 3rd, he was asked
5 point blank who has keys to Swan Street. He said -- I'm
6 paraphrasing because I haven't reviewed it in some time,
7 but the defense has it -- just some contractors.

8 THE COURT: Well, they say he wrote it down and
9 made a picture.

10 MR. KIRSCHNER: He then alleges that at some
11 other point in time, he wrote these things down and gave it
12 to either Detective Norris or Sergeant Wagner. I spoke
13 with both of them again this morning. Although, I had been
14 told all along, we have the universe of notes, I wanted to
15 double check, and they said that didn't happen. In fact,
16 if he had -- because I will say he does mention
17 Michael Price in other parts in his interview expressing
18 some problems that he had, had with his brother, and I'll
19 tell you, if he had given that information to the police in
20 light of saying he had, had some problems with his brother,
21 um, that would have been an area ripe for investigation at
22 that moment. He did not do that.

23 THE COURT: All right. Well, maybe it will just
24 remain in that status. If your response to that discovery
25 question is there's no place else we can look, it did not

1 happen, and he chooses to testify or introduce other
2 evidence that it did happen, then that's as much as we can
3 do I think.

4 Um, are you able to tell me today in front of
5 everyone or not, um, what the significance of that is?

6 MR. KIRSCHNER: The key?

7 THE COURT: Yeah, whether Michael Price had a
8 key.

9 MR. KIRSCHNER: The significance is that I think
10 they offered a --

11 THE COURT: An intruder theory.

12 MR. KIRSCHNER: They offered an intruder theory,
13 and they withheld from the police -- if they wanted to talk
14 about who had access to that home without having to force
15 their way in, they withheld from the police one of the most
16 important facts in that story which is that my -- in his
17 words -- drug-addicted brother had a key.

18 THE COURT: So it's circumstantial evidence that
19 the other version was a false exculpatory version
20 basically? That's what you're saying?

21 MR. KIRSCHNER: Yes.

22 THE COURT: All right. Now, on Number 17 -- I'm
23 sorry?

24 MR. CONNELLY: Mr. Kirschner has a habit of
25 saying they when he refers to an individual. Mr. Zaborsky

1 withheld nothing about Michael Price or anything else.

2 THE COURT: Fair enough.

3 MR. KIRSCHNER: Nor do I intend by overstatement
4 to include everybody in everything I say, so my apologies
5 to Mr. Connelly.

6 THE COURT: All right. Every other overt act in
7 this alleged conspiracy occurred on August 2nd and August
8 3rd except for one, and the one is Number 17 which, um,
9 asserts that sometime in November of '07, um, Mr. Price
10 told Catherine Wone --

11 MR. GRIMM: Your Honor, can I interrupt for one
12 second? That witness is in the courtroom, so if we're
13 going to have a discussion on that in any detail and
14 Mr. Kirschner's going to relay the details of what that
15 witness said, I would rather, um, the young lady --

16 THE COURT: Mr. Kirschner is going be able to
17 tell her anyway what this is about, and he's already
18 discussed that. I mean, I don't see that there's a need to
19 exclude anybody.

20 MR. GRIMM: Okay.

21 THE COURT: Um, I just don't understand what it
22 has to do with the alleged conspiracy. Um, it alleges
23 that, um, Price told her that he gave all the names of
24 workers and contractors but declined to tell her that
25 Michael Price also had a key.

1 MR. KIRSCHNER: Your Honor, I think that
2 Mr. Price was --

3 THE COURT: Is it the same answer as the one
4 you've given me?

5 MR. KIRSCHNER: It is, and they were sticking
6 with the story that they had agreed to provide in hopes of
7 exculpating themselves.

8 THE COURT: I doubt if that's an overt act of an
9 obstruction conspiracy, but you don't have to prove --

10 MR. CONNELLY: Your Honor, I have an additional
11 problem with that. First of all, she's not a law
12 enforcement officer.

13 THE COURT: Right. I know. That's why I said I
14 doubt it.

15 MR. CONNELLY: Second of all, the problem with
16 the likely conspiracy is it goes from August 2nd, 2006, to
17 the date of the superseding indictment and problematic with
18 two counts. Number one, these guys got counsel almost
19 immediately after their hours of interrogation, and to the
20 extent that the object of this conspiracy is alleged that
21 these guys didn't fully tell the truth to what happened
22 that night and the conspiracy runs from the time of the
23 event until the time of the superseding indictment, counsel
24 has somehow implicitly implicated that. So we're going to
25 have a jury charged with a superseding indictment that

1 lasts until January of '08 or '09, and at that time where
2 counsel had been advising these guys whether to talk or not
3 to talk. That's number one.

4 Number two, we've got a length of an -- of an
5 alleged conspiracy that lasts from August of '03 to January
6 of '09. The only overt act is that with respect to
7 Ms. Wone. As far as a charging matter, are there other
8 things within that two-and-a-half year period I got to be
9 aware of?

10 THE COURT: I totally agree, and that's why I --
11 I think -- well, let me put that question: Are you
12 alleging -- other than stonewalling, which they already
13 know about, are you alleging anything affirmative between
14 August 3rd, 2006, and the end date of the conspiracy,
15 November 21, 2008, other than Overt Act No. 17?

16 MR. KIRSCHNER: A couple of points in response,
17 Your Honor. First of all, there may be some additional
18 evidence, and evidence continues to come in. Um, I will
19 say, we will continue to aggressively investigate this
20 murder, um, moving forward, and we have every right to do
21 that we believe. Um, so there may be some other matters
22 that are, um, going to be proved up at trial. We'll give
23 notice to the defense of those other matters. I don't
24 think there will be dozens and dozens of other matters
25 moving forward, but I can think of a few at this moment

1 that I'm not prepared to actually disclose.

2 THE COURT: Well, they're not alleged as overt
3 acts.

4 MR. KIRSCHNER: Correct. Correct. But other
5 matters that I think would still be relevant and admissible
6 if the Court rules it's admissible to show their continued
7 participation in the charged conspiracy. But I want to say
8 a couple of things about the complaint that we've seen a
9 couple of times now from the defense about, sort of, the
10 nature and the scope and the length of the charged
11 conspiracy.

12 You know, the law of conspiracy -- and we are
13 drafting what I don't even know the Court will want us to
14 file which is a reply to the reply to our reply, but in any
15 event, as we're discussing some Bill of Particulars issues,
16 you know, once you're a member of a conspiracy, you are a
17 member of a conspiracy until you withdraw. I understand
18 there is law that involves a sort of de facto termination
19 of the conspiracy upon arrest which is not invariably the
20 case, but there is some support that, look, generally
21 speaking -- and in Superior Court, we usually litigate it,
22 um, in the context of or the statements made after arrests
23 in furtherance of the conspiracy. So it's kind of a
24 default way to take up the issue of, you know, what is
25 the -- what constitutes the end of a conspiracy.

1 And as Your Honor knows probably better than I
2 given the number of years that you've been on the bench,
3 you're a member of a conspiracy unless and until you
4 withdraw or the object has been achieved, and there's no
5 evidence of withdrawal that we have come upon. So we tried
6 to -- and it's a conspiracy to sort of conceal the true
7 circumstances of this crime, and that, we would suggest, is
8 an ongoing conspiracy unless it's been terminated or
9 they've withdrawn.

10 As Your Honor knows, the accepted methods of
11 withdrawal that we pick up from the case law involve
12 notifying the authorities that you're no longer a member or
13 notifying your co-conspirators that you are no longer one
14 of them or perhaps giving a full confession to the police
15 upon your arrest.

16 THE COURT: Stop at that point because that's
17 what's peculiar about this conspiracy. This conspiracy as
18 you -- as you conceive it seems to be you did it and you
19 won't tell us that you did and you continue not to tell us
20 that you did.

21 MR. KIRSCHNER: You continue to cover it up.

22 THE COURT: Well, that's different. That's
23 different. If you're doing something affirmative to
24 obstruct justice along the way, those would be overt acts
25 and you would allege them, but what seems to be alleged

1 here is you lawyered up, that's Mr. Connolly's point, you
2 lawyered up on August 3rd, and since that time, you haven't
3 told us anything about what really happened. And that
4 can't be a conspiracy to obstruct.

5 MR. KIRSCHNER: No. But to try to prove that
6 because once you retained counsel, you didn't tell the
7 Government. That's different from whether you did some
8 things that continue to misdirect.

9 THE COURT: I agree.

10 MR. KIRSCHNER: Um, but --

11 THE COURT: And the only one alleged here is the
12 one that I've identified in the --

13 MR. KIRSCHNER: And there may be some more that
14 frankly we may have to start out with an ex parte offer to
15 the Court recognizing that it will soon become public
16 knowledge.

17 THE COURT: All right.

18 MR. KIRSCHNER: But, um, so -- and let me -- you
19 know, Mr. Connelly, at a minimum, and perhaps the other
20 counsel have expressed this and we've had this discussion
21 about, you know, as they say in their papers, well, that
22 kind of makes the defense attorneys co-conspirators.
23 Obviously, that's never our intent nor is it our intent to
24 come in and suggest -- say or suggest that in any way. And
25 I would propose -- we're getting ahead of ourselves to the

1 trial which I know we're all looking forward to. But we
2 will try to find some ways to make sure -- and I'm sure
3 Your Honor will help us if we need help -- cut things back,
4 enter into stipulations.

5 When I say cut things back, it may be that as we
6 move forward and issues become joined, you know, we're
7 interested in protecting the rights of the defendant and
8 not unnecessarily making it look like the defense attorneys
9 are doing something wrong in the eyes of the jury. And we
10 may be able to actually shrink the charged period of the
11 conspiracy for legal if not tactical reasons or if Your
12 Honor believes that we're out of bounds, that you're going
13 to tell us we're out of bounds.

14 So I see a number of ways that -- that the focus
15 of this will become somewhat narrowed, and we will avoid
16 the things that we're debating today.

17 THE COURT: Well, that's the reason I raised it.
18 The defense, whatever else they're entitled to know,
19 they're certainly entitled to know if you allege
20 affirmative acts in furtherance of the conspiracy between
21 August 3rd and November -- August 3rd, '06, and November of
22 '08.

23 MR. KIRSCHNER: Fair enough.

24 THE COURT: Whatever they are, they're entitled
25 to know what they are. And the grand jury hasn't yet

1 alleged them.

2 MR. KIRSCHNER: True.

3 THE COURT: Um --

4 MR. SCHERTLER: I'm sorry, is Mr. Kirschner
5 implying there may be a superseding indictment yet again?

6 THE COURT: I don't think so. Maybe there will
7 be an editing of this indictment. I think we might be able
8 to do. I don't know the answer to that. It's something we
9 have to talk about.

10 MR. GRIMM: Could I ask Mr. Kirschner through the
11 Court just in terms of timing because we all want to move
12 forward on both sides when that would be disclosed, two
13 weeks, two months, two days?

14 THE COURT: Well, we're going to set some dates
15 after today, so we'll probably have a better idea of the
16 answer to that.

17 Another issue that's raised by the pleadings,
18 and, again, I don't intend to discuss all of them but there
19 are some that I thought might be helpful to ventilate a
20 little bit today, this business of the timing of what
21 happened on August 2nd and the mysterious -- I shouldn't
22 use that word -- the possibility that there were e-mails on
23 Mr. Wone's Blackberry that would affect the time of all
24 this. Is it the Government's contention that Mr. Wone
25 wrote those e-mails or did not write those e-mails?

1 MR. KIRSCHNER: Um, we cannot say that Mr. Wone
2 wrote those e-mails. That could very well have been an
3 orchestration as well. I can't prove that he didn't write
4 them. If I can give the Court a little bit of what we
5 have --

6 THE COURT: That's only one of my questions. The
7 second question is: Am I correct in reading the pleadings
8 that the only evidence of that at the moment is
9 Detective Wade's recollection of having seen them because
10 at the moment, you don't have any electronic, um, um, copy
11 of what was there?

12 MR. KIRSCHNER: That's correct. And this kind of
13 dovetails with one other request. And if Your Honor will
14 stop me if I'm trailing too far afield. When, for
15 instance, the defense attorneys asked for all of
16 Catherine's Wone's computers, we don't think they're
17 entitled all of them and the Government' doesn't have all
18 of Catherine Wone's computers. But, again, I think if we
19 can narrow the focus which we hope to do in meeting with
20 the defense to, for example, because there was an e-mail
21 that was at least addressed to Catherine Wone --

22 THE COURT: Did she get it?

23 MR. KIRSCHNER: Well, she didn't get it is the
24 answer. I think they're entitled to a limited -- because
25 everybody has private matters on their computers, and a

1 wholesale disclosure of their computers is just
2 inappropriate.

3 THE COURT: I agree.

4 MR. KIRSCHNER: But we can narrow the focus of
5 that maybe in agreement that, okay, let's provide
6 Ms. Wone's e-mails to show that she didn't receive that
7 e-mail that was allegedly sent from her husband. So we
8 certainly, I think, can reach some agreement on some of
9 those discovery matters moving forward.

10 THE COURT: Can you -- can you say the same thing
11 about the colleague and the lunch date? Do we know who
12 that is, and do we know that he didn't get it either?

13 MR. KIRSCHNER: No, we're still working on that.
14 And I cannot say that they did not receive it, um, and I
15 don't want to say more than that because I don't want it to
16 be an uninformed representation.

17 MR. SCHERTLER: Your Honor, if I could. I made a
18 request after -- immediately after getting the discovery
19 last Friday from Mr. Kirschner and Mr. Martin that they
20 disclosed to us the name of the colleague which is not in
21 their discovery packet. That's clearly Brady information.
22 Mr. Martin represented to me in my phone conversation with
23 him on Monday he talked to Mr. Kirschner, and they would
24 get back to me. We haven't heard anything yet. But I'm a
25 little bit shocked, frankly, that two-and-a-half years

1 later --

2 THE COURT: Tone it down. You don't get shocked,
3 Mr. Schertler. Come on.

4 MR. SCHERTLER: I try not to. Sort of like the
5 word mysterious.

6 THE COURT: Well, I took it back.

7 MR. SCHERTLER: They say that Detective Wade saw
8 this days after the murder occurred, so in early August of
9 2006. Here we are in April of 2009. They have the name of
10 the colleague that supposedly the e-mail was sent to or
11 written to, um, and we don't know whether he received it
12 two-and-a-half years later? I mean, wouldn't that be one
13 of the basic things that a detective would do if the day
14 after he read the e-mails on the Blackberry go and say,
15 hey, Joe Smith, did you receive an e-mail from Robert Wone
16 at 11:07 p.m. on the night of August 2nd, 2006? I guess
17 that's why I use the word shocked.

18 But regardless of whether they've been diligent
19 about investigating this, this is Brady information for the
20 defense that we need to investigate, and I think that
21 immediate disclosure is required by Mr. Kirschner and
22 Mr. Martin to us about the name of that person.

23 We'll meet with Detective Wade at the first
24 availability opportunity. I guess there are no notes. You
25 know, from what we've been told, the Secret Service

1 negligently failed to image that Blackberry. Um --

2 THE COURT: I'm going to ask about that too.

3 Why do you assume he knows the name of the
4 colleague? If it's based on Detective Wade's memory, he
5 may not remember the name of the person that it was
6 addressed to.

7 MR. SCHERTLER: Mr. Kirschner says that he's
8 investigating it now.

9 THE COURT: Yeah, but he didn't say he knows who
10 it is. Do you know who it is?

11 MR. KIRSCHNER: No.

12 THE COURT: That's what I thought he said.

13 MR. KIRSCHNER: We have a shortened nickname, and
14 we have not been able to identify that person.

15 THE COURT: That's what I thought you said.

16 MR. SCHERTLER: Okay. Well, it's two-and-a-half
17 years later. Even if you have a shortened nickname, um,
18 you can look at the guy's calender for what he had on his
19 schedule for August 3rd. There are a thousand ways you can
20 investigate.

21 THE COURT: I assume they're doing that.

22 MR. SCHERTLER: Well, I would like to do it too
23 because I think it's Brady that could be exculpatory toward
24 my client, and that's why I think that information is
25 important, and we should have what they have.

1 THE COURT: Then we'll put that on the agenda of
2 things that you need to discuss with each other. I don't
3 necessarily disagree with you. It may be that -- you'll
4 have plenty of time to investigate it. I just don't want
5 to do it all today.

6 MR. SCHERTLER: I understand.

7 THE COURT: I'd rather you all meet with each
8 other before then.

9 Now, as to the forensic analysis of the
10 Blackberry, are you still trying to do more, or is that
11 done because they may have a right to do their own -- you
12 know -- maybe if you sent it to Scotland Yard, you'd get an
13 answer that you haven't gotten so far.

14 MR. KIRSCHNER: The problem is we don't have the
15 Blackberry, and what I tried to lay out in the letter is a
16 fairly large number of electronic media, um, equipment was
17 provided to the Secret Service. Um, and when we talk about
18 negligently failed, I'm reluctant because they were trying
19 to help the investigation and work through this. They
20 imaged a number of the items that was -- that were provided
21 to them. The Blackberry apparently had to go to some
22 separate person in a separate unit for purposes of being
23 imaged. I can't give you an exact timeframe, but I think
24 the Blackberry was retained by the Secret Service, and the
25 Government generally -- for about four weeks or six weeks,

1 Ms. Wone had wanted the Blackberry back because it would
2 have had her husband's contact list, and she felt the very
3 understandable need to have it so she could contact some
4 people.

5 Detective Wade at some point was told -- was
6 informed, okay, everything's been imaged, his understanding
7 was including the Blackberry, and we know it's important to
8 get it back to Ms. Wone. Here's the Blackberry back. He
9 provided the Blackberry back to Ms. Wone. She got the
10 information she needed, she provided it back, and I'm quite
11 sure we did not ask her to retain it. She provided it back
12 to Radio Free Asia. They recycled it. I have spoken with
13 their president. I have spoken with their IT people. They
14 informed me they didn't retain a SIM card or some other
15 independent record and that the way that their Blackberries
16 have service provided, it goes to an outside provider.
17 They don't do that in-house IT or at least they didn't back
18 in 2006.

19 We've gone down every path that we can think of
20 to try to recreate that. Um, we have not been successful
21 in that, and those are the circumstances under which it was
22 turned back over. There was a misunderstanding about it
23 being imaged. It apparently wasn't imaged. We've talked
24 to the Secret Service agent who left the Secret Service and
25 is out in Ohio somewhere. We've gone down every path we

1 could, Your Honor, and it's unfortunate. But when we've
2 exhausted every possibility, we told the defense we're
3 willing to give them Detective Brian Wade, and they can
4 pick his brain and his recollection about what he saw and
5 whether we're talking about missing evidence instructions
6 months from now remains to be seen. But that's kind of the
7 sequence of events.

8 THE COURT: Nothing prevents the defense from
9 talking to the people at Radio Free Asia I suppose; right?

10 MR. KIRSCHNER: No.

11 MR. SCHERTLER: In light of what you just heard,
12 the representations that you just heard, there's a
13 slipperiness to the lack of evidence that becomes
14 affirmative evidence in this case. Is Mr. Kirschner saying
15 that he has a theory that these three gentleman concocted
16 an e-mail on Robert Wone's Blackberry, or the absence of
17 that evidence, does that become something that I need to
18 address in a Bill of Particulars or at, you know, trial.

19 THE COURT: Well, you're going to know before we
20 try the case what Catherine Wone is going to say about
21 whether she got an e-mail. You're going to know before we
22 try the case what Detective Wade is going to say about what
23 he remembers having seen on the, um, on the Blackberry, and
24 there may be nothing more to know at that point. And it
25 may be left up to each side to argue that, that proves that

1 he was alive at a certain time, and the Government can
2 argue that, that proves that the -- or tends to prove that
3 defendants were going so far as to concoct e-mails.

4 MR. CONNOLLY: And if that's an allegation in
5 this case, I'm entitled to notice of that.

6 THE COURT: I don't know about that. Why would
7 you be?

8 MR. CONNOLLY: Well, if it's an overt act in the
9 indictment -- of the conspiracy, I certainly have an
10 opportunity to know that.

11 THE COURT: It's not alleged as an overt act.
12 It's a piece of evidence, and it's circumstantial evidence,
13 and the jury will decide, I suppose, if that's where it's
14 left, um, what's more likely and what's less likely.

15 MR. GRIMM: Your Honor, we would be entitled
16 though to notification as to which defendant was actually
17 on that Blackberry doing it. Otherwise, if it's one as
18 opposed to the other, it damages my client if my client had
19 nothing to do with it. I don't think you can just throw
20 out that theory that someone had that in her hands that
21 because it wasn't received, one of them did it. I don't
22 know who, but one of them did.

23 THE COURT: Well, it wasn't fingerprinted, and
24 there's no way to know who wrote that e-mail, um, so, um --

25 MR. GRIMM: It's very damning.

1 THE COURT: Well, there's a problem in the case
2 generally, and you're well aware of it, and it's part of
3 your -- it's actually the crux of your motion for Bill of
4 Particulars which I'll probably end up denying that, um,
5 Mr. Kirschner and the grand jury and Mr. Martin have not
6 told you what each individual did that night. And whenever
7 we try this case, you're probably still not going to be
8 told. Um, now, whether it's fair to try the case that way
9 is something that we'll litigate, but I think Mr. Kirschner
10 has probably disclosed -- Mr. Kirschner and Mr. Martin have
11 probably disclosed everything they know or close to
12 everything they know about individual acts that any
13 individual did as part of this overall alleged cover up.

14 Um, now, if there are other -- if there's other
15 proof, that ought to come out before trial so you know.
16 Each counsel, obviously, is entitled to know what's alleged
17 against his individual client.

18 MR. GRIMM: Right.

19 THE COURT: Each client is entitled to know.

20 MR. GRIMM: I agree, but there's an opening
21 statement that one of these three did something with a
22 Blackberry, and that Blackberry's been around for two
23 years, and I found out four days ago that my client may
24 have concocted some staged e-mail on it. That's simply not
25 fair. It's not right at this point. It's not.

1 Mr. Kirschner knows -- he's the lead dog over there. How
2 would he not know that the time of death, which is
3 reflected in a Blackberry, wouldn't be important to the
4 person being charged with a crime when he said to this
5 Court that over an hour this man was tortured and murdered.
6 Over an hour. We now know that may be impossible, but we
7 can't prove it because we don't have the Blackberry.

8 THE COURT: He can't prove it either.

9 MR. GRIMM: Pardon me?

10 THE COURT: He can't prove it either.

11 MR. GRIMM: But he can allege it and say, I'm
12 sorry, but we lost it. I'm sorry, but it wasn't imaged.
13 Everybody was acting fair. If we had known early on, we
14 would have said, you know what, give it to us. We'll get
15 it done.

16 THE COURT: Well, you know, some of that is water
17 over the dam. It doesn't mean -- it doesn't mean it's
18 being withheld. You have it in plenty -- you have what
19 there is in plenty of time to prepare a defense based on
20 it. What it's going to show or not show remains to be
21 seen.

22 MR. GRIMM: Had it been disclosed to us though in
23 a timely fashion, we would not be having this discussion.
24 That's the problem. I'll be --

25 THE COURT: Discovery doesn't start until the

1 indictment is returned. I'm not sure what you're saying.

2 MR. GRIMM: That was -- that was months ago.

3 THE COURT: Well, it's now been disclosed. We're
4 months away from trial.

5 MR. GRIMM: Not when things are disclosed like
6 this. It adds to the time that we have to prepare now.

7 MR. SCHERTLER: Your Honor, I think our concern
8 is -- and, again, I don't want to go too far with this
9 because you're absolutely right, we are months away. We
10 don't have a trial date. We got this information now.

11 Our bigger -- our greater concern is we have been
12 asking for this information in written and oral form from
13 the day the indictment came down. The only way we seem to
14 get a response to it is when we file a 50-page motion to
15 compel, and then all of a sudden, we get a letter that
16 discloses Brady that Mr. Kirschner had in his possession on
17 the day the indictment was returned.

18 I think that our concern is the Government is
19 playing a little bit of a game here in terms of, okay, when
20 are we going to disclose certain exculpatory information.
21 Now, that may be a dangerous game for them in terms of
22 erring on the wrong side and having something bad happen to
23 their case as a result of it, but I think, you know, our
24 concern is that we get this stuff in time for us to
25 investigate it. This Brady information about the e-mails

1 is critical.

2 Detective Wade, if you read that affidavit again,
3 seems to imply there's an hour and a 20-minute period in
4 which all the manifest allegations that the Government
5 claims happened to Mr. Wone occurred. And when you look at
6 an hour and 20 minutes, you say, wow, well, that's a long
7 time. Just cut it in half, um, on some pretty compelling
8 evidence.

9 THE COURT: I understand the significance of it.
10 I mean, if he wrote that e-mail -- if there was an e-mail
11 and he wrote it, it makes a big difference in the case. I
12 understand that. The Government is -- and I'm not going to
13 let them hide stuff that you're entitled to know. At least
14 I'm going to try not to, but they're probably never, no
15 matter when we try the case, going to be able to prove that
16 he either did or didn't, but their -- their allegation is
17 that he didn't.

18 MR. SCHERTLER: Well, but part of the -- that may
19 be their allegation, but part of our problem is that -- and
20 I think negligent is a mild word, but they negligently
21 failed to preserve the evidence or have it properly
22 processed for us to make use of it. I don't know that they
23 can make that allegation based on the speculation and the
24 lack of evidence that Mr. Kirschner has.

25 THE COURT: It's possible you're right.

1 MR. SPAGNOLETTI: Your Honor, if I may. It's one
2 of the reasons why the electronic equipment, the narrow
3 period of time that we're talking about in our motion, is
4 so important. It's one thing to say that Ms. Wone didn't
5 receive it or Radio Free Asia can't find it on their
6 servers based on their investigation, but that's the reason
7 we need it ourselves. And if it's in their possession --

8 THE COURT: What's the it?

9 MR. SPAGNOLETTI: We need the physical material,
10 the computer material, to do the search simply because they
11 have not been able to find it. Again, as you said before,
12 Scotland Yard may be able to do so. And so it is -- I
13 understand this will be subject of the discussions that
14 we'll have with the Government about the list of 105, but
15 it may not be that we have to rely on the Government's
16 representation.

17 THE COURT: I agree with that.

18 MR. SPAGNOLETTI: And we have the right to go
19 look behind it --

20 THE COURT: I agree with that. I was focused on
21 the Blackberry, not on her computer or other servers. I
22 don't know what happens to e-mail in cyberspace, but I
23 agree that you're entitled to exhaust the possibility that
24 you can retrieve this if it ever was out there somewhere.

25 MR. KIRSCHNER: And as Mr. Spagnoletti says, we

1 need the electronic information. They will correct me if
2 I'm wrong, I thought they had been provided a copy of much
3 of the computer images that have been done by the Secret
4 Service. I may be wrong about that.

5 MR. SCHERTLER: Not Mr. Wone's or Ms. Wone's.

6 MR. KIRSCHNER: I didn't have Mr. Wone's, and I
7 explained why.

8 THE COURT: But I think -- if you haven't already
9 done so, I would assume you'd want to talk to the people at
10 Radio Free Asia to see where the servers are and what can
11 be gotten off the servers, and if you need any court orders
12 to be able to investigate that, I think I would be inclined
13 to give it to you.

14 MR. SPAGNOLETTI: Since we just learned about it
15 on Friday, we're now working through that.

16 THE COURT: You probably know better than I
17 what's -- what's involved in a search of that kind, but I
18 agree that just because the Government says we can't find
19 it, it doesn't end the inquiry necessarily.

20 Um, why don't we, um, suggest some dates, um,
21 that will give you -- that will give you time to meet. And
22 I'm -- I'm ready at any time to set a trial date by the
23 way, but I think the Innocence Protection Act and testing
24 of biological material really needs to happen first as we
25 discussed at the last hearing, and I'm not sure we're ready

1 to do that until the next hearing.

2 MR. SCHERTLER: I think we agree, Your Honor.

3 Your Honor, on motions hearings, do you usually
4 confine that to Fridays?

5 THE COURT: It's much easier if I'm in a trial
6 Monday through Thursday to do it on a Friday, and I would
7 do it in the afternoon on a Friday rather than when I have
8 a full calendar in the morning.

9 MR. SCHERTLER: Then I think I can tell the Court
10 on behalf of Mr. Spagnoletti and myself, the only Friday
11 we're unavailable would be May 7th. We're available every
12 other day. I'm sorry, May 8th.

13 THE COURT: The Court is closed that day for
14 training anyway.

15 MR. CONNOLLY: Your Honor, our preference would
16 be the sooner the better.

17 THE COURT: Well, I could do it -- I could
18 definitely do it the afternoon of the 15th.

19 MR. CONNOLLY: I'm out of town that day. When I
20 was saying sooner, I meant, like, next Friday.

21 THE COURT: I can't do it next Friday I don't
22 think. Plus, I think -- I don't want to, um, imply that
23 you can have a ten-minute conversation with Mr. Kirschner
24 and say, well, we can't agree. We're going to go to court.

25 MR. CONNOLLY: I understand.

1 THE COURT: I mean, you may need more than one
2 session to get this all done in a way that narrows the
3 focus.

4 MR. CONNOLLY: I'm completely amenable to sitting
5 down with the charts. I'm completely amenable to joint
6 testing.

7 THE COURT: Okay. Well, if it can't be the 15th,
8 I probably could do it the 22nd, and I could do it the 29th
9 also of May at 2:00.

10 MR. GRIMM: Either days are fine with us.

11 THE COURT: Well, if Mr. Connolly wants the
12 earlier one, we can shoot for the 22nd.

13 MR. CONNOLLY: That's fine, Your Honor.

14 THE COURT: Do you want to discuss with each
15 other when you're going to meet, or can I rely on your
16 being able to -- there's a lot of people involved.

17 MR. GRIMM: We get along on a regular basis, Your
18 Honor. As the Court can see, we're relatively friendly.

19 THE COURT: All right.

20 MR. GRIMM: That won't be a problem.

21 May I bring up one more issue?

22 THE COURT: Yes.

23 MR. GRIMM: We would like to ask on behalf of all
24 three defendants that any, um, restrictions, um, on
25 pretrial release be removed and they be put on straight

1 personal recognizance. Right now, all they're doing is
2 checking in once a week. They've done that religiously.
3 There's no drug testing requirement. I think it's clear
4 based on the track record that these three gentleman are
5 here to fight these charges and go to trial, and we're just
6 wasting -- I'm not so much concerned about their time, but
7 I think just wasting the time of the Pretrial Services
8 Agency, so we'd ask the Court to modify conditions of
9 release to straight personal recognizance for each of the
10 defendants.

11 THE COURT: Isn't the only additional condition
12 that's left that when they travel out of town, they have to
13 notify where they're going, when they're coming back, and
14 where they can be reached while they're gone?

15 MR. GRIMM: No. I believe that they have to
16 check in once a week personally. And that's what they have
17 been doing. And we -- and I think we don't have a problem
18 with -- with checking in on travel, but I think it's the
19 once-a-week, personal check in that we're trying to get
20 removed.

21 MR. CONNOLLY: It's physically coming to the
22 courthouse instead of calling.

23 THE COURT: I guess I don't have a problem with
24 that unless you do.

25 MR. KIRSCHNER: A one-day-a-week check in doesn't

1 seem burdensome, but I will not say that we have some
2 indication that there have been concerns while they've been
3 on release, so we'll defer to the Court. We do -- and I
4 think -- I don't hear the defense disagreeing, we would ask
5 for continued notice of travel. Um, but beyond that,
6 that's fine.

7 THE COURT: All right. I can change -- I can
8 change the in person to telephone. So they call once a
9 week whether they're traveling or not, and then they call
10 in addition if they're traveling.

11 MR. SCHERTLER: That's fine.

12 MR. CONNOLLY: Perfect.

13 MR. KIRSCHNER: Can I inquire through the Court,
14 are they still all living at the same place that they have
15 been living at, or has there been movement?

16 THE COURT: Well, if there's a change of address,
17 they also need to notify the pretrial services of that
18 immediately.

19 MR. SCHERTLER: Right. I don't think that's
20 changed.

21 MR. CONNOLLY: No change.

22 MR. KIRSCHNER: Thank you.

23 THE COURT: Um --

24 MR. SCHERTLER: And just so we're clear, on May
25 22nd, Your Honor, you'll handle -- we'll address the

1 discovery motions and then, um --

2 THE COURT: I would like a -- I would like a
3 pleading by the 15th not to exceed ten pages on each side
4 that tells me -- that identifies the remaining discovery
5 disputes and the authorities each side claims in support of
6 their positions that it either is or is not discoverable.

7 MR. SCHERTLER: That's fine.

8 THE COURT: And I hope the list is down to a
9 manageable number. I guess I would -- and I'm limiting
10 that to Rule 16 discovery, not Brady discovery. If there
11 are Brady issues, we have to litigate that separately I
12 guess.

13 MR. KIRSCHNER: And an IPA hearing, Your Honor,
14 will that await another status?

15 THE COURT: I was thinking we would set that on
16 the -- on the -- when we convene on the 22nd, but maybe we
17 could set it now. I'm not sure I understand the universe
18 of things that we're talking about in the -- and there is
19 one thing I need to discuss with defense counsel too on a
20 pending ex parte motion. But -- but it's just a question
21 of whether this is preventing us from setting a timely
22 trial date which I really don't want to lose sight of.

23 MR. KIRSCHNER: If we can perhaps after we meet,
24 um, and narrow the focus a little bit, maybe we can talk
25 about at the next status hearing those -- particularly

1 those things that raise consumability issues because I
2 think that will be the sticking point, if any, as opposed
3 to simple retesting of something that can be retested.

4 THE COURT: Well, I think, um, you should also
5 discuss when you meet to the extent that the defense is
6 either willing or required to disclose it, what the defense
7 wants to test of the things that you have already tested
8 that haven't been consumed.

9 MR. CONNOLLY: Your Honor, we have done that.
10 We've actually written a letter to Mr. Kirschner asking.

11 THE COURT: All right. And you do want to test
12 some items?

13 MR. CONNOLLY: Oh, yes.

14 THE COURT: All right. Well, let's get that on
15 the table for the meeting on the 22nd also to make sure we
16 can do the logistics of that. And maybe you'll be able to
17 give me a sense at that hearing of how long that's going to
18 take on your side.

19 MR. CONNOLLY: I think we listed four separate
20 items we wanted to test. We're not talking 180. We're
21 talking four items.

22 THE COURT: Okay. And you have a lab identified
23 and you'll be able to tell me how long that they expect it
24 to take?

25 MR. CONNOLLY: Well, we have a lab in one

1 instance, and hopefully the FBI lab will do the remaining
2 three other items.

3 THE COURT: The FBI lab didn't do the first test?

4 MR. CONNOLLY: No. They haven't done tests on
5 things that I was hopeful they would have done for the
6 items that have been recovered.

7 THE COURT: I see what you're saying. All right.
8 Fair enough.

9 All right. Let me ask the three defense counsel,
10 any three, to approach the bench.

11 (Whereupon, an ex parte bench conference was held.)

12 (Whereupon, the proceedings ended.)

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CERTIFICATE OF COURT REPORTER

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I, Caroline Maddox, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the hearing in the case of the **UNITED STATES OF AMERICA versus JOSEPH PRICE, DYLAN WARD, and VICTOR ZABORSKY**, Criminal Action Number 2008-CF1-27068, 2008-CF1-26996, and 2008-CF1-26997 in said court, on the 24th day of April, 2009.

I further certify that the foregoing 40 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tapes of said proceedings.

In witness whereof, I have hereto subscribed my name, this the 6th day of May, 2009.



Caroline Maddox
Official Court Reporter

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