SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA		
v.	:	CRIMINAL ACTION NOS.
JOSEPH RAY PRICE	:	CF1 27608-08
DYLAN WARD	:	CF1 26996-08
VICTOR ZABORSKY	:	CF1 26997-08
	:	
Defendants		

Washington, D.C.
Friday, January 15, 2010

The above-entitled action came on for a Hearing before the Honorable LYNN LIEBOVITZ, Associate Judge, in Courtroom Number 310, commencing at 2:00 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND RECORDS OF TESTIMONY AND PROCEEDINGS IN THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

GLENN KIRSCHNER, Attorney at Law
Assistant United States Attorney
Washington, D.C.

PAT MARTIN, Attorney at Law
Assistant United States Attorney
Washington, D.C.

(Appearances Continued)

APPEARANCES CONT.

On Behalf of the Defendants:

For the Defendant: Joseph Ray Price
Bernard Grimm, Attorney at Law
Washington, D.C.

For the Defendant: Dylan Ward
David Schertler, Attorney at Law
Washington, D. C.

For the Defendant: Victor Zaborsky
Thomas G. Connolly, Attorney at Law
Washington, D.C.

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DEPUTY CLERK: Calling on Your Honor's status hearing calendar, United States v. Joseph Ray Price, CF1 27068-08, United States v. Dylan Ward, CF1 26996-08, and United States v. Victor Zaborsky, CF1 26997-08.

MR. KIRSCHNER: Good afternoon, Your Honor; Glenn Kirschner and Pat Martin on behalf of the United States.

THE COURT: Good afternoon.

MR. SPAGNOLETTI: Robert Spagnoletti and David Schertler for Mr. Ward who is present.

THE COURT: Good afternoon

MR. CONNOLLY: Tom Connolly for Mr. Zaborsky.

THE COURT: How are you.

MR. GRIMM: Bernie Grimm on behalf of Mr. Price, Your Honor; good afternoon.

THE COURT: Good afternoon.

The case is here for a status hearing, and are all three defendants present for the record?

MR. SCHERTLER: Yes, Your Honor; they are.

THE COURT: Good afternoon.

The motions and matters that I think I have before me, and since everybody responded to the law clerk I would like to be sure that we are all in agreement: are the defendants' motion to dismiss; the motion for

scheduling order, the motion to exclude uncharged criminal conduct, and an exparte matter that I will deal with at the bench with counsel. And, is there anything else that anybody thinks I am supposed to be addressing today?

MR. KIRSCHNER: No, Your Honor.

MR. SCHERTLER: No, Your Honor.

THE COURT: The first one I would like to handle is the motion to dismiss, and I am happy to hear argument. I have read the pleadings, and I understand the arguments in the pleadings so I am not inviting argument, but I am happy to hear argument about other things you want to tell me. And so, Mr. Spagnoletti, are you arguing on behalf of the defendants?

MR. SPAGNOLETTI: We are, Your Honor, and I am going to take very seriously your admonition not to repeat what is in the pleadings. So, I am going to sort of cut to the chase here.

The core to our motion -- as you know there are three counts in the indictment. The motion relates to counts one and two which are conspiracy to obstruct justice, and obstructing justice. Assuming all of the facts true as the government has alleged in the indictment, facts which at trial which we will most certainly not agree with and prove otherwise, but for

purposes of this motion, assuming them all to be true, not one of them as they are enumerated in the indictment -- there are 17 in the overt acts--

THE COURT: Can I just ask, are you saying that the acts alleged in count one are not sufficient to establish the charges in count one? Or, are you saying that I am bound to consider the acts alleged in count one and consider the 12b2 motion as to count two?

MR. SPAGNOLETTI: Well, both, Your Honor.

THE COURT: Why is that, if the case is saying this is not a sufficiency inquiry?

MR. SPAGNOLETTI: I am not saying that we are talking about sufficiency. I am talking about what is alleged in the indictment. If -- the government has failed to allege that the first eight overt acts occurred in a pending proceeding, so you take those off the table.

I think our motion fairly and convincingly demonstrates why that is the case. What is left are false statements made to the police, all of which fit into those last -- except for the last overt act, act 17, all of them fit within the false statement category, which again our pleadings conclusively demonstrate can not as a matter of law support an obstruction of justice count.

As to the last act, the conversation with Ms.

Wone in November of 2007, that is so far beyond the official proceeding that is in question here and because she was not a member of law enforcement, for all of the reasons in the pleading that comes off the table as well.

When you take all of them off the table, and there can be no conviction for obstruction, there can therefore be no conviction for conspiracy to obstruct since those were not unlawful acts. Pearsall makes it --

THE COURT: Are you taking the position that overt acts must be unlawful acts?

MR. SPAGNOLETTI: No, what I am saying is that the object of the --

THE COURT: Overt acts can be lawful acts, what does it matter if all -- however many overt acts in the conspiracy are all lawful acts, and that no one of them could be a crime even if that were true.

MR. SPAGNOLETTI: It is what the purpose of the conspiracy was for was to obstruct justice. It could not have happened under the law. And, so the object of the conspiracy is not a crime. They have alleged it is a crime, but it is not as it has been borne out in the indictment. So therefore because you cannot obstruct justice, in any of the ways that they have said, the fact that they agreed to do those acts cannot be conspiracy to obstruct justice.

And, finally, what I would say, Your Honor, is if the court is going to sort of split the baby if you will going forward it is nevertheless very important for the defense that that be made clear at this stage. Because it will--

THE COURT: Meaning --.

MR. SPAGNOLETTI: Meaning, for example, perhaps if the court were to be inclined to agree with all of the acts before the 911 call, but not necessarily from the 911 call forward it changes the tenor of the case everything from opening arguments to the way the evidence gets introduced --

THE COURT: So you are asking me now also to rule on a motion to exclude evidence?

MR. SPAGNOLETTI: No, that is not -- I am asking to define the contours of what the obstruction could be as a matter of law because that will govern what evidence the court will ultimately allow, what motions we need to file in limine as we go forward with the case.

So we believe very firmly, and I would just repeat that we believe it is conclusive in our pleadings that none of the acts constitute obstruction and therefore not conspiracy to obstruct. And recognizing that it still leaves the tampering charge which we have not argued here. That would still continue to exist.

But, even if the court finds something other than complete dismissal of counts one and two, the contours of that are very important for the continuation of this case, and how it plays out ultimately.

Again, we can raise that issue again later on, but because this is before the court now in full form, we have made all of our legal arguments, arguments the court would see again further on down the line, we think it is very important for the court to address those.

THE COURT: Thank you. Mr. Kirschner will be arguing for the government?

MR. KIRSCHNER: Thank you, I will. I will be brief also. This is a sufficiency of the evidence claim by the defendant with a lot of window dressing. I think the most important point that the government would like to make really comes as a result of the reply brief filed by the defendants and by Mr. Spagnoletti's argument that as a matter of law let's set aside the first eight overt acts which are before they placed a phone call to the police. And then I think by all accounts, and even the defense account, an official investigation is on the way. So all of the acts that come thereafter certainly are committed during the course of an official proceeding.

But, Mr. Spagnoletti just argued that they can't be deemed to have been committed during the course

of an official proceeding as a matter of law because--

THE COURT: Are we now talking about one through eight?

MR. KIRSCHNER: No, we are now setting those aside. We are talking now about everything from the phone call forward. The defense argues as a matter of law they can't be obstruction because false statements to the police as a matter of law can't be obstruction.

THE COURT: Well, I think they are arguing that a particular false statement alone as cited in certain cases in those cases was deemed not to be a completed obstruction of justice.

MR. KIRSCHNER: I heard a slightly broader argument from Mr. Spagnoletti.

THE COURT: So, are you relying on a single statement here, or are you relying on more than one?

MR. KIRSCHNER: I am actually trying to address--

THE COURT: In your case, in your obstruction of justice count, assuming that I should be reaching a sufficiency of the evidence alleged in count one in deciding whether you have properly alleged count two, are you asking me to conclude that any one overt act, any single statement is the entire basis for that charge?

MR. KIRSCHNER: Absolutely not.

THE COURT: Is that how you are proceeding here?

MR. KIRSCHNER: No, but the only point I am trying to make is they adopt the federal case law which says that your obstruction, your effort to impede must come during a judicial proceeding no less than Judge Hogan in the F.Supp opinion cited by the defense said look, in the Smith case --

THE COURT: As opposed to an investigation?

MR. KIRSCHNER: As opposed to a statutorily defined police investigation.

THE COURT: But, if we are talking about everything after eight, we are talking about many that occurred during -- do we need to have that discussion?

MR. KIRSCHNER: Only because they stood up and said it is barred as a matter of law, so I think we do very briefly. That is the only point --

THE COURT: I actually don't think we do. I think that the arguments as to the later overt acts goes to whether lies to the police or omissions to the police or assertion of one's Fifth amendment rights could be an obstruction in these circumstances.

MR. KIRSCHNER: And, it can be because the law it cites saying that it can not be is federal case law that is decided in the context of an active judicial proceeding being required at the moment those false

statements are made. That is not what our statute says. And, that is a critically important distinction that the defense doesn't draw in its pleadings.

THE COURT: Okay, I understand.

MR. KIRSCHNER: And otherwise, I think we rest on the pleadings. Nothing in the defense pleading which is sort of like a criminal summary judgement that they are really asking for, and you know they argue that without the obstruction you could have the conspiracy to obstruct. The black letter law in the Redbook Instructions itself is that the object of the conspiracy need not be achieved, and you could still have a viable conspiracy.

THE COURT: Here is the only sort of spacing which I think there is a factual discussion that they could reasonably suggest under 12b2 a sufficiency discussion that we ought to be having. And, that would be under count two, let's say all the evidence you had, or all the evidence that the count was based on was an allegation of acts, of the overt acts that you have listed. And, let's say that a certain portion of them did not occur during the police investigation that proceeded it, and so those would not be acts of obstruction. And, let's say all that was left were statements that were lies, or failures to confess, and that there were no sort

of affirmative acts of cleanup destruction of evidence anything other than talk or failure to talk. That that would not be sufficient on which to allege obstruction of justice.

So to the extent that that was your claim here, is that your claim here, and do you think it flies?

MR. KIRSCHNER: It is not our claim, and it kind of shows the folly of talking about the sufficiency of the evidence, when all we are looking at are the charged overt acts. That is not the entirety of this case. And even the federal cases that talk about --

THE COURT: And meaning after the placing of the 911 call?

MR. KIRSCHNER: Yes, Your Honor.

THE COURT: Is there anything about the 911 call itself that you would suggest is during the course of an official proceeding even under our law which is more than just either an insertion of the Fifth amendment privilege or a lie or a failure to confess?

MR. KIRSCHNER: I think the strongest evidence is the investigation itself was initiated after the defendants had kind of orchestrated and set the stage. They decided when to call the police. And when the police arrived they in substance said here it is, here is the crime scene.

THE COURT: I guess my question is why isn't everything from that moment on just a big old failure to admit a crime, and they are allowed to do that?

MR. KIRSCHNER: Your Honor, because it is misdirection. It is hours and hours of video taped statements by which they are misdirecting law enforcement efforts. They insist it is an intruder. Law enforcement has to go out and did undertake efforts to see whether there were other burglaries in the area, to see if there were intruders that might fit the MO.

Was that the main thrust of the investigation? Of course not, because of the way the scene had been orchestrated, and it was fairly apparent to everybody at the first instance. But it is not simply I didn't do it and I don't want to talk to you. It was active misdirection of the investigation over the course of hours of videotaped statements to the police, and that is not all.

There will be other evidence introduced. It hasn't all been --

THE COURT: I am not asking you to preview your evidence here.

MR. KIRSCHNER: There is more.

THE COURT: Thank you. I am prepared to rule. Did you want to respond?

MR. SPAGNOLETTI: If I could respond to that last point. The court is exactly right. What we have here is a series of interviews by the police where the defendants tell the police -- look, I didn't do it, I don't know what happened, somebody else must have done this.

THE COURT: They said more than that, didn't they? They said an intruder came in and here is how I knew it and they said all of this according to the allegations with the knowledge of what had preceded the investigation which is according to the government and their allegations that they had in fact materially altered the crime scene.

MR. SPAGNOLETTI: They didn't say an intruder came in. What they said is I don't know what happened, but it must have been an intruder because it wasn't one of us.

THE COURT: So taking the evidence in the light most favorable to the government which I must at this stage, and granting all reasonable inferences to the government, why couldn't a reasonable juror infer from that statement on these allegations that (a) it was false; (b) it was intended to misdirect the police and make them think it was an intruder instead of something else, and to perpetuate the things that had gone on prior

to the 911 call, the efforts to deceive, and the success in the deception by changing sort of the way things looked.

MR. SPAGNOLETTI: And we will take those set of facts. Still it amounts to telling a false statement to a police officer.

THE COURT: Do you have a case anywhere that says a false statement in a course of deception in a case where the alleged crime is in fact omission, concealment and all of that, could not be a part of a scheme to obstruct justice? All you have is cases that say a statement alone in those circumstances wasn't.

MR. SPAGNOLETTI: A false exculpatory statement alone is not enough to support an obstruction of justice.

THE COURT: Is not enough, or in those cases is not enough.

MR. SPAGNOLETTI: Certainly they were deciding the facts of those particular cases, but --

THE COURT: I didn't read the sort of blanket statement as a matter of law that you are asking me to see in these cases.

MR. SPAGNOLETTI: I would say this, there is no case that says as a matter of law you can have obstruction of justice based on false statements, particularly a false exculpatory statement. Let's be

very clear what the ramifications of this are because what the government would have this court do and believe, and allow to proceed, is that a defendant could be questioned, not given their rights, and not under arrest, none of that stuff and simply deny involvement in a crime and nevertheless be charged with an obstruction of justice. It is a constitutionally troubling --

THE COURT: I don't hear the government making that argument.

MR. SPAGNOLETTI: That is the effect of what they are arguing. It is a constitutionally troubling position that would allow them to charge someone for not confessing.

Again, in the District of Columbia, as we point out in the pleadings, the Council made a decision about how they were going to treat false statements to law enforcement, and they were only going to criminalize it first of all as a misdemeanor, and secondly in writing.

THE COURT: So, that is the only way it can be done?

MR. SPAGNOLETTI: No.

THE COURT: There is only one charge available?

MR. SPAGNOLETTI: No, but what I am saying is that a policy decision was made by the Council to treat them that way. The fact that false statements to the

police may be used in some other fashion is not necessarily determinative, but for these purposes the cases I think are fairly clear. These cases interpret 1503. It is a statute from which our obstruction of justice statute was derived.

The Court of Appeals has said specifically look to 1503 and the cases interpreting 1503 and interpreting our obstruction of justice law.

We were very careful about how we crafted this argument in the pleadings because we feel very s strongly that --

THE COURT: I noticed that.

MR. SPAGNOLETTI: We feel very strongly that the pleadings themselves demonstrate -- and the cases that we cite in the pleadings demonstrate that the kind of false statements that we are talking about here in and of themselves, just denying their involvement in the offense, is certainly not enough to constitute obstruction of justice.

THE COURT: I understand your argument. I will rule.

Before the court is defendant's motion to dismiss counts one and two of the indictment, the government's opposition to the motion and the defendants' reply. In their motion the defendants' seek dismissal of

counts one and two pursuant to D.C. Superior Court Criminal Rule 12b2.

Essentially, defendants' argue in their motion that taking the overt acts stated in count one as true, and assuming that this is the only evidence that underpins the charges in either of these two counts, that these acts either alone or together do not establish the elements of a substantive offense of obstruction of justice.

They argue further that defendants therefore as a matter of law could not have agreed to commit the offense of obstruction of justice as charged in count one, and that both charges must be dismissed.

For purposes of their argument the defendants divide the overt acts into three groups. First, those acts they argue precede the 911 call. Second those acts following the 911 call which they claim consists only of allegations of false statements and lies to the police. And, third, the final overt act, an alleged misrepresentation to the victim's wife.

The defendants' principal argument as to the first group is that none of these acts can constitute obstruction of justice because they did not take place during official an proceeding as required by the obstruction of justice statute alleged in this case,

22-722(a)6) of the D.C. Code.

They argue that this is because all of the pre 911 acts preceded the initiation of a criminal investigation by a department or agency of the government.

As to the second group, defendants principally argue that defendants' failure to confess or lies to the police without more cannot constitute obstruction.

And, as to the third defendants similarly argue that a failure to give truthful information to the victim's wife alone cannot constitute obstruction.

The government first responds that the defendants' arguments expand the scope of the proper inquiry of the court on a 12b2 motion to dismiss, and that the indictment on its face sufficiently sets forth the elements of the offense.

Second, the government appears to argue that the court ought to find that each overt act is in fact a crime in and of itself. As to the first group of acts designated by the defense, the government appears to argue that the knowledge that an investigation was likely to commence prior to the 911 call is sufficient to satisfy the requirement that the obstruction must take place during an official proceeding.

As to the second group of acts, the government

argues that in the circumstances the defendants' statements and omissions constituted acts of obstruction of justice in and of themselves.

And, as to the final overt act, the government similarly argues that the act of misrepresenting to the victim's wife constituted and act of obstruction of justice in and of itself.

I conclude that the defendants' arguments are meritless and should be rejected, but not for all of the reasons argued by the government. I need not reach the question, and I decline to, whether each overt act alleged in count one in and of itself could be an act sufficient to satisfy the elements of obstruction of justice.

The determination of whether the charges in count one and two are facially sufficient at this stage under Rule 12b2 does not require me to decide whether any single overt act alone was an obstruction of justice. Even if I did reach the kind of sufficiency analysis suggested by the defendants' motion, I would not have to decide these questions.

Under Rule 12b2 there are two criteria by which sufficiency of the indictment is measured. These are cited at Page 7 of the government's brief, and in the annotation to the rule. The first inquiry is whether it

contains the elements of the offense intended to be charged and sufficiently apprises the accused of the allegations he must be prepared to meet.

And, the second criterion is whether the record adequately shows that the defendant may plead a form of acquittal or conviction in the event that later proceedings are initiated.

I conclude that both criteria by which the facial sufficiency of the charges is determined under Rule 12b2 are satisfied here on the face of the indictment. Count one pleads every element of the offense of conspiracy to obstruct justice. Count two pleads every element of the substantive offense of obstruction of justice charged under D.C. Code Section 22-722(a)(6).

To establish conspiracy to obstruct justice the government is required to prove beyond a reasonable doubt that (1) two or more persons entered into an agreement to obstruct justice under Section 722(a)(6); that as to each defendant he intentionally joined in that agreement; and third, that a conspirator committed one overt act in furtherance of the conspiracy.

It is settled horn book law that an overt act need not be an illegal act. I am citing to a 1942 Supreme Court case, Braverman vs. United States, 317 US 49, and more generally this is so basic that I had to

find a hornbook to actually say it - Lafave Criminal Law Fourth Ed. Section 12.1 thru Section 12.2(c) at pages 613 through 628.

An overt act may be any act taken to carry out the conspiracy or effect the object of the conspiracy including a lawful act done for an unlawful purpose. And that is at page 627 at Lafave.

Moreover, the crime which is the subject of the agreement need not be completed for a conspiracy to be proved. Importantly for purposes of this motion, and I quote from Lafave, if the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement. And that is at Page 627 and note 76.

The crime of conspiracy thus is complete at the time the agreement has been formed, and the overt act has been committed under our statute. And that is whether or not the substantive crime is ever committed.

In order to prove obstruction of justice under D.C. Code Section 22-722(a)(6), the government must prove that a defendant "corruptly any way obstructed or impeded or endeavored to obstruct or impede the due administration of justice in any official proceeding. The term official proceeding is defined in Section 721(4) as any trial, hearing, investigation or other proceedings

in a court of the District of Columbia, or conducted by any agency or department of the District of Columbia Government, or a grand jury proceeding."

The defendants concede that a pending police investigation falls within the definition of the term official proceeding, and that such an investigation began at 11:49 p.m. on August 2, 2006, the time that the 911 call was made.

Here, the indictment alleges in Count one that the defendants agreed among themselves to obstruct justice in connection with the homicide of Robert Wone between August 2, 2006, the date of the murder and November 21st, 2008 and that the "primary object" of this conspiracy was to conceal from the authorities and others the true circumstances surrounding the homicide.

The overt acts alleged in Count One preceded, included and post dated the 911 call that initiated the police and fire department's investigation into Mr. Wone's death.

Taking these allegations as true, and in the light most favorable to the government as I must for purposes of deciding this motion the alleged acts included a dramatic, and massive effort to alter the crime scene, and to destroy or contaminate evidence between the time of the murder and the time of the

arrival of the police, as well as numerous statements to police, paramedics, homicide investigators and others thereafter that either were materially false or omitted material facts, and that were intended to mislead them as to the true circumstances surrounding the death and to misdirect them in their efforts to solve the crime.

I conclude that the agreement as alleged on its face to impede the investigation by the police was an agreement to obstruct justice under Section 722(a)(6).

Defendants argue that the overt acts prior to the placing of the 911 call could not have constituted obstruction of justice in this case because those acts preceded the initiation of the police investigation and that the defendants therefore could not have agreed to commit an obstruction.

This argument misapprehends the law of conspiracy, the facts as alleged taken as true, and in the light most favorable to the government would support a finding by a reasonable jury based on circumstantial evidence that the defendants entered into an agreement to obstruct the investigation even before the 911 call by cleaning up an altering the crime scene.

The overt acts alleged were in furtherance of that agreement, and those include the ones preceding the 911 call. It is not necessary that any act have been

during an official proceeding because the substantive crime of obstruction need not be alleged in Count one to establish the conspiracy.

Moreover, I would add that the alteration of the crime scene and other concealment of evidence of the murder may well have continued after the 911 call and through the five minutes up until the arrival of the police.

Once the 91 call was initiated the investigation by MPD and the fire department into the death began an official proceeding was underway, even according to defendants. The misrepresentations in the 911 call itself and the acts thereafter were all during an official proceeding and constituted an affirmative effort to continue the misdirection of the investigation that began with the very first overt acts alleged including those preceding the call.

As for the statements of the defendants to others after the 911 call the defendants argued that these alone could not have constituted obstruction. Of course, this could not defeat count one any event. As to Count two, the substantive obstruction, the cases cited by defendants for the proposition that their statements to others as alleged in the overt acts in count one could not have been acts of obstruction are inapposite. First,

because they are factually very different cases from this one, and in this case the statements took place during a much broader course of conduct.

And, second because the elements required to prove obstruction in federal court differ from those required under the D.C. Code.

The government here alleges the statements both to police and to others were part of and intended to further the overall scheme of affirmative misdirection of and concealment of the truth from the investigators and the allegations of obstruction does not rely as defendants suggest on any single lie or failure to confess by a defendant, but on the role of these statements and the continuing scheme.

I therefore find that taken together as true and in the light most favorable to the government the overt acts alleged in count one constitute a course of conduct that satisfies the elements of the substantive offense of obstruction at this stage, as they also do in the offense of conspiracy.

For all of the foregoing reasons I therefore deny the motion to dismiss.

Moving on to scheduling issues, I drafted a proposed scheduling order which I will hand out. It is just for discussion purposes basically since you all

couldn't agree, I figured I would come up with my own schedule. And some of my dates, I just want to talk about what I mean, and here are the issues that I really think are going to be important to address in setting a schedule.

The first is the disclosure of scientific evidence and the experts in the 16(a)(1)(e) disclosure. The second issue is the uncharged conduct issue, and the defendants have filed a motion to exclude uncharged criminal conduct which I'm going to obviously defer ruling on subject to a briefing schedule that we are about to set.

And so I guess my first question on the scientific evidence is has it all been disclosed, is there more coming, and what is the government's assessment of when it is going to be able to disclose these things. And the closer that comes obviously to our trial date, the less likely it is that we are going to keep the trial date.

MR. MARTIN: Your Honor, I think I can safely say that the vast majority of scientific and expert related discovery has been provided, but here is what may still be provided relief for areas, and they all fall into the expert disclosure frame.

We expect perhaps some more trace evidence

work, not a whole lot, but a little bit more.

THE COURT: On what?

MR. MARTIN: There were fibers that were covered from certain pieces of evidence. Some from the knife. The disclosure as to that has already been made. In other words, the towel fibers, but we are still asking our experts to look at other fibers that have been found on other pieces of evidence, including I believe it was a fiber on a piece of clothing Mr. Wone was wearing at the time he was found by the paramedics.

In addition to that we're asking our blood splatter expert to do some additional work, and I think we would call that quasi reconstructionist work but that is still being done and on going.

THE COURT: Can I just ask, have the defendants made a 16 (a)1(e) demand in this case, or is it just a 16b? In other words --

MR. SCHERTLER: The distinction?

THE COURT: 16 A (1) is that not the section any more? The specific disclosure as to the experts, their CV's and their opinions they are going to render?

MR. SCHERTLER: Yes. And these were made frankly, Your Honor, back in December and January of last year.

THE COURT: That is obviously imposes a

reciprocal obligation, and so you are also --

MR. SCHERTLER: Yes, although as I look at the rules 16 B, the reciprocal obligation, I think you have accommodated this in your scheduling order requires defense experts to be notified after the government completes its disclosure of its experts.

THE COURT: Because you can't know until you are told?

MR. SCHERTLER: Precisely.

THE COURT: Okay. And so, as to the trace evidence do they already know who the expert is. In other words, this is just additional stuff and possible supplements?

MR. MARTIN: They do, Your Honor.

THE COURT: As to the blood spatter experts the same thing?

MR. MARTIN: They do, Your Honor.

THE COURT: Do you anticipate disclosing any additional experts between now and trial at this point?

MR. MARTIN: We are looking into an anesthesiologist.

THE COURT: Anything else?

MR. KIRSCHNER: I think that is it.

THE COURT: So that my first date on here which is 16(a)(1)(e) notice due, you have essentially given it

all. The question is are you going to have other stuff to supplement with later, and you just don't have it now, right?

MR. KIRSCHNER: That is right,Your Honor. And again, I think it is probably 90 percent, 95 percent disclosed at this stage.

THE COURT: Just while you are standing, have you received any 16 (a)1(e) notice from the defense?

MR. KIRSCHNER: No, Your Honor, and we made that initial request back in 2008.

THE COURT: Mr. Schertler, I have put in a defendants' notice due February 26th given that you have gotten a large portion of 16(a)1(e) disclosure. Is that a reasonable date for you?

MR. SCHERTLER: Your Honor, I think that would be a reasonable date, and if there were anything that we felt where we needed more time on a particular topic we would obviously file the appropriate motion with the court and discuss that with the government. But, I think we do anticipate being prepared to make our reciprocal disclosures. I mean, that is five weeks down the road, and I think we can do most of it then.

I am a little bit concerned. They may be using the same trace hair and fiber expert and the same blood pattern expert, but we are talking about new topics.

THE COURT: Right. So, unless and until they make the disclosures you obviously can't respond, and you can't give full disclosure of what your experts would say to respond or rebut it.

MR. SCHERTLER: Correct, and I think what you have done is you have got a three week difference between the government completing its disclosures on February 5th, and us responding. I would say that especially if you are going to introduce an entirely new expert, like an anesthesiologist, it would take us more than three weeks to find somebody that would come in and examine what the government's expert has done and get that person on board for the defense.

THE COURT: You are saying if they were to introduce a completely new?

MR. SCHERTLER: Yes.

THE COURT: That is why I put that footnote in here. I am by no means trying to either cut off the further exploration of the scientific evidence and further testing, whatever on earth you all are going to do with the evidence here as long as you want to do it, but I just want to get a good discovery schedule. And if the government has something that is examined in April, and doesn't give you notice of it until April, and you are not able to deal with it until April, that is assumed

here, and you can tell me why that messes you up and you can't have a trial.

MR. SCHERTLER: Well, it messes us up for a lot of reasons. Here is --I think this is our overall concern. If you look back on this, this occurred three and a half years ago.

THE COURT: I really am not interested in hearing the entire debate over who has done a worse job of disclosing what here. I really would just like to set a schedule now.

MR. SCHERTLER: I understand, but we have got a--

THE COURT: Why don't we pay attention to that now.

MR. SCHERTLER: I will. We have got a May 10th trial date, and I understand, and what makes complete sense to me is that the court has set dates for the disclosure of expert evidence. I am concerned about the fact that the government might come up with additional evidence in April of this year right before trial--

THE COURT: They may well, Mr. Schertler, and my real point is to the extent that they do, I assume you are not suggesting that justice would be served by the government saying as of February 5th we will not test another thing, even if we could. And I also assume you

are not undertaking on behalf of the defendants not to argue a trial that the government could have done a lot of testing they didn't do, which you might be precluded from doing if I told them as of February 5th you can't test another thing. So, all I am saying is they will keep testing, you will keep testing, you will disclose the results timely. And, to the extent that someone is prejudiced in May, we will have a talk about it.

MR. SCHERTLER: I guess that is my point. The government has had three years to do all this testing by February 5th of this year. They should finish it.

THE COURT: If it happens, it happens. I am just not seeing that now. They have every incentive to get all this done. They know what will happen if they disclose test results a week before trial. It is highly unlikely that they will get to use it at trial, so we will see.

So, let's seriously set this schedule now. The government completing discovery, my goal there is to have you give discovery of everything you have got. In other words, we are picking it up, and we haven't got it yet, and we don't know yet. Just get everything you have got and put yourselves in a position to say on February 5th, we have disclosed everything we have, and after that obviously you have a continuing obligation to provide

discovery according to the rules. But, is February 5th a reasonable date for that?

MR. KIRSCHNER: Yes, Your Honor.

THE COURT: And, at this point, do you think the answer to that is that you're already have?

MR. KIRSCHNER: I think it is, Your Honor.

THE COURT: That may be. That way we will just understand that you have at least given what you have.

For notice of uncharged conduct, and I think that is the other really complicated issue here, much more complicated -- mostly complicated by the fact that none of it is probably truly other crimes evidence, and so I will sort of use a 404b umbrella here.

But, I think that the uncharged conduct here could fall into three categories. And, in thinking about sort of when I want to know when disclosure has been made, so that we don't end up messing up the schedule, I think that the first category is circumstances of the murder, the things that are articulated in the affidavit, and whatever else has already been disclosed.

It would be I think hard to suggest the fact that the murder could not be introduced as evidence in this case. And, it would be hard to suggest that the circumstances surrounding it and the evidence that the government has as to what happened during the murder

couldn't come in.

The questions here are does the government intend to argue that the defendants committed those acts. In other words, are you here saying one or all defendants committed the murder? I am looking at Mr. Kirschner. Who should I be looking to on this?

MR. KIRSCHNER: Probably both of us.

THE COURT: Are you going to be saying, and I am just hypothesizing, I am not asking for an answer right now. Are you going to be saying a murder happened, and they cleaned it up, and that was obstruction. Are you going to be saying a murder happened and they did it one or all, and that is why they cleaned it up, and it was the motive for the obstruction.

Or, are you going to be somewhere in the middle of that saying there is certainly enough here to suggest that that is the motive. And, I think the implications of that for the defendants are significant. I think they are entitled to know what your theory is soon enough to rebut that theory, because it necessarily is going to depend on the presentation of some scientific evidence, and is necessarily going to implicate the need to call experts.

Now, I'm going to assume they have probably done some of that thinking already, but without deciding now what of the circumstances come in, and what the

government is allowed to argue, I at least think they need to know what you are going to try to argue. And, I don't think that the government should be forced to you know decide a matter that they may well not decide until ten minutes before opening statements, but at least you do need to say what you may try to do.

MR. KIRSCHNER: I think we will do that according to the Court's schedule on February 5th, in our written notice.

THE COURT: That was my purpose for notice number one. Uncharged conduct number one in my view, and Mr. Schertler, you can tell me whether this makes sense because of the potential for either Frye hearings or the need to get other experts, I do think you need to know that early. I don't know that that is so much a crimes discussion.

There certainly will probably be motions in limine by the millions, in which I have to answer the questions of what if any of this evidence is either so speculative it that it shouldn't be offered; what if any of this evidence is irrelevant, what if any of this evidence is so prejudicial that it shouldn't be offered, but as a fundamental proposition clearly something about the way he died is going to be coming in in this trial.

MR. SCHERTLER: Precisely, and I think what we

would be doing is asking for two things. First of all, some sense of the government's theory of the case. Is their theory that one or more of the defendants in this case committed the crime, or is it that a third party that possibly these defendants knew who came in and committed the crime. I think that has been unclear from the time that this case began. We do not know what their theory is.

THE COURT: I think you are entitled to notice of that, and they are entitled to notice of that in the alternative if that is your decision, but to the extent it is in the alternative you then know that you are going to have to proceed to defend against it if that's how they choose to go.

MR. SCHERTLER: Obviously, if we think their theory is insufficient, I think as you point out as a matter of law to allow them to be able to argue that, there will be motions in limine we will file.

THE COURT: Exactly.

MR. SCHERTLER: The second part of it, and I am not sure if this is in the same uncharged conduct one, or what you are calling uncharged.

THE COURT: I will tell you what I think uncharged conduct two and three are, which is other stuff; things outside the four corners of the arrest

warrant on the night of August 2nd, and thereafter. In other words, things that are crimes that is two for me, and things that are not crimes but which might be considered to bad character evidence under 404b.

MR. SCHERTLER: Then I think what I want--

THE COURT: I had viewed number two actual crimes that didn't take place on the night of the offense as being something that the government could disclose later, but I don't contemplate that involving experts, but heaven only knows in this case.

And, secondly the third category may be something that in the government's view they don't have to disclose, and it is prejudicial and we don't like it and we will talk about it on the trial day.

MR. SCHERTLER: That category intrigues me.

THE COURT: I don't know what that this, I am sure you know better than I do.

MR. SCHERTLER: When you are talking about uncharged conduct one, and your are talking about four corners of the affidavit, 14 page four cornered affidavit, I think that one of our concerns all along has been these allegations of using a paralytic drug, in the affidavit.

THE COURT: Right; that's what I mean.

MR. SCHERTLER: The allegations of sexual abuse,

the allegations of torture, and frankly it is our position that the government has absolutely no evidence to support any of that, and they should not be allowed to argue that,

My impression is that is included in your uncharged conduct number one. The government would disclose to us which of those arguments they actually feel they are going to make at a trial, and then we could challenge it in the form of a motion in limine, or possibly a --

THE COURT: Exactly. Truly, I do want to emphasize number one, that I am not going to treat that notice as a matter as to which the government might be estopped later on from asserting slightly different facts, or that it has waived arguments, or that it is bound to make certain arguments. In other words, it is notice such that you will be sufficiently aware of those things that you would have to defend against.

And to the extent that they file it in the alternative, or say we may seek to introduce evidence of that is their decision. I think that they have got up until the minute they offer it to offer it. It is just that you need to have notice that they might so that you can meet the force of it, and to file whatever motions you want.

MR. SCHERTLER: And I assume if they don't give us notice, if they make a decision that they are not going to use a particular allegation made in the affidavit that they would be estopped then from using that at trial.

THE COURT: I am not going to say that now. I don't know what allegation we are talking about to the extent that you have had notice of what is in the affidavit since a long time. There may not be an issue of prejudice, if it was something that you would have hired an expert and conducted scientific testing to rebut, that would be a different story.

MR. SCHERTLER: Well, if they say they are going to use -- they plan on using everything that they have alleged in the affidavit at trial, then I think at least we know what we are dealing. If they say we are going to use half of what we've got in the affidavit --

THE COURT: That is not what I am asking for. I'm just not doing that. What I am saying is to the extent that there is uncharged criminal stuff in the affidavit such as a suggestion of sexual assault, if you're going to be arguing that the victim was sexually assaulted by someone, we don't know who, but we are not saying that he did it, that would be nice to know. If you don't know yet, that is fine.

If you are going to be arguing that -- or you might argue that one or more of the defendants committed a sexual assault, I think they are entitled to know that so that they can rebut that. Beyond that, to the extent that you challenge the foundation for such an argument, I think that would be a motion in limine that I would address later. And, at that point the government would have to proffer its evidence.

MR. SCHERTLER: Right; As I understand it that is still part of uncharged conduct number one, and you actually scheduled a hearing in which --

THE COURT: Yes, but I'm certainly not ruling that the government needs to check every sentence in the affidavit and say we're going to approve this, but we are not going to prove that, and we might change this a little bit. I am just not saying that.

So, let's await the notice and you can argue the specifics later when something comes up that doesn't satisfy you.

On the other crimes two, as I said, I don't know nearly what you all know on both sides and so I don't know what potential other crimes evidence there may be that you are going to seek to offer. And, to the extent that it wouldn't involve potential expert testimony or scientific evidence, I think that the second

notice date is the right date for that.

If you think there is something that the defense is going to have to get experts on I think you should act in an abundance of caution and disclose it on the first date though, because at the end of the day if they can't rebut because they haven't had time, you know I will have to decide what to do with it.

MR. SCHERTLER: Your Honor, Mr. Spagnoletti actually had a good suggestion. You talked about two, and you have also talked about three. Would it make sense to collapse two and three.

I think one of our concerns is --

THE COURT: I am not setting a date for three. I'm leaving that out there. I think that three is uncharged conduct that is not a crime. So, to the extent that -- and I hate to give examples, but I can imagine things that the government might seek to offer at trial that are not within the four corners of the affidavit, but which they think are relevant that are not crimes.

But, that you might argue are sensitive matters or so highly prejudicial and inflammatory that they should come in under Rule 403. And, those are not things that I think the government has to disclose under any theory. So, I would leave it to their sense of -- I guess I would say obviously that if we are at mid trial and

something exposed is brought to my attention that it is less likely to be resolved in a way that the government likes if I find out about it for first time while we are in the middle of trial.

So, they can give disclosure of what they want to give disclosure of with enough time so we can argue about it before trial.

MR. SCHERTLER: If I can just take a moment on that. Obviously, I think the government has had ample time to do everything in this case. The court has discretion to set a schedule that will allow the orderly conduct of the trial.

I don't know that it benefits the parties, the government as well as the defendants or the court to have this all of a sudden coming to light the day of trial or mid trial, when the government knows what it is. They could tell us before hand, and we could deal with it before hand. It is no prejudice to the government and it allows the court to frankly there are less issues you would have to deal with as we hit a trial that is going to be probably a lengthy and contentious trial.

THE COURT: I appreciate your position, but I just don't think it is consistent with what the government is obligated to do, and of course I would like to know what the transcript would be ahead of time so I

could think all the issues through. But, I don't think it is fair to the government to make them disclose their evidence just because it would smooth out the litigation.

MR. SCHERTLER: Well, it partially smooths out the litigation, but I think it also prevents a trial by ambush. There may be something that in and of itself would not be criminal, and they are calling it other conduct. But, it could be something that would be highly prejudicial in circumstances of this case.

It seems to me to benefit the court. It definitely eliminates prejudice of the defendants if we're allowed to explore that before we get into trial.

THE COURT: I think that is what motions in limine are designed for, and you should file, anticipate as much as you can, and if you want me to think about it and bring it to my attention, I will think about it.

But, if it is not criminal conduct they are not obligated to disclose it. So, in fact there is no notice requirement under Drew really any way, so this is all actually just management. So, I'm not going to order them to disclose non criminal conduct. I'm just going to ask the government to save us from as many mid-trial disputes as possible.

MR. SCHERTLER: Very well.

THE COURT: With that, are my dates okay in the

scheduling order?

MR. KIRSCHNER: They are good for the government, Your Honor.

MR. SCHERTLER: They are fine for the defense, Your Honor.

I think what we had suggested in our proposed scheduling order is a hearing or maybe a couple of hearings prior to trial to address I think primarily the uncharged conduct category number one.

THE COURT: But, none has been noticed yet. Oh, number one, I don't know that an evidentiary hearing would be appropriate, and I do believe at the moment that I can address those matters on the trial date, to the extent that I need to do something in a hearing ahead of time I will schedule it. Let's wait and see what the notice says.

My real concern is honestly Frye stuff, and I don't know, but I assume that we are going to have to hold a Frye hearing or more at some point. And, so that is the thing I am trying to anticipate in this schedule, and I would like to know as soon as possible whether we are going to do that. And, once I do know, I would also just like to set another status hearing, and to the extent so that I have you all, and if that is the Frye hearing, that is the Frye hearing maybe the next one it

would be.

MR. SCHERTLER: I think that makes a lot of sense of we could schedule a status hearing to see where we are once some of these filings have been made.

THE COURT: So we will set a status date, but before we get to that I have signed the scheduling order, I have distributed to all of you and I will get you copies of the signed order.

Next, I actually need to have all counsel at the bench, please.

(BENCH CONFERENCE UNDER SEAL)

THE COURT: Are you asking me to seal this bench conference?

MR. SCHERTLER: Yes, for the time being, Your Honor.

THE COURT: Do you want to articulare a basis sort of generically under the law.

MR. SCHERTLER: Your Honor, I think the basis would be for the sealing that the defendants have discussed information that is confidential in the sense that it goes to the defense strategy in this case, that does not have to be disclosed at this time.

THE COURT: And, that it would be a Sixth Amendment infringement for you to have to disclose that

publicly?

MR. SCHERTLER: I would agree with that.

THE COURT: Why don't we pick a status date.

MR. SCHERTLER: Your Honor, if I could propose I think under your scheduling order we have a lot of things that would be coming due towards the end of February, or early March. I think from the defense perspective we would almost prefer to have a status hearing sooner as opposed to later; maybe early in March to see where we are in these things.

THE COURT: That is fine. Do you want to do Friday March 5th for the next week, the 12th.

MR. MARTIN: The 5th is fine for the government

THE COURT: Why don't we do the twelfth to the extent that you all -- I wouldn't mind having seen the response before we have a status hearing, at 2:45 on the 12th.

Is there anything else we should do today?

MR. KIRSCHNER: I don't believe so, Your Honor.

THE COURT: See you on March 12th.

(Whereupon, the proceedings concluded at 3:10 p.m.)

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CERTIFICATE OF REPORTER

I, Cheryl Ransom-Jones, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by voice recognition, in my official capacity, the proceedings and/or testimony adduced, upon the trial in the matter of United States of America v. Joseph Price, Criminal Action No.27068-08, United States of America v. Dylan Ward, Criminal Action No. 26996-08, and United States of America v. Victor Zaborsky, Criminal Action No. 26997-08 on the 15th of January, 2010.

I further certify that the foregoing 48 pages constitute the official transcript from said proceedings, as taken from my notes, together with the backup tape(s) of said proceedings.

In witness whereupon, I have subscribed my name this 28th day of January, 2010.

CHERYL RANSOM-JONES
Official Court Reporter