

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DAVID A. BANKS;
2. DEMETRIUS K. HARPER, a/k/a KEN HARPER;
3. GARY L. WALKER;
4. CLINTON A. STEWART, a/k/a C. ALFRED STEWART;
5. DAVID A. ZIRPOLO; and
6. KENDRICK BARNES,

Defendants.

REPORTER'S PARTIAL TRANSCRIPT
(Jury Trial Day 1 - Excluding Voir Dire)

Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 8:55 a.m. on the 26th day of September 2011, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF:

MATTHEW T. KIRSCH and SUNEETA HAZRA, U.S. Attorney's Office - Denver, 1225 17th St., Suite 700, Denver, CO 80202

FOR THE DEFENDANTS:

Pro Se

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SEPTEMBER 26, 2011

(Proceedings commence at 8:55 a.m.)

THE COURT: You may be seated.

Court calls Criminal Case No. 09-cr-00266-CMA,
encaptioned the United States of America v. David A.
Banks, Demetrius K. Harper, Gary L. Walker, Clinton A.
Stewart, David A. Zirpolo and Kendrick Barnes.

Would the parties enter their appearances.

MR. KIRSCH: Good morning, Your Honor, Matthew
Kirsch and Suneeta Hazra representing the United States.
We also have with us at counsel table our advisory
witness, FBI Special Agent John W. Smith.

MS. HAZRA: Good morning.

THE COURT: Good morning.

MR. BARNES: Good morning, Your Honor,
Kendrick Barnes representing himself.

THE COURT: Good morning.

MR. ZIRPOLO: Good morning, Your Honor, David
Zirpolo representing himself.

MR. BANKS: David Banks, representing myself.

MR. WALKER: Good morning, Your Honor, Gary Walker,
representing myself.

MR. HARPER: Demetrius Harper, Your Honor,
representing myself.

MR. STEWART: Good morning, Your Honor, Clinton

1 Stewart representing myself.

2 THE COURT: Good morning.

3 Now, this hearing was set for 8:30 this morning.
4 Mr. Banks, I understand that you delayed proceedings by
5 not being here. Do you have an excuse?

6 MR. BANKS: We got caught. I was waiting -- there
7 was like 12 people in line when I got to my parking
8 location. Ended up getting out of line. I got out of
9 line about 8:25. Getting out of line, I had to go find
10 another place to park. It was a long line of people.
11 Some of the machines are kind of slow. So trying to
12 process those machines, and then finally get into a new
13 location, getting parked, then going to that machine, and
14 coming over here, delayed me probably about 15 minutes.
15 My apologies, Your Honor.

16 THE COURT: Well, in the future you need to plan
17 for that, especially when commuting from Colorado Springs,
18 for that delay. I have a number of matters to get covered
19 before we bring in the jury, and I don't like to keep the
20 jury waiting.

21 So I take it that you all did receive the e-mail
22 that I sent out over the weekend regarding the jury
23 selection process.

24 MR. KIRSCH: Yes, Your Honor.

25 THE COURT: So we are going to seat 36 people in

1 these chairs. That 36 will comprise the entire jury
2 panel, and will take into account every peremptory and --
3 -- every peremptory strike that can be issued. I just
4 want to make sure that you all understand exactly how the
5 process is going to work.

6 If we excuse anyone for cause, we will just take
7 the next person in line, and that has been done by random
8 computer assignment. Each of the jurors has been numbered
9 one through whatever we have, 100 jurors or so, and we
10 just take the next one in line.

11 Is there any way I can narrow down the number of
12 witnesses whom I have to read to the jury, or should I
13 just go through the jury list and keep all of those
14 witnesses listed. I have, as I indicated, 49 will-calls
15 from the Government, 44 may-calls. And I have 65
16 will-calls and 17 may-calls from the defendants, only 12
17 of which overlap between the two parties. That is about
18 150 names that I need to call.

19 MR. KIRSCH: Your Honor, the only way that I
20 believe that witnesses could be eliminated from the
21 Government's list, is I don't know if the Court -- is if
22 the Court rules on the admissibility of records based on
23 the declarations prior to the beginning of the trial. We
24 have a number of may-call records that are only to serve
25 as custodians of records in the event we are required to

1 put on live testimony about that.

2 THE COURT: Well, I am prepared to rule on the
3 motion in limine. So I can do that at this point. In
4 this case, the defendants filed a joint motion in limine
5 challenging the admissibility of evidence as not properly
6 certified authentic under Federal Rule of Evidence 902(11)
7 803(6), and they move to exclude from trial all of the
8 Government's business records that are not accompanied by
9 valid certificates of authenticity.

10 At the outset, the Court notes that the Government
11 does not need certificates of authenticity to offer
12 business records into evidence if they choose to lay the
13 foundation for those records through testimony. Thus, the
14 Court interprets the defendants' motion in limine as
15 moving to preclude the admission of business records
16 through certificates of authenticity in lieu of having to
17 produce live witnesses.

18 Rule 803(6) of the Federal Rules of Evidence
19 provides an exception to the hearsay rule for business
20 records if they are kept in the ordinary course of a
21 regularly conducted business activity, and if the regular
22 practice of that business activity was to make the
23 memorandum, report, record or data compilation.

24 Now, to satisfy 803(b), a document must have, one,
25 have been prepared in the normal course of business; two,

1 have been made at or near the time of the events it
2 reports; three, be based on personal knowledge of the
3 entrant or of an informant who had a business duty to
4 transmit the information to the entrant; and, four, not
5 have involved sources, methods or circumstances indicating
6 a lack of trustworthiness. That is from United States v.
7 Gwathney, G-W-A-T-H-N-E-Y, 465 F.3d 1133, Tenth Circuit,
8 2006.

9 Now, the proponent of a business record must lay
10 the foundation for its admission. And one way this
11 foundation may be laid is through a certificate of
12 authenticity produced by the records "custodian or other
13 qualified person," according to Federal Rule of Evidence
14 902(11). The written declaration must certify that the
15 record was, one, made at or near the time of the
16 occurrence of the matter set forth by or from information
17 transmitted by a person with knowledge of those matters.
18 Two, was kept in the course of the regularly conducted
19 activity. And, three, was made by the regularly conducted
20 activity as a regular practice.

21 The Government seeks to introduce various business
22 records through such certificates of authenticity.
23 Although defendants challenge these certificates, it
24 appears that defendants confuse the requirements of 803(b)
25 and 902(11). The defendants first challenged the

1 admission of the records on the grounds that the staffing
2 companies provided business records to the Government more
3 than 4 years ago, but the Government never requested
4 certificates of authenticity until recently.

5 The defendants thus contend that the declarations
6 do not satisfy the requirements of Federal Rule of Civil
7 Procedure 806(3). However, the declarations do not need
8 to satisfy Rule 806(3), they need to satisfy Rule 902(11).
9 Had the records, themselves, been made only recently, this
10 would be grounds for excluding them, as they are required
11 to have been made at or near the time of event it reports.

12 However, the fact that the certificates of
13 authenticity were produced several years after the records
14 were made does not render the certificates insufficient,
15 as there is no such requirement in Rule 902(11).

16 Similarly, the defendants argue that the
17 declarations fail to address the fourth criteria of the
18 business records exception; to indicate it has not
19 involved the sources, methods and circumstances by which
20 the records were made trustworthy. Again, this is a
21 requirement of Rule 803(6). There is no requirement in
22 Rule 902(11) that a declaration of authenticity contain
23 this information.

24 Defendants also argue that some of the declarations
25 are invalid because they were signed by persons who no

1 longer work for the companies that made the records. The
2 Court is not persuaded. The term "custody or other
3 qualified witness" is broadly interpreted. The witness
4 need only have enough familiarity with the recordkeeping
5 system of the business in question to explain how the
6 record came into existence in the ordinary course of
7 business.

8 Furthermore, a person may certify that a record
9 meets the requirements of Rule 902(11) without having
10 knowledge of the specific transaction in the record, as
11 long as they have a general knowledge of the processes
12 that led to the creation and maintenance of those records.
13 United States v. Adefehiniti, A-D-E-F-E-H-I-N-I-T-I, 510
14 F.3d 319, a District of Columbia Circuit, 2007.

15 To the extent that the defendants contend that they
16 were not provided a certificate of authenticity
17 sufficiently in advance of their offer into evidence under
18 Rule 902(11), the Court finds that the Government provided
19 sufficient advance notice. The Government provided copies
20 of eight certificates on September 1, 35 certificates on
21 September 12, 7 certificates on September 16, 2
22 certificates on September 19, and 4 certificates on
23 September 23rd.

24 Although Rule 902(11) does not specify how much in
25 advance the certificates need to be provided, the Court

1 finds that the Government has made the records and
2 certificates available sufficiently in advance of their
3 offer into evidence to provide the defendants with a fair
4 opportunity to challenge them, as required by Federal Rule
5 of Civil Procedure 902(11). This is evidenced by the fact
6 that the defendants have twice now challenged the
7 admissibility of these records.

8 Finally, to the extent that the defendants
9 challenge whether these records qualify as business
10 records, the Court will not prematurely determine whether
11 documents offered as business records so qualify.
12 However, none of the challenges raised by the defendants
13 preclude the Government from offering business records
14 into evidence through certificates of authenticity rather
15 than through live testimony.

16 So the motion is denied.

17 All right. That takes care of that. So if you
18 could let me know -- I don't want to go through that now,
19 but when we bring up the jury, if you can go through and
20 cross out which witnesses I do not have to read to the
21 jury, in terms of making sure nobody knows those
22 witnesses, I would appreciate it, or if you can tell me if
23 it is just the custodians of records at the end of the
24 list, I can cross those all out.

25 MR. KIRSCH: Your Honor, I just was attempting to

1 go through the list as the Court was ruling, and I believe
2 that it is correct that any of the witnesses who have
3 "COR" in the parentheses of the description in the
4 Government's may-call witnesses, those witnesses can all
5 be eliminated from the Court's reading.

6 THE COURT: All right. Are there any questions
7 regarding the jury instructions? I did receive the
8 Government's response to that. I agree that the last two
9 instructions, which deal with the jury's deliberation and
10 their post-trial communications with me should be excluded
11 for purposes of these preliminary instructions. I also
12 have re-labeled these as "preliminary instructions,"
13 because it is critical that I not have those be final
14 instructions in the eyes of the jurors. These are
15 preliminary instructions, and may be subject to change
16 depending on what arises during the course of this trial.

17 So I do agree with the Government there. I do not
18 agree with the Government in terms of excluding 8, 9 and
19 10. I believe those instructions should be given with the
20 preliminary instructions, because to give them at the time
21 a witness comes in to -- if it becomes necessary, would
22 call undue attention to that particular evidence if I read
23 the instruction only at that time.

24 And, so if I read them all as one, and it doesn't
25 become necessary for that at the end of trial, I will just

1 exclude it, and that is one that they don't need to
2 consider.

3 MR. WALKER: Your Honor?

4 THE COURT: Yes.

5 MR. WALKER: Gary Walker. I just did a poll of the
6 co-defendants, and I don't believe everyone has seen those
7 instructions that were sent this weekend.

8 THE COURT: I sent them to the e-mail box that was
9 given to us to provide notice to the defendants.

10 MR. WALKER: I believe it was certainly checked on
11 Saturday, possibly not Sunday afternoon.

12 THE COURT: I sent them Saturday. I was in all day
13 Saturday working on these.

14 MR. WALKER: We can bring them up now.

15 THE COURT: Well, let me explain to you, what we
16 will probably do, then, is wait until after we select the
17 jury, so you have some time, at least, to review them
18 before I make any decisions. I made three changes,
19 essentially. I did exclude 19 and 20, which are really
20 more proper for giving at the end of the trial, because
21 that is when I tell them what their duty is to deliberate
22 and how they will conduct themselves and how they
23 communicate with me.

24 I disagreed with the Government, 8, 9 and 10, which
25 deal with impeachment and some of those. I think those

1 need to be read at the same time as the other
2 instructions, otherwise it will cause undue attention to
3 them if I wait until a witness is called in that may be
4 impeached, and then read the instruction. So I think it
5 is more fair to give that as part of the regular package.

6 I also, after thinking about it, do not believe
7 that it is appropriate for purposes of the preliminary
8 instructions to read the entire Indictment. So I took out
9 Instruction No. 14, which was the Indictment. And the
10 reason I don't think that it is appropriate for a
11 preliminary instruction is that essentially I will be
12 reading the Government's entire case to them before any
13 evidence is introduced and before opening is even given.

14 So it is in my discretion whether I even allow them
15 to see the Indictment, based on the research I have done.
16 I am not sure whether I will give them that final
17 instruction at the end of trial, but I am clearly inclined
18 not to give it at the beginning of trial. So I'm going to
19 remove Instruction No. 14.

20 We will have the instruction with the elements of
21 each of those. Instruction 14, the Indictment, is 20
22 pages, and I think it just gives the Government too much
23 of an advantage for me to read the entire Indictment to
24 them before the trial even starts.

25 MR. KIRSCH: Your Honor, if I could just -- I want

1 to clarify. The Court, I believe has referred a couple of
2 times now to Instructions 8, 9 and 10. In the original
3 numbering we were objecting to 9, 10 and 11.

4 THE COURT: I am sorry, then that is what it should
5 have been.

6 MR. KIRSCH: Okay. I wanted to make sure one that
7 hasn't been removed.

8 THE COURT: If it is 9, 10 and 11, I just miswrote
9 it here. Whichever were the ones that had to do with
10 witnesses and whether they would be by impeachment.

11 MR. KIRSCH: Yes, Your Honor. Then the one other
12 one that was in a slightly different category was
13 Instruction No. 11, which was the expert witness
14 instruction.

15 THE COURT: Right. The expert witness instruction.
16 So, yes, you are correct, it is 9, 10 and 11 that I will
17 include. I overruled the Government's objection to that.
18 I will include that. And I have re-labeled all of these
19 as "preliminary instructions." And I will tell the jury
20 that these are the instructions that I am giving at the
21 beginning of trial. It is possible that either side will
22 have additional instructions that they will want to tender
23 before we get to the end of the case, and that these
24 instructions may change, and it is the final ones that I
25 give at the end of trial that will govern their

1 deliberations.

2 But I will not make any further rulings. I will
3 not distribute them. We will talk again before -- well,
4 we will talk again after we empanel the jury, but before
5 we do opening statements, so that I can make sure all of
6 the parties are able to make any record that they want to
7 make with respect to the way we are proceeding with these
8 jury instructions.

9 So I won't make any final rulings on that at this
10 point. So, at this point, everything is in except for 14,
11 19 and 20, is what I propose to give in the preliminary
12 instructions.

13 Does anybody have any questions about the juror
14 strike list, how we are going to proceed with respect to
15 that? That is part of what I sent out. I had given you
16 an indication. I also indicated that you would have four
17 strikes for the alternates. I read the rule again over
18 the weekend, and I had made a mistake. You get two
19 strikes. So you will have your 10 peremptories for the
20 defendants, plus two additional that you can only use with
21 respect to the alternate jurors.

22 The Government will have six, plus two that they
23 can use with respect to their alternate jurors.

24 Alternate jurors in this case are going to be
25 jurors 1, 2, 3 and 4. So whoever are first four seated,

1 those are our alternate jurors. They cannot be stricken
2 with peremptories until we get to rounds 7 and 8,
3 essentially.

4 MR. BANKS: What is the status of any final motions
5 that came to the Court?

6 THE COURT: I don't have any final -- I am sorry,
7 we do have the motion to dismiss. I ruled on the motion
8 in limine. I received -- yes, thank you Mr. Banks, I need
9 to address those.

10 I received this morning, right before I walked in
11 here, a joint motion to dismiss the Indictment for speedy
12 trial act violations. And I have received a joint motion
13 for change of venue.

14 Mr. Kirsch, has the Government seen copies of
15 those?

16 MR. KIRSCH: We have, Your Honor. We saw the
17 motion for change of venue this morning. We got the
18 motion to dismiss last night at about 8:00 p.m.

19 THE COURT: I am not quite sure I understand the
20 motion for change of venue. It seems to be geared around
21 the fact that one of the people who has been listed as a
22 witness by the defendants, Mr. Greg Goldberg, who is a
23 lawyer here in town, was the one who brought this case to
24 the attention of the United States Attorney's Office.

25 There is an indication in here that apparently it

1 is believed that I have some sort of relationship or
2 friendship with Mr. Goldberg. I do not. I met him only
3 as a result of the fact that we were nominated at the same
4 time, but I am not friends. I have never socialized with
5 him. And I recused myself from the other case because I
6 was handling the prosecution of Lawanna Clark, who is
7 related to one or more of the defendants in this case, and
8 I did not feel it was appropriate for me to be -- and I
9 was handling this case, and I did not think that it was
10 appropriate for me to be involved in the other case.

11 The motion for change of venue under Federal Rule
12 of Criminal Procedure 20 or 21, the Court finds that this
13 motion filed, essentially as I saw it, it was faxed to the
14 clerk's office at 4:44 on Friday. It was not seen by
15 anyone until this morning. It was not docketed until this
16 morning. That is essentially filing it on the eve of
17 trial. I have 100 jurors waiting downstairs to come in.

18 The facts that are set forth in the motion for
19 change of venue have been known since 2004, or at least
20 since the last couple of years since this Indictment has
21 been filed and, therefore, I find that the motion for
22 change of venue is untimely.

23 This case has been pending since 2009, which is
24 part of the reason for the motion to dismiss. This motion
25 could have been made at any point during that time. This

1 case has been set for trial several times, and at the
2 request of the defendants, I have granted motions for
3 continuance of the trial. Therefore, I deny the motion
4 for change of venue on the merits, but also as untimely.

5 Motion to dismiss the Indictment for speedy trial
6 act violations, I have read through that. Yes, there were
7 several ends of justice continuances granted in this case.
8 My recollection is, with the exception of the first ends
9 of justice continuance, which was requested by the
10 Government, declaring this case complex, but which was
11 agreed to by the defendants, all of the motions for
12 continuance have been filed by the defendants, and I have
13 granted those.

14 When these defendants were represented by counsel,
15 their attorneys indicated that they needed at least a year
16 to prepare for trial because of the complexity of this
17 case; being a white collar crime case and all of the
18 documents that were necessary to review, and I granted
19 that.

20 We were scheduled to go to trial in January of last
21 year, or actually January of 2011, earlier this year. In
22 November or so, the defendants decided they wanted to
23 proceed pro se. After we held the hearings on those and
24 defendants decided to proceed pro se, I had told them at
25 that time that I was not inclined to grant -- well, at

1 that time the case had been continued to May, is my
2 recollection. And so in December I allowed the defendants
3 to proceed pro se. I indicated that I was not going to be
4 inclined to grant any additional continuances just because
5 they were proceeding pro se.

6 Nonetheless the defendants requested, as a result
7 of their decision to proceed pro se, that they needed
8 additional time. That was, if I recall, sometime in the
9 spring, maybe March, they requested a continuance of the
10 May trial. At the defendants' request -- because this
11 case was complex and they were proceeding on their own, at
12 the defendant's request, I granted them their ends of
13 justice continuance. And I believe I made all of the
14 appropriate findings I needed to make in those ends of
15 justice orders, and it was at the defendants' request that
16 this case was pushed from May until this morning.

17 So the Court is going to deny the motion to dismiss
18 Indictment. I will issue a written order on this denial,
19 but I am giving you my oral order today because we need to
20 bring the jury in and proceed to trial.

21 MR. KIRSCH: I am sorry, Your Honor, just a very
22 quick supplement on that point. Two things. One is that
23 I believe we tried to review the record this morning, and
24 I believe the record actually indicates that the first
25 request for complexity was filed by the defendants,

1 although it was not opposed by the Government. It may
2 have even been a joint motion, but I believe it was filed
3 by Mr. Stewart's counsel at the time.

4 The one other thing that I would ask is that it was
5 unclear to the Government whether the defendants might
6 also have been making a constitutional speedy trial claim.
7 In the event that they are, the Government would ask the
8 Court to address the four factors from Barker v. Wingo.
9 If I could very briefly, I could give the Government's
10 position on those.

11 THE COURT: Yes, if you would, please.

12 MR. KIRSCH: The first factor, Your Honor, is the
13 length of the delay. And that length is long enough to
14 allow the Court to consider the other factors in this
15 case. However, the other three factors all weigh strongly
16 in favor of the Government.

17 Factor number two is the reason for the delay. As
18 the Court just has indicated, the reason for the delay in
19 this case was the repeated requests by the defendants for
20 more time.

21 That leads to the consideration of the third
22 factor; whether the defendants asserted their rights to a
23 speedy trial. Again, in this case, they have, in fact,
24 been doing the opposite. And it wasn't until literally
25 the eve of trial that they finally asserted their rights

1 to a speedy trial.

2 The final factor is whether prejudice resulted to
3 the defendants. And nothing in the defendants' motion or
4 anything that they have ever said has explained how it is
5 that they have been prejudiced by this delay. So the
6 Government would ask the Court to make findings along
7 those lines, as well.

8 THE COURT: All right. Yes, and the Court will.
9 And I did cover those, but I did not cover them under the
10 Constitutional. Yes, the length of delay in this case has
11 been substantial. I believe the defendants' motion, -- I
12 have not had time to calculate, because this was literally
13 handed to me 5 minutes before I walked out to the bench,
14 that trial has been delayed for -- well, the case was
15 filed in 2009. We are now in 2011, near the end and going
16 to trial. So there has been a considerable length of
17 delay, which would weigh in favor of the defendants'
18 request.

19 However, the Court agrees with the Government that
20 the other three factors, the reasons for the delay have
21 all been at the request of the defendants. The
22 defendants, in addition, have been out on bond this entire
23 time. They have not been incarcerated. And so the
24 reasons for the delay rest against the defendants because
25 it was at their request that these ends of justice

1 continuances were granted.

2 The defendants have never, prior to this time,
3 asserted any rights under speedy trial. And, if I
4 recall -- and I will have to go through and check, but I
5 recall when the defendants were requesting to proceed pro
6 se, I raised the issue of the fact that this was going --
7 this would most likely result in some delay, although I
8 was hesitant to grant any additional continuances of the
9 trial, I did back in March or so at the request of the
10 defendant. That factor weighs against the defendants, and
11 the defendants have not indicated that they have been
12 prejudiced in any way as a result of this delay, and I see
13 no basis to find any prejudice.

14 There is great prejudice to the prosecution and to
15 the Court and to the public, because this motion was
16 literally filed on the eve of trial, the third time trial
17 has been set, and I have a hundred jurors waiting
18 downstairs to proceed. So with that being said, the Court
19 denies the motion to dismiss indictment. And, as I
20 indicated, I will issue a formal written order confirming
21 my ruling.

22 Do the defendants wish to make any statement for
23 the record?

24 MR. BANKS: Just briefly, Your Honor. Obviously we
25 had to file this particular motion. In many cases, we

1 were in conflict at the time with our attorneys, which is
2 one of the reasons we sought to do things differently as
3 we proceeded pro se. On a number of occasions, we didn't
4 agree with them on not only the time the trial was taking,
5 but, in essence, how much they actually knew about the
6 case, which was, in our mind, delaying this case just way
7 too far, and it just took way too long.

8 Part of that actually came from the defendants not
9 actively participating in this particular defense and
10 being able to provide the necessary information that the
11 attorneys needed to actually move this process forward in
12 a much more timely fashion.

13 So we make our arguments on that particular basis,
14 as well as the basis provided under the Speedy Trial Act
15 with regards to the public interest. That is all I have
16 for right now, Your Honor.

17 THE COURT: All right. Anybody else?

18 All right. Are there any other matters that need
19 to be brought to my attention before we proceed to bring
20 the jury in?

21 MR. KIRSCH: Your Honor, I did want to bring a
22 couple other matters to the Court's attention. One is,
23 the Court may know this, we have copies of the defense
24 exhibit list, we still don't have copies of the defense
25 exhibits. I understand we are going to be getting those

1 later on today or tomorrow. But we obviously do need to
2 get those before we would get to their use of those
3 exhibits so we can inspect those.

4 Their list appears to be much longer than the
5 actual number of exhibits that they have marked. They
6 have about 284, I think, items on their list, but they
7 seem to only have one binder worth of exhibits.

8 THE COURT: From the defendants' exhibit list that
9 I have, I have 297.

10 MR. KIRSCH: There appear to be some of those that
11 are blank or have gaps, Your Honor. So we got to about
12 284.

13 THE COURT: I see.

14 MR. KIRSCH: And we had gotten -- prior to trial,
15 we had gotten copies of about 10 that we could associate
16 with the list based on the Bates numbers. We didn't get
17 any that were actually marked with exhibit numbers. So I
18 am just making the request that we, again, get those in a
19 timely enough manner that we can review them before the
20 defendants use them.

21 THE COURT: All right. So whoever the spokesman is
22 for the defendants, when will the Government be provided
23 those?

24 MR. WALKER: We will be able to provide those
25 tomorrow morning.

1 THE COURT: All right. And as long as you
2 understand -- and we probably won't get to any witness
3 testimony today anyway. But as long as you understand,
4 you can't use any exhibits unless the Government has been
5 given opportunity to review beforehand.

6 MR. WALKER: We understand.

7 MR. KIRSCH: Your Honor, a couple of other quick
8 things, if I could. One is, in the course of running
9 criminal histories for our witnesses, we have determined
10 -- we have one witness who may have a felony conviction.
11 We are trying to get the details about that today. And
12 we'll provide that to the defendants as soon as we have
13 that.

14 I believe that it is going to be too old to be
15 admissible under the Federal Rules of Evidence, but -- and
16 I don't expect that that witness will be called until the
17 second week of trial. I just wanted the Court to be aware
18 that we may need to raise that again at some point during
19 the trial, and we'll obviously bring it up with the Court
20 before we would call that witness.

21 THE COURT: All right.

22 MR. KIRSCH: I wanted to ask the Court about the
23 stipulated exhibits and what the Court's procedure was in
24 terms of the timing of admission of any stipulated
25 exhibits.

1 THE COURT: Because there are so many exhibits, I
2 would just request that you -- we not offer them all at
3 once. When you are going to use it with a witness, you
4 merely indicate to the Court that this has been stipulated
5 to, and I will admit it at that time. Otherwise, I have
6 600 exhibits, half of which may never ever be addressed.

7 MR. KIRSCH: Thank you, Your Honor.

8 THE COURT: So just so the defendants understand, I
9 am not accepting any stipulated up front. If you want an
10 exhibit to be introduced and to be considered by the jury,
11 you have to move its admission. But if it is stipulated,
12 all you have to do is tell me it is stipulated and I will
13 let it in.

14 MR. BANKS: Your Honor, were you done? Your Honor,
15 with regard to the number of exhibits, we have eliminated
16 a number of those that we're actually not going to use.
17 So the 284 number will sufficiently go down some.

18 THE COURT: All right. That is good. That is why
19 I don't admit exhibits up front. As you go through the
20 course of trial, you will figure out that some of these
21 don't need to be admitted. I understand that for purposes
22 of being prepared here, you gave me every exhibit you
23 might possibly use. But that is why I will only admit the
24 exhibits as we use them.

25 MR. KIRSCH: The last thing that I had, Your

1 Honor -- thank you for indulging me -- is I raised
2 something akin to this when we had the pretrial
3 conference. I wanted to just ask the Court again about,
4 in terms of opening statements, the defendants continue to
5 have on their witness list and on their exhibit list a
6 number of items that refer to events that occurred well
7 after 2005.

8 They have, for instance, the reporter from the
9 Colorado Springs newspaper that I assume is linked to the
10 complaints that they have previously made that the search
11 warrant affidavit that they claim was under seal was
12 improperly disclosed. They continue to have witnesses
13 listed from the Philadelphia Police Department, where they
14 were attempting to sell their software in 2008. They also
15 have listed a number of videos that are -- they are
16 referring to as "a just cause" videos.

17 Those are videos that, as far as we know, were
18 produced by the defendants or someone working with the
19 defendants. Those consist primarily of comments; complete
20 hearsay by the defendants and a number of other defendants
21 about what they perceive as problems with the
22 investigation and/or prosecution of both this case and
23 Ms. Clark's case. They contain personal accusations about
24 various Government personnel.

25 It is the Government's position that references to

1 any of those things in opening statements would be
2 irrelevant and improper, and that the defendants should be
3 precluded from referring to those in opening statements.
4 And the Government certainly intends to object in opening
5 statements if those matters are referred to.

6 THE COURT: All right. Defendants?

7 MR. BANKS: Your Honor, with regards to some of the
8 things that happened as far as -- first, I want to address
9 the -- that Telegraph article. That particular article --
10 and, as you know, we are on record as filing a complaint
11 that it was under seal. And in the actual pre-Indictment
12 delay motion, that was articulated in that motion, as
13 well.

14 It is our opinion, as far as us being able to
15 conduct business on a routine business, that article was
16 used not only by Mr. Smith here to pass to staffing
17 companies as he brought them in, but it was also used and
18 affected us to be able to do business after the raid.

19 So as far as we're concerned, it is relevant due to
20 the fact the Government has used this particular article,
21 not only as a sword in many cases to inhibit us, and we
22 feel like it is our right to be able to put that sort of
23 evidence on as far as the actual actions of the
24 Government.

25 THE COURT: Now, are you intending to try to

1 introduce the article, itself?

2 MR. BANKS: Yes, we are.

3 THE COURT: How are you going to lay the foundation
4 for that article?

5 MR. BANKS: Well, the foundation for the article,
6 various FBI personnel actually speaking in that particular
7 article.

8 THE COURT: All right. But that doesn't get the
9 article in. That may get their statements in. You can
10 ask them about their statements. That will not get the
11 article in.

12 MR. BANKS: And Mr. Beebe actually wrote the
13 article. So if he is here to testify, he will be able to
14 lay the foundation as far as the testimony about what he
15 received, when he received it, along those particular
16 lines.

17 THE COURT: And the relevance of all of that
18 information is what to your defense?

19 MR. BANKS: Well, the Government -- as you said in
20 the previous hearings, we have the right to put on a
21 defense. Part of our defense is that the Government came
22 after us for motivations that are not -- that we don't
23 consider pure justified motivations at this particular
24 time. So that will be part of our case with regard to how
25 the Government conducted this investigation, not only

1 before -- during 2002, but on through past the end of
2 2009. As they mentioned, Philadelphia and those type of
3 places.

4 The Government is on the record as -- whether the
5 Government wants to introduce that or not, there is
6 relevant testimony from those individuals that not only
7 speak to our character or our belief, as far as what we
8 were doing as a business, which we think is relevant as
9 far as intent, so on and so forth.

10 The Government has asserted on numerous times that
11 this case is only about representations and those things
12 that were made, but this case is about our specific
13 intent, and to sign contracts and to do various other
14 things, not only with staffing companies, but in good
15 faith to do things as far as our business was concerned.
16 And we feel, obviously, that that is very relevant
17 information for the jury to be able to consider.

18 If the Government did not want that sort of
19 evidence in, why were they continuing the investigation,
20 which that article came up again. And the Inspector
21 General for the City of Philadelphia is on the record, and
22 some people from Philadelphia, that they had a
23 conversation with Mr. Kirsch.

24 So if Mr. Kirsch is involved in conversation with
25 places and businesses that we are trying to do business

1 with, if the FBI is going there to interview different
2 people in 2009, is it not relevant that that information
3 should come in, because if the FBI didn't want it in,
4 maybe they shouldn't have been interfering in our
5 business.

6 THE COURT: What I need to understand is what is
7 the relevance of what happened in 2009 to the charges in
8 2005?

9 MR. WALKER: Your Honor, if I may add to what
10 Mr. Banks stated. The relevance of that article that
11 happened immediately after the raid -- and if it was under
12 seal, as we believe, is improper for the release of that
13 information, as well it impacted our ability to make sales
14 and, thus, pay debts in a timely manner.

15 As Mr. Banks alluded to, law enforcement agencies
16 did see that article. We approached them to make sales,
17 they would refer to that article and the fact that there
18 was a raid, and the fact that that information was
19 released by the FBI. And so the two are directly related,
20 because it impaired our ability to make sales and, thus,
21 have sufficient revenue to pay on our debts.

22 THE COURT: But, remember, I told you that the fact
23 that you may have intended to use -- may have intended to
24 pay back moneys that are alleged that you obtained through
25 fraud is not a defense to the fraud claim; right?

1 I am not going to make a ruling on it at this time,
2 but I want to caution the defendants, you have to be
3 careful. If you have to tell the jury something that you
4 will prove in your opening statement that you do not
5 prove, they will hold it against you. So be cautious as
6 to how far out on that limb you want to go; telling them
7 things that you are going to prove, if you don't know that
8 you are going to be able to prove them or get them in as
9 evidence. I will not tell you you can't, but the jury
10 will listen carefully to what you say. And the worse
11 thing you can do is over promise your case.

12 All right. And, Mr. Kirsch, if you feel at a
13 certain point you need to make an objection, you need to
14 make an objection. But I will not rule prematurely until
15 I know what the evidence is and how it really ties into
16 the allegations in this case, I can't make a ruling. I
17 will tell you that it seems to me that something that took
18 place in 2009 is going to be totally irrelevant to any
19 claims you have to make in this case.

20 If it is something that took place immediately
21 after the Indictment was issued and it was leaked, and you
22 have evidence that it was illegally leaked, that may be
23 more relevant. I just don't know enough about the case.

24 MR. KIRSCH: Your Honor, just on that point about
25 the search warrant. The Court has already ruled on that;

1 that it did already come up, and the Court already found
2 that there wasn't anything improper about what happened.
3 But the defendants keep wanting to refer to that. The
4 Court has already ruled on that. The Court has already
5 ruled it wasn't improper, and that it wasn't.

6 So the Government's position is that that should be
7 excluded. The Court has sufficient information to exclude
8 any attempt by the defendants to reference to something
9 that they claim is improper when the Court has already
10 found that it wasn't.

11 THE COURT: Well, if I already ruled on it, you can
12 raise that. If they are going to assert something like
13 that, then you can definitely raise the fact that I have
14 already ruled on it. I am not sure exactly what it is
15 that they are trying to bring in, and I don't want to rule
16 prematurely and preclude them from something that may be
17 relevant. I don't know.

18 MR. BARNES: We would like to use it as credibility
19 for their witnesses if they have Agent Smith testify. He
20 did testify earlier that how the case started was staffing
21 agencies contacted the FBI. That contradicts evidence
22 that how the -- basically, of the case started by a letter
23 received by U.S. Attorney's Office. He stated under oath
24 that the issue is the Government used that as evidence to
25 basically inform the staffing agencies that they had been

1 part of some scam, without giving -- basically, they were
2 using -- with their statements, they were trying to prove
3 the fact that they had been scammed without them ever
4 contacting the FBI or any Government official at the time.

5 THE COURT: If it goes to credibility, it may come
6 in some other way. I don't know. I will not make any
7 advance rulings. Counsel, you handle it the best way you
8 think you need to handle it. But I will not preclude,
9 without having a better understanding of what exactly the
10 defendants intended to introduce.

11 MR. BANKS: Your Honor, one final quick statement.
12 The theory of our defense, and the pattern of our business
13 activities, that was in 2002 to 2005, and on as far as our
14 dealings with law enforcement, law enforcement will be
15 testifying in this particular case, not only from the
16 NYPD, but from other law enforcement agencies. The how we
17 conducted business, Your Honor, is of extreme importance
18 to at least the thought of whether a company would be
19 engaged in a scheme if they're participating legitimately
20 in business and these legitimate transactions and
21 legitimate meetings, and that pattern of legitimacy
22 continued on until 2009.

23 And our interactions with these people, what we
24 told them, what we told them in 2002 is going to be
25 consistent with what we told them in 2009.

1 THE COURT: All right. But you are not going to
2 get into -- I've already ruled on that part. You can get
3 into anything that is reasonably related to 2005 and
4 before, but we will not get into 2009-2010. And, also, I
5 need to caution you, this opening statements. This is
6 what facts you are going to prove, what witnesses you are
7 going to bring in, and what they are going to say. It is
8 not argument.

9 I need to be very clear on that. And I have
10 lawyers that don't understand that concept, and I
11 sometimes have to interrupt them and say, sorry, this is
12 not closing argument, this is opening statements. It is
13 what your facts are going to show. All right.

14 Anything further?

15 MR. KIRSCH: No, Your Honor, thank you.

16 THE COURT: All right. We have been keeping the
17 jury waiting, so I am going to allow Ms. Barnes to bring
18 in the jurors. As I have indicated, they have been
19 randomly numbered already from one through whatever. We
20 have 98, I think. She will seat them in the order. We
21 start with number 1 on this end in the back row, 2, 3, 4,
22 and then it comes back up here to 9, 10, 11, and then we
23 just go this way each time, all right, so that you know
24 the numbers of the jurors.

25 I will be conducting the entire voir dire. I will

1 call you up here. I will call you up after I finish the
2 main bulk of my voir dire to see if you have any
3 challenges for cause. And we will discuss that. If there
4 are challenges for cause, and I accept those, I will then
5 have to call new jurors up to fill those places, we will
6 go through voir dire again, and then we will get to the
7 peremptories.

8 After we do the peremptories, I will call you up
9 before -- once I see the list, I will call you up for any
10 other additional motions that you may want to make at that
11 point. And if there are none, or if there are, I will
12 rule on them, and then we will tell the jurors who are
13 excused and who are going to be main jurors in this case.

14 I expect this will probably take the bulk of the
15 day. I don't know that we will have time to do openings
16 today, but we will just see where we are at. All right.
17 So Court will be in recess until Ms. Barnes brings in the
18 jurors. And we will proceed at that point.

19 (Voir dire proceedings had but not transcribed per
20 request of ordering party.)

21 (The following is had in open court, outside the
22 hearing and presence of the jury.)

23 THE COURT: All right. You may be seated.

24 Before we broke for the lunch break, I did have the
25 proposed preliminary jury instructions circulated to you.

1 And I did that so that we would know whether or not you
2 had any objections to those proposed jury instructions,
3 because my staff will need to make copies. My intent
4 would be to read those, if there is no objection to them,
5 to the jury, immediately preceding your opening statements
6 tomorrow.

7 So I don't know. I know you have been busy here.
8 You have been busy with the jury selection. What I would
9 like to do, to give you adequate time to go through
10 them -- I didn't change anything other than what I told
11 you. I deleted No. 14, No. 19 and No. 20. I have left
12 all of the others in. So it was essentially the one
13 instruction that dealt with the Indictment that I took out
14 and the two that are really concluding instructions, and I
15 labeled these "preliminary." And I will tell the jury
16 that if they change at the end of the trial -- and I will
17 read them the final instructions, it is the final
18 instructions that will govern.

19 So, at this point I think you probably need some
20 time to review them. I would request that you are back
21 here promptly -- remember that. It won't be quite as busy
22 tomorrow because we won't have all those jurors come in,
23 but I would like to start promptly at 8:30. And if you
24 are going to have any objections, then we need to get
25 those -- you may need to come in early, because we need to

1 make those changes, but I want to give my staff time to
2 make copies.

3 Each juror will have a copy of the instructions as
4 I read them. They will be allowed to keep those
5 instructions as we proceed through the trial. I will tell
6 them, however, that these are just the preliminary
7 instructions, and they are subject to change, and my final
8 instructions will be what will govern this case.

9 All right. So 8:30 tomorrow. If you have
10 objections, that is when we will address those. And if we
11 can get that done promptly at 8:30, my staff can start
12 making copies.

13 I did put, as you notice, a table of contents. I
14 do that with all my jury instructions, because I think it
15 helps the jury to find things easier.

16 Anything to be raised or brought to my attention
17 before we adjourn for the evening?

18 MR. KIRSCH: Your Honor, just a question. Will the
19 Court also make a copy of the preliminary instructions a
20 part of record? Will those be copied?

21 THE COURT: Yes. They will be a part of the
22 record, and that is the other thing I need to ask you. At
23 the final trial prep conference, I had not indicated that.
24 I would prefer not to have my court reporter have to
25 transcribe. I will read them verbatim. I will make no

1 changes to them. They will be made part of the court
2 record, so that if there is any matter for appeal, you all
3 will have the exact instructions.

4 So do I have your consent not to have my court
5 reporter go through and having to transcribe those as I
6 read them?

7 MR. KIRSCH: Yes, from the Government, Your Honor.

8 MR. BANKS: Yes, Your Honor, as long as those are
9 attached.

10 THE COURT: Yes. And if I do make any changes, as
11 I indicated with the final, it will only be if there is a
12 typo. And I've tried to read these very carefully. So I
13 do read them. If you see anything that needs to be
14 changed, let me know and we will make those changes at the
15 time. But I will only make those sorts of grammatical or
16 clerical error changes, and I will do it on mine and
17 initial it, and that is what will go into the record.
18 Other than that, I do not make any changes, I read them
19 verbatim.

20 All right. It has been a long day. Anything
21 further?

22 MR. KIRSCH: Nothing further, Your Honor. I will
23 just go ahead and point out to the Court, to save the
24 staff the burden tomorrow, I believe there is a typo on
25 page 1 of Instruction No. 1.

1 THE COURT: What is the typo?

2 MR. KIRSCH: Mr. Banks' first name is spelled
3 without an "i."

4 THE COURT: David?

5 MR. KIRSCH: It is spelled "Davd."

6 THE COURT: Thank you very much. So we try to
7 watch out for those sorts of things.

8 Anything further? Let me know. Anything further
9 from the defendants?

10 MR. BANKS: No, Your Honor.

11 THE COURT: All right. Thank you very much. We
12 will see you at 8:30 tomorrow morning.

13 Court will be in recess.

14 (Court is in recess at 5:09 p.m.)

15 **R E P O R T E R ' S C E R T I F I C A T E**

16 I, Darlene M. Martinez, Official Certified
17 shorthand Reporter for the United States District Court,
18 District of Colorado, do hereby certify that the foregoing
19 is a true and accurate transcript of the proceedings had
20 as taken stenographically by me at the time and place
21 aforementioned.

22 Dated this 5th day of December, 2011.

23

24 _____
s/Darlene M. Martinez

25 RMR, CRR