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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA)
)
 vs.)
)
 ADRIAN MENDIOLA) CR No. 10-37
 DAVID SANTOS and) Garapan, Saipan
 ALBERT TAITANO)

- - - - -

DAUBERT HEARING
DAY FOUR
Pretrial (Motions)

- - - - -

BEFORE THE HONORABLE JOHN HOUSTON, Visiting Judge,
on May 6, 2011

- - - - -

FOR THE GOVERNMENT:
Kirk Schuler, Esq.
Eric O'Malley, Esq.

FOR DEFENDANT MENDIOLA:
Ramon K. Quichocho, Esq.

FOR DEFENDANT SANTOS:
Michael W. Dotts, Esq.

FOR DEFENDANT TAITANO:
Bruce Berline, Esq.

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Friday, May 6, 2011

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(In open court:)

THE CLERK: If Your Honor please, this is Criminal Case Number 10-00037, United States of America versus Adrian Mendiola, et al, coming up for a pretrial hearing.

Counsel, please state your appearance.

MR. SCHULER: Kirk Schuler representing the United States. With me is AUSA Eric O'Malley, representing the Government.

THE COURT: Good morning, sir.

MR. BERLINE: Bruce Berline on behalf of Albert Taitano, who appears.

MR. DOTTS: Michael Dotts on behalf of David Santos, who is present with me in the courtroom.

MR. QUICHOCHO: Ray Quichocho on behalf of Mr. Mendiola, who is here.

THE COURT: Good morning. There are at least two housekeeping matters we need to discuss. One is a juror issue that we'll discuss. The second is the submittal disclosed last night.

1 Have the defendants had an opportunity to
2 digest the submittal from last evening?

3 MR. BERLINE: Yes, Your Honor. Does the
4 Court have a copy?

5 THE COURT: Yes.

6 MR. BERLINE: Your Honor, we think this is
7 Brady material, and we think it's Giglio
8 material. I have said throughout this, we have
9 known that this toolmark and firearms
10 identification evidence would be critical to
11 this case for a very long time.

12 On September 24, 2010, I wrote my first
13 discovery request to the Government requesting
14 Brady and Giglio material, generally.

15 On October 28, 2010, I wrote another
16 discovery letter. This was when Mr. O'Malley was
17 on this case. That letter said we discussed the
18 documents pertinent to the lab testing in this
19 matter. I informed you that I had been told that
20 I need the bench notes and photomicrographs from
21 the toolmark testing.

22 You stated that you had been in contact with
23 the lab and had requested a copy of all the
24 underlying test documents from them and that such
25 documents were probably included in the production

1 but that you would send the lab a follow-up e-mail
2 to be certain.

3 And we talked about this, and this is a
4 memorialization of our conversation, saying we
5 really need everything on the lab and testing
6 regarding firearm identification.

7 Other than that, I thought our discovery
8 issues were well on our way to being resolved. I
9 would, however, like to know that at some point
10 prior to trial or the discovery hearing, if such a
11 hearing occurs, that you believe that all
12 discovery as required by the rules have been
13 provided to the defendants.

14 October 25, supplemental discovery request
15 again, a written summary -- this talked about
16 expert summary pursuant to Rule 16, I made a
17 request for books and photographs, computer
18 records, tangible objects, which are material to
19 the preparation of defendants' defense or are
20 intended for or may be intended for use by the
21 Government as trial evidence, as far as any
22 reports of physical or mental examinations or of
23 scientific tests or experiment and the results
24 thereof made in the connection of this case.

25 I explained that I thought discovery was

1 lacking. So well-documented discovery requests
2 saying, like, I need this stuff.

3 On November~1, 2010, I received a letter
4 regarding the supplemental discovery. Today I
5 received all the laboratory materials from the
6 Fish and Wildlife lab. That's the first line of a
7 letter dated November~1, 2010, from Mr. O'Malley.

8 Last night we were given this letter, dated
9 September 8, 2010, and signed by Mr. Scanlan on
10 September 8, 2010, and this letter basically
11 states that he achieved a non-consensus result on
12 his recent firearms examination test; that he was
13 to halt all case work activities related to
14 cartridge case comparisons. They must -- the
15 firearms examination tests must be thoroughly
16 reviewed. It basically says that, I think -- I
17 think, that he messed up and failed his
18 proficiency exam.

19 I did not have this at anytime prior to last
20 night, after we conducted a two-day Daubert test
21 and after I've made multiple requests in writing
22 to the Government for documents relevant to these
23 tests.

24 We think that this is Brady, Your Honor.
25 Citing United States v. Price, a 2009, Ninth

1 Circuit case. It talks about -- it's a very good
2 case on Brady. Footnote 14 -- I have a copy for
3 you, Your Honor.

4 THE COURT: That would be helpful, yes.

5 MR. BERLINE: If we go down to Footnote 14
6 on page 15, Your Honor: It is the State's --
7 I'm sorry. Are you there?

8 THE COURT: Footnote 14.

9 MR. BERLINE: Yes, Your Honor.

10 THE COURT: Yes.

11 MR. BERLINE: It is the State's obligation
12 to turn over all information --

13 THE COURT: Hold on. I'm not --
14 I have footnote 14 on page 20.

15 MR. BERLINE: Yes, Your Honor. I think
16 yours is in bigger type.

17 THE COURT: Okay. I see here. The second
18 sentence.

19 MR. BERLINE: Yes, Your Honor. It is the
20 State's obligation to turn over all information
21 bearing on a Government witness' credibility.
22 This must include the witness' criminal record,
23 including prison records, and any information
24 therein which bears on credibility.

25 For the benefit of trial prosecutors who must

1 regularly decide what material to turn over, we
2 note favorably the thoughtful analysis set forth
3 by two district courts in this circuit. The
4 material standard usually associated with Brady
5 should not be applied to pretrial discovery of
6 exculpatory materials, just because a prosecutor's
7 failure to disclose evidence does not violate a
8 defendant's due process rights does not mean the
9 failure to disclose is proper. The absence of
10 prejudice to the defendant does not condone the
11 prosecutor's suppression of exculpatory evidence.
12 Rather, the proper test for pretrial disclosure of
13 exculpatory evidence should be an evaluation of
14 whether the evidence is favorable to the defense,
15 i.e., whether it is evidence that helps bolster
16 the defense case or impeach the prosecutor's
17 witness.

18 If doubt exists, it should be resolved in
19 favor of the defendant and full disclosure made.

20 The Government should, therefore, disclose
21 all evidence relating to guilt or punishment which
22 might reasonably be considered favorable to the
23 defendant's case, even if the evidence is not
24 admissible, so long as it is reasonably likely to
25 lead to admissible evidence.

1 Key to this Daubert hearing were error rates
2 and proficiency exams. We did not get this
3 letter.

4 Now, it's dated September 8, 2010. The
5 Government last night said, well, we weren't sure,
6 you know -- it never came up, the proficiency
7 rates never came up. The defense never asked
8 Mr. Scanlan about his proficiency, so we think we
9 want to give it to him now.

10 Well, if they don't think that it's relevant
11 and they didn't think that they had any duty to
12 disclose it prior to the Daubert hearing, why do
13 they now think that it's prudent to bring it up
14 after the Daubert hearing? Why do they ask not to
15 impanel the jury? Because they're now fearful
16 that this is Brady material and that we should
17 have had it.

18 When I got this, Your Honor --

19 THE COURT: Let's do this: Mr. Scanlan,
20 maybe you should leave the courtroom as we
21 discuss this.

22 MR. BERLINE: Thank you, Your Honor.

23 (Mr. Scanlan exited the courtroom.)

24 THE COURT: You may continue, counsel.

25 MR. BERLINE: When I got this -- actually,

1 early this morning, I got on the phone to my
2 consultant and Professor Schwartz and explained
3 this to them. I didn't have time to explain it
4 in detail. They were very concerned about it,
5 but that's all the farther I got.

6 So what I need is more time to have my expert
7 evaluate this, and I feel I should have an
8 opportunity to discuss this with my expert and to
9 get a supplemental report from that expert.

10 In the alternative, what I think would be
11 appropriate here is that Mr. Scanlan's evidence
12 is -- the word escapes me -- excluded, and that
13 the Government foregoes -- and the Daubert issue
14 is resolved in our favor on this basis, Your
15 Honor.

16 I think this is critical evidence, and I'm
17 not saying it's bad faith on the part of the
18 prosecution. I don't know the details. What I do
19 know is this was dated September 8, 2010. This is
20 from the United States Department of Interior,
21 Fish and Wildlife Service.

22 There is no doubt that this is a Government
23 agency, and the Government is responsible for
24 its -- for producing Brady material from its
25 investigatory arm. Undisputable. We haven't got

1 it. We didn't get it until after the Daubert
2 hearing.

3 We are severely prejudiced, Your Honor.
4 Thank you.

5 THE COURT: Any other comments from the
6 other counsel?

7 MR. DOTTS: We join in Mr. Berline's
8 comments.

9 MR. QUICHOCHO: We join, Your Honor.

10 THE COURT: Mr. Schuler.

11 MR. SCHULER: First of all, I think it's
12 clear, if there was a request, Mr. Berline
13 would have specifically noted it in his
14 discovery.

15 There was no request for a proficiency test.
16 That's nowhere in the discovery that I've seen.
17 The fact of the matter is it was disclosed. The
18 fact of the matter is I don't think it fits neatly
19 into any discovery or Brady or Giglio rule.

20 I did make a Henthorn request. The Ninth
21 Circuit requires that. I specifically sent a
22 Henthorn request related to all the witnesses of
23 the U.S. Fish and Wildlife Service. I have
24 documentation back from them that says there is no
25 Brady or Giglio information related to these

1 witnesses. I reviewed that.

2 This information goes to the -- not the
3 credibility in terms of truth or dishonesty of
4 this or not really neatly into the exculpatory
5 nature of this evidence. This is related to the
6 702 analysis. A witness qualified as an expert by
7 knowledge, skill, experience, training or
8 education -- this is about his qualifications as a
9 witness and whether or not he's qualified as an
10 expert to testify -- out of an abundance of
11 caution.

12 I was surprised, Your Honor, that this did
13 not come up at the Daubert hearing. As a result,
14 I thought it was appropriate for you to know this
15 information. That's why I wanted to disclose it.

16 THE COURT: Why was it you were expecting
17 it to come up?

18 MR. SCHULER: Because in leading up to
19 this case, Your Honor, proficiency tests were
20 discussed in the cases, in the literature. It
21 became more and more apparent as it came up, as
22 this hearing was about to begin, that
23 proficiency tests would be discussed. So I was
24 counting on it to be discussed, Your Honor.

25 THE COURT: Having known that, counsel,

1 having known that proficiency exams would be
2 discussed, wouldn't it, in your mind, become
3 relevant to the nature of the pretrial hearing?

4 MR. SCHULER: I think it is relevant in
5 relation to the qualifications of this witness,
6 Your Honor. It is relevant to the 702 analysis
7 whether this expert is qualified, yes.

8 THE COURT: And it was part of our
9 discussion over the last two or three days.

10 MR. SCHULER: Yes, Your Honor.

11 THE COURT: Go ahead.

12 MR. SCHULER: So U.S. v. Price case,
13 Footnote 14 does discuss credibility and
14 exculpatory -- credibility was the words of the
15 Court there in the first part of that footnote.
16 Again, credibility -- the Henthorn request was
17 made. No Brady or Giglio information was
18 turned over.

19 It doesn't go to his truthfulness or
20 dishonesty or bias. This is a test that was done
21 after -- this non-consensus result was made after
22 the results in this case were done.

23 The defendants have plenty of time to use
24 this information at trial to test the
25 qualifications of this witness.

1 Your Honor, this is an expert who has had a
2 twenty, 25-year career, and this is the only test
3 that he's had a non-consensus result on.

4 During the Daubert hearing, I think it is
5 important to note that Mr. Scanlan was forthright.
6 He said my error rate was not zero percent.
7 That's when I thought this was all going to come
8 out.

9 THE COURT: How would defense know to
10 bring it out if they didn't have access to the
11 information? How would they target that area
12 without access to discovery?

13 MR. SCHULER: Well, Your Honor, this is
14 part of the inquiry of, I believe, every
15 cross-examination. Every cross-examination is
16 going to challenge the witness' qualifications.

17 I would think it was an area -- it was an
18 expected area I thought would be discussed by
19 defendants. It didn't come out. It was discussed
20 in terms of yes, Mr. Scanlan acknowledged he
21 didn't have a zero percent error rate.

22 THE COURT: How long has the
23 prosecution -- not Fish and Wildlife -- how
24 long has the U.S. Attorney's Office had this
25 information?

1 MR. SCHULER: Your Honor, I received a
2 call from the U.S. Fish and Wildlife lab with
3 the director in February of this year, and this
4 is at a time when the Daubert hearing was
5 scheduled much sooner. I forget when -- I
6 think the Daubert hearing was in March at that
7 time, but I learned this -- my notes indicate
8 that I learned this information on February --
9 I believe it is the middle of February, and the
10 information I received was that Mr. Scanlan had
11 received a non-consensus result on a
12 proficiency test after -- in 2010, after the
13 results in this case were complete.

14 THE COURT: What is your take on the
15 request, the requested options presented by the
16 defendant?

17 MR. SCHULER: Your Honor, I believe they
18 have sufficient time -- whether to exclude the
19 evidence -- I believe for all the reasons we
20 stated in the past few days, this type of
21 evidence is admissible.

22 Whether or not this witness is qualified to
23 testify to that is a consideration that this
24 proficiency test should come into play about.

25 Your Honor can see through the document

1 submitted that these are tests that are given to
2 firearms examiners. These are standards that
3 control this discipline.

4 So on the other hand -- yes, there's a
5 non-consensus result. But on the other hand, this
6 is indicative of a discipline that is controlled;
7 that is tested, and that when mistakes are made,
8 those are corrected.

9 So on the one hand, Your Honor, it shows
10 positive things about this discipline. On the
11 other hand, with respect to this individual
12 expert, it's a non-consensus result and a mistake
13 he made in the 20 to 25-year career.

14 THE COURT: Do you know if this is the
15 only -- this is all you've received from the
16 lab in that regard?

17 MR. SCHULER: Yes with, Your Honor.

18 THE COURT: Regarding discipline, if you
19 will.

20 MR. SCHULER: Yes, Your Honor. I received
21 information that he completed the corrective
22 action plan successfully.

23 THE COURT: Thank you.
24 Counsel.

25 MR. BERLINE: If Mr. Schuler was working

1 out of an abundance of caution, we should have
2 had this in February of 2011. Clearly, this is
3 Brady material. It's Giglio material too.

4 There is an affirmative duty for the
5 Government to provide this to us, and the Ninth
6 Circuit just last year says you need to do it, and
7 if there's a doubt, you need to do it.

8 He intentionally withheld that information
9 from us. We now know he intentionally withheld
10 it. It doesn't matter. There is no good
11 faith/bad faith criteria for Brady, but we now
12 know he intentionally withheld it.

13 Because I'm not an expert, Your Honor,
14 because this is the first time I ever dealt with
15 toolmark and firearms identification evidence, we
16 had constant -- that's why I have these discovery
17 letters and why we had these conversations, and
18 that's why I was working on assurances that I had
19 the entire file.

20 And I guess I'd like to provide these into
21 evidence, Your Honor. One of the things is when
22 we are talking about, in my October 25, 2010,
23 letter -- and I'm also requesting laboratory work
24 sheets and/or notes that were produced during or
25 as a result of any scientific testing or

1 experimentation in this matter; C, a written
2 summary of expert testimony the Government intends
3 to use during trial, including the witness'
4 opinion, the basis and reasons therefor and the
5 witness' qualifications.

6 This has to come under witness'
7 qualifications. His proficiency rating, the fact
8 he failed a proficiency rating in September of
9 '09 has to be material. We just went through an
10 entire Daubert hearing and spent a lot of money
11 and a lot of resources on experts, and I'm going
12 to talk to you about that most likely in an ex
13 parte hearing, because I have a bill.

14 There's the prejudice, and we have completely
15 derailed the Daubert hearing. I was deprived this
16 information. I would have given this to my
17 expert. I would have given this to both experts.
18 I'm almost certain this would have been a critical
19 point of contention in this hearing.

20 That being said, Your Honor, I would like
21 to -- I don't know what to mark these as, Your
22 Honor.

23 THE COURT: Counsel, my suggestion is
24 to -- these are the discovery requests?

25 MR. BERLINE: These are the discovery

1 requests and the responses, Your Honor.

2 THE COURT: My suggestion is to mark them
3 as Court's exhibits, not exhibits, but Court's
4 exhibits so they're separate and apart from the
5 evidentiary exhibits.

6 MR. BERLINE: I did put defendant's
7 exhibit stickers on them. I can --

8 THE COURT: Yes, sir.

9 Tina, I don't know if there are previous
10 Court's exhibits in the file prior to my
11 engagement here. My thinking is we've had a
12 couple during the course of this hearing that I
13 didn't accept, but the documents are struck from
14 the record, those should be Court's exhibits.
15 Those are at least two. At this juncture, let's
16 begin with Court's Exhibit Number 3.

17 MR. BERLINE: Okay.

18 THE COURT: You can document them in
19 turn. You can just write Court Exhibit 3 on
20 it. That way, they're part of the record, but
21 they're not evidence.

22 MR. BERLINE: Court's Exhibit 3 is a
23 September 24, 2010, discovery request in United
24 States versus Albert Taitano, Criminal Case
25 10-00037 from Mr. Bruce Berline to Eric

1 O'Malley. It consists of five pages, plus the
2 fax cover sheet and the fax confirmation sheet,
3 Your Honor.

4 Court's Exhibit Number 4 is a letter from
5 Bruce Berline to Mr. Eric O'Malley on October 28,
6 2010, regarding supplemental discovery request,
7 United States v. Albert Taitano, Criminal Case
8 Number 10-00037. That is a two-page letter along
9 with a fax cover sheet and the confirmation, Your
10 Honor.

11 Court's Exhibit Number 5 is an October 25,
12 2010, letter from Bruce Berline to Mr. Eric
13 O'Malley regarding supplemental discovery request,
14 United States v. Albert Taitano, Criminal Case
15 Number 10-00037. That consists of a three-page
16 letter, the fax cover letter, the fax cover sheet
17 and the fax confirmation sheet. Again, that's
18 Court's Exhibit Number 5.

19 Finally, Your Honor, Court's Exhibit Number~6
20 is a letter from Mr. O'Malley to Mr. Quichocho,
21 Mr. Berline and Mr. Dotts regarding supplemental
22 discovery, U.S. v. Mendiola, et al, CR 10-0037.
23 That's a one-page letter, Your Honor.

24 For the record, it does have my office's
25 "received" stamp on it. It also has some writing

1 in pencil that was not part of the original
2 document, Your Honor. Again, that's Court's
3 Exhibit 6.

4 I guess we request they're admitted into
5 evidence as far as purposes of this hearing, if
6 that's appropriate.

7 THE COURT: They're not admitted, but
8 they're attached to the record as Court
9 exhibits for later reference and the Court's
10 consideration, as well.

11 MR. BERLINE: One last point is
12 Mr. Schuler brings up the point about United
13 States v. Henthorn. I don't think this is a
14 Henthorn issue, Your Honor. It might be.

15 Henthorn dealt with dishonest and perjurious
16 information contained in personnel records of
17 police officers and that such. Maybe this is;
18 maybe it's not. I didn't want to make those
19 aspersions. I didn't want to make those
20 allegations. I'm not waiving it. I just don't
21 have that information, Your Honor.

22 Thank you.

23 THE COURT: Anything else?

24 MR. QUICHOCHO: Again, we join in the
25 statement.

1 Just for the record, Your Honor, Mr. Mendiola
2 also sent a general discovery request for Brady
3 material and Giglio material. I don't have the
4 letter in front of me or with me right now, Your
5 Honor, but I'd like to put on the record that we
6 did request that, as well.

7 THE COURT: All right. Thank you, sir.

8 MR. DOTTS: Same for Mr. Santos.

9 We also made a general request, and I think
10 you've seen some of the Government's responses to
11 all counsel. Mr. Berline took the lead on the
12 Daubert motion. He's the one that focused on this
13 information.

14 MR. BERLINE: I guess one more thing,
15 Your Honor, just to make clear is -- what we're
16 requesting is two things: More time to consult
17 with our experts and to bring in possible
18 supplemental testimony, a possible supplemental
19 report, or to strike Mr. Scanlan's testimony.

20 Thank you, Your Honor.

21 THE COURT: Thank you, counsel.

22 Anything further from the Government?

23 MR. SCHULER: Your Honor, just to follow
24 up with Mr. Berline's comment about the
25 Henthorn request. The Henthorn request that we

1 made are specific to Brady and Giglio
2 materials. It's a letter that we sent out to
3 the U.S. Fish and Wildlife Service. It was
4 sent out on two different occasions, because
5 the trial got moved back. So I sent it out
6 personally a second time because of the later
7 trial date to update the file and make sure
8 there was no Brady or Giglio information.

9 THE COURT: All right. Thank you.

10 MR. BERLINE: One last thing, Your
11 Honor. Again, the case law is clear. It
12 doesn't matter -- it comes down -- it's the
13 prosecutor's duty to get that information if it
14 exists from its investigatory arm. It doesn't
15 matter that they sent out requests and they
16 didn't do it. If they have it, if U.S. Fish
17 and Wildlife has it in their files, it's deemed
18 that they have it, and it doesn't matter good
19 faith/bad faith; they didn't give it to us. If
20 there's prejudice, then there's a Brady
21 violation.

22 Thank you, Your Honor.

23 THE COURT: All right. Thank you. I'll
24 take a moment in place to review.

25 (Pause in the proceedings.)

1 THE COURT: The Court is ready to share
2 its ruling.

3 Last evening, near the end of -- at the end
4 of jury selection and prior to the jury being
5 sworn, the Government produced a document with
6 a cover letter, dated May 5, to counsel with
7 respect to disclosing an attached document from
8 the Fish and Wildlife Service Office of Law
9 Enforcement, addressed to Mr. Scanlan, dated
10 September 8, 2010.

11 It is a two-page document, and it deals with,
12 as has been explained on the record here today,
13 the witness', Mr. Scanlan's, achievement of a
14 non-consensus result on a recent firearms
15 examination test, which appears to the Court, as
16 well, to be a proficiency test.

17 The letter lays out the number of corrective
18 actions as to Mr. Scanlan, an employee of the lab,
19 and states in pertinent part that, essentially,
20 he's failed to comply satisfactorily with
21 proficiency, and that the lab would reexamine
22 reports on cartridge case comparisons dating back
23 one year from the date of the letter.

24 The letter is dated September 8, 2010. One
25 year back would be September 7 or 8, 2009. The

1 examinations in this case, the record in this case
2 reflects that the Fish and Wildlife lab received
3 the evidence on December 4, 2008, and Mr. Scanlan
4 examined the evidence between March 30 and
5 April 1st of 2009.

6 So the examination in this case was not
7 subject to the reexaminations required by the
8 corrective action in the letter.

9 On September 24, 2010, defendants submitted a
10 first discovery request, requesting Brady and
11 Giglio generally.

12 October 28, 2010, there was another request
13 for all underlying test documents, and there was,
14 quote, a need to know all information provided by
15 the rule that had not been produced, including
16 witness qualification.

17 There was another general discovery request
18 under Rule 16 on October 25th, 2010. The
19 Government responded on November~1st, 2010,
20 and as has been made clear on the record,
21 defendant Mendiola, as well as defendant Santos,
22 also made requests under Brady and Giglio.

23 In or about February, the prosecutor made a
24 second request for Henthorn evidence from the
25 agency, specifically seeking Brady and Giglio

1 material, and the Court finds that Henthorn can be
2 read broadly to include final or disciplinary
3 action by an agency against an employee,
4 especially to the extent that would affect
5 credibility on the witness' testimony.

6 The Court finds that the Government sending
7 these requests to the agency satisfied its
8 obligation, quote, to learn of any information,
9 unquote, that would be subject to disclosure to
10 the defendants.

11 Thereafter, as the Government learned through
12 discussion with opposing counsel that proficiency
13 tests were a theme in its discussions with
14 defendants, it should have produced the report
15 provided yesterday.

16 This is especially true where the Government
17 was aware that the witness to whom the report
18 related was to be heavily relied upon the
19 Government at the trial, and the Court finds that
20 based upon what it knows about the case at this
21 juncture, that Mr. Scanlan would be a primary
22 witness at the trial.

23 The defense has presented to the Court the
24 case of U.S. versus Price. Here, in Price,
25 Mr. Price was convicted of being a felon in

1 possession of a firearm. After his conviction,
2 Price learned of a primary witness' lengthy
3 history of having little regard for truth and
4 honesty and specifically acts of fraud and
5 dishonesty toward police departments.

6 And Price complained that the Government
7 failed to disclose, and the Government failed in
8 its duty to learn of anything or reveal this
9 information known to others acting on the
10 Government's behalf.

11 The Ninth Circuit found that the information
12 in possession of the prosecution and others acting
13 in the Government's behalf that might lead to
14 impeachment or impeach a Government witness must
15 be disclosed prior to trial. Failure to disclose
16 that -- if the failure to disclose that
17 information would have a reasonable probability to
18 persuade a jury that there was a reasonable doubt,
19 then the information was prejudicial to the
20 outcome of the case.

21 Regardless of how we categorize the evidence,
22 this case is unlike Price. Here, this discovery
23 violation -- this is a discovery violation, but it
24 is not a Brady violation.

25 This is not a Brady violation, in that the

1 evidence has been disclosed before trial and not
2 after trial. So we don't get to the prejudicial
3 issue to exclude or preclude -- to reverse the
4 conviction or for a new trial.

5 The prejudicial analysis is different where
6 there has not been a trial in the first place. So
7 any failure to disclose up to this point will not
8 be a failure -- or would not create a prejudice to
9 the outcome of the particular case.

10 However, the Court finds that the information
11 not produced would have been material to
12 cross-examine Mr. Scanlan during the course of the
13 Daubert hearing.

14 The defense asserts that both experts could
15 have used -- could have received this information,
16 consulted with the attorneys and assist the
17 defense in the preparation of their
18 cross-examination both here on the Daubert hearing
19 and also at the trial.

20 Two or three points here: Professor Schwartz
21 testified that no proficiency test on which to
22 quantify Scanlan's experience and reliability
23 existed. In that regard, the evidence is not
24 exculpatory.

25 She also could use it as -- she could use it,

1 on the other hand, as evidence to support her
2 theory on the lack of proficiency by Scanlan and
3 his methods and procedures, and that is quite
4 clear from the existing testimony, as we've had it
5 here on the record.

6 With respect to the defendant's second
7 expert, the second expert has been provided with
8 the information and now has time to digest the
9 information, consult with counsel and testify upon
10 it prior to the time to testify at trial.

11 Again, there has been no trial in this case.

12 Next, the Court has not ruled on the Daubert
13 hearing, so there's been no closure on the Daubert
14 analysis that impacts the Court's decision with
15 respect to Daubert, so there's no prejudice
16 suffered in that regard.

17 The defendant requests a continuance of the
18 proceedings to consult with counsel or to exclude
19 Mr. Scanlan's testimony. The Court finds that
20 neither is appropriate in this case.

21 Professor Schwartz has addressed the training
22 and lack of oversight in her testimony, and
23 Mr. Hendricks, I believe his name is, is days away
24 from testifying in the case, and the Court finds
25 that the appropriate remedy here is to re-call

1 Mr. Scanlan to the stand and reopen
2 cross-examination so the defendant can delve into
3 this disciplinary action that might impact his
4 credibility.

5 As the Court has noted, this disciplinary
6 action was noted after the time for discovery in
7 this case and was not subject to discovery in the
8 time frame for this case. In that regard, the
9 defense request for a continuance is denied.
10 Defense request to exclude the testimony is
11 denied.

12 The Court will reopen the hearing. I
13 understand Mr. Scanlan is probably somewhere
14 around. We can reopen the cross-examination in
15 short order.

16 The Court also notes that defendant was just
17 provided this information, to counsel, and if the
18 defense needs an hour or hour and a half on the
19 telephone to chat with him, the Court will permit
20 that. But it is not so substantive that there
21 cannot be a complete response. It's a follow-up
22 on cross-examination and a supplement to what has
23 already been addressed in the course of
24 cross-examination.

25 That's the Court's Order. So my thinking is,

1 it's quarter till 11. We call Mr. Scanlan at
2 quarter after the hour. Counsel, you can get on
3 the phone and talk to your consultants again. If
4 that's not enough time, let me know. We can
5 reopen cross-examination. I'll permit
6 recross-examination, but not redirect; just
7 recross-examination. The Court will filter that
8 in in making its decision in the case.

9 Counsel, if you need more time than a
10 half-hour, that's fine, but it seems this can be
11 handled with a phone call and just to consult.

12 Based upon the nature of the document and the
13 Court's appreciation of the skill sets of counsel,
14 based upon your consultations already, it seems
15 you can handle this without a consultation.

16 The Court will permit some time to consult
17 before we proceed.

18 That's the Court's Order, and at this time,
19 we'll recess in this matter until quarter -- until
20 15 after the hour, unless defense counsel
21 indicates it needs a little more time, and we'll
22 move on to the next matter on calendar.

23 MR. BERLINE: How about 10:30, Your
24 Honor?

25 THE COURT: All right. 10:30. Very well.

1 MR. SCHULER: Your Honor, during this
2 hearing, we requested from the lab as much
3 other information that they might have about
4 this. I believe it should be in my e-mail box
5 momentarily, and I'm going to give that as soon
6 as I get it.

7 THE COURT: If there's more, let me know.
8 If there's more, I need to know. Okay.

9 MR. SCHULER: Thank you, Your Honor.

10 (A short recess was taken.)

11 - - -

12 (In open court:)

13 THE COURT: The record shall reflect the
14 parties are present.

15 Counsel.

16 MR. BERLINE: Yes, Your Honor.

17 Thank you. I'm flattered that you think I have
18 the skill set to do this in 45 minutes. I was
19 at the office going through some notes, trying
20 to put together a recross and talk to my
21 consultant and my expert. There were already
22 e-mails in my in box waiting for me.

23 I came back. I have another packet of
24 materials that I haven't gone through, but
25 Mr. Dotts has gone through. He's trying to

1 explain to me the problems.

2 It appears the bottom line, we need more
3 time, and we're asking till Monday to go through
4 this. It's my understanding, and I'll let
5 Mr. Schuler expand on this, but it's Mr. Schuler's
6 understanding that Mr. Reinholz, the examiner,
7 also had to take a new proficiency test. It
8 doesn't appear to be in here. Again, I didn't
9 look at it. Mr. Dotts can talk about this.
10 Whether he had to do a new proficiency test,
11 that's not in here, or he reviewed Mr. Scanlan --
12 actually, should Mr. Scanlan be excused?

13 THE COURT: Yes, sir. You should wait
14 outside. We're talking about these documents,
15 sir.

16 (Mr. Scanlan exited the courtroom.)

17 MR. BERLINE: Whether Mr. Reinholz
18 was the actual reviewer of Mr. Scanlan's
19 re-test when he was the reviewer of the
20 original test, we don't know. We haven't
21 figured that out, and I just don't have ample
22 time.

23 This is very important, Your Honor. The
24 evidence shows that, for my client, there were two
25 shotgun shells found. Just two out of eighty --

1 however many were collected. It's critical
2 evidence, and so I need to be careful about this.

3 My expert, Miss Schwartz, has made certain
4 recommendations to me, and it's going to take me
5 time.

6 So I respectfully ask that I be given till
7 Monday to do this. I know time is critical, but
8 there's simply nothing I can do. I've done the
9 best I can to prepare for this. It was a last
10 minute thing. It's out of my control.

11 THE COURT: Mr. Schuler, any thoughts?

12 MR. SCHULER: Well, this appears to be
13 everything from the lab, Your Honor. I don't
14 know how much more I can provide.

15 I do believe there's, in communicating with
16 Mr. Scanlan, there is a proficiency test from
17 Mr. Reinholz. Mr. Reinholz is the one that peer
18 reviewed Mr. Scanlan's work in this case, and in
19 talking to Mr. Scanlan now, those are the only two
20 firearm examiners in the Fish and Wildlife lab, or
21 at least during this relevant time frame. So
22 they're the ones that are always reviewing each
23 other's work. There's not a third examiner that
24 is qualified to do the comparisons under the
25 microscope.

1 So my understanding in communicating with
2 Mike is that some of the corrective action plans,
3 they're reviewing each other's work during that,
4 and they were also -- the two of them also
5 received the same result on the same proficiency
6 tests.

7 So if that's, in fact, the case, then there
8 would be an identical set of documents regarding
9 Mr. Reinholz, and I don't have those documents. I
10 assume the lab could get it to me as soon as they
11 can. Mr. Reinholz is not going to be testifying
12 here. He is relevant because he reviewed the
13 work.

14 I'm honestly at a loss whether that needs to
15 be received immediately now and provided or not.

16 THE COURT: I agree that a continuance is
17 needed.

18 MR. BERLINE: Your Honor, again, I
19 appreciate Mr. Schuler's candidness. We are
20 going to reopen the Daubert for that -- very
21 well, Your Honor.

22 THE COURT: Yes.

23 MR. BERLINE: Thank you.

24 THE COURT: I'm just thinking about time
25 frames here. My first thought is at this time

1 we should have the jury set to come in at
2 1:00 p.m. on Monday. We may have to push that
3 off, but at this juncture, I see 1:00 p.m. on
4 Monday.

5 MR. BERLINE: Yes, Your Honor.

6 MR. DOTTS: I would agree.

7 THE COURT: Then mid morning, if things --
8 the development suggests we may have to decide
9 to take longer, I'll have them come in on
10 Tuesday morning, but I think cause has been
11 shown with the additional documents, all of
12 them may not be exculpatory or lend themselves
13 to impeachment, but there's a package here --
14 it's a package that needs to be explored, and I
15 think defense should have an opportunity to
16 have more time to consult the experts in that
17 regard.

18 I'll ask the Clerk to advise the panel that
19 they are to return on Monday at 1:00 p.m.

20 Before we go, we have another jury issue.
21 This morning when I arrived, I received the
22 letter, I believe, that you have been provided
23 from prospective juror number 45. She lays out
24 that after talking things over with family last
25 night, I believe, that her daughter works for

1 Mr. Dotts, and her Godson's brother is
2 Mr. Quichocho.

3 Later on in the letter, she indicates at the
4 bottom that -- she asks to, in essence, to pick
5 another juror instead. It seems at the end of the
6 letter that she can be fair to both sides.

7 I'd like to have your thoughts on this.

8 MR. BERLINE: Yes, Your Honor. Bruce
9 Berline.

10 Your Honor, I'll let the other people speak
11 about the relationship, but she does say she can
12 be fair to both sides. My concern is we only have
13 one alternate, and in hindsight, I should have
14 said something that we probably should have two
15 alternates or maybe even three. There is a
16 tendency here to lose alternates, so I'm concerned
17 that we won't have any alternates if we excuse
18 this juror.

19 I don't think this is -- it doesn't appear to
20 be serious. She stated that she can still be fair
21 to both sides, and I'll let the other attorneys
22 talk about the relationships, but that's my take.

23 THE COURT: I'd like to hear about the
24 relationships.

25 MR. DOTTS: Michael Dotts for the record.

1 I didn't recognize the name. Her daughter has
2 a different surname. I didn't realize it was
3 the mother.

4 Technically, in my office, the daughter, I
5 believe, is Dolores San Nicolas, is the secretary
6 for David Banes, my partner. But it is a small
7 office, and I have lots of contact with the
8 daughter. I've never met the mother, but that's
9 the relationship.

10 THE COURT: Thank you, sir.

11 MR. QUICHOCHO: I didn't recognize her
12 being my brother's Godmother. I don't even
13 know her. I just know her name. I know her
14 face.

15 My brother -- before I was born, that
16 relationship with my brother happened, is my
17 understanding. Never ate dinner or lunch or
18 anything like that.

19 I do have to disclose the same daughter
20 that's working for Mr. Dotts now used to work for
21 me before she moved to Mr. Dotts. I think that's
22 the same person we're talking about, Dolores --

23 MR. DOTTS: San Nicolas.

24 MR. QUICHOCHO: She indicated she's
25 going to be fair. If we're going to knock her

1 out, Your Honor, we looked at the jury list,
2 there would have been two more left for
3 another -- I guess, technically, we can still
4 pick an alternate, but we have two more people
5 left on the list, unless Your Honor is going to
6 impanel another venire, which is going to be
7 from Saipan, Rota and Tinian again.

8 THE COURT: I've not encountered this
9 circumstance before.

10 MR. BERLINE: Welcome to Saipan, Your
11 Honor.

12 THE COURT: My practice is always one
13 alternate. Certainly, we could have had two.
14 I should have inquired in that regard.

15 But here, we have a circumstance where the
16 venire panel has come in through the process; 13
17 jurors have been selected. I've excused the
18 balance of the panel, but the jury has not been
19 sworn in.

20 So the question is, is the balance of the
21 panel, even though they've been excused, they're
22 still part of the jury pool, this jury pool,
23 whether my excusal is a discharge from this
24 service -- I would have to work that through --
25 and can we at this juncture add additional

1 alternates from that jury pool.

2 MR. BERLINE: Your Honor, another point
3 of concern that would have to be thoroughly
4 addressed if we did that, this trial has now
5 taken on a public media aspect. There was a
6 big story on it on the news, pictures of very
7 cute fruit bats, and there's only one news
8 here. It's channel two. Everybody watches it,
9 and that's something.

10 If we do that, we're going to have to really
11 be careful about that, as far as publicity and
12 getting external facts about this case.

13 Thank you.

14 THE COURT: And we should be concerned
15 about how that impacts the integrity of this
16 process.

17 MR. BERLINE: Yes, Your Honor.

18 THE COURT: Because it would be unusual.

19 MR. QUICHOCHO: If I may, Your Honor.

20 THE COURT: Yes, sir.

21 MR. QUICHOCHO: We also run the risk of
22 losing additional jurors over the weekend,
23 even.

24 THE COURT: All right. But you know,
25 counsel, these are misdemeanors. We didn't

1 need 12. So, actually, we aren't stuck with 12
2 jurors in this case. We could have eight. So
3 maybe that's not a big concern. Because
4 there's no right to 12 jurors in a misdemeanor
5 trial.

6 MR. QUICHOCHO: Except, I believe, one of
7 my counts --

8 THE COURT: Is a misdemeanor?

9 MR. BERLINE: His is a felony.

10 MR. SCHULER: It's a 12-month misdemeanor.

11 THE COURT: It's a 12-month misdemeanor,
12 up to 12 months; right?

13 MR. QUICHOCHO: Right. The fine is up to
14 15,000.

15 MR. SCHULER: It's actually weird. The
16 Class A misdemeanor is up to 12 months, but
17 only a \$10,000 fine. The Class B misdemeanors
18 are only six months, but up to a \$25,000 fine.
19 Don't ask me why.

20 THE COURT: I've not made a ruling with
21 respect to the jury trial based in part on the
22 amount of the fine, but technically, a
23 statutory sentence of less than one year --
24 less than -- more than a year -- less than a
25 year in jail, up to 12 months is a misdemeanor,

1 and a defendant in a misdemeanor jury trial is
2 not required to have 12 members. That's my
3 recollection.

4 MR. SCHULER: Your Honor, I've not
5 researched that issue. I trust your judgment,
6 but I can't verify that.

7 THE COURT: It's something we could look
8 into. My thinking at this juncture, first, I
9 think it may be imprudent for us to go back to
10 the discharged jury pool to collect more
11 jurors.

12 Number two, I don't think that's necessary.
13 We have 13. I think the consensus is -- I haven't
14 heard from the Government with respect to this
15 juror, but there's no objection amongst defense
16 counsel; there's no motion amongst defense counsel
17 to grant the request.

18 She indicates that she can be fair. My
19 thinking is that I agree with defense counsel. We
20 have 13 jurors. If we lose one or two, I can do
21 some research on it, but I'm rather certain that a
22 jury trial for a misdemeanor offense does not
23 require 12 members.

24 We have time to look at that. Well, we have
25 time over the weekend to do that. We can discuss

1 that again on Monday. If that's the case, we'll
2 just have to decide. We can get down to 12, and
3 by agreement of the parties, we can go below 12
4 even if 12 were required, or I could go below 12
5 if I find good cause.

6 I'm not saying that's the most advantageous
7 backstop, but I think there's leeway because we
8 have misdemeanor offenses here. But we can -- if
9 you'd like to look at it over the weekend, you
10 can. I will have my staff look at it to see
11 whether my recollection is correct in that regard.

12 So the Court will direct the Clerk to advise
13 Number 45 that "thanks, but no thanks"; she's a
14 member of the panel.

15 The Court finds that the reasons for conflict
16 or concerns that she's raised are not material to
17 whether or not she could be a fair and impartial
18 juror in the case, in light of the discussion here
19 and also in light of her submittal.

20 Counsel, first thing on Monday morning, if
21 you have some other thoughts with respect to
22 timing and such, just let me know.

23 Even if -- I'll do this: I'll go a step
24 further. If you want to attempt to schedule
25 Miss Schwartz for a half-hour block to talk about

1 this for Monday morning, I'll permit the funds to
2 do that if you think her input is material with
3 respect to those documents.

4 My ruling earlier was that I can -- I
5 understand her position from her testimony, and I
6 can infer how these documents would play on her
7 interpretation of Mr. Scanlan's qualifications and
8 this whole issue, but if you think it's necessary
9 to bring her in for some limited questioning on
10 this matter, the Court would be agreeable to that.

11 MR. BERLINE: Do you think there's any
12 reason, Your Honor -- if the parties agree, can
13 we contact you over the weekend?

14 THE COURT: Sure.

15 MR. BERLINE: I hate to be presumptuous,
16 but because we are on such a tight schedule --

17 THE COURT: Sure. I have no problem with
18 that. I can give you my e-mail address. It's
19 probably better on my cell phone. It's easier
20 for me to reach. I'll give it to you before we
21 conclude here. I think that would be
22 beneficial if we could just maybe copy
23 everybody so we can understand before we get
24 here our planning purposes, for planning
25 purposes we'll know how we're going to start.

1 MR. DOTTS: One other request for planning
2 purposes. Can we know who the Government's
3 first witness is?

4 THE COURT: If we start in the afternoon,
5 as we would have started, I would assume your
6 witnesses would be nonexperts. Right?

7 MR. SCHULER: Yes, Your Honor.

8 THE COURT: I'm not suggesting you
9 have a right to share -- counsel, the
10 Government has a right to put on its case any
11 way it wants, but I'll allow you to meet and
12 confer to the extent it might assist you in
13 your preparation, but I'm not going to direct
14 or hold the Government to how they're going to
15 present their witnesses.

16 And the time frame of the trial, we'll just
17 deal with that as we go along.

18 Anything else?

19 MR. BERLINE: That's a good point, Your
20 Honor. Monday, with Miss Schwartz, it's --
21 it's a private company. I'm just thinking
22 about if the VTC place is open. I know the
23 Government -- Monday is Sunday in New York.

24 MR. DOTTS: If we find out it's not open
25 on Sunday, we will contact you.

1 MR. BERLINE: We should probably at that
2 point have another ex parte meeting on the CJA
3 costs, Your Honor. I need to advise the Court.

4 THE COURT: Sure. Not a problem.

5 MR. QUICHOCHO: Actually, the schedule of
6 when this is for -- the witnesses are set to
7 come in --they were supposed to come in Sunday.

8 MR. DOTTS: That changed.

9 THE COURT: They're coming in Tuesday.

10 MR. BERLINE: Also, Your Honor, I guess we
11 would ask for an admonishment that the
12 Government cannot meet with Mr. Scanlan. This
13 would be a continuation of cross-examination.

14 THE COURT: Yes. The Government should
15 not discuss this issue any further, if you have
16 already. Have you discussed it already, sir?

17 MR. SCHULER: Yes, Your Honor. I was
18 reviewing the documents.

19 THE COURT: I would imagine they would
20 have up to this point.

21 MR. BERLINE: I have no problem with that.

22 THE COURT: I don't think the witness
23 should be prepped on the testimony, counsel.

24 MR. SCHULER: One point of clarification.
25 What about the -- if, in fact, the testimony is

1 admitted, what about trial, for trial
2 testimony?

3 THE COURT: For?

4 MR. SCHULER: For actual trial testimony
5 for Mr. Scanlan if, in fact, the testimony is
6 admitted.

7 THE COURT: I'm sorry?

8 MR. SCHULER: Well, Mr. Scanlan
9 might be potentially testifying two times;
10 Monday morning regarding this issue,
11 proficiency test issue. I understand I'm not
12 to communicate with him at all concerning that
13 issue.

14 My question is whether over the weekend I
15 could prepare with him regarding the specific
16 testimony that would be expected in this case not
17 relevant to his proficiency testing, but if I
18 could prepare with him for the actual case
19 specifically.

20 THE COURT: Yes, sir. The Court will
21 accept your representation that you're not
22 going to discuss this matter with him.

23 MR. SCHULER: Thank you, Your Honor.

24 THE COURT: I need to make a ruling. I
25 haven't made a ruling on our hearing yet. Of

1 course, the hearing is reopened. You can prep
2 your potential witness, counsel, and we'll wait
3 and see how this plays out on Monday as to what
4 my decision is going to be. I haven't given my
5 decision on the matter yet.

6 MR. BERLINE: Thank you, Your Honor.

7 THE COURT: All right. I'll share with
8 you my e-mail address. 8:30 Monday morning.
9 Anything else?

10 MR. BERLINE: No, Your Honor. Thank you.

11 THE COURT: We're in recess.

12 MR. DOTTS: Thank you, Your Honor.

13 MR. BERLINE: Thank you.

14 (Court recessed at 11:05 a.m.)

15 - - -

16 (At this juncture, defense counsel met ex
17 parte in-chambers with Judge Houston. The
18 proceedings are under seal by Order of Court.)

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CERTIFICATE OF REPORTER

I, PATRICIA A. GARSHAK, Official Court Reporter, in the United States District Court for the Northern Mariana Islands, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings held in the within entitled and numbered cause on the date hereinbefore set forth, and I further certify that the foregoing transcript has been prepared under my direction.

PATRICIA A. GARSHAK, RDR-CRR
Official Court Reporter

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA)
)
 vs.)
)
 ADRIAN MENDIOLA) CR No. 10-37
 DAVID SANTOS and) Garapan, Saipan
 ALBERT TAITANO)

- - - - -
 DAUBERT HEARING
 DAY FIVE
 Pretrial (Motions)

- - - - -
 BEFORE THE HONORABLE JOHN HOUSTON, Visiting Judge,
 on May 9, 2011
 - - - - -

FOR THE GOVERNMENT:
 Kirk Schuler, Esq.

FOR DEFENDANT MENDIOLA:
 Ramon K. Quichocho, Esq.

FOR DEFENDANT SANTOS:
 Michael W. Dotts, Esq.

FOR DEFENDANT TAITANO:
 Bruce Berline, Esq.

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Monday, May 9, 2011

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(In open court:)

THE CLERK: If Your Honor please, this is Criminal Case Number 10-00037, United States of America versus Adrian Mendiola, et al, for the continuation of the Daubert hearing.

Counsel, please state your appearance.

MR. SCHULER: Kirk Schuler representing the United States. Behind me is Special Agent George Phocus and Michael Scanlan.

THE COURT: Good morning, sir.

MR. BERLINE: Bruce Berline on behalf of Albert Taitano, who appears this morning.

MR. DOTTS: Michael Dotts on behalf of David Santos, who is present with me in the courtroom.

MR. QUICHOCHO: Ray Quichocho on behalf of Mr. Mendiola, who is present in the courtroom.

THE COURT: Good morning, sir.

We're here for a continuation of our hearing from Friday.

I'd like to make two housekeeping notes clear for the record. Number one, regarding the length

1 of the trial and my being on the island, I think
2 all the parties should know that I go by the old
3 truth that if you're in for a penny, you're in for
4 a pound.

5 So I'm here until this case is over, even if
6 it's until the end of next week. I'm not going to
7 leave before the end of the trial. So no one need
8 to be worried or make decisions.

9 There's two notices from the Government over
10 the weekend, and those are matters to be discussed
11 at an appropriate time.

12 Obviously, I won't be swayed by any of the
13 options. I'll call it as I see it, and we'll
14 discuss what the options are at that point when we
15 get to that point in the discussion.

16 MR. BERLINE: I don't know if I
17 understand. Does the -- is the Government
18 going to make a motion now to dismiss counts?

19 THE COURT: They could make a motion now
20 to dismiss.

21 MR. BERLINE: It's my -- I'm not really
22 clear. If we know what's going on, we can make
23 a more informed decision.

24 We would, obviously, need time to respond to
25 this. If they're going to do that, maybe we

1 that was given to us regarding Mr. Scanlan's
2 documents, and then the other with
3 Mr. Reinholz.

4 The Court has these; is that correct, Your
5 Honor?

6 THE COURT: One second.

7 I do.

8 My apologies, counsel. I may have to step
9 off the bench to retrieve them.

10 MR. BERLINE: That's fine.

11 THE COURT: Do you have an extra set?

12 MR. BERLINE: No, I don't.

13 (Pause in the proceedings.)

14 THE COURT: Mr. Scanlan, the Court has
15 permitted reopening of the cross-examination.

16 MR. BERLINE: I apologize, Your Honor. I
17 didn't realize you were back on the bench.

18 Just for the record, we have marked the
19 packet that begins with a letter, February 15,
20 2011, to Todd, T-O-D-D, Nordhoff, N-O-R-D-H-O-F-F,
21 from Kenneth W. Goddard, G-O-D-D-A-R-D, and this
22 is the packet that deals with Mr. Scanlan, and
23 that will be marked as Defendant's DE.

24 The next packet, Your Honor, starts off with
25 a Wednesday, September 8, 2010, letter to

1 Mr. Andrew Reinholz from Edgar Espinoza,
2 E-S-P-I-N-O-Z-A, and has numerous documents
3 attached to that. That would be Defendant's
4 Exhibit DF, Your Honor.

5 At this time, we would move these into
6 evidence.

7 MR. SCHULER: Your Honor, I don't have any
8 particular objections to those. I also have --
9 I talked to defense counsel and Mr. Berline
10 specifically about another letter. It's just a
11 one-page letter that I received from the lab
12 that indicates proficiency review has been
13 completed.

14 The letter is actually dated May 6, just
15 Friday of last week. It just indicates that the
16 proficiency tests reviews of Mr. Scanlan and
17 Reinholz have been completed.

18 I'd like to submit that, along with these
19 materials, as a Government Exhibit, I guess, and
20 the only qualification that I would like to make
21 with regard to these exhibits is that these are
22 inherently internal documents within the U.S. Fish
23 and Wildlife Service. I would appreciate a
24 Court's Order that they be admitted for this
25 proceeding, but that they not be disseminated

1 outside these court proceedings, Your Honor.

2 THE COURT: I'll grant that request at
3 this time for this particular hearing. If it
4 comes up at trial, then that's another matter.

5 MR. SCHULER: Thank you, Your Honor.

6 MR. BERLINE: We also may need to be
7 speaking -- I've already disseminated them to
8 my experts, Your Honor.

9 THE COURT: That's more work
10 product-related.

11 MR. BERLINE: I just wanted to make that
12 clear, we have discussed these documents.

13 THE COURT: Thank you, counsel.

14 MR. BERLINE: The Government's Exhibit,
15 Your Honor -- I guess we have been using D as
16 for Daubert, and then a letter, whether it's
17 Government or defendant exhibit.

18 Shall we continue with that?

19 THE COURT: Yes.

20 MR. BERLINE: The May 6, 2011 -- I stand
21 corrected. It seems the Government has been
22 using numbers.

23 THE CLERK: D numbers and D letters.

24 THE COURT: The Government has numbers
25 with the D.

1 MR. BERLINE: So what would be the next
2 one in line with the Government's numbering?

3 THE CLERK: D-26.

4 MR. BERLINE: I've marked the letter to
5 Kenneth W. Goddard, G-O-D-D-A-R-D, from Patti,
6 P-A-T-T-I, Williams, W-I-L-L-I-A-M-S, dated
7 May 6, 2011, as Government Exhibit D-26, and if
8 Mr. Schuler doesn't mind, on his behalf, I move
9 that into evidence, as well.

10 MR. SCHULER: Thank you, Your Honor.

11 THE COURT: D-26 is admitted.

12 MR. BERLINE: Do you have a copy of that,
13 Your Honor?

14 THE COURT: No, I don't.

15 MR. BERLINE: May I, Your Honor?

16 THE COURT: Yes, you may.

17 - - -

18 FURTHER CROSS-EXAMINATION

19 BY MR. BERLINE:

20 Q Mr. Scanlan, on September 8, 2010, you received a
21 non-consensus letter from Fish and Wildlife Service;
22 correct?

23 A Yes.

24 Q That came specifically from the Office of Law
25 Enforcement; is that right?

1 A The letter was signed by Edgar S. Espinoza, who is the
2 supervisor forensic scientist in the Criminalistic
3 Section in the National Crime Laboratory.

4 Q Do you have the letter with you?

5 A Yes.

6 Q Can you look at the caption? That caption says:
7 United States Department of Interior, doesn't it?

8 A It does.

9 Q Then it says: Fish and Wildlife Service, doesn't it?

10 A Yes.

11 Q Then it says: Office of Law Enforcement, doesn't it?

12 A Yes, and it continues --

13 Q There's no question pending, Mr. Scanlan. Thank you.

14 Andy Reinholz received a non-consensus letter as
15 well; correct?

16 A That's my understanding, correct.

17 Q Do you know for certain, or do you not know for
18 certain?

19 A I'm assuming so. I don't recall seeing a letter.

20 Q Getting a non-consensus letter presents a serious
21 problem for you, doesn't it?

22 A Yes.

23 Q Does it undermine your credibility as far as a --

24 A Yes.

25 Q Does it undermine your credibility as far as a forensic

1 scientist?

2 A Yes.

3 Q Does it undermine your proficiency as a forensic
4 scientist or your proficiency rating?

5 A The rating, yes.

6 Q Are your proficiency ratings -- again, let me back up.
7 You are the senior forensic scientist at your
8 laboratory; right?

9 A I am one of them.

10 Q Does the lab submit your proficiency ratings for
11 purposes of assisting and gaining, in obtaining its lab
12 accreditation?

13 A Yes.

14 Q This letter, this non-consensus letter, could possibly
15 put your lab accreditation at risk; right?

16 A Yes.

17 Q When did you tell anyone involved in this matter,
18 meaning this case, about the existence of the
19 September 8 non-consensus letter?

20 A I don't recall the exact date. I had a conversation
21 via phone with Attorney Schuler, and that was disclosed
22 by myself and by Dr. Espinoza.

23 Q When? What date?

24 A I don't recall a date.

25 Q Was it within a month of you receiving this letter?

1 A I don't recall.

2 Q Was it prior to Christmas of 2010?

3 A I don't recall.

4 Q Could it have been maybe after Christmas of 2010?

5 A I don't recall.

6 Q You have no recollection whatsoever?

7 A I have no recollection of a date.

8 Q Did you take notes about this event?

9 A No, I did not.

10 Q But you did at one point discuss this with Mr. Schuler?

11 A Yes.

12 Q But you did not document that?

13 A That's correct.

14 Q You received this letter on September 8, 2010; correct?

15 A Yes.

16 Q You submitted a declaration in this matter, didn't you?

17 A Yes, I did.

18 Q Was that at the request of Mr. Schuler?

19 A It was.

20 Q Your declaration is not dated. Do you know when you
21 made that declaration?

22 A No, I do not.

23 Q Your declaration states: By my signature below, I
24 certify that the foregoing is true and correct, to the
25 best of my knowledge and belief, doesn't it?

1 A Yes.

2 Q And you signed that?

3 A Yes.

4 Q Do you know -- and you don't know the date of when you
5 signed this?

6 A No, I do not.

7 Q Do you know the approximate month of when you signed
8 it?

9 A I believe it might have been March or April.

10 Q Of 2011?

11 A Yes.

12 Q Did you write your declaration? Did you draft your own
13 declaration?

14 A I drafted part of it. There were several drafts and
15 correspondence with Mr. Schuler and revisions, and the
16 final draft was drafted by his office and sent to me
17 for review and signature.

18 Q So you're certain it was sometime between March or
19 April of 2011?

20 A That's my recollection.

21 Q Actually --

22 MR. BERLINE: I think we can take judicial
23 notice, Your Honor, the filing date on
24 Mr. Scanlan's declaration, which is Document
25 73-10, was filed on April 1st, 2011. That is

1 on the file header.

2 THE COURT: The Court will accept judicial
3 notice.

4 MR. BERLINE: Thank you, Your Honor.

5 BY MR. BERLINE:

6 Q This was well after you had received the September 8,
7 2010, letter, the non-consensus letter; right?

8 A Yes.

9 Q Did you mention this letter in your declaration?

10 A I did not.

11 Q Did you discuss this letter with Mr. Schuler in your
12 declaration?

13 A No.

14 Q But Mr. Schuler had notice by this time of the
15 September 8, 2010 letter; correct?

16 A Yes.

17 Q In fact, Mr. Schuler had notice of the September 8,
18 2010, non-consensus letter sometime in February of
19 2011, didn't he?

20 A I don't know what information he had, other than
21 verbal, and I don't know what date.

22 Q But you told him, you eventually informed him of that
23 letter; right?

24 A Yes.

25 Q Again, you don't remember the date of that?

1 A I do not.

2 Q At anytime, did you discuss with Mr. Schuler or anyone
3 else related to this case about whether or not to
4 disclose this non-consensus letter?

5 A I believe there was some conversation about that.

6 Q And who was that with?

7 A Dr. Espinoza and Mr. Schuler.

8 THE COURT: Counsel, what's the relevance?

9 MR. BERLINE: I think it goes to bias and
10 it also goes to -- I think this goes to
11 credibility of this witness, Your Honor. It
12 also goes to lack of proper procedures, proper
13 protocol.

14 We're also going to tie it into ethics that
15 was also brought up by the Government and gone
16 into detail with Mr. Scanlan, Your Honor.

17 THE COURT: Sir.

18 MR. SCHULER: Your Honor, thank you for
19 bringing that up. I did want to raise an
20 objection to this line for the same reason. I
21 believe we were beyond this part.

22 I believe Mr. Berline is -- well, I believe
23 the Court's ruling was that there's no prejudice
24 to the defendants at this time. It should have
25 been disclosed earlier. It was not Brady or

1 Giglio information, and now we're here to
2 cross-examine Mr. Scanlan on the proficiency
3 tests, so I will place an objection on that
4 ground, Your Honor.

5 THE COURT: All right, sir.

6 MR. BERLINE: The purpose of this was that
7 the Court did find a discovery violation, Your
8 Honor. It's my understanding the Court didn't
9 find a Brady violation, because the prejudice
10 that we suffered could be fixed through
11 additional cross-examination.

12 THE COURT: Yes.

13 MR. BERLINE: It's my understanding this
14 is part of my remedy to fix that prejudice and
15 to explore this area.

16 THE COURT: No, sir. I ruled. That's the
17 law of the case now. We can't make the record
18 now support your position of prejudice or
19 intent or bad faith. I made the decision on
20 that point.

21 MR. BERLINE: I understand that, but what
22 I'm doing is exploring about the details of how
23 this letter came about and how it was known,
24 and we go into the written recommendations, the
25 results in the report, the letter that all case

1 work was suspended, and we're about ready to
2 get into that letter.

3 THE COURT: All right. I'm of the mind
4 that the area of inquiry that you just engaged
5 in is irrelevant when it gets to intent whether
6 it's geared towards bad faith of the
7 prosecution or intent to deceive.

8 I've dealt with all of that, counsel. Any
9 questions or answers in the last couple minutes in
10 that regard are stricken. You may move on. You
11 can deal with the credibility issue. That's why
12 we're here as part and parcel to this. But issues
13 with respect to intent or deceit and all that --
14 with respect to disclosure to the Government
15 doesn't matter here now.

16 MR. BERLINE: I understand that, but
17 that's part of the deceit, and the -- you're
18 going to see how this ties into his code of
19 ethics that he needs to fully disclose this
20 stuff and fully explain these conclusions and
21 so forth and so on.

22 I'm not really concerned about the Brady or
23 the discovery motion, but I'm trying to lay a
24 proper foundation to argue that the scientific
25 methodology and the intertwined 403 -- I'm

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(In open court:)

THE COURT: We'll move on to see if the issue has been resolved, sir. You may continue with your examination.

MR. BERLINE: Thank you, Your Honor.

THE COURT: The Court withdraws its relevance objection at this point. You may proceed. The record stands as it is.

MR. BERLINE: Is the motion to strike still in effect?

THE COURT: Beg your pardon?

MR. BERLINE: The Court struck the testimony. Has that been re-called?

THE COURT: That's vacated. I've withdrawn my relevance objection at this point, my sua sponte, say, objection at this point.

MR. BERLINE: Thank you, Your Honor.

BY MR. BERLINE:

Q Mr. Scanlan, your declaration was intended to be submitted to the Court as testimony, wasn't it?

A Yes.

Q We're looking at Government's Exhibit D-17. Your association, the Association of Firearm and Toolmark Examiners, has a Code of Ethics, doesn't it?

1 A They do.

2 Q Do you subscribe to that Code of Ethics?

3 A I do.

4 Q Do you have a copy with you?

5 A I believe I do.

6 Q Looking at page three; K. Maybe I can read it to you
7 and you can agree with me or not.

8 A I'm not sure where it is right now. Go ahead.

9 Q Let me read this to you.

10 On K, it says: "The expert shall not exaggerate
11 or embellish their qualifications when testifying".

12 Does that sound familiar to you?

13 A Yes.

14 Q By failing to include this non-consensus result in your
15 declaration, are you not embellishing your
16 qualifications?

17 A I wouldn't characterize it that way.

18 Q Are you not exaggerating your qualifications?

19 A No.

20 MR. SCHULER: Your Honor, I'm going to
21 object again to -- it's the Government's
22 position that the questions that preceded are
23 improper, irrelevant and inflammatory in light
24 of the Court's prior ruling. It should be
25 struck, and I believe what the defendant is

1 suggesting is Mr. Scanlan did not testify in
2 the previous proceedings about his error rate,
3 when in fact, Mr. Berline had asked him, what
4 is your error rate -- you do not -- again, I'm
5 paraphrasing here, Your Honor, but I believe
6 the question was: And in fact, your error rate
7 is not zero percent, is it? And Mr. Scanlan
8 replied: Yes, it is not zero percent.

9 It was Mr. Berline's responsibility to follow
10 up on that. You could not have a more honest
11 witness up here.

12 MR. BERLINE: Objection.

13 THE COURT: All right.

14 MR. BERLINE: My question was to the
15 declaration --

16 THE COURT: This question is to the
17 declaration, which your questions are,
18 nonetheless, argumentive. You've made your
19 point about what the declaration says and what
20 the rule says, sir.

21 MR. BERLINE: Very well. I understand.

22 BY MR. BERLINE:

23 Q Going back to the September 8, 2010, non-consensus
24 letter, Mr. Scanlan, this letter means that you failed
25 your firearms test, doesn't it?

1 A Yes.

2 Q The first part of the letter, the September 8 letter
3 that you received, number one told you to suspend all
4 case work, didn't it?

5 A No.

6 Q Was it specifically limited to cartridge case
7 comparisons?

8 A Yes.

9 Q There's a difference?

10 A Yes.

11 Q So what could you continue to do?

12 A I could continue to do firearms examination, bullet
13 comparisons, elemental analysis.

14 Q Could you do shotgun shell comparisons?

15 A No.

16 Q You're required to provide a written explanation for
17 your results -- the letter required you to provide a
18 written explanation for your results for that
19 particular test that you failed; is that right?

20 A Yes.

21 Q This particular test is known as 10-526?

22 A That's correct.

23 Q You wrote a letter, dated September 15, 2010, where you
24 explained your answers involving items one, two, three
25 and four of that particular test, didn't you?

1 A Yes, I did.

2 Q You actually wrote two letters on September 15, 2010,
3 didn't you?

4 A Yes, I did.

5 Q If we look to the second letter of September 15 in the
6 packet marked as Defendant's DE, you put in there: The
7 class characteristics and some matching microscopic
8 detail led to too much emphasis on the match's
9 characteristics and not enough on the nonmatching
10 detail; thus, leading to a statement that was too
11 strong and not supported by the insufficient level of
12 matching detail.

13 Is that right?

14 A That's correct. That's referring to the items three
15 and five. So there were two items out of four items
16 that were correct, and three and five were incorrect.

17 Q Again, this is an example of the problems of a
18 subjective analysis; correct?

19 A Yes.

20 Q You subjectively put too much emphasis on matching
21 characteristics; correct?

22 A Yes.

23 Q So we know that a shell, a cartridge can have matching
24 characteristics and still not be a match?

25 A You can have some matching characteristics.

1 Q In fact, it can have so much matching characteristics
2 that it led you to a false positive, didn't it?

3 A Yes.

4 Q In your line of duty, a false positive is the worst
5 possible kind of error that you can make; right?

6 A Yes.

7 Q Because that can lead to innocent people going to jail;
8 correct?

9 A That's correct.

10 Q And you made that mistake, didn't you?

11 A I did.

12 Q If we can go in the packet again, Defendant's
13 Exhibit DE, if I can find it here, there is a
14 February 2, 2011, letter from the American Society of
15 Crime Laboratory Directors.

16 MR. BERLINE: Your Honor, I think that is
17 the second page of Exhibit DE.

18 BY MR. BERLINE:

19 Q Are you there, Mr. Scanlan?

20 A Yes, I am.

21 Q This letter states that your laboratory responses for
22 the following questions, were any and -- quote: Were
23 any of the question expended cartridge cases, open
24 paren, items two through five, close paren, discharged
25 from the same firearm as the known expended cartridge

1 cases, open paren item one, close paren?

2 Your responses was to item three: Yes.

3 And item five: Yes.

4 Is that right?

5 A Yes.

6 Q Those were incorrect responses, weren't they?

7 A They were.

8 Q In fact, the correct response in the next line says:
9 Item three should have been no, and item five should
10 have been no.

11 The letter says that; right?

12 A No. Actually, it doesn't.

13 Q You put for item three "yes" and item five "yes" in
14 your exam; is that right?

15 A Yes.

16 Q Those were false positives, weren't they?

17 A Yes.

18 Q You made two false positives on one test; right?

19 MR. SCHULER: I'm going to object to asked
20 and answered.

21 THE COURT: Overruled.

22 BY MR. BERLINE:

23 Q You made two false positives on one test?

24 A Yes.

25 Q If we can go back to the September 8, 2010, letter, the

1 non-consensus letter, number three, the letter wanted
2 you to provide a written explanation for the results as
3 reported in the non-consensus results, which state:
4 The cartridge cases from item two, item three and item
5 five were fired from the same firearm as the cases from
6 item one. The item four does not appear to have been
7 fired in the same firearm as item one.

8 That is your answer that you gave during the exam;
9 is that right?

10 A That's right.

11 Q Again, there were two false positives, but there was
12 also -- you reached one inconclusive result on your
13 exam, didn't you?

14 A Yes.

15 Q And the correct answer was supposed to be an exclusion;
16 correct?

17 A That was designed by the manufacturer to be an
18 exclusion.

19 Q So the manufacturer designed it to be an exclusion, and
20 you found it to be inconclusive; correct?

21 A Correct. An inconclusive is not a wrong answer.

22 Q On this test, it's an error?

23 A No, it is not. Inconclusive is not an error on any
24 test.

25 Q But in reality, in a test, the manufacturer says we

1 intend this to be excluded and the proper answer is an
2 exclusion. So if you call an exclusion inconclusive,
3 as far as that test goes, that's a wrong answer, isn't
4 it?

5 A No, it is not.

6 Q But the most important thing is it doesn't matter,
7 because in your discipline, it's not counted anyway;
8 right?

9 A That's correct. It's not counted against you.

10 Q So in your non-consensus letter, because you put an
11 inconclusive for item one, that is not the subject of
12 this non-consensus result. In other words, they're not
13 concerned about your inconclusive answer; is that fair?
14 Is that fair to say?

15 A I was trying to follow your line. I was confused on
16 I -- item one was the standard, and if you would
17 rephrase, that would help me.

18 Q Certainly. I apologize, Mr. Scanlan.

19 On the one item you reached an inconclusive result
20 on, which item was that?

21 A I believe item number four.

22 Q So your non-consensus results letter is not concerned
23 about your inconclusive result, is it not?

24 A No, it is not.

25 Q It's concerned about your two false positives; correct?

1 A Yes.

2 Q If we can go to the September 15, 2010, the first
3 September 15, 2010, from you to Dr. Espinoza, and
4 again, this is Defendant's Exhibit DE -- are you there,
5 Mr. Scanlan?

6 A Yes, I am.

7 Q This letter, you're attempting to explain to
8 Dr. Espinoza your thought process on how you came to
9 the results on your test; is that right?

10 A Yes.

11 Q You stated -- and I'm looking at the -- one, two,
12 three, four -- the fifth paragraph that starts with
13 item four. You state: Item four was inconclusive as
14 having been fired in the same firearm as item one.
15 Class characteristics were similar. However,
16 microscopic detail did not match.

17 So we now know that an inconclusive result can
18 exclude -- it's possible that it can exclude a firearm,
19 can't it?

20 A An inconclusive is not a total exclusion. It can be
21 explained as either an inclusion or an exclusion
22 statement. Either it tends to support the two firearms
23 that are started with the same firearm work or be
24 phrased as an exclusory statement that it does not
25 appear that they were fired from the same firearm.

1 However, they cannot be totally discounted,
2 because the class of characteristics still do match,
3 and there's always a possibility of alteration over
4 time or modification of the parts, replacement of parts
5 that could not totally exempt that particular firearm.

6 Q But the bottom line is: When you say -- when a firearm
7 examiner makes an inconclusive result, it could be
8 excluded or it could be included. You don't know;
9 correct?

10 A Yes, that's correct.

11 Q In the test you took, 10-526, the manufacturer meant to
12 exclude that, exclude the cartridge case that you
13 deemed was inconclusive; right?

14 A Yes.

15 Q So according to the test, we know for a fact that you
16 can come up or a firearms examiner can come up with an
17 inconclusive result, and in fact, it can be excluded,
18 looking at this test; right?

19 A It can be known to be an exclusion, yes.

20 Q Fair enough. That's what I meant. If you know, if
21 you're in a test atmosphere, if you know.

22 So if you conclude that a result is inconclusive,
23 to be fair in your report, you must explain that an
24 inconclusive result can exclude a firearm; right?

25 A Yes.

1 MR. BERLINE: If we go, Your Honor, to --
2 there's an e-mail dated October 5, 2010, in
3 Packet DE, Doina, D-O-I-N-A, V-O-I-N, Voin.
4 Maybe the 23rd page into the packet.

5 BY MR. BERLINE:

6 Q Are you there, Mr. Scanlan?

7 A Not yet. I am somewhat familiar with -- I have found
8 it, yes, go ahead.

9 Q In fact, if you look at number two, the question is:
10 What would be the wording of the conclusions in your
11 report? That's the correct question; right? Do you
12 know what she is asking you for there?

13 A This is the standard wording that goes with a
14 proficiency test. That's the wording that's on the CTS
15 proficiency test response sheet.

16 Q And CTS, the testing authority, wants to know after
17 you've done your analysis, how would you write your
18 report; correct?

19 A Yes. There's some checkoff boxes on the top part of it
20 and another separate section is how you would word your
21 conclusions.

22 Q You worded -- let me read -- the cartridge case from
23 item three was discharged in the firearm -- I'm
24 sorry -- in the same firearm as the cases from item
25 four. That's what you put; correct?

1 A Yes.

2 Q What you mean by that is that is an identification;
3 correct?

4 A Yes.

5 Q It's a match; right?

6 A Yes.

7 Q The next sentence says: The cartridge cases from item
8 one and item two did not appear to have been discharged
9 in the same firearm as the cases from item four; right?

10 A Yes.

11 Q What do you mean by that?

12 A That's an inconclusive.

13 Q That's an inconclusive; right?

14 A Yes.

15 Q You've stated in the affirmative, that it did not
16 appear to have been discharged, and that's a correct
17 way to put it; right?

18 A Yes.

19 Q You could maybe have also put it might have come
20 from -- it might have been discharged from the same
21 firearm? You could have put that; right?

22 A I could have.

23 Q But to be fair, if you put that, you should also put
24 the opposite of that; correct? Just as likely, it did
25 not appear -- it could not -- I'm sorry. It did not

1 appear to have been discharged. You should put both?

2 A Not necessarily. It's an inconclusive, and as the
3 additional information there, it does not appear it was
4 fired in that, and contrary to that, if it did have
5 information that lent it to the conclusion it might
6 have been, that would be worded differently. It would
7 be it could have been fired in that firearm, or there's
8 insufficient matching detail for a conclusive
9 comparison. That's usually the extra line that I put
10 on there for the reports.

11 Q And you could have just put the word "inconclusive"?

12 A Technically, yes, but from the AFTE guidelines and
13 laboratory guidelines, they want an explanation for any
14 inconclusive. Just putting the word "inconclusive" is
15 not sufficient for reports.

16 Q If you put in your report the opposite of what you put,
17 of what was contained in this e-mail from Doina to you,
18 if you put in that such a cartridge could have been
19 discharged in a particular gun, isn't that distorting
20 the conclusion of an inconclusive result?

21 A No.

22 Q It's not?

23 A No.

24 Q Just with that naked statement that this could have
25 been discharged in a particular gun, that's not a

1 distortion?

2 A That's an inconclusive.

3 Q Is it a complete definition of an inconclusive?

4 A I would say it's sufficient to convey the thought that
5 there's not enough information for a conclusive
6 comparison.

7 Q Can you please explain to me why you didn't put that
8 same language on your test results? Because you put:
9 Did not appear to have been discharged. So why didn't
10 you put: It could have been discharged?

11 A I put "did not appear to", because all the detail I
12 saw, the class characteristics were there, but there
13 wasn't enough supporting individual characteristics to
14 support a positive conclusion. It supported a negative
15 conclusion.

16 Q Are you saying an inconclusive result can tend to
17 support one conclusion or the other?

18 A Yes.

19 Q Would it be important to explain that in your report?

20 A I don't know to what point you're expecting it to be
21 explained. By stating that either it does not appear
22 to be or it could have been, it's either a positive
23 inconclusive or a negative inconclusive in the report,
24 in the wording.

25 Q I guess that's what I'm getting at. In your mind, you

1 now have different degrees of inconclusive. There's a
2 positive inconclusive and a negative inconclusive; is
3 that right?

4 A It's not just in my mind. It's also in literature and
5 it's also in some of the AFTE guidelines.

6 Q It's in the AFTE guidelines?

7 A I believe it's in there --

8 Q Don't believe. Do you know? Is it or is it not in the
9 AFTE guidelines?

10 A I do not have a copy of the AFTE training manual in
11 front of me.

12 Q You've been doing this for 25 years, sir. You're not
13 familiar with the AFTE guidelines?

14 A In general -- in general, yes, and I have also been
15 following those for 25 years.

16 Q Let me ask you this: Would you agree that failing to
17 put both possible outcomes of an inconclusive result
18 could be misunderstood by other people reading your
19 report?

20 A I suppose there's always that possibility.
21 Therefore -- (inaudible).

22 Q Thank you. I'm sorry, you said "that's a phone call
23 away"?

24 A Yes. If there's some question about it, then whoever
25 has received the report, typically, an attorney, will

1 ask for a clarification if they don't understand what's
2 written in the report.

3 Q Would you agree that failing to include both possible
4 outcomes of an inconclusive result is unclear?

5 A Not necessarily, no.

6 Q Would you agree that failing to include both outcomes
7 of an inconclusive result would be ambiguous?

8 A No.

9 Q Looking back at Government's D-17, your Code of Ethics,
10 your Code of Ethics starts out with a preamble. Did
11 you pledge to make a full and fair investigation of
12 both relevant facts and physical evidence?

13 A Yes.

14 Q You pledged to render an opinion strictly in accordance
15 with the information contained from your examination
16 and to maintain an attitude of independence,
17 impartiality and calm objectivity, didn't you?

18 A Yes.

19 Q The Code of Ethics then state that your findings of
20 fact and their conclusions and opinions should then be
21 accurately reported; correct?

22 A Yes.

23 Q On page two, tests are designed to disclose facts, and
24 all interpretations shall be consistent with that
25 purpose and will not be knowingly distorted.

1 Is that right? That would be B on page two.

2 A Yes.

3 Q Number C: Where the test results are inconclusive or
4 indefinite, any conclusions drawn shall be fully
5 explained.

6 Do you read that?

7 A Yes.

8 Q Do you subscribe to that belief?

9 A Yes.

10 Q Your Code of Ethics also state that a failure to meet
11 or maintain these standards will justifiably cast doubt
12 upon an individual's fitness for this type of work.
13 They say that; correct?

14 A Yes.

15 Q Have you reported any of these violations to AFTE for
16 their evaluation of your conduct?

17 MR. SCHULER: Objection, Your Honor.

18 THE COURT: Overruled.

19 BY MR. BERLINE:

20 Q Have you reported any of these violations to AFTE for
21 their evaluation of your conduct?

22 A First of all, there have not been any violations of the
23 ethics code, and no, I have not reported anything
24 because there weren't any violations.

25 Q In your subjective opinion; correct?

1 A In my opinion, yes.

2 Q You were suspended for these false positives; right?

3 A Yes.

4 Q This puts your lab accreditation at risk; right?

5 A It could.

6 Q Let's go on to requirement number four in the
7 September 8, 2010, non-consensus. It states: All
8 cartridge case comparison case work conducted in the
9 last year will be reviewed by two persons, to include
10 the criminalistics team leader and one additional
11 member of the management team.

12 Was this done?

13 A Yes.

14 Q Did the cartridge case comparison case work review
15 include the ten shotgun shells that were submitted in
16 October 2009 in this case?

17 A My understanding that the whole case file was reviewed.
18 I don't have any personal knowledge of that.

19 Q It's your understanding that the entire case file of
20 this was reviewed?

21 A That was my understanding.

22 Q Who would have that knowledge?

23 A The people who reviewed it.

24 Q Who was that?

25 A Dr. Espinoza and Darrell Hegdahl.

1 Q Do you have access to that documentation?

2 A Give me a moment to see if I can read it.

3 (Pause in the proceedings.)

4 A One reference would be in the packets that deals with
5 the February 15, Todd Nordhoff's, the cover letter, and
6 about seven pages from the end of it, if you go back
7 about seven pages.

8 Q And we're talking DE, Exhibit DE?

9 A I believe that's your exhibit. The header is United
10 States Department of Interior, Fish and Wildlife
11 Service, and it's dated October 21.

12 Q Let's get there. Okay?

13 A It starts out: The document is titled United States
14 Department of the Interior, Fish and Wildlife Service,
15 Thursday, October 21 of 2010. Dear Mike, this letter
16 is to follow up on completion of the Corrective Action
17 Plan, parentheses, CAP, close parentheses, implemented
18 on September 08 of 2010. You have successfully
19 completed the requirements of the CAP as follows in
20 response to Corrective Action Plan for Michael Scanlan,
21 and number two, analytical documentation of the
22 firearms proficiency test was thoroughly reviewed and
23 those gross errors were documented.

24 Q Let me interrupt you there real quick. Mr. Scanlan. I
25 think the question was -- let me back up a little.

1 Dr. Espinoza and Darrell -- I'm sorry. I can't --
2 it's a strangely spelled name. Hegdahl. Can you spell
3 that for us?

4 A H-E-G-D-A-H-L.

5 Q They reviewed your case files; is that right?

6 A Yes. I believe there's another letter --

7 Q That's fine. We'll get there. But the initial letter
8 says that all -- on number four on September 8, in the
9 September 8, 2010, it says: All cartridge case
10 comparison case work conducted in the last year will be
11 reviewed by two persons.

12 My question is: Did Dr. Espinoza and Mr. Hegdahl
13 review the case work within the last year from the
14 letter?

15 A That was my understanding.

16 Q Did they produce notes or documents of their work, of
17 their review?

18 A I do not have that knowledge.

19 Q If you know, would it have been a standard protocol to
20 take notes on a case review?

21 A I am not aware of that.

22 Q Who was the criminalistics team leader? Was that
23 Dr. Espinoza?

24 A Yes.

25 Q And then with no disrespect, I'm just going to refer to

1 him as his first name, because it's easier for --
2 Darrell was the -- I'm sorry. And what was Darrell?

3 A He's administrative branch chief.

4 Q Was he the one person in the management team?

5 A No. He is part of the management team. Dr. Espinoza
6 is also part of the management team.

7 Q That's my question. Number four says: These cases
8 shall be reviewed by two people, one from -- a
9 criminalistics team leader, and one additional member
10 of the management team.

11 So Dr. Espinoza was the criminalistics team
12 leader?

13 A Yes.

14 Q And Darrell was then the additional member of the
15 management team; is that right?

16 A That's correct.

17 Q I just wanted to clear that up.

18 Did either of these gentlemen review -- they
19 reviewed the -- they certainly reviewed the
20 October 2009 shotgun cases that were submitted in this
21 matter; correct?

22 A As far as I know, they reviewed everything that was in
23 that case file, irregardless of the date.

24 MR. BERLINE: One moment, please, Your
25 Honor. I apologize.

1 THE COURT: All right.

2 Let's take a 15-minute break.

3 (A short recess was taken.)

4 - - -

5 (In open court:)

6 THE COURT: The record should reflect the
7 parties are present.

8 You may continue, please.

9 BY MR. BERLINE:

10 Q I think we left off talking about Dr. Espinoza and
11 Darrell Hegdahl as the review team.

12 If you look at the set of eight non-consensus
13 results letter, attached to that on the fourth page,
14 there is another letter March 28, 2011, from Darrell
15 Hegdahl to Todd Nordhoff.

16 Do you see it?

17 A Yes.

18 Q He states that he reviewed the case files from the past
19 year of your cases; correct?

20 A Yes.

21 Q If you look then back to the packet of DE, on page 12,
22 there appears to be -- is that an e-mail from you to Ed
23 Espinoza?

24 A There's one in there. I'm not sure.

25 Q Do you see what appears to be an e-mail with your name

1 at the top, Mike Scanlan, and it's dated 9/15/2010 at
2 11:57 a.m.?

3 Are you there?

4 A Okay.

5 Q Is that an e-mail from you to Ed Espinoza?

6 A It is.

7 Q Did you state: I reviewed case files from the past
8 years dealing with cartridge case comparisons and found
9 no abnormalities?

10 A That's correct.

11 Q Quickly going back to the March 28, 2011, Darrell
12 Hegdahl reviewed your case files also; correct?

13 A Yes.

14 Q Did Darrell Hegdahl take any notes or document his
15 review of your case files?

16 A I don't know.

17 Q You don't have them in your possession?

18 A I do not.

19 Q Going back to the September 8, 2010, looking at the
20 September 8, 2010, non-consensus results letter --
21 strike that for now.

22 You obtained this letter on September 8, 2010, the
23 non-consensus results letter; correct?

24 A Yes.

25 Q You then e-mailed Mr. Espinoza on 9/15/2010 at

1 11:57 a.m.; correct?

2 A Yes.

3 Q Do you work over the weekends?

4 A No.

5 Q According to this, if you do the math on the dates, you
6 spent 4.5 days reviewing your past cartridge case
7 comparisons; correct?

8 A I haven't done the math.

9 Q Well, let's do it.

10 You received a letter on the 8th of September?

11 A Yes.

12 Q Did you immediately get to work on reviewing your case
13 comparisons?

14 A I don't recall.

15 Q Start September 9. I believe the 9th is a Thursday.
16 The 10th, 11th and 12th I believe is Saturday and
17 Sunday. The 13th, 14 and 15. And the 15th you wrote
18 an e-mail at 12:00 o'clock. So nine, ten -- 13, 14,
19 15; one, two, three, 4.5 days.

20 Do you agree with that?

21 A Sure.

22 Q How many case files did you review in 4.5 days?

23 A All the ones that were in the past year.

24 Q Do you know how many those were?

25 A No, I don't.

1 Q For this case file, it took you basically about two
2 days each on the case files in this matter; is that
3 right?

4 A No. That's impossible.

5 Q Let me ask you this: Do you know how long it took you
6 to analyze -- I think there was initially 79 shotgun
7 shell cartridge cases given to you?

8 A I have a reference. I can look it up on case 08-368.
9 I did analysis on lab Exhibit four through 119 between
10 March 30, 2009 and April 10, 2009; and Exhibit 121
11 through 131 of that same case, October 5 through
12 October 6 of 2009; and Exhibits 1-A, 2-C and 3-C,
13 March 24, 2011 to March 25, 2011.

14 Q When you went back to review your case work analysis
15 for the past year, did you look at the notes for each
16 of those cases?

17 A Yes, I did.

18 Q Were your notes with those other cases contain the same
19 level of detail that your notes contain in this case?

20 A I would say they all contain about the same level.

21 Q By going back to your notes, were you able, just
22 looking at your notes, able to tell what specific areas
23 you thought at the time you made these examinations
24 matched?

25 A I had photomicrographs to refer to that showed the

1 representative variant for each one of them.

2 Q I'm talking about your notes.

3 A Those are part of my notes.

4 Q Your written notes.

5 A Those are part of my note package.

6 Q Your written notes, were you able to look at your
7 written notes and determine what areas you thought were
8 in agreement?

9 A From the written notes, no, but the --

10 Q And were you able from those written notes to determine
11 what areas were not in agreement?

12 A Not from written notes.

13 Q Did you go back in your review of your case files, did
14 you put the shotgun shells or shells or whatever in
15 your analysis, did you put it back under the
16 microanalysis comparison scope?

17 A No.

18 Q You looked at the photomicrographs?

19 A That, and my notes, yes.

20 Q Photomicrographs are one-dimensional documents;
21 correct?

22 A Two-dimensional.

23 Q And when you have your analysis peer reviewed, the peer
24 reviewer actually takes the objects to be compared and
25 puts them in the comparison microscope; right?

1 A Yes.

2 Q He does not conduct his review solely on the
3 photomicrographs; correct?

4 A That's correct.

5 Q That would be improper; correct?

6 A Yes.

7 Q That is not how you reviewed your case files; you did
8 not reexamine these shells under the comparison
9 micrograph; right?

10 A That's correct.

11 Q So reviewing, peer reviewing or reviewing objects or
12 toolmarks, standard protocol is to review them under
13 the -- I'm sorry -- under the microscope, isn't it?

14 A Yes, for peer review.

15 Q But when you reviewed your own work, you did not review
16 them under a microscope, did you?

17 A No.

18 Q Did you explain this to Mr. Espinoza?

19 A No, I did not.

20 Q Did you take notes of your review procedures?

21 A No, I did not.

22 Q Let's go to requirement number five of the September 8,
23 2010, non-consensus results letter. Requirement five
24 states that you would be provided with four practice
25 samples; right?

1 A Yes.

2 Q And these are supposed to be blind samples, aren't
3 they?

4 A Yes.

5 Q But you knew that you were going to be given these four
6 practice tests prior to you taking them; right?

7 A Yes.

8 Q These practice tests are old tests, aren't they?

9 A Yes.

10 Q Have you taken these tests before?

11 A Yes.

12 (Pause in the proceedings.)

13 THE COURT: I began to have a sidebar with
14 my clerk after your question. These tests are
15 old tests --

16 MR. BERLINE: You heard that and the
17 answer also?

18 THE COURT: Yes.

19 BY MR. BERLINE:

20 Q You've taken these tests before, haven't you?

21 A Yes.

22 Q This letter required you to take four practice tests
23 that you had already taken before; right?

24 A Yes.

25 Q Were you required to undergo any additional training as

1 a result of failing test 10-526?

2 A No.

3 Q Were you required to take any continuing educational
4 credit courses as a result of failing the test?

5 A No.

6 Q There is no requirement for any kind of continuing
7 educational courses for firearm examiners?

8 A No.

9 Q You took four sample tests from 2002, 2003, 2005 and
10 2006, weren't they?

11 A Yes.

12 Q With each test, you get information about a
13 hypothetical?

14 A A hypothetical scenario.

15 Q It's entitled Manufacturer's Information?

16 A Yes.

17 MR. BERLINE: Should I re-ask?

18 THE COURT: Yes.

19 BY MR. BERLINE:

20 Q This information is entitled Manufacturer's
21 Information, isn't it?

22 A I believe that's the title of it, yes.

23 Q And you get this information at the time you're given
24 the test; right?

25 A Yes.

1 Q And it tells you what each sample packet contains,
2 doesn't it?

3 A Yes.

4 Q And these are unique circumstances; for instance, one
5 will be a Federal American Eagle 235-grain 45 ACP
6 full-jacketed bullet, while a different test the next
7 year would be maybe a .22 caliber soft point cartridge;
8 is that right?

9 A Yes. They mix them up.

10 Q So they're easily identifiable, these pattern facts?

11 A Well, I can tell a bullet from a cartridge case. I
12 don't know what you mean by easily identifiable.

13 Q I'm sorry. That's a bad question. The Manufacturer's
14 Information is usually -- the word escapes me -- unique
15 to each test?

16 A Yes, I guess, and there are sometimes when you get two
17 years in a row, you get cartridge cases for tests or
18 two years in a row get bullets. It's not necessarily
19 alternating from year to year.

20 Q But my point is, it's not always a 45 grain -- it's not
21 always a Federal American Eagle 230 grain 45 ACP full
22 metal jacket?

23 A No. It can be rifle cartridge cases or bullets from
24 rifles or handguns.

25 Q And each test involves different types of ammunition;

1 correct?

2 A Yes.

3 Q If we go to table one -- and that's page 15 in packet
4 DE -- are you there?

5 A I don't have it labeled by page number. If you can
6 give me it.

7 Q It's not page number, but if you just count the pages
8 in the packet, Mr. Scanlan. It's a table that looks
9 like this (indicating).

10 THE COURT: It says page eight at the
11 bottom.

12 MR. BERLINE: Thank you, Your Honor.

13 A I have it.

14 Q If you look at the very fine print in the lower
15 left-hand corner, it says Test Number 02-526; correct?

16 A Yes.

17 Q That's the test you took for your first sample test;
18 right?

19 A Yes.

20 Q The response summary gives information about certain
21 aspects of this test; right?

22 A Yes.

23 Q If you see, it says that 249 participants took this
24 test; right?

25 A Yes.

1 Q And then it has a little graph. It says responses on
2 the left side. Item one on top. Item two in the
3 middle. Item three. Then it's a question. Could any
4 of the question cartridge cases, items one to three,
5 been fired using the suspect weapon?

6 Is that the question you were presented with in
7 the first standard practice test?

8 A Yes.

9 Q Now, in this test, none of the 249 participants missed
10 or gave an incorrect answer; right?

11 A Yes.

12 Q And we know that looking at item one, because no one
13 said yes to that question. Am I right?

14 A Yes.

15 Q Everyone said no to that question; right?

16 A That's correct. Well, no, that is incorrect.

17 Q You're right, you're right, you're right. I stand
18 corrected. One hundred ninety-one people said no.

19 A That's correct. Fifty-eight were inconclusive.

20 Q Fifty-eight were inconclusive. So 58, those 58
21 inconclusives were not counted for this test; they're
22 not even considered because it's inconclusive; right?

23 A Yes.

24 Q But looking at this response summary, we know that 58
25 people were wrong; right?

1 A No.

2 Q Looking at this test -- because we know, do we not, you
3 know that the correct answer is no? No. Item one
4 could not have been fired from the subject weapon. I'm
5 just talking about this test, Mr. Scanlan.

6 A Is that a question?

7 Q I'll re-ask it. We know that the proper response is
8 for this test that item one could not have been fired
9 using the suspect weapon; right?

10 A I don't have the Manufacturer's Information of how the
11 test was designed, but from the indication, the
12 responses on the response summary, it indicates that
13 item one, since no one said it was a match, they all
14 excluded it, except -- well, let me back up. One
15 hundred ninety-one people totally excluded it.
16 Fifty-eight people said it was inconclusive.

17 Q Doesn't it appear to you that the right answer to that
18 question is, no, item one could not have been fired
19 using the suspect weapon?

20 A I would not agree to that. Inconclusive is not a
21 correct answer.

22 Q Excuse me. Do you think the proper answer was yes to
23 that question?

24 A Not necessarily, no.

25 Q So you're using your subjective judgment again; right?

1 A Yes. The proper answer could have been inconclusive.

2 Q Let's assume that the proper answer was no. Then these
3 people that said inconclusive as opposed to saying no
4 gave the wrong answer; right?

5 A No.

6 Q Item two. Using your logic that we just looked at, no
7 could be the right answer for item two; correct?

8 A I can't see where I agree with you on that one either.
9 The respondents put zero. None of them marked no for
10 that particular item.

11 Q So the correct response is yes?

12 A Yes was the response that 100 percent of the
13 participants put down.

14 Q Let me ask you this: Is there a right or wrong answer,
15 in your opinion, to these tests?

16 A An inconclusive, again, is not an incorrect answer and
17 is properly used in some circumstances. On these
18 tests, you have four cartridge cases. They fire
19 approximately 300 rounds, and then they break that up
20 into test samples, and they send out three of them that
21 are marked as standards from that particular firearm
22 out of those 300, and then they fire some from another
23 firearm. Again, about roughly 300 samples, and they
24 take representative samples of those and they make up
25 the individual tests.

1 So as the testimony before, there can be
2 differences in the hardness of primers and the way that
3 toolmarks will transfer to those particular cartridge
4 cases. So there can be variations between the tests.
5 Even though they are designed to be inclusions or
6 exclusions, there could be enough variation in the
7 samples that are sent out to the examiners that it may
8 not be straightforward and that clear.

9 Q Let's talk about the test you failed. No doubt, you
10 failed that test, 10-526; correct?

11 A Two of the samples, I incorrectly associated, yes.

12 Q You failed it; right?

13 A Yes.

14 Q Three hundred thirty participants took that test; is
15 that right?

16 A I believe so, yes.

17 Q Was it item three you gave the false positive on?
18 There were two false positives; correct?

19 A Yes, there were.

20 Q Which items were they?

21 A I believe it's three and five.

22 Q In the response summary for your test, eight for item
23 three, eight people said yes, the question expended
24 cartridge case was discharged from the same firearm as
25 the known expended cartridge case.

1 You were one of those people; right?

2 A Yes.

3 Q That's an incorrect response; right?

4 A Yes.

5 Q Two hundred sixty-one people said no.

6 That's a correct response; right?

7 A Yes.

8 Q Because afterwards, you knew that this was an
9 exclusion, this was supposed to be an exclusion; right?

10 A That's the way it was designed by the manufacturer of
11 the test.

12 Q So the intent of the manufacturer was to -- what they
13 wanted to see is firearms examiners to have an
14 exclusion. That would be the best answer; right?

15 A That's the intended answer, yes. Also, to back up on
16 your prior question. . .

17 Q I haven't asked a question yet. Let me ask the next
18 question.

19 Then 61 people put inconclusive. Those people did
20 not agree with the manufacturer's intent, did they?

21 A That's correct, yes.

22 Q If we go to the next page, you'll see at the bottom
23 03-526, Test 03-526. That's the second test you took;
24 correct?

25 A Is that another page like this? (indicating)

1 Q It says page eight too. But it says in the lower
2 left-hand corner, Test Number 03-526.

3 A Give me a moment till I find that one.

4 THE COURT: Are you on the following page
5 now?

6 MR. BERLINE: Yes, Your Honor.

7 A I have it.

8 Q Looking at the response summary, again, 100 percent
9 correct -- I'm sorry -- 246 participants took this
10 test; correct?

11 A Yes.

12 Q No one got a wrong answer, did they?

13 A That's the indication, yes.

14 Q Is it fair to say that for item one, the manufacturer's
15 intent was that item one was not fired in the same
16 firearm as the known cartridge cases?

17 A From the responses, it appears that is what they
18 intended.

19 Q So again, we have 25 inconclusives; right?

20 A Yes.

21 Q So 25 people did not agree with the manufacturer's
22 intent; right?

23 A I'm not sure that's why they put an inconclusive down.
24 Some laboratories have a policy they won't exclude if
25 the class characteristics are the same. They have a

1 policy they will not make an exclusion.

2 Q And different laboratories throughout the United States
3 have different policies and protocols; right?

4 A Yes.

5 Q Again, it doesn't matter, because your discipline
6 doesn't take into account inconclusive answers; doesn't
7 matter to them. Right?

8 A That's right.

9 Q If you go to the next page, look at 05-526 -- I'm
10 sorry. This is the 2005 practice test; right?

11 A Yes.

12 Q Again, out of 255 participants, no wrong answers; is
13 that right?

14 A Right.

15 Q Again, we have 12 inconclusives; right?

16 A That's correct.

17 Q Next page, we go to the 2006 practice tests, Test
18 Number 06-526 in the lower left-hand corner. Here, we
19 have the response summary is a little different. We
20 have two wrong answers --

21 THE COURT: Is there a question, sir?

22 MR. BERLINE: I'll strike that, Your
23 Honor.

24 THE COURT: Make sure you're not
25 testifying here.

1 MR. BERLINE: Yes, Your Honor.

2 BY MR. BERLINE:

3 Q If you look at item one, in the responses, the question
4 was: Were any of the question cartridge cases items
5 one through three fired in the same firearm as the
6 known cartridge cases?

7 That was the question that was presented to you;
8 right?

9 A Yes.

10 Q In the response for item one, it indicates one yes
11 response; is that right?

12 A Yes.

13 Q In item three, if you look over, it indicates a one --
14 one yes response; correct?

15 A Yes.

16 Q Are those incorrect responses?

17 A They would appear to be.

18 Q Yet even though we have what appears to be one -- two
19 incorrect --

20 THE COURT: Hold on a second, counsel.

21 I'm trying to make sure I'm following you.

22 On my table, item three has three responses.

23 You're on the following page, page 18.

24 MR. BERLINE: Your Honor, if you look in
25 the lower --

1 THE COURT: 269 participants.

2 MR. BERLINE: Yes, Your Honor. If you
3 look in the lower left-hand corner, you'll see
4 test number, it should be 06-526 on your
5 packet.

6 THE COURT: All right, okay. You may
7 continue.

8 MR. BERLINE: Thank you, Your Honor.

9 BY MR. BERLINE:

10 Q Just to summarize, these are what appears to be two
11 incorrect responses; right?

12 A Yes.

13 Q In fact, these appear to be two incorrect false
14 positive responses; right?

15 A Yes.

16 Q If you look at item one, you see in parentheses, zero
17 percent; right?

18 A Yes.

19 Q Is that a zero percent error rate?

20 A I have no idea how they figure that. Apparently, is --
21 may calculate to less than one percent so they put it
22 as zero. I don't know how they calculate that
23 percentage.

24 Q But that is an indication of the error rate; right?

25 A Yes, it is. In this case, it is. So even though --

1 Q Then we have 269 participants. Everybody got the right
2 answers except for what appears to be two people;
3 right?

4 A Appears to, yes.

5 Q Even though we had for item one, 19 inconclusives;
6 right?

7 A Yes.

8 Q Even though in item two, we had two inconclusives;
9 right?

10 A Yes.

11 Q And even though in item three, we had 19 inconclusives;
12 right?

13 A Yes.

14 Q So for these four tests -- strike that. These test
15 results are published on the web, on the Internet;
16 correct?

17 A Yes.

18 Q You had access to the results?

19 A They are on the Internet. They are available to
20 anybody that looks for them.

21 (Pause in the proceedings.)

22 MR. BERLINE: What are we at, Miss Clerk?

23 THE CLERK: DF.

24 MR. BERLINE: Your Honor may I approach?

25 THE COURT: Yes, you may.

1 BY MR. BERLINE:

2 Q Mr. Scanlan, I'm handing you a document marked as
3 Defendant's Exhibit DF. Can you look at that, please.

4 Do you recognize that as the test response summary
5 for Test 10-526?

6 A Yes.

7 Q That's the test that you failed?

8 A Yes.

9 Q This had 330 participants taking the test; right?

10 A That's correct.

11 Q There were, by my calculations -- how many false
12 positives were included in this test by the
13 participants?

14 A It looks like 24.

15 Q Twenty-four false positives; right?

16 A Yes.

17 Q This test -- is it your opinion that this test was
18 harder than the test -- than your practice tests?

19 A My opinion, yes. It was harder than some of the
20 practice tests.

21 Q And by the response summary, the response summary seems
22 to indicate that it was, indeed, a much more difficult
23 test; correct?

24 A Yes. There's far more inconclusives on this one and
25 also false positives.

1 Q Again, false positives being the very worst answer, the
2 very worst result that a firearm examiner could
3 conclude; right?

4 A Yes.

5 MR. BERLINE: Your Honor, I ask that D --

6 THE COURT: DF.

7 MR. BERLINE: Did I put that as DF?

8 THE COURT: Yes.

9 MR. BERLINE: Could we re-mark it as G?

10 It should be G.

11 (Pause in the proceedings.)

12 MR. BERLINE: For the record, I have
13 re-marked Mr. Scanlan's exhibit, the test
14 numbered 10-526 results as DG, and I request
15 that that be entered into evidence, Your Honor.

16 THE COURT: It's admitted.

17 BY MR. BERLINE:

18 Q Going back to the September 8, 2010, letter, at number
19 five, it talks about standard case note documentation
20 guidelines. Do you see that?

21 A Yes.

22 Q In the NFLQA/QC manual. Do you see that?

23 A Yes.

24 Q What is that?

25 A That is a manual that's a Forensic Labs Quality

1 Assurance/Quality Control Manual.

2 Q It also talks about established laboratory protocols;
3 correct?

4 A Yes.

5 Q What are those?

6 A Those are procedures that are written procedures for
7 the laboratory.

8 Q Were those the ones that we reviewed prior to, in the
9 Daubert hearing awhile back?

10 A Yes. That would be part of them.

11 Q There's more?

12 A Well, that's just the one section, and each discipline
13 has a set.

14 Q Number six in the September 8, 2010, non-consensus
15 results letter talks about taking a reference samples
16 competency test; correct?

17 A Yes.

18 Q On September 21, 2010, did you take a competency test?

19 A I took it prior to that.

20 Q Oh, okay. When? Was it around that time?

21 A It was prior to that. It was, I believe, prior to
22 October 5th or somewhere in that frame.

23 Q Now, it says in the letter that it's supposed to be a
24 blind test; correct?

25 A Yes.

1 Q But you knew when you received these samples that this
2 was a test; right?

3 A Yes.

4 Q If we look at a page in the packet called, entitled
5 competency test, and that would be well after the
6 tables that we were just looking at, a couple pages
7 after the tables we were just looking at?

8 THE COURT: Counsel, one second.

9 (Pause in the proceedings.)

10 THE COURT: You may continue, sir.

11 MR. BERLINE: Thank you, Your Honor.

12 BY MR. BERLINE:

13 Q Are you there, Mr. Scanlan?

14 A Yes, I am.

15 Q If you look one, two, three, four -- the fourth
16 paragraph, basically it instructs you to list all
17 supporting data and documentation with your report; is
18 that right?

19 Let me rephrase that. You were told to take this
20 examination; correct?

21 A Yes.

22 Q And you were also told to list all supporting data and
23 documentation used in your examination; correct?

24 A I believe that's correct, yes.

25 Q Did you do that?

1 A Yes.

2 Q Do we have that? Were we provided that in the packet?

3 A There's a copy of my report, but not the notes section
4 of it.

5 Q Do you have those with you?

6 A No, I do not.

7 Q Your results and your work while taking this test was
8 also to be technically reviewed; correct?

9 A Yes.

10 Q Who did that technical review?

11 A Andrew Reinholz.

12 Q Andy Reinholz on September 8, 2010, was also suspended
13 from making any cartridges case comparisons; correct?

14 A Yes.

15 Q He was not reinstated until December 2010; correct?

16 A I have no idea.

17 MR. BERLINE: Your Honor, just for the
18 record, if we can look at Exhibit DF -- it's
19 been admitted into evidence -- the last letter
20 on DF -- may I approach the witness, Your
21 Honor?

22 THE COURT: Yes.

23 BY MR. BERLINE:

24 Q I'm showing you the last letter on Exhibit DF. Is that
25 a letter reinstating Mr. Reinholz's ability to do case

1 comparisons on December 10, 2010, from Ed Espinoza?

2 A This is a letter confirming his completion of the
3 corrective action plan implemented on September 8 of
4 2010. It says: You successfully completed the
5 requirements of the CAP.

6 Q And is eligible to resume cartridge case work
7 activities; correct?

8 A Yes.

9 Q That's number eight?

10 A That is correct, yes.

11 Q If you look at the very next page of Packet 10-E on a
12 document that says competency test, you'll see initials
13 AR; correct?

14 A That's correct.

15 Q Whose are those initials?

16 A Andrew Reinholz.

17 Q That's the same individual who was also suspended on
18 September 8, 2010?

19 A Yes.

20 Q And does this indicate that he did a technical review
21 of your case work?

22 A Yes.

23 Q On October 5th, 2010?

24 A Yes.

25 Q Who is Doina Voin, do you know?

1 A She runs a quality assurance program.

2 Q She works for your laboratory; right?

3 A She does.

4 Q Does she work in the same lab as you do?

5 A She works in the same building, yes.

6 Q She's on a first name basis with you; correct?

7 A Yes.

8 Q She's not an independent quality assurance coordinator?

9 What I mean by that is, she doesn't work for an outside
10 agency; right?

11 A That's correct.

12 Q And this competency test -- and not the practice test,
13 but the latest, the competency test, that was Test
14 08-526; right?

15 A I'm not real sure. I would have to refer back to . . .

16 Q If you look at the page, the next page after Andy
17 Reinholz's technical review approval on Packet DE,
18 you'll see a table one there. Do you see that?

19 A Yes, I do.

20 Q What is that?

21 A That's the manufacturer's summary for Test Number
22 08-526.

23 THE COURT: Excuse me. Which exhibit?

24 MR. BERLINE: We're back on the Packet DE.

25 THE COURT: Not Reinholz's package?

1 MR. BERLINE: Not Reinholz's package, Your
2 Honor.

3 THE COURT: All right.

4 BY MR. BERLINE:

5 Q Now, you called this a manufacturer's summary. But
6 isn't a manufacturer's summary different than what
7 you're seeing here?

8 A Well, this is the sheet from collaborative testing,
9 CTS.

10 Q But this is the response summary; correct?

11 A Yes.

12 Q The manufacturer's summary gives specific facts and
13 descriptions and circumstances relating to the test;
14 right?

15 A Yes. They outline what they did, how they designed the
16 test.

17 Q So this is the response summary of the competency test
18 that you took; right?

19 A Yes.

20 Q And this is a 2008 test; correct?

21 A Correct.

22 Q You took this test before; right?

23 A Yes, I have.

24 Q You were given -- as a part of this test, you were
25 given the manufacturer's summary; right? When you were

1 given the test, were you given a packet of material?

2 A Are you referring to the competency test or the
3 original examination of this?

4 Q Good question. I'm referring -- let's do both.

5 Initially, in 2008, when you took the test, were you
6 given a packet of material?

7 A Yes.

8 Q And in that packet of material, was it a
9 manufacturer's -- was there something called a
10 Manufacturer's Information?

11 A Yes.

12 Q And the purpose of that Manufacturer's Information is
13 to give you specific and unique underlying facts of the
14 evidence that the testers are providing you; right?

15 A Yes.

16 Q Because you can't do this in a vacuum. You need to
17 know facts about where this evidence came from;
18 correct?

19 A Some basic things, yes.

20 Q Okay. Then when you were given this test as a
21 competency test -- and you were given this about what,
22 two years later?

23 A Yes, approximately.

24 Q You took this competency test in 2010; correct?

25 A Yes, that's correct.

1 Q And just two years later -- you were given a test in
2 2008; right?

3 A Yes.

4 Q Were you given a test in 2009?

5 A Yes.

6 Q You're given a test every year; right?

7 A Well, actually, now it's two tests. It's one firearms
8 and one toolmark test per year.

9 Q Okay. So you're given the 2000 test, and for this
10 competency test, you're given the same Manufacturer's
11 Information sheet; right?

12 A No.

13 Q Oh, you're not?

14 A No.

15 Q You're not given any kind of factual background?

16 A We're given manufacturer background, but if you go back
17 about two pages prior to your other inquiry on the
18 results, where it says competency test on top and page
19 one of two, and it's signed by Doina Voin, that is the
20 information that I was given for the competency test,
21 and what she has done is taken some of the information
22 from the original test and rewritten it, and she may
23 have scrambled the samples around. I'm not sure. I
24 haven't looked at it that close.

25 But anyway, she mimicked the Manufacturer's

1 Information. The first paragraph, enclosed four
2 samples, so on, representing fires, test fires, and the
3 samples are listed there.

4 Q She didn't give you this whole complete Manufacturer's
5 Information?

6 A No. I didn't have the same one that CTS put out.

7 Q Again, this was the same test you had taken just two
8 years prior?

9 A Yes.

10 Q Again, this '08 test -- let's see if we can get to
11 those. Going back to table one of Mr. Scanlan's
12 packet, Your Honor, DE, Test Number 08-526, this test
13 when it was originally given in 2008 had 304
14 participants; right?

15 A Yes.

16 Q No errors; right?

17 A That appears correct.

18 Q For item one, there's 22 inconclusives?

19 A Yes.

20 Q Item two, 21 inconclusives?

21 A Yes.

22 Q Item three, one inconclusive?

23 A That's right.

24 Q If you go to the next page in the Packet 10-E, you see
25 the e-mail from Doina Voin to you and other people,

1 dated October 5, 2010, at 11:44 a.m.

2 Do you see that?

3 A Yes.

4 Q Okay. And this is where it says: Congratulations, you
5 successfully completed your proficiency Test 08-526;
6 right?

7 A It's referred to as competency test, MDS 092110 C,
8 firearms examination.

9 Q Then the next line, the competency test items used in
10 this test are the items provided by CTS proficiency
11 Test Number 08-526; right?

12 A Yes.

13 Q Again, if we look at two, you say the wording on the
14 conclusion of your report would be for an inconclusive
15 result would be "did not appear to have been discharged
16 in the same firearm".

17 Right?

18 A Yes.

19 Q You did not put "could have been discharged from that
20 firearm".

21 Right?

22 A That's correct.

23 MR. BERLINE: One moment, please, Your
24 Honor.

25 (Pause in the proceedings.)

1 BY MR. BERLINE:

2 Q In this matter you prepared an amended criminalistic
3 examination report?

4 A Yes.

5 Q You also prepared a criminalistic -- there was a
6 criminalistic examination report first and then an
7 amended one; correct?

8 A Yes.

9 Q It was just you had an amended one because there were
10 page numbers messed up on it; is that right?

11 A Yes. Pages weren't consecutively numbered?

12 Q But the substance, the content did not change; right?

13 A That's correct.

14 Q In that report, you set forth what you did to the
15 shotgun shells you received in this matter; right?

16 A Yes.

17 Q You concluded that some shotgun shells were discharged
18 in the Mossberg shotgun; is that right?

19 A Yes.

20 Q And then you also concluded that some shotgun shells
21 had similar class characteristics to lab case number
22 09000120, lab one, which is the Mossberg shotgun;
23 right?

24 A Yes.

25 Q So you concluded that some shotgun shells had similar

1 class characteristics to the Mossberg and could have
2 been discharged in that shotgun. You put that in your
3 report; right?

4 A Yes.

5 Q You did not put it the other way; right?

6 A That's right.

7 Q But that's not ambiguous in your mind?

8 A No.

9 Q That's not misleading?

10 A Not at all.

11 Q That's not unclear?

12 A It seemed to be clear enough to myself and the people
13 that reviewed the reports.

14 Q You think that would be clear to a jury?

15 A I believe with explanation, it would be.

16 Q Exactly. You feel that you would have to explain that;
17 correct?

18 A I would have to explain what an inconclusive is and
19 what the meaning of an inconclusive is, yes.

20 Q Do you think that that result was a clear and
21 straightforward answer?

22 A I believe so, yes.

23 MR. BERLINE: Your Honor, I'm about ready
24 to go into Mr. Reinholz's packet. It's not
25 going to take me so long. This might be a good

1 break if you'd like, but if you like, I will
2 continue.

3 THE COURT: You're going to go into his
4 package to the extent he knows about it.

5 MR. BERLINE: To the extent he knows about
6 it, Your Honor, and it might be quick because
7 he might not know anything.

8 (Pause in the proceedings.)

9 THE COURT: Let's move on, counsel. We'll
10 take a break before noon.

11 BY MR. BERLINE:

12 Q Let me back up.

13 THE COURT: Before we go on, there's an
14 administrative matter.

15 Mr. Schuler, are you going to handle the Rule
16 five?

17 MR. SCHULER: I didn't know there was an
18 initial appearance. Who is the defendant,
19 Your Honor?

20 THE COURT: Could you confer with the
21 agent who is in the back?

22 MR. SCHULER: Your Honor, I believe that's
23 the agent.

24 THE COURT: So it's not -- this is not
25 your --

1 (Pause in the proceedings.)

2 THE COURT: Let's continue, counsel.

3 BY MR. BERLINE:

4 Q Real quick, the September 8, 2010, non-consensus
5 results letter for you, Mr. Scanlan, said that they
6 should review your work; is that right, generally?

7 A Yes.

8 Q Two people, the criminalistics team leader and a member
9 of the management team; is that right?

10 A Yes.

11 Q So the one person that reviewed your material was who?
12 Because I can't pronounce the name.

13 A Darrell Hegdahl.

14 Q He reviewed your work; correct?

15 A Yes.

16 Q And we had a letter from him; correct?

17 A Yes.

18 Q The other person that reviewed your work -- and we
19 might have gone over this, but -- correct?

20 A Yes.

21 Q Do we have any indication that Mr. Espinoza reviewed
22 your work?

23 A I'm not sure whether there's a letter in this response,
24 specifically from him or whether it's just a general
25 response to the whole packet that he was part -- he was

1 part of the criminalistics team that did the review
2 that responded to the --

3 THE COURT: Could you repeat the end?

4 A I'm not sure whether there's a --

5 THE COURT: Hold on a second. I'll ask
6 the court reporter to read the response.

7 (The reporter read from the record.)

8 THE WITNESS: Part of the response to the
9 proficiency review board and the person was
10 Todd Nordhoff, who was the chair of that board.

11 THE COURT: You may continue.

12 MR. BERLINE: Thank you, Your Honor.

13 BY MR. BERLINE:

14 Q As far as firearm examiners in your laboratory,
15 Mr. Scanlan, it's just you and Mr. Reinholz; is that
16 correct?

17 A That's right.

18 Q Are you aware on September 8, 2010, Mr. Reinholz was
19 suspended, like you were, for failing a test?

20 A Yes.

21 Q That was the same test that you failed, 10-526; right?

22 A Yes.

23 Q Are you aware that he had to go to, as a result of that
24 failing, failure of 10-526, are you aware -- did he
25 have to do something different than what you had to do?

1 A Yes.

2 Q What was that?

3 A He had to travel to another laboratory and observe
4 other firearms examiners for a period of time. I
5 believe it was one week that he spent. I'm not
6 absolutely sure what the dates were.

7 Q So he had to get some additional training?

8 A Yes.

9 Q You did not?

10 A I did not.

11 Q Do you know, did he make the same mistakes that you did
12 in 10-526?

13 A Yes.

14 Q He made false positives?

15 A Yes, he did.

16 Q Did he make two false positives?

17 A Yes.

18 Q Do you know, did he have to take practice tests?

19 A Yes.

20 Q Do you know how many he was supposed to be given?

21 A I believe it was the same; four practiced and one
22 competency.

23 Q Are you aware how many actual practice tests he took?

24 A As far as I recall, it was four of the practice tests
25 and one competency.

1 Q Did you see him take four practice tests?

2 A I did not observe him personally, no.

3 Q Do you know?

4 MR. BERLINE: I guess, Your Honor, since
5 this is in evidence -- the packet only looks to
6 me like there's three practice tests. That's
7 my point. So my point, he can only testify as
8 to what he knows.

9 BY MR. BERLINE:

10 Q He took -- do you know on his competency tests, did he
11 take the same competency tests that you did?

12 A No, he did not.

13 Q He took a different one?

14 A Yes.

15 Q Which one did he take?

16 A I don't recall.

17 Q Would the competency test -- is there a special way
18 that your lab indicates the competency test? Is it
19 given a different, unique number? It might be a bad
20 question.

21 Normally, the practice test had 08 dash 526, that
22 type of number; correct?

23 A Yes.

24 Q Indicates the year and then -- do you know what the 526
25 stands for?

1 A Those were CTS tests from that particular year and that
2 series number for the tests.

3 Q Your competency test went -- a different number;
4 correct?

5 A Yes.

6 Q It didn't use the CTS numbering system?

7 A It was one of the CTS tests that was renumbered by our
8 laboratory, by Doina Voin.

9 Q And your number was MDS -- I'm sorry. If you look
10 again at Doina Voin's e-mail to you, dated 10/5/2010 --
11 and again, this is your packet, marked DE, I believe.

12 A Okay. I'm there.

13 Q Your competency test was number MDS 092110-C; right?

14 A Yes.

15 Q Okay. Do you know what number Mr. Reinholz's test was?

16 A No.

17 Q Did you have a chance to review -- did Mr. Reinholz
18 take notes when he took these proficiency tests -- I'm
19 sorry -- the practice tests or the competency tests?

20 A He did for the competency test, and I don't know
21 specifically about the practice tests.

22 Q Okay. Is Mr. Reinholz's proficiency rating, is that
23 used for the lab accreditation? Does that have --
24 strike that. Let me rephrase that.

25 Does Mr. Reinholz's proficiency rating, does that

1 have any impact on your laboratory's accreditation?

2 A Indirectly, yes, because everyone in the laboratory is
3 required to take the proficiency tests in the fields in
4 which they're working, so it's a requirement of the
5 accreditation board, the ASCLAD Accreditation Board,
6 and they do check records for that.

7 Q For your laboratory's accreditation, is it true that
8 you -- that only your proficiency rating documents are
9 submitted to the accreditation laboratory to obtain
10 your proper certification?

11 A Yes.

12 MR. BERLINE: May I have one moment, Your
13 Honor, please?

14 THE COURT: Yes.

15 (Pause in the proceedings.)

16 MR. BERLINE: Your Honor, I just want to
17 make sure that everything is into evidence that
18 was marked, and this would conclude my
19 cross-examination.

20 Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 Mr. Scanlan, what is the difference between a
23 practice test, a competency test and a proficiency
24 test, if any?

25 THE WITNESS: The practice tests were

1 proficiency tests that had been sent out by the
2 testing agency in prior years. So of five
3 tests that were available dealing with
4 cartridge cases, four of those were chosen as
5 practice tests, and one of them was picked as a
6 competency test, and those were chosen and
7 renumbered by Doina Voin, quality assurance
8 person.

9 So she randomly assigned the practice tests
10 and the competency tests, and my tests were
11 different. In other words, of the five tests,
12 Andrew Reinholz took one of them as a competency
13 test. I took one of them as a competency test,
14 but they were not the same ones. They were picked
15 out of the group of five. So then the remaining
16 four for each of us was used as a practice test.

17 THE COURT: How do they reconcile with a
18 proficiency test? Are they all proficiency
19 tests?

20 THE WITNESS: They were all proficiency
21 tests from prior years.

22 THE COURT: How often are proficiency
23 tests required by the accreditation board that
24 you referred to?

25 THE WITNESS: Once per year.

1 THE COURT: Going back to these practice
2 tests, I'd like to go back to 02-526, 03-526,
3 05-526, 06-526, 08-526 and 010-526. They're in
4 Exhibit DE, I believe, beginning on page 15 of
5 the package. Are you there?

6 THE WITNESS: Yes.

7 THE COURT: With respect to -- I
8 understand your testimony is that inconclusives
9 do not count with respect to accuracy of the
10 numbers. They don't count with respect to
11 error rates; is that correct?

12 THE WITNESS: That is correct, yes.

13 THE COURT: With respect to the '02 test,
14 the 2002 test, was the error rate zero as to
15 the three items?

16 THE WITNESS: Actually, if you're
17 referring to the brackets. . .

18 THE COURT: Yes.

19 THE WITNESS: If that is the number of
20 respondents in each one of those brackets, not
21 the error rate, so under item one, you have
22 zero percent, you have 77 and 23. The 77 and
23 23 would add up to a hundred percent of the
24 respondents for that particular item.

25 I think I have seen some discrepancies in

1 those numbers, where not all respondents would
2 necessarily respond to each one of the columns or
3 each one of the responses. Rather than that being
4 an error rate, that's just a hundred percent or
5 whatever percent had each particular response.

6 THE COURT: Let's go to 2005, 526.

7 THE WITNESS: I'm there.

8 THE COURT: There were 255 participants.
9 It appears under item three, 12 participants
10 entered inconclusive; 243 entered no. There
11 was zero under yes.

12 Correct?

13 THE WITNESS: Yes, that's correct.

14 THE COURT: Go to 2006, 526 the next page.
15 269 participants. Look to item one. One
16 answered yes; 249 answered no, and 19 were
17 inconclusive.

18 My effort is to follow up on the cross with
19 respect to that one individual who answered yes,
20 and I recall your response being that the term
21 "error rate" was used and that's why I'm coming to
22 that. I want to make sure I have some clarity on
23 this.

24 Zero percent, does that mean because one is
25 less than -- the one person who tested outside of

1 the norm is less than zero percent of the total?

2 THE WITNESS: I would have to correct that
3 testimony, because I misinterpreted the
4 brackets again, because -- again, the 97 and
5 seven adds up to 100 percent on the 249 and 19.
6 So the one is one out of 216. I guess they
7 picked a percent out of that.

8 THE COURT: It's still less than
9 one percent?

10 THE WITNESS: Right.

11 THE COURT: Let's look to item three.
12 Would the same apply to item three?

13 THE WITNESS: Yes.

14 THE COURT: If we move over to the 2008
15 test, which is four pages from the one we're
16 looking at, table one, there were 304
17 participants.

18 THE WITNESS: Yes, I'm there.

19 THE COURT: Item three, 303 of the
20 participants answered yes, and one participant
21 answered no, and that one participant is
22 reflected to be less than one percent or
23 zero percent.

24 THE WITNESS: That's actually in the
25 inconclusive box, but yes, I believe that's

1 correct, also.

2 THE COURT: Would that be an error rate or
3 no? Is that less than one percent error rate
4 of those tested?

5 THE WITNESS: This particular one is in
6 the inconclusive box, so it would not be
7 counted against, so it would not be counted as
8 an error. So the error rate would be zero.

9 THE COURT: Mr. Berline, would you assist
10 me in identifying the location for the 2010
11 test?

12 MR. BERLINE: Yes, Your Honor.

13 MR. SCHULER: Exhibit DG.

14 MR. BERLINE: Did you find it, Your Honor?

15 THE COURT: I've had it, but I don't have
16 it right now. I have it. Here, under item
17 two, on Exhibit DG, sir, item two, one
18 respondent answered no, and 328 of 330
19 participants answered yes.

20 Again, would the zero percent in parentheses
21 represent that one percent of all respondents
22 answered no?

23 THE WITNESS: Yes, I believe so.

24 THE COURT: With item two -- I'm sorry.

25 Item three as we move to the right of the chart

1 here, it appears that eight participants
2 responded yes, and it indicates in parens a
3 2 percent rate. Would that be -- or about
4 2 percent of the participants answered
5 incorrectly?

6 THE WITNESS: Yes, I believe so.

7 THE COURT: The same would apply to item
8 four, the six persons who answered yes would be
9 2 percent of all those responding answered
10 incorrectly?

11 THE WITNESS: I believe that's correct.

12 THE COURT: And the same as to item five
13 under the yes category with the ten?

14 THE WITNESS: I believe so.

15 THE COURT: So in your mind, are those
16 error rates or just percentages of
17 participants?

18 THE WITNESS: I'm not sure how we
19 interpret that, because they are percentage of
20 participants, but they could also be
21 interpreted as an error rate. I'm not sure
22 with the inconclusives not being counted how
23 that is actually figured for an error rate.

24 THE COURT: All right.

25 THE WITNESS: And CTS publishes an error

1 rate. And I'm not sure that they have for
2 these particular ones, but they have published
3 error rates, sir, overall error rates for
4 groups of tests before. I don't know that they
5 generate an error rate for each individual test
6 or how they go about it.

7 THE COURT: Is that error rate in any of
8 the materials submitted into evidence here?

9 THE WITNESS: Not that I'm aware of.

10 THE COURT: To your recollection, would
11 you recall what that error rate may be, what
12 range it might be?

13 THE WITNESS: Well, the published error
14 rate that I've seen is approximately
15 1.4 percent, 1.5, sometimes 1.2 percent for
16 cartridge case comparisons.

17 THE COURT: Over the last 11 years you've
18 been in this business with the --

19 THE WITNESS: Excuse me. That's from the
20 CTS test results, and that's the acknowledged
21 error rate for, I believe, about a ten-year
22 period or something like that.

23 THE COURT: All right.

24 Mr. Berline, any follow-up on those
25 questions, sir?

1 MR. BERLINE: No, Your Honor.

2 Thank you.

3 THE COURT: All right. Sir, you may step
4 down.

5 Mr. Scanlan, I'd like to ask you to step
6 outside for a moment, sir.

7 (The witness left the courtroom.)

8 THE COURT: Ten-minute recess.

9 (A short recess was taken.)

10 - - -

11 (In open court:)

12 THE COURT: The record should reflect the
13 parties are present.

14 I'd like to hear from you, Mr. Berline.

15 MR. BERLINE: What we've learned further
16 today through cross-examination is subjectivity
17 in this discipline is undisputed and rampant.

18 There's a lack of protocols in this
19 discipline, especially in this lab. By testimony,
20 we know there's a lack of protocols for the whole
21 discipline across the United States by all the
22 labs, because they differ. There's no standard
23 for protocols.

24 This lack of protocols, the seriousness of
25 this lack of protocols is demonstrated by how this

1 internal problem, this serious internal problem
2 was handled by the lab.

3 You had two people who took the very same
4 test; failed the same test. The similarities here
5 are very uncanny. Failed the same test. Failed
6 the same answer. Made two false positives.

7 If you compare the packets and the wording on
8 the letters and the correspondence, it's very
9 similar. They take the same practice tests. For
10 some reason, there's only three in Reinholz
11 packet, but they're the same three as in
12 Scanlan's. Scanlan took one more.

13 These are prior tests they've all taken
14 within a four- or five-year period. They only
15 take one. With the practice test they're given a
16 manufacture information. It's basically a fact
17 pattern. That's unique. It's easily
18 identifiable.

19 So when you take this, you say, oh, yeah,
20 I've done this before. All these results are on
21 the web. I looked at them. These are just parts
22 of what are on the web. You can search for his
23 identifier number and come up with his comments
24 and conclusions, and they're in there, along with
25 everybody else on the web, going all the way back.

1 So they take all the same tests that they've
2 taken before; "voila", they pass them. That does
3 not seem to be a reliable scientific method for
4 fixing errors just by taking a test that you've
5 already taken --

6 THE COURT: Aren't the fact patterns
7 changed? He testified that --

8 MR. BERLINE: Only on the one competency
9 test, Your Honor. That's the one special one,
10 and that's the one where I talked about the
11 special number that it had. The others, he
12 knew they were prior practice tests. He knew
13 much of it was 08-526, 03-526 and 06.

14 But on this competency one, after he took the
15 four practice ones, then they hid it. They gave
16 it a different number and took facts from the
17 manufacturer's summary and boiled it down.

18 I admit, I think on the competency test, he
19 might not have recognized that he -- of which
20 version he had taken before. But they both took
21 the same test.

22 You can see on Reinholz's packet, it has the
23 same MDS . . . one C number that Mr. Scanlan's
24 test had. Even though Mr. Scanlan testified they
25 took different tests, they did not.

1 This is their procedure to correct serious,
2 serious errors. There's no worse error than false
3 positives that have an ability to put innocent
4 people in prison.

5 THE COURT: What about all the oversight
6 with the accreditation board and all that?
7 What's your take on all that?

8 MR. BERLINE: One of my requests, whatever
9 happens here, is we need a quality control
10 expert. I don't know how much oversight --
11 there's a letter, one letter that's in
12 Scanlan's packet from the accreditation people.
13 It's not in Reinholz's. They don't seem to be
14 concerned about Reinholz.

15 The American Society of Crime Lab Directors
16 Laboratory Accreditation Board seems to be
17 concerned with, again, just his false positives;
18 not the inconclusives.

19 So we have one letter. They say, hey, we got
20 a problem with this. Come up with an action plan
21 and send us the results.

22 What do they do? They take previous tests
23 they already know about. It's reviewed by Andrew
24 Reinholz, who is also suspended, but is still
25 reviewing these results.

1 They miraculously come up with, we now passed
2 all our competency tests, and they then in the end
3 send it off to the accreditation lab, and they get
4 a letter from the accreditation lab saying you're
5 good. It doesn't appear that any of these people
6 come down to this lab and independently regulate
7 what's going on.

8 We don't know -- the quality assurance person
9 works for Fish and Wildlife. She works for the
10 same laboratory. There is no independent quality
11 assurance, and the accreditation board doesn't
12 seem to be personally involved. They're just
13 doing this by correspondence. Just show us he
14 passes these proficiency tests. From these tests,
15 we know, it's undisputed that class
16 characteristics alone can lead to a false
17 positive, because that's what happened to
18 Mr. Scanlan, and that's what happened to Mr.
19 Reinholz twice.

20 Class characteristics lead to false
21 positives. We also know that inconclusives can
22 lead to exclusions, but they're not -- they
23 absolutely deny that.

24 What these reports show is here's the answer
25 to this question, and so all these percentages,

1 all these people, 219 say -- 15 people say
2 inconclusive. All the other people say no, and
3 you have a zero percent for yes.

4 So we know the answer is used -- the
5 manufacturer, the designer of this test intends to
6 on a specific answer. Most of the people have the
7 right answer. The inconclusives are wrong. They
8 got the wrong answer, because they said it's
9 inconclusive, when the right answer was excluded.

10 You can only determine that in this testing
11 environment, because of the subjectivity of this
12 whole discipline, there's no way to prove for
13 certain what an inconclusive means in real life.
14 It can only be shown in test circumstances when
15 the person designing the test --

16 THE COURT: Couldn't it be favorable to
17 the defendant, as well as negative, if it's
18 inconclusive?

19 MR. BERLINE: Could be, yes.

20 THE COURT: It could be the positive side
21 of it or the negative side of it, as you
22 related to the witness.

23 MR. BERLINE: Absolutely, Your Honor.
24 That's another problem with this discipline and
25 the protocols. I wouldn't have so much of a

1 problem with it -- of course, I would want to
2 know if the inconclusive was an exclusion, but
3 as long in the reports they put inconclusive,
4 or they put this might not have been -- I can't
5 remember the language now, but do it favorably
6 to the defense.

7 Mr. Scanlan, in his report, puts these could
8 have been discharged from the firearm. That's
9 from an expert, who is supposed to be unbiased and
10 make clear and concise conclusions, and that's in
11 his Code of Ethics.

12 Where test results are inconclusive or
13 indefinite, only conclusions drawn shall be fully
14 explained. Putting in your report that these
15 cartridges may have been discharged in the
16 Mossberg, to me, is misleading. At a minimum,
17 it's distorting what inconclusive means.

18 THE COURT: I understand your point about
19 the examiner can go either way. But the
20 passage also supports the notion that
21 inconclusives are okay, because it's in the
22 Code of Ethics.

23 MR. BERLINE: I'm not arguing about that.
24 I think inconclusives are fine. I'm just
25 saying this is more indicative of the problems

1 with the subjectivity of this, and there's no
2 underlying statistical, mathematical or any
3 other kind of quantitative analysis where you
4 can say, like Mr. Scanlan was trying to say,
5 there's a positive inconclusive and a negative
6 inconclusive.

7 There's no such thing, because they don't use
8 statistics. They don't use probability. They
9 don't use the CMS. They don't count striations.
10 You can't do that. That's the problem with this
11 discipline. Not to mention in the testing area,
12 the inconclusives are not counted toward the error
13 rate.

14 That's why Hamby can say in his conclusion
15 that there's a zero percent error rate, because in
16 reality, there's no way to determine that.

17 In the testing realm, there is, and clearly,
18 we saw that. But AFTE refuses to acknowledge
19 that. I think, Judge, it's right, those
20 parentheses are error rates. They say
21 zero percent, because if you carried it out, it
22 would be less than one -- .00012 percent error.

23 THE COURT: Sir, you've gone on for 14
24 minutes, but I'll allow you to close it up,
25 since I was asking questions.

1 MR. BERLINE: Again, there's subjectivity,
2 which is bad enough, but there's no protocol,
3 no standardized testing procedures, and there's
4 no documentation to support this kind of
5 evidence.

6 This evidence, this discipline is unreliable.
7 The scientific methodology underlying it is nearly
8 nonexistent.

9 This evidence should not be brought in.

10 As far as error rates what they really should
11 be doing is success rates. If they did it on
12 success rates, you would have a huge -- thirty
13 40 percent. That would be the true number.

14 Let's do success rates, not error rates, and
15 get rid of inconclusive. Success rates. If they
16 figure that out, my bet is this evidence wouldn't
17 be worth giving to a jury. It wouldn't be helpful
18 to a jury.

19 In that instance, I think this should be out,
20 because it's scientifically unreliable, and the
21 underlying methodology is -- if you want to call
22 it that -- is misleading.

23 On the other hand, if it comes in, I think
24 what we heard today, Mr. Scanlan's testimony
25 should be excluded, because on a 403 analysis, his

1 reliability, his trustworthiness, his honesty, his
2 procedures make this kind of evidence far more
3 prejudicial than probative.

4 Thank you, Your Honor.

5 THE COURT: Thank you, sir.

6 Mr. Schuler.

7 MR. SCHULER: Before I get to my argument,
8 I would like to renew an objection, actually,
9 that you made sua sponte to strike that prior
10 testimony.

11 I don't believe any of the questions
12 Mr. Berline asked during that line of questioning
13 has anything to do with Government's Exhibit D-17,
14 the Code of Ethics.

15 He brought up certain portions of that code
16 that the tests are designed to expose findings and
17 all interpretations should be consistent with that
18 purpose, et cetera. Where tests results are
19 inconclusive or indefinite, any conclusions drawn
20 shall be fully explained.

21 Subitem K on page three was: The expert
22 shall not exaggerate or embellish or exaggerate
23 their qualifications while testifying. He made
24 some points with this Government Exhibit D-17, but
25 it wasn't related to the predicate questions that

1 you struck at all.

2 So, Your Honor, I would renew that motion and
3 ask you to strike that line of questioning.

4 I would also like to clear my request to Your
5 Honor to make sure that these internal Fish and
6 Wildlife laboratory documents -- some of them are
7 not internal.

8 The proficiency tests are available online.
9 The internal documents, I believe that counsel
10 understands they're not to disseminate them
11 outside this proceeding. They made it clear that
12 their experts have them, as well. I would like
13 that their experts be held to that order, as well.

14 THE COURT: I will direct that the experts
15 return the documents without making any copies
16 back to defense counsel. If you have faxed
17 them or e-mailed them --

18 MR. BERLINE: I did e-mail them. Would it
19 be sufficient if they tell me they deleted
20 them?

21 THE COURT: However they submit the
22 document, that they deleted them and shredded
23 them from their equipment and kept no copies.

24 MR. SCHULER: And they haven't
25 disseminated them --

1 THE COURT: And that they haven't
2 disseminated them any further, yes.

3 MR. SCHULER: Regarding the motion to
4 strike prior testimony, I'll renew that if Your
5 Honor wants to rule on that now, or later I'll
6 get to my argument.

7 THE COURT: I'll consider your objection.
8 I would like to hear your argument.

9 MR. SCHULER: First of all, regarding the
10 proficiency test, the error rates, one of
11 Mr. Scanlan's last comments, he couldn't tell
12 you for sure whether the literature we
13 submitted that talked about the proficiency
14 tests, the error rates validation study, I want
15 to direct Your Honor to some portions that do.

16 Government Exhibit D-4, it's an article by
17 Ron Nichols. It talks about it. The paragraph
18 that I'll read is Robert Thompson assesses the CTS
19 data for two time periods, the first 1978 through
20 1997, and then the second period, 1998 through
21 2002.

22 The percentage of false identifications for
23 firearms in the first time period was one percent.
24 The percentage of false identifications in the
25 second time period was 1.3 percent. That's on

1 page 592 of Government Exhibit D-4.

2 Page 593 discusses some validation studies
3 where there was error rates reported, as well, of
4 less than zero percent.

5 Government Exhibit D-5 also discusses the
6 proficiency tests error rates and the validation
7 study error rates. That is on page 23 of
8 Government Exhibit D-5, Your Honor.

9 Lastly, Mr. Hamby's affidavit also discusses
10 it on Paragraphs 31 and 33. Paragraph 33,
11 subparagraph five says: Firearms proficiency
12 tests unsurprisingly show higher error rates than
13 validity tests, but the overall average in the
14 range of 1 percent to 3 percent.

15 So there are tests that have been done than
16 tests you've seen today, and those are the
17 reported error rates for those tests.

18 The challenge with regard to this particular
19 proficiency test result of Mr. Scanlan,
20 Mr. Reinholz, there's one aspect of this challenge
21 that the defense is raising that goes to this
22 particular individual's qualifications, his
23 qualifications to be able to testify up here as an
24 expert.

25 Now, this is one test that he has received a

1 non-consensus result on in a 25-year career.

2 That's important to remember. He has done hours
3 under comparison microscope in the 25 years of his
4 experience, and he has no blemishes on his record
5 except for this proficiency test.

6 Now, that proficiency test was corrected
7 through this corrective action plan. The
8 defendants can argue about the way that corrective
9 action plan was performed, but there was a plan,
10 and he performed it and took five proficiency
11 tests and passed those and was certified to do
12 case work again.

13 An important thing to remember also is this
14 proficiency test score he received a non-consensus
15 on was a year after he had done the result in this
16 particular case.

17 What if this case was brought before his
18 proficiency test results came out? Where would we
19 be then; a 2255 motion to bring this evidence back
20 into the Court?

21 It begs the question, Your Honor, how many
22 cases are there going to be where an expert who
23 has testified in a case and then subsequently
24 receives a proficiency test result that indicates
25 he didn't perform well, are we going to reopen

1 those up?

2 Granted, in this case, that didn't happen,
3 but at the time that this expert performed these
4 evaluations, there wasn't any blemishes on his
5 record in a 25-year career of doing at least
6 annual proficiency tests in firearms, and also
7 toolmarks.

8 So I don't think there's any question that
9 this expert is qualified, despite this mistake.

10 Now, there is the relevance to the overall
11 challenge of the firearms and toolmark
12 reliability. But the connotation or the commotion
13 that's been raised particularly today and last
14 week about this proficiency test score in regards
15 to overall reliability, in my opinion, Your Honor,
16 also demonstrates the standards controlling this
17 technique or this discipline. You relate it to
18 the Daubert factors. We have -- it shows there's
19 proficiency tests. There's testing done of this
20 discipline.

21 It shows there's some indication of error
22 rates. That's two out of five Daubert factors.
23 It shows that it can be tested. There are ways to
24 test this discipline, and it shows it has been
25 done, and when mistakes are made, it is corrected

1 or serious attention is drawn to the matter.

2 Now, it also shows in relation to another
3 Daubert factor that it is peer reviewed. We
4 talked about peer review in the sense of journals
5 being published, but really, it's broader than
6 that.

7 If an examiner makes a mistake, there's a lot
8 of attention brought to that mistake, and it's not
9 just that examiner, but individual examiners that
10 peer review the proficiency tests too. In other
11 words, this discussion that we've had demonstrates
12 that actually can support the Daubert factors in
13 at least four out of the five.

14 The last, fifth factor is general acceptance
15 among the scientific community. Professor
16 Schwartz doesn't agree it should be
17 admissibility --

18 THE COURT: The relevant scientific
19 community.

20 MR. SCHULER: The relevant scientific
21 community. Exactly. Firearms and toolmarks
22 examiners is certainly the relevant scientific
23 community among firearms and toolmarks
24 examinations.

25 It's clearly shown through the literature we

1 submitted that it is accepted. It's also
2 acknowledged it's not the exclusion of all
3 firearms in the world, and it's also acknowledged
4 it's not entirely objective, and it's acknowledged
5 that humans can make mistakes.

6 The bottom line is Rule 702 and Daubert does
7 not declare this evidence inadmissible. What we
8 found here is that the defendants have basically
9 asked Your Honor -- because it doesn't have the
10 degree of DNA, or because the proficiency tests
11 aren't the gold standard in how to test the error
12 rates, in other words, there's a degree, they
13 think the reliability degree has to be way up
14 here.

15 Rule 702 and Daubert do not say that. They
16 impose a burden on the Government to make sure
17 that this evidence is reliable in order to be
18 admissible, Your Honor.

19 Nothing that they have said says it doesn't
20 meet that standard under Daubert or under the Rule
21 702 analysis, Your Honor, and the qualifications
22 of this individual examiner only show this one
23 blemish on his record.

24 So the bottom line is that nothing in Rule
25 702 or Daubert excludes this evidence. That

1 burden has been met, Your Honor.

2 If there's any individual questions you have
3 for me, I would be happy to answer them.

4 If I can have a moment to look at my notes.

5 THE COURT: You may.

6 (Pause in the proceedings.)

7 MR. SCHULER: Lastly, Your Honor,
8 inconclusives are not why we're here. I think
9 you picked up on that when you were reviewing
10 the proficiency tests.

11 We're not here because Mr. Scanlan made an
12 inconclusive result or other firearms examiners
13 made an inconclusive result, when the
14 manufacturer's answer that only they know is that
15 it was an exclusion. We're here because there was
16 matches declared, and that's the evidence we're
17 seeking to admit, Your Honor.

18 So the remarks about the inconclusives are
19 not as specific or relevant to what the arguments
20 here made under 702 and Daubert, Your Honor.

21 There's no evidence that Mr. Scanlan or
22 Mr. Reinholz were taking a sneak peak at the
23 online proficiency tests while they were taking
24 these tests. And yes, the lab only has two
25 firearms and toolmarks examiners. They don't

1 really have a way within the lab to do their
2 corrective action plan and have somebody else
3 review that work. So they were working within the
4 confines of the experts that they had.

5 Your Honor, I'll rely on the arguments I made
6 previously on Friday, the exhibits that we
7 submitted, those exhibits submitted April 1st in
8 that binder provided to you and the arguments
9 here.

10 Thank you very much.

11 THE COURT: Two-minute rebuttal. You
12 don't have to take it if you don't want to.
13 It's your motion, sir.

14 MR. BERLINE: I'll just make a couple
15 points. The tests made to rehabilitate
16 Mr. Scanlan, you could see that they were
17 fairly easy tests. A hundred percent,
18 everybody had a hundred percent answers. The
19 one he failed --

20 THE COURT: Maybe they're all that good.

21 MR. BERLINE: Maybe. It could be, Your
22 Honor, with such a subjective criteria, I tend
23 to doubt it. I think these are very simple,
24 very obvious tests, and if you look in
25 Miss Schwartz's affidavit, I think she talks

1 about some comments on prior test-takers that
2 support this was an easy test.

3 In relation to that, the one he failed was
4 fairly difficult in respect to the other one, the
5 practice tests and the competency tests. There
6 were, I think, 24 false positives on that, Your
7 Honor. So this proficiency --

8 THE COURT: Hold on. We're getting back
9 to false positives and the error rate. But if
10 you break those 24 false positives down to the
11 three items on the test, the error rate is one
12 to 3 percent. Look at the numbers on the
13 chart.

14 MR. BERLINE: Right. Item one, item two,
15 item three, you're right. Twenty-four all
16 together. However, that's just one test, so
17 the thing is we don't have an accurate -- the
18 Government hasn't shown this has an accurate
19 error rate.

20 Hamby's declaration, which we know he had
21 some serious problems and was fired, says zero, a
22 zero error rate. We know by these tests it's not
23 zero, right?

24 So the other thing is this May 6 -- strike
25 that, Your Honor.

1 Again, we ask the Court to find that there's
2 a lack of scientific methodology, a lack of
3 reliable scientific methodology, given the
4 subjectiveness, the lack of protocols and the lack
5 of any underlying statistical or other
6 quantitative measurement system.

7 THE COURT: Thank you very much, counsel.

8 To the defendants in the case and counsel,
9 it's 20 minutes to one. First of all, you may
10 recall that on Friday, I indicated that I would
11 have the jury come in at 1:00 o'clock today.

12 During the course of our hearing this
13 morning, I've directed the Clerk's Office to call
14 the jurors and have them come here at
15 eight o'clock in the morning; number one.

16 Number two, I have to handle another criminal
17 matter briefly. Then I need to incorporate what
18 we've done here this morning into the bidding and
19 review the bidding and my thoughts in regard to
20 provide an Order, and I will give an Order. I'll
21 give you my take on all this after the lunch hour.

22 So assuming that we will be in the rule five
23 or -- I don't know, five or 15 minutes or so,
24 takes us to 1:00 o'clock, just before
25 1:00 o'clock. My need to digest all this and

1 incorporate all these matters I've heard today and
2 do my take on this overall matter, I'm thinking we
3 should come back at 2:30. We'll come back at
4 2:30 p.m. At that time, I'll give you my ruling,
5 and then we'll see where we go from there.

6 I have the jury coming back, because I didn't
7 want them sitting out there for two hours in case
8 we have argument. I think it's unfair to the
9 jurors.

10 As I indicated at the beginning of our
11 discussion this morning, I'm in for penny or for
12 pound. If this trial lasts till next week, I'll
13 be here. I'm not going to rush these things.

14 My intention to put you on notice is I've had
15 two notes from the United States with respect to
16 positions it may take with respect to whatever
17 decision I come out with.

18 My intention is to deal with that after I
19 make my rulings. You can think about arguments
20 either way during the course of the break. Once I
21 make my ruling, we'll move into whatever motions
22 the Government has and whatever the response is,
23 we'll deal with it here today.

24 Anything else here?

25 MR. BERLINE: One concern of mine is we've

1 had this jury out there since Thursday. We
2 gave them one admonishment. They're just
3 hanging out there.

4 What I'd like is to bring them back in and at
5 least admonish them one more time, because I think
6 this is a highly unusual circumstance for a jury
7 to be out there that long without doing anything,
8 and I think it would be prudent to re-admonish
9 them about not educating yourself about what's
10 going on. I know there's been news reports on the
11 TV, and I'm concerned about the sanctity of our
12 jury.

13 THE COURT: All right. Thank you,
14 counsel. I accept that. The Court finds that
15 it will review the matter with them in the
16 morning. I'm not going to call them in here
17 for 15 minutes and send them back home. I
18 think to jerk them around like that would be
19 unfair to the jurors. If anything, it would
20 reduce their confidence in the way the system
21 works, when they can be handling their personal
22 affairs or at work.

23 I'll re-admonish them in the morning and make
24 sure everyone has followed the admonishment.
25 They're going to be here at eight, but we're going

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to start at 8:30. If for some reason we're not starting at 8:30, we'll discuss whether or not we're going to release this jury or whether or not we can give them some firm base to start this trial.

I think we need to give them something firm tomorrow, in fairness to them, or at least start with swearing them in and my preliminary instructions.

We're in recess until 2:30 on this matter.

(Court recessed for lunch.)

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2 Afternoon Session

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4 THE COURT: The record shall reflect that
5 the parties are present.

6 Mr. Mendiola, Mr. Santos and Mr. Taitano, I'd
7 like to share with you the Court's ruling on
8 motions before the Court.

9 There are three. First, there's a motion to
10 exclude testimony or evidence with respect to the
11 science of firearms identification; second,
12 there's a motion to preclude Mr. Scanlan from
13 testifying; and third, there's a Government motion
14 that in the event that the testimony is
15 admissible, that the Court exclude the testimony
16 of Professor Schwartz.

17 I'll take them in order. I'd like to share
18 here my rulings. This is an oral ruling. It will
19 not be in writing. Otherwise, it will be a matter
20 of record.

21 The defendants move to exclude the testimony
22 demonstrating that certain shotgun shell casings
23 match certain firearms in this matter based upon
24 firearms evidence on the grounds that the research
25 and methodology of such evidence is unreliable and

1 not scientifically based.

2 Rule 702 of the Federal Rules of Evidence
3 governs the admissibility of expert testimony in
4 Federal Court.

5 U.S. versus Finley, a Ninth Circuit case,
6 2002, Rule 702 provides that if scientific,
7 technical or other specialized knowledge would
8 assist the trier of fact to understand the
9 evidence or to determine a fact in issue, a
10 witness qualified as an expert by knowledge,
11 skill, experience, training or education may
12 testify thereto in the form of an opinion or
13 otherwise if, number one, the testimony is based
14 upon sufficient facts or data; two, the testimony
15 is the product of reliable principles and methods;
16 and three, the witness has applied the principles
17 and methods reliably to the facts of the case.

18 In Daubert, the Supreme Court held that the
19 expert witness testimony is admissible under 702
20 only if it is relevant and reliable. The
21 proponent of the expert has the burden of proving
22 admissibility under Daubert.

23 The trial Court is assigned the task of
24 gatekeeper and ensuring that an expert's testimony
25 both rests on a reliable foundation and is

1 relevant to the task at hand by weighing the
2 following factors:

3 One, whether a method can or has been tested;
4 two, the known or potential rate of error; three,
5 whether the methods have been subjected to peer
6 review; four, whether there are standards
7 controlling the technique's operation; and five,
8 the general acceptance of the method within the
9 relevant scientific community.

10 These factors have been held not to be
11 exclusive or exhaustive under *United States versus*
12 *Prime*, 43 Fed. 3d, 1147, 2005 Ninth Circuit case.
13 Instead, the District Court has considerable
14 leeway in determining in a particular case how to
15 go about determining whether a particular expert
16 testimony is reliable.

17 Under *Kumho Tire*, the 1999 Supreme Court
18 case, in *Kumho Tire*, the Supreme Court made clear
19 that the gatekeeping function of the trial Court
20 described in *Daubert* applies to all expert
21 testimony.

22 The primary consideration in every case is
23 whether the testimony is based upon reliable
24 principles. The test of reliability is flexible
25 in the *Daubert*'s list of specific factors neither

1 necessarily nor exclusively applies to all aspects
2 or to every case.

3 The Supreme Court also instructed that the
4 District Court has considerable leeway in deciding
5 these particular factors. With the dictates of
6 these two Supreme Court cases and the Prime case
7 in mind, the Court considers the challenges in
8 this case.

9 With respect to the underlying scientific
10 principles behind firearm, toolmark evidence, the
11 Court finds that the Supreme Court standard has
12 been met. The Court finds that there are
13 standards controlling the technique's operation.
14 The Association of Firearm and Toolmark Examiners,
15 the AFTE theory establishes such standards and
16 guidance.

17 AFTE, the largest organization that supports
18 the interchange of information concerning firearms
19 examination, standardizes terms and conclusions
20 that are employed in the examination, provides
21 training manuals and operational guidelines for
22 examiners and laboratories for uniform methodology
23 and process for firearm examinations and a Code of
24 Ethics for examiners to ensure the enhancement of
25 the integrity of the examinations.

1 Other organizations weigh in to ensure the
2 integrity of the description of the discipline,
3 such as the International Forensic Science
4 Laboratory and Testing Center and the American
5 Society of Crime Laboratory Directors. All
6 organizations accept the terms and conclusions
7 that have become the vertebrae of the discipline;
8 specifically, including the identification, no
9 identification and the inconclusive conclusions
10 reached by examiners.

11 Laboratories are accredited through these
12 organizations, and in some cases, specifically the
13 American Society of Crime Laboratory Directors to
14 oversee and review competencies and proficiencies
15 of individual examiners in member laboratories.

16 The methodology is peer reviewed and in broad
17 context in at least two ways. Peer review ensures
18 that information being disseminated is accurate
19 and reliable. A number of pieces of literature
20 has been presented to reflect that peer review
21 occurs within this forensic discipline. The AFTE
22 Journal, the Journal of Forensic Science, Forensic
23 Bulletin and the ASTM International. The
24 publications reflect the general acceptance of the
25 methods and operations utilized by the firearms

1 identification activity.

2 Importantly, peer review is engrained into
3 the discipline in another very unique way. The
4 evidence reveals that the American Society of
5 Crime Laboratory Directors has undertaken the
6 responsibility of reviewing results of firearm
7 proficiency tests conducted by the Fish and
8 Wildlife Forensic Laboratory.

9 A lab's accreditation is based in part on the
10 competency of its examiners. As has been the
11 subject of the evidence we've heard this morning,
12 the Fish and Wildlife examiners competency test
13 are reviewed by an outside agency. The agency's
14 proficiency review committee monitors and reviews
15 corrective action plans imposed on examiners who
16 fail to successfully complete the competency test.

17 The Court finds that the relevant scientific
18 community is the firearms and toolmark
19 identification examiners community. Some entities
20 and individuals have criticized the reliability of
21 methods utilized in this relevant community.

22 The National Academy of Science, NAS, is
23 empowered to review various scientific disciplines
24 and appears to be charged with informing state
25 coders how to constructively enhance and advance

1 the validity and certainty of various scientific
2 disciplines.

3 For example, there's an article in the
4 materials entitled Strengthening Forensic Science
5 in the United States hyphen A Path Forward. While
6 NAS's critique is helpful and instructive towards
7 improving the validity of all forensic science
8 disciplines, among its shortcomings are, number
9 one, the conclusions that only DNA analysis sets a
10 gold standard that is faithful to all the
11 identified factors listed in Daubert.

12 Number two, all other disciplines are in need
13 of improvement to achieve its gold standard
14 rating; and three, the committee was devoid of any
15 or sufficient number of members skilled in the
16 science or art of firearms and toolmark
17 examinations to inform its analysis and
18 conclusions with respect to methodology and
19 reliability of procedures and operations utilized
20 by skilled practitioners.

21 A read of NAS's reports reflects a genuine
22 interest in an altruistic goal in improving the
23 validity index of all forensic sciences towards a
24 threshold of the previously discussed gold
25 standard, and it does spend considerable time in

1 the firearms area to elevate the discipline.

2 While defendants present evidence that NAS
3 state some concerns regarding the proficiencies
4 involving potential rates of error and other
5 suggestions to improve the validity and
6 conclusions reached by firearms examiners, other
7 evidence also shows that proficiency matters are
8 embraced by the relevant scientific community with
9 regular testing and oversight by examiners and
10 laboratories, as demonstrated in this case.

11 However, even in light of the critique and
12 suggestions to improve the validity of conclusions
13 reached by the firearms and toolmark examiners,
14 NAS does not suggest or find that firearm and
15 toolmark examiner identification is not a science.

16 Professor Schwartz has also criticized the,
17 quote, science, end quote, of firearm
18 identification, relying upon her research and the
19 findings of NAS and other critical writings
20 relating to scientific analysis.

21 While Professor Schwartz's informed
22 viewpoints are relevant in the discussion, the
23 criticism must be considered along with the facts
24 that she is not an examiner; has never examined a
25 firearm and has never taken a proficiency exam,

1 and thus, cannot inform as to the nature and
2 particularities of the observations made in the
3 examining process to the extent individual
4 subjectivity comes into play upon observed data
5 viewed under the lens of examining equipment or
6 what equipment is best utilized under given
7 circumstances.

8 As such, the weight of the evidence suggests
9 that the peer review through publications and
10 organizations that review and monitor examiner
11 competencies in the relevant scientific community,
12 along with the standards employed by umbrella
13 technical and advisory organizations, support the
14 reliability of the methodology.

15 Moreover, cases cited by the defendants do
16 not find firearms identification evidence to be or
17 firearms identification examinations to be a junk
18 science. Based upon this Court's review of the
19 testimony, the exhibits considered and arguments
20 of counsel, the Court finds firearms
21 identification sufficiently satisfies a
22 Daubert/Kumho factors to be a reliable science.

23 Even if the firearms identification
24 discipline does not meet sufficient identified
25 factors in Daubert, this Court finds that it is an

1 area of technical and specialized knowledge,
2 evidence of which would be admissible to assist
3 the trier of fact under Rule 702.

4 As such, defendant's motion to exclude
5 firearms identification evidence as a science is
6 denied.

7 The Court now moves to the defendant's
8 challenges with respect to Mr. Scanlan's
9 qualifications as an expert.

10 Mr. Scanlan has 11 years of experience in
11 examining shotgun shells for the Fish and Wildlife
12 Service. He has been a forensic examiner for many
13 years, beginning in 1985, and is well-seasoned and
14 disciplined in the forensic examinations generally
15 as a result of his varied assignments and
16 positions over the years.

17 He has more than 22 years of firearms
18 identification experience. He applied the AFTE
19 theory of identification in his examination in
20 this case and has followed those guidelines for 25
21 years. He has subscribed to the Code of Ethics
22 established by AFTE over the years.

23 He's engaged in continuing education on
24 firearms identification over the last 11 years.
25 He stays abreast of the development of peer review

1 publications and has contributed to such
2 publications and stays abreast of critical
3 publications in the field, and he has engaged in
4 consistent competency testing since at least 2002.

5 Mr. Scanlan has performed thousands of
6 comparisons in this field and is familiar with and
7 utilizes the equipment generally accepted in the
8 field to perform his examinations to form his
9 conclusions.

10 In addition, his lab adheres sufficiently to
11 the protocols established by AFTE, and his work is
12 peer reviewed in his lab by way of an independent
13 examination performed by another skilled examiner.

14 In this case, the peer reviewer was a
15 supervisor with over 20years of peer review
16 experience.

17 He undergoes established proficiency testing.
18 The evidence shows that Mr. Scanlan received
19 non-consensus results or a nonsuccessful
20 completion of a portion of a competency test
21 administered in 2010. The failure on this test
22 impacts his lab's stature in the relevant
23 scientific community that National organizations
24 use his proficiency rating to assist in
25 determining the lab's accreditation.

1 Evidence shows that the Fish and Wildlife has
2 an internal proficiency review process through a
3 quality controlled director. When Scanlan failed
4 to pass all components of the competency test, the
5 internal quality control administrator and other
6 administrators implemented a corrective action
7 plan, a CAP, and provided notice of test results
8 and CAP to the American Society of Criminal
9 Laboratory Directors and its proficiency review
10 committee.

11 Mr. Scanlan later complied with all
12 conditions of the CAP. The evidence demonstrates
13 that this is the only partially failed competency
14 test in Scanlan's professional examiner history.

15 The Court finds that the evidence concerning
16 his failed test, any failure to timely discuss the
17 case results with the prosecutor or to include any
18 mention of the failure in his report goes to the
19 weight of his testimony, not to the admissibility
20 and his qualifications as an expert firearms
21 examiner.

22 This Court, therefore, finds that Mr. Scanlan
23 qualifies as an expert in firearms identification
24 in this case.

25 However, in light of the evidence reflecting

1 that firearms identification is not an exact
2 science, as with DNA, comparable to the validity
3 standards developed in the gold standard DNA
4 testing procedures, and the extent to which and
5 manner in which the relevant community includes
6 and accepts the, quote, inconclusive category,
7 unquote, as a conclusion, the witness will not be
8 permitted to testify that any conclusion is made
9 to an absolute certainty.

10 Accordingly, defendant's motion to preclude
11 the testimony of Mr. Scanlan is denied.

12 The last motion is the Government's motion to
13 exclude Professor Schwartz's testimony at trial.
14 Professor Schwartz's extensive writing, research
15 and scholarship on the reliability and validity of
16 scientific methods within various forensic science
17 disciplines, including firearms identification,
18 and whether such disciplines qualify as a science
19 was appropriately presented and received in the
20 Daubert hearing.

21 However, the Court finds that Professor
22 Schwartz should be precluded from testifying as an
23 expert at trial. Her testimony regarding the
24 discipline's reliability was for purposes of the
25 Daubert hearing.

1 Daubert and Kumho make clear that the Court
2 is a gatekeeper on whether this evidence is
3 considered. It is not the petit juror's role to
4 do so. So there will be no two full-blown Daubert
5 hearings in this case.

6 The case of Versace versus United States is a
7 case which refused to allow the expert to critique
8 the entire field of the discipline before the
9 petit jury.

10 The Court is of the mind that that is the
11 appropriate analysis, and the Court will not do so
12 in this case.

13 Having said that, the defense is correct that
14 it should be able to introduce evidence that
15 checks the strength of the science and the methods
16 utilized by the expert.

17 Professor Schwartz is not such a witness that
18 can present defendant's proffered evidence. She,
19 again, is not a firearms examiner. She has no
20 experience in firearms identification or
21 examination and has not undertaken a single exam
22 or single proficiency test.

23 She does not qualify as an expert in the
24 field of firearms identification.

25 This Court has approved the procurement of

1 expert resources to test evidence and challenge
2 the Government's expert in this case. So
3 defendants have expertise available to challenge
4 objectively, based upon the evidence and
5 independent firearms examination, the Government's
6 evidence.

7 While a witness' bias and interest in the
8 outcome of a case generally goes to the weight
9 given the evidence and not its admissibility, and
10 while the Court is generally better equipped to
11 decipher objective aspects of a witness' testimony
12 from its advocacy, the Court finds that Professor
13 Schwartz's passion and interest in respect to the
14 demise of the discipline of firearms examination
15 on any permitted stage, whether her scholarship
16 has the ability -- which her scholarship has the
17 ability to influence adversely affects the
18 foundations and premises upon which she espouses
19 and attacks Scanlan's credibility and testing
20 reliability and, thus, adversely affects her
21 reliability as an expert trial witness. Any
22 relevance and probative value intertwined in the
23 rhetoric of her testimony is outweighed by the
24 strong likelihood of misleading and confusing the
25 jury under Rule 403 analysis.

1 While trial testifying experts may be accused
2 during closing argument to have a bias in their
3 discipline, firearm identification is not
4 Professor Schwartz's discipline, and a criminal
5 jury trial in a Federal Court cannot and should
6 not be a public soap box or platform for a
7 self-proclaimed advocate, whether as a
8 noncharacter witness, lay witness or an expert for
9 the Government or defense to influence the
10 traditional fact-finding process.

11 For these reasons, the Government's motion to
12 preclude Professor Schwartz from testifying as a
13 witness at trial is granted.

14 That's the Court's order.

15 Do you want to take a break before we begin
16 from here? Or do you want to move on?

17 MR. BERLINE: Move on.

18 THE COURT: The Court intends to call the
19 jury at eight o'clock in the morning on all
20 three defendants.

21 Mr. Schuler, do I understand you may have a
22 motion?

23 MR. SCHULER: Yes, Your Honor. I have
24 five copies here that I'd like to provide
25 defense counsel with and one for Your Honor.

1 It is the motion that I attached to my e-mail
2 last night. Nothing has changed with it at all.
3 I have not officially filed it yet, but I would
4 like to bring it to your Court's attention now and
5 file it with Your Honor, or if you'll allow me to,
6 I'll electronically file it immediately hereafter.

7 THE COURT: Share with me, counsel -- I
8 know there's an e-mail practice in the
9 district. Are those e-mails also filed as a
10 matter of record?

11 MR. BERLINE: No, Your Honor. Are you
12 talking about the personal e-mails?

13 THE COURT: No. There was an e-mail,
14 there's a notice on Friday night and one
15 yesterday.

16 MR. BERLINE: It was given to you and
17 counsel?

18 THE COURT: Yes.

19 MR. BERLINE: No. Those are not filed,
20 unless directed to by the Court.

21 THE COURT: Okay. The Court orders the
22 motion, the Government's Motion to Dismiss
23 counts three and four without prejudice to be
24 filed at this time.

25 Counsel received notice of this over the

1 weekend.

2 Who speaks?

3 MR. BERLINE: Me. Actually, Your Honor, I
4 just received certain notice of it this morning
5 of the actual intent and the Motion to Dismiss
6 count three. I guess -- it's the Government's
7 motion. First of all, I guess should they go
8 first here, or do you want to hear from me?

9 THE COURT: Thank you, sir.

10 Mr. Schuler.

11 MR. SCHULER: Thank you, Your Honor.

12 THE COURT: My apologies, sir.

13 Mr. Schuler.

14 MR. SCHULER: Thank you, Your Honor.

15 I hope you've had a chance to read the
16 motion. The Rule 48(a) dismissal is appropriate
17 if it's not contrary to manifest public interest.
18 That's the standard in the Ninth Circuit, and
19 actually, the only question is, is it clearly
20 contrary to manifest public interest. The answer
21 to that is no.

22 Public interest actually supports this
23 dismissal to allow the Government time to
24 reanalyze this test, and there's no evidence here
25 of prosecutorial harassment. That's one of the

1 concerns with granting these motions, because this
2 is not a case where the prosecution is potentially
3 harassing these defendants, because the
4 determination of whether to recharge cannot be
5 made until after this firearms identification
6 evidence has been re-tested, and there's certainly
7 no indication of bad faith.

8 So under the law, case law, and the Rule 48,
9 there doesn't appear to be any reason why it
10 shouldn't be dismissed without prejudice, Your
11 Honor.

12 THE COURT: How do you factor in this
13 moment to do it, as opposed to last week, as
14 opposed to the first day of the Daubert
15 hearing, and such?

16 MR. SCHULER: Well, it's definitely not
17 too late, Your Honor. The opportunity is here
18 to proceed against defendant Mendiola. That
19 opportunity is still here.

20 The opportunity of whether this should be
21 tried -- I mean, I guess in my opinion, Your
22 Honor, this benefits both parties; benefits the
23 Court, as well, and that with more time to re-test
24 this evidence, there may not be a subsequent
25 prosecution, or there may be a pretrial resolution

1 to that prosecution, or perhaps there will be
2 charges refiled and an additional trial.

3 But I think the only consideration is that it
4 isn't too late, and this is just as an appropriate
5 time now as it could have been during the
6 proceedings.

7 THE COURT: How does it support the public
8 interest?

9 MR. SCHULER: The public interest, Your
10 Honor -- the public has an interest in pursuing
11 justice. That is the role of the prosecutor,
12 of course, as well. The pursuit of justice
13 would definitely want to make sure that the
14 evidence that the prosecution is bringing is
15 the quality of evidence that would support a
16 prosecution; that the public does not have a
17 lack of confidence in that evidence when a
18 prosecution is brought.

19 So I think re-assuring the public of this
20 prosecution by re-testing the evidence is in its
21 public interest, Your Honor.

22 Another clarification, too, the timing of
23 this is appropriate because the ruling on the
24 Daubert hearing had to be made, as well. Waiting
25 for that ruling to come down made it an

1 appropriate time to issue this.

2 I did want to provide notice over the weekend
3 so counsel would have an opportunity to research
4 the issue and weigh their options, and also to
5 provide notice to Your Honor.

6 I'll rely on the motion that's now been filed
7 and wait for any rebuttal argument.

8 Thank you.

9 THE COURT: Mr. Berline.

10 MR. BERLINE: Can we have one second, Your
11 Honor?

12 THE COURT: Sure. Excuse me. Do you want
13 to take ten minutes?

14 MR. BERLINE: Yes. That would be --
15 15-minute recess.

16 THE COURT: We'll return at 3:30.

17 (A short recess was taken.)

18 - - -

19 (In open court:)

20 THE COURT: The record shall reflect the
21 parties are present.

22 Mr. Berline.

23 MR. BERLINE: Thank you, Your Honor.

24 Thank you for granting us additional time to
25 discuss this, Your Honor.

1 The parties oppose the motion, Your Honor.
2 Our clients would like to proceed with the trial.

3 There has been immense energy expended up to
4 this time. We're now not only at the 11th hour,
5 but the 12th hour of trial.

6 In my quick research, my understanding is
7 that this Court -- that the Rule 48 has no
8 standard as to discretion of this Court, and the
9 majority of the courts find this Court has broad,
10 broad discretion as to whether to grant or deny
11 this motion.

12 We think that this motion should be denied
13 basically because, as this Court found, the
14 Government claims it's not happy with its own
15 evidence regarding the shotgun shell test. It
16 discovered that in February of 2011. It said
17 nothing. It gave us -- it did not produce to us,
18 to the defense. It made no mention until well
19 into the Daubert hearing.

20 United States v. Hayden, 868 2nd, 15, Ninth
21 Circuit 1988 -- and I apologize, Your Honor, but I
22 did not read this full case due to time
23 constraints -- says that the evidence of good
24 faith or bad faith of the Government may be taken
25 into consideration when deciding upon these

1 motions.

2 It's my position that the fact that the
3 prosecutor failed to provide us this information
4 about the problems with Mr. Scanlan's proficiency
5 should weigh heavily in deciding whether to grant
6 this motion.

7 It certainly knew at that time that they had
8 problems with its evidence, and at that time it
9 should have raised it with the Court, as opposed
10 to this 11th hour, after incredible amounts of
11 time, energy and money has been spent.

12 The other point, Your Honor, would be if the
13 Court, indeed, has -- if the question is whether
14 the Motion to Dismiss is with or without
15 prejudice, therein lies the discretion of this
16 Court -- and I did see some cases where a Court
17 doesn't have discretion about whether to grant the
18 Government's motion. The discretion lies in
19 whether to dismiss it with or without prejudice.

20 We would ask that the Court grant the
21 Government's motion, but grant it with prejudice
22 as to defendant Taitano and defendant Santos for
23 the very same reasons, Your Honor; that we would
24 never be here had the Government diligently
25 provided what I think was exculpatory evidence as

1 to Mr. Scanlan's proficiency problems, for the
2 very reason that it did include at least part of
3 the shotgun shell testing that's involved in this
4 case and that was the October 2009, and I
5 apologize, but I just wasn't very -- I know the
6 Court found that was a discovery violation.

7 What I am unclear about is whether that
8 discovery violation was actually a Brady
9 violation, and where we had the opportunity to fix
10 the prejudice, or it was just a discovery -- it
11 wasn't Brady violation, but we still fix the
12 prejudice either way. And that's my problem.

13 In any sense, we ask that we continue and go
14 on with trial. In the alternative, grant the
15 Government's motion, but grant it with prejudice,
16 because they are solely at fault for the position
17 we find ourselves in today.

18 THE COURT: Counsel, before you sit down,
19 I have some general considerations I would like
20 for all counsel to address.

21 Do you want to address this point first, sir?

22 MR. QUICHOCHO: Yes, Your Honor.

23 THE COURT: Please come forward.

24 MR. QUICHOCHO: Your Honor, this Motion to
25 Dismiss without prejudice, if granted, would be

1 unfairly prejudicial to Mr. Mendiola, because
2 Your Honor, for the past about a month or so,
3 we've been aggressively working together as a
4 team. We've divvied up the work, and we
5 divided who is going to take the lead on which
6 issues and which witnesses.

7 And for the Government to move to dismiss the
8 co-defendants without prejudice reaks of
9 harassment. Something smells fishy.

10 As Mr. Berline mentioned, the Government knew
11 about this since last year, since September 2010.
12 And the prosecutor's office, according to
13 Mr. Schuler, knew about it since February, and it
14 wasn't brought up. Now they're making an excuse
15 that we were waiting for the decision on the
16 Daubert motion.

17 What they're trying to do now here at exactly
18 the 12th hour -- we have a jury impaneled -- is to
19 force a continuance on that part, on the other two
20 defendants, so that they can enhance whatever
21 evidence they may have, when they could have done
22 that a long time ago.

23 They're trying to segregate the defense team
24 and divide the defense case. And I will be ready
25 to go with this case, Your Honor. You know, I'll

1 roll with the punches.

2 If it were a dismissal with prejudice, I
3 agree, then the continued -- the division of labor
4 would not have gone in vain, because defense
5 counsel can still help out in the trial.

6 But a dismissal without prejudice will leave
7 me, all of a sudden, overnight to take on the
8 whole trial by myself on behalf of Mr. Mendiola.
9 This is not a decision where there's multiple
10 counts against the two and one is going to be
11 dismissed. No. This is dismissing them out of
12 the case all together without prejudice, and Your
13 Honor -- I looked at the alternative, just in case
14 that Your Honor dismisses the co-defendants.

15 A jury instruction, Ninth Circuit jury
16 instruction, 2.14, disposition of charges against
17 co-defendant, at a minimum, put this instruction
18 in and state the reason why all of a sudden, when
19 the jury knows that there are three defendants
20 going to trial, all of a sudden they're only
21 seeing my client.

22 So we have to, as the jury instruction said
23 here, that we should disclose it to the jury, and
24 the proposed jury instruction, if the
25 co-defendants are dismissed for reasons that do

1 not concern you, the case against co-defendants
2 Albert Taitano and David Santos are no longer
3 before you because the Government has dismissed
4 the charges against them. Do not speculate why.
5 This fact should not influence your verdict with
6 reference to the remaining defendants, and you
7 must base your verdict solely on the evidence
8 against the remaining defendant.

9 Your Honor, first off, as it is made clear,
10 the co-defendants object to the dismissal without
11 prejudice. But in the event, Your Honor, that
12 that happens, either with or without prejudice,
13 then at a minimum, this jury instruction should be
14 read to the jury.

15 THE COURT: Tell me, sir, does the
16 firearms evidence have any impact on your
17 client one way or the other?

18 MR. QUICHOCHO: Not directly, Your Honor,
19 because the charge against my client is for
20 possession under the Endangered Species Act and
21 under the Lacey Act for the acquisition and the
22 receipt of endangered or threatened species in
23 violation of the Endangered Species Act, which
24 is the "taking".

25 Indirectly, it does have a relevance, Your

1 Honor, with regards to the ammo and the gun issues
2 that we've discussed in the Daubert, but
3 primarily, my client has been charged with the
4 taking of the mariannus mariannus.

5 For that reason, we ask you deny the motion,
6 and if you are going to grant the motion, it
7 should be a dismissal with prejudice.

8 THE COURT: Thank you, sir.

9 The general question I have is, the
10 government makes reference to the fact that in
11 light of the controversy over the credibility of
12 Mr. Scanlan, that re-testing is also in the
13 interest of justice because Mr. Scanlan may
14 possibly have been wrong, and the test results may
15 come out in favor of defendants.

16 What's your take on that?

17 MR. BERLINE: My take on that, initially,
18 is that other than the subjectivity of it all,
19 that if -- that's a slippery slope. We start
20 going down that, then when do we stop
21 re-testing?

22 Let's say -- the subject of this motion
23 wasn't really attacking his individual procedures.
24 That's coming for trial. That's the methodology,
25 in general, of firearms testing discipline. Let's

1 say they re-test, and right now, my client only
2 had two shotgun shells that match. So let's say
3 the next guy says one. Am I now going to bring
4 another expert in and re-test, and let's say he
5 says, well, that's -- no, there's three?

6 Which one do you believe? When do you stop?
7 When is the Government going to be satisfied?
8 What if he comes in, and now he says, now there's
9 five matching shotgun shells?

10 Doesn't that put me at somewhat of a
11 disadvantage? Do I now call back Scanlan and say
12 no, there's only two?

13 When does it stop is my problem. The
14 Government has not articulated any real problem
15 with the firearm evidence. What is it that went
16 away?

17 That's another case I saw, the Seventh
18 Circuit that said there were two things you need
19 to do to preserve this is you need to object as to
20 the lack of good faith, and I don't really like
21 that term, but you need to object to that, and you
22 need to insist on the prosecutor articulating the
23 problem with the evidence.

24 I don't know what the problem with the
25 firearm evidence is. Did we have the wrong

1 shells? Is the microscope, did it blow up
2 suddenly, something out of the control of the
3 Government? Is there a real problem that affects
4 the fair administration of justice, such that it
5 was out of the Government's control? It affected
6 the evidentiary test, and therefore, it's unfair
7 to go forward. The Government should be able to
8 back up and re-test because something out of its
9 control went awry.

10 It isn't like, oh, we got a bad result. Oh,
11 we need a chance to enforce a Plea Agreement, a
12 witness was sick, something like that. I have yet
13 to understand exactly what is wrong with this
14 firearm testimony where the Government wants to
15 dismiss and re-test, and I would ask the Court --
16 ask the Government to articulate that better.

17 And I might not have answered your question,
18 Your Honor.

19 THE COURT: If this was not so close to
20 swearing in a jury, the Government could submit
21 a written application just to dismiss the
22 charge. It has that discretion. It's the
23 Government's discretion, not the Court's, to
24 dismiss.

25 Certainly, I have some discretion to apply

1 because of the timing of all this, but the
2 Government is -- about what charges to bring and
3 when to bring them or to drop them is the
4 prerogative of the executive department.

5 MR. BERLINE: Correct, Your Honor. It's
6 the prerogative of this Court as to whether to
7 allow them to do it with or without prejudice.

8 They are free to bring charges and drop
9 charges, but they have to do it with approval and
10 leave of the Court. And simply because we were
11 just -- I think it's more indicative of
12 gamesmanship and gamesmanship and tactics here,
13 but we were minutes within swearing of the jury,
14 and I actually researched this. My thinking was
15 form over substance; we have a jury. We impaneled
16 the jury. Just because we didn't take the extra
17 15 seconds to swear them in, for all practical
18 purposes, we have a jury.

19 It doesn't appear to be the case, but there
20 certainly needs to be more when we're this close.
21 I think if the Court does feel it does not have
22 the discretion to tell the Government when it can
23 bring charges, drop charges, dismiss cases or not,
24 given the circumstances and closeness in time to
25 starting trial, that it should be with prejudice,

1 and that certainly this Court does have discretion
2 to do, Your Honor.

3 Thank you, Your Honor.

4 THE COURT: Mr. Quichocho, sir, what would
5 your position be -- let's assume the Government
6 made a very, very favorable offer to
7 defendants, even a dismissal without prejudice?
8 What prejudice is it to your client to proceed
9 tomorrow under those circumstances? Even if it
10 was a deal to dismiss without prejudice, what
11 prejudice is it to your client tomorrow?

12 MR. QUICHOCHO: As I indicated earlier,
13 since last year, defense counsels were working
14 together. The past month or so, we were
15 aggressively preparing for trial, and we've
16 divvied up work so there will be no
17 duplication, and at the same time, we were
18 closely working together.

19 Even through trial, we met with regard to who
20 is going to take the lead on which witnesses and
21 which are going to second -- go second.

22 Everything, Your Honor, we're prepared to go to
23 trial as a team.

24 Then all of a sudden, two defense counsels
25 are going to be gone, and I'm going to have to

1 fill in the gap over those.

2 If it were a dismissal with prejudice, it
3 would be different, because they can still assist
4 me. If it's without prejudice, it would still be,
5 in my view, a conflict to assist me in the trial
6 tomorrow.

7 THE COURT: Mr. Schuler.

8 MR. SCHULER: I think it's clear
9 Mr. Quichocho represents Mr. Mendiola, and the
10 other counsel represents their clients. That's
11 their job to prepare. I don't see any
12 prejudice to Mr. Quichocho if two out of the
13 four counts are dropped and he's left defending
14 the charges against his client. That doesn't
15 seem to me to be any prejudice.

16 The jury instructions can certainly address
17 the issue of where the other defendants are. The
18 problem -- the reason for this motion or the
19 problems that Mr. Berline was looking for the
20 Government to articulate is, one of them is the
21 timing of the Daubert issue. None of the parties
22 could have foreseen what's before us now. I
23 certainly didn't foresee this. We didn't expect a
24 week long Daubert proceeding either.

25 We, I think unfortunately, made a decision to

1 hold the Daubert hearing out of the benefit of all
2 the parties immediately before trial. I think in
3 hindsight, that was a poor decision, but that's
4 where we're at.

5 And another problem that Your Honor
6 identified, well, what if it's exculpatory, what
7 if the re-test is done and there is exculpatory
8 findings?

9 Certainly, the defense counsel, they know
10 what their expert has said about this evidence.
11 Unfortunately, the Government doesn't know that.
12 We don't know what their examiner said, but those
13 are results that they know about. What if it is
14 exculpatory? I would certainly have a duty to
15 turn that over.

16 The public interest has -- as I stated
17 earlier, the problem of the public interest
18 pursuing justice here, that is the interest of the
19 public, and I think that's achieved by granting
20 this dismissal without prejudice, and it's purely
21 speculation to try to think of what might happen
22 next.

23 What is in front of us is this Motion to
24 Dismiss, and it is a prerogative of the executive
25 branch to be able to bring this motion, and I

1 think Mr. Berline was suggesting there was bad
2 faith on behalf of myself. I certainly don't
3 think that's the case.

4 With regard to the proficiency tests, the
5 case law research that I've done is when a defense
6 counsel has specifically made a request for a
7 proficiency test, then that should be disclosed.
8 These were very general discovery requests.

9 Proficiency tests that occurred over a year
10 after these results had been done, I wish we would
11 have turned them over much earlier. We would have
12 certainly obviated the need for this hearing and
13 all that's taken place.

14 There was certainly no bad faith on my
15 behalf. In all candor, I raised it at this time
16 because it was brought up at the Daubert hearing.

17 THE COURT: I haven't found there's bad
18 faith, sir.

19 MR. SCHULER: Thank you, Your Honor.

20 Again, Your Honor, I appreciate Your Honor's
21 ruling on the Daubert hearing. I think when we
22 stick to the law, whether it's 702 and the Daubert
23 hearing, during the analysis of the Daubert
24 hearing and the hearing on that, the Rule 48 law
25 and the rules we have regarding motions to

1 dismiss, this is an appropriate circumstance where
2 the Court can exercise its discretion and permit
3 leave of Court for the Government to dismiss this
4 without prejudice, and I really do think it's
5 perhaps in the best interest of all parties that
6 this -- it's speculation to think of what might
7 happen after this, but there certainly hasn't been
8 any true prejudice, I think, demonstrated or bad
9 faith -- prejudice to the defendants demonstrated
10 or bad faith on behalf of the prosecutor, Your
11 Honor.

12 THE COURT: If the Court were to grant
13 your request, how many witnesses would you be
14 calling as to Mr. Mendiola?

15 MR. SCHULER: We wouldn't have to call the
16 firearms identification evidence. That
17 wouldn't be presented, Your Honor.

18 Mr. Scanlan did analyze other evidence. I
19 don't think even that evidence, we would have to
20 present. So I think Mr. Scanlan would not have to
21 testify. I do believe there is at least two other
22 witnesses that would not have to testify.

23 So a substantial number of witnesses, Your
24 Honor, I think could be cut, possibly even four.
25 I hate to corner myself, but it would be less. It

1 wouldn't take as long. I can guarantee that.

2 There would be -- the charges do -- the
3 second charge is from the Lacey Act charge of
4 transporting, receiving or acquiring threatened
5 species. That charge is from on or about
6 November~1st of 2008 to December 19 of 2008.

7 We will still be talking about relevant facts
8 on November~1st, as well as the relevant facts on
9 December 19. Counts three and four also were
10 related to the November~1st evidence, as well. So
11 there will be certainly some overlap in the
12 evidence, but it won't be as prolonged.

13 THE COURT: Will there be any evidence of
14 shooting at all or anything like that?

15 MR. SCHULER: Yes, Your Honor.

16 THE COURT: Percipient witnesses?

17 MR. SCHULER: Yes, Your Honor. Not
18 actually seeing the shots fired, but in terms
19 of circumstantial evidence of seeing the
20 defendants near the site where the shooting was
21 known to have occurred and the timing of that.

22 THE COURT: Thank you.

23 Anything else?

24 MR. BERLINE: Quickly, Your Honor.

25 Mr. Schuler states that because of the timing

1 of the Daubert, we didn't know all this was
2 going to happen.

3 But it was the Government's burden to do
4 this. We have been talking about the Daubert
5 hearing since last year, and the strange thing is
6 the Government prevailed. They got what they
7 want. So I don't see any surprise or, again, any
8 reason to re-test. They won the motion. There's
9 no surprise there. They got it.

10 There's also public interest here in the
11 terms of fiduciary responsibility to the public.

12 Finally, there's prejudice to my defendant.
13 He's indigent. I'm his CJA appointed counsel, but
14 he still has to fly here. He has a job. He has
15 to give up that time, and not to mention the
16 emotional distress and anxiety that naturally
17 occurs with being under indictment.

18 So for those reasons, Your Honor, again we
19 would request this motion be denied, or as to the
20 two defendants, the motion be granted, but with
21 prejudice.

22 THE COURT: All right. Thank you.
23 Anything further from anyone else?

24 I want to take ten minutes. I want to be in
25 recess.

1 In the time I've had, I've looked to only
2 Moore, only, thanks to counsel, and there are two
3 Ninth Circuit cases reflected in Moore, and I've
4 also considered some notes from other circuits in
5 that regard.

6 The first case is U.S. versus Weber, a 1983
7 case from the Ninth Circuit. It provides that the
8 Court should dismiss unless it is clearly contrary
9 to the public interest. The Court goes on to say
10 that the defendant's interest is an insufficient
11 ground to deny the Government's motion for leave
12 to dismiss.

13 In U.S. versus Hayden, a 1988 Ninth Circuit
14 case, the Court found that it was improper to
15 dismiss a reindicted case with prejudice unless
16 the Court found that the Government acted in bad
17 faith.

18 Before we took the recess, we discussed bad
19 faith to an extent, and I indicated I felt
20 Mr. Schuler did not act in bad faith. I was
21 referring specifically to the discovery issue that
22 we had in this case, to make sure the record's
23 clear.

24 Also, there's an inference by defendants that
25 there's bad faith with respect to the timing of

1 the motion, in light of the Daubert hearing; that
2 the Government knew about the defendant's
3 challenge, and the Daubert hearing should have
4 been held earlier.

5 I'm not the first judge on this case, but
6 since I've been acquainted with it since early
7 January, I'm aware of issues surrounding the time
8 of this hearing in light of the trial time frame
9 and such, and in the Court's opinion, based upon
10 the discussions I've had with counsel and the
11 record I've reviewed, the Court cannot find that
12 it was the Government's burden or responsibility
13 or interest in the timing of the Daubert hearing
14 with respect to the trial.

15 It appears to the Court that it was a
16 combined consensus that the best way to handle
17 this was to handle this matter all at once, for
18 the interest of witnesses, the issues with respect
19 to payment of witnesses and witnesses'
20 availability and travel, and it appeared to be the
21 consensus of all, that the Court adopted, that we
22 would hold the Daubert hearing just days before
23 the actual trial in this case.

24 So the Court cannot find the timing of the
25 Daubert hearing, the length of the hearing, which

1 was -- the Court must find was primarily out of
2 the control of the Government in this regard, the
3 timing of the trial and even selecting the jury.
4 Even though those two events bumped heads and time
5 frames were moved was not of any fault of the
6 United States.

7 The Court further finds that the Government's
8 request not to impanel the jury with the
9 information that it had was strategic, but it was
10 not underhanded or in bad faith. The Court finds
11 it was a responsible move, understanding what
12 issues it wanted to discuss after the jury left to
13 recommend to the Court not to impanel the jury.

14 I think it would be a sad day in the justice
15 system when the prosecution goes forward with
16 evidence it is not truly confident should lead to
17 the possibility of a conviction. The Government's
18 motion reflects concerns for the test results, and
19 the Court finds that those concerns are based
20 primarily on the public interest.

21 The Court does not find prosecutorial
22 harassment. The Court does not find that a
23 dismissal would be contrary to the manifest public
24 interest. The Court finds otherwise; that it may
25 serve the manifest public interest to get a

1 re-testing.

2 This is a difficult decision the Government
3 has, from the Court's experience in trial
4 practice, as a judge -- not in any other capacity
5 -- for the Government to acknowledge that a
6 re-testing may be appropriate, when it's relied on
7 a particular expert for so long.

8 The Court can't find the Government has
9 tossed the current expert under the bus, but
10 recognizes under the interest of justice,
11 re-testing is necessary in this case.

12 Again, the Court finds that the Government
13 has provided as much notice as humanly possible of
14 its intentions here, in light of the timing of
15 this hearing, the jury, the status of the jury
16 pool in this case, so that we could act on it
17 expeditiously and effectively.

18 The Court finds that in the exercise of
19 discretion, that the Court should grant the Motion
20 to Dismiss counts three and four without
21 prejudice.

22 That's the Court's order.

23 Counsel.

24 MR. BERLINE: Thank you, Your Honor.

25 One housekeeping matter. There was count

1 five, which was a forfeiture count. I guess that
2 should probably be included. I can speak briefly
3 on that.

4 The motion wasn't actually to dismiss count
5 five at all, but there is a portion of count five
6 that would only relate to defendants Santos and
7 Taitano, and that was the two firearms seized at
8 their residences.

9 THE COURT: So count five shall be
10 dismissed without prejudice as they relate to
11 the two dismissed defendants.

12 MR. SCHULER: I think that's prudent, Your
13 Honor. Thank you.

14 THE COURT: That's the Court's Order.

15 MR. DOTTS: Would it be -- given the
16 Court's Order -- I know this has created a lot
17 of stress for my client -- would it be prudent
18 to set some time lines as to when there would
19 be subsequent testing, when there would be a
20 new indictment and maybe a new trial date, just
21 so we can keep this thing moving?

22 THE COURT: I've dismissed it without
23 prejudice, sir, so there's no case pending. I
24 think the controlling time thing would be the
25 statute of limitations. I understand your

1 client's concern about the anxiety and the
2 waiting and all that, but that's the
3 prerogative of the United States to investigate
4 its case.

5 Mr. Quichocho, the jury is going to be here
6 at eight o'clock in the morning, and I've directed
7 the Clerk's Office to have them ready to come in
8 for 8:30 for placing under oath.

9 If you'd like some additional time to meet
10 and confer with your co-counsel before we begin
11 that process, I'm not going to change the time
12 they come in, but maybe we can start at
13 ten o'clock and give you a little more time. It's
14 up to you, sir.

15 Do you want a little -- what's your
16 preference, sir?

17 MR. QUICHOCHO: Ten o'clock would be fine,
18 Your Honor.

19 THE COURT: The jury will come in as
20 ordered. We'll begin the trial at ten with
21 preliminary instructions, and I will include
22 2.14 as a preliminary instruction. I'll pass
23 it by counsel before we start in case it needs
24 to be modified in some way.

25 Since the charges against defendants Santos

1 and Taitano, since those charges are dismissed,
2 bond is exonerated as to those defendants.
3 They're under no further pretrial condition.

4 Is there anything else we can discuss today?

5 MR. BERLINE: Your Honor, can we also have
6 the passport released back to my client?

7 THE COURT: Yes, sir. All conditions of
8 bond are vacated, and if the Government is in
9 possession of passports, they ought to be
10 returned to defense counsel. All conditions of
11 release are vacated, so if you're holding
12 passports, they should be returned.

13 Anything else?

14 MR. BERLINE: No, Your Honor.

15 THE COURT: Mr. Taitano, I apologize for
16 mispronouncing your name, sir. I tried.

17 Should we have any follow-up session just
18 with Mr. Mendiola before -- Mr. Dotts,
19 Mr. Berline, you're excused.

20 Is there any need for any follow-up before
21 tomorrow morning?

22 MR. QUICHOCHO: Your Honor, there's one
23 issue that we were supposed to deal with
24 regarding whether we can go down to eight
25 jurors.

1 THE COURT: Yes. I was mistaken. The
2 Court was in error. Rule 23 provides a jury of
3 12 in all jury trials. I was in error.

4 There's an exception upon stipulation, but no
5 fewer than eight members, and the Court can go
6 lower than 12, go down to 11 for good cause shown.
7 So I was in error, sir.

8 MR. QUICHOCHO: Thank you, Your Honor. I
9 just wanted to clarify that.

10 THE COURT: Anything else?

11 MR. SCHULER: The preliminary jury
12 instructions, Your Honor, I think we might need
13 to alter them just a little bit, because I
14 believe the preliminary jury instructions
15 included all counts. Other than that, I think
16 we're ready to go.

17 THE COURT: I'll have a fresh set for you
18 maybe by 9:45 in the morning. That's the first
19 set of the preliminary jury instructions,
20 removing instructions that pertain to the other
21 two defendants, just modifying the instruction
22 to tailor to the instructions regarding your
23 client.

24 MR. QUICHOCHO: Also, Your Honor, the
25 closing instructions are supposed to be due

1 today and the verdict. So we should discuss
2 that some other time.

3 THE COURT: Let's say Wednesday, close of
4 business. At the end of the trial date on
5 Wednesday, if you can submit them by that time,
6 we may have to discuss them on Thursday. I
7 don't know, but we'll see where we are on
8 Wednesday with the trial.

9 MR. QUICHOCHO: Thank you, Your Honor.

10 MR. SCHULER: The last thing, Your Honor,
11 I raised this before Mr. Dotts and Berline
12 leave. I did have an outstanding motion to
13 strike certain portions of testimony, if now is
14 a good time for Your Honor to rule on it. I
15 just wanted to raise it before everybody else
16 has perhaps gone.

17 THE COURT: All right. The motion to
18 strike is denied. I think that it was part and
19 parcel of going towards credibility of the
20 witness. So I deny that request to strike.

21 Thank you. But for counsel, I do want those
22 documents returned and a declaration from whoever
23 you disclosed those documents to.

24 MR. BERLINE: Your Honor, it is okay a
25 declaration saying that they've either

1 destroyed or deleted them, or do you want them
2 returned?

3 THE COURT: If it's an e-mail, they have
4 to destroy, delete and a declaration that they
5 have not disseminated it to anyone.

6 MR. BERLINE: And if they have?

7 THE COURT: To identify who they
8 disseminated it to.

9 MR. BERLINE: If they did print, shredding
10 them is sufficient and put that in the
11 declaration?

12 THE COURT: Yes, sir. And the Court Order
13 is that they are not to disseminate.

14 MR. BERLINE: I've already e-mailed them.

15 THE COURT: If it comes up in another
16 hearing someplace, they're in contempt.

17 MR. BERLINE: I told them that at this
18 point, you can't disseminate.

19 THE COURT: Thank you.

20 MR. QUICHOCHO: Your Honor, just to
21 clarify, the closing jury instructions will be
22 due Wednesday, or do you still want us to file
23 it today?

24 THE COURT: No. Because of hour and
25 changed circumstances, let's wait till

1 Wednesday -- we can do it Wednesday close of
2 business. You can electronically file until
3 11:59. As long as we have them on Thursday
4 morning. I doubt if we'll get close to jury
5 instruction consideration before that time.

6 MR. QUICHOCHO: Thank you, Your Honor.

7 THE COURT: Anything else?

8 MR. SCHULER: No, Your Honor.

9 MR. BERLINE: Your Honor -- I'm sorry. I
10 know I was excused, but believe it or not, we
11 better have one more ex parte meeting to wrap
12 things up.

13 THE COURT: That's fair. But we're not
14 going to do it today. Let's set a time. It's
15 a late hour for the staff.

16 MR. BERLINE: There's some loose ends I
17 want to address, especially because it's
18 without prejudice.

19 THE COURT: I direct that the parties be
20 here at 9:45 to address the jury instructions,
21 and we begin at ten.

22 (Court recessed at 4:55 p.m.)

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CERTIFICATE OF REPORTER

I, PATRICIA A. GARSHAK, Official Court Reporter, in the United States District Court for the Northern Mariana Islands, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings held in the within entitled and numbered cause on the date hereinbefore set forth, and I further certify that the foregoing transcript has been prepared under my direction.

PATRICIA A. GARSHAK, RDR-CRR
Official Court Reporter