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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
VS.	)	FILE NO. 1:07-CR-107-TCB
	)	
	)	ATLANTA, GA
GERARD MARCHELLETTA,	)	AUGUST 10, 2012
GERARD MARCHELLETTA, SR.	)	2:45 P.M.
TERESA L. KOTTWITZ,	)	
	)	
DEFENDANTS.	)	

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TRANSCRIPT OF CHANGE OF PLEA HEARING  
BEFORE THE HONORABLE TIMOTHY C. BATTEN, SR.  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	CHRISTOPHER BLY ASSISTANT U.S. ATTORNEY
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FOR THE DEFENDANTS:	ROBERT G. BERNHOFT JAMES WIMBERLY, JR. JEROME J. FROELICH ATTORNEYS AT LAW
---------------------	---

LORI BURGESS, OFFICIAL COURT REPORTER  
(404) 215-1528

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT  
PRODUCED BY CAT.

1 P-R-O-C-E-E-D-I-N-G-S:

2 THE COURT: GOOD AFTERNOON. NOW, WHO HAVE I NOT  
3 MET THAT -- WE HAVE A NEW LAWYER. I KNOW THE GOVERNMENT'S  
4 LAWYERS.

5 MR. WIMBERLY: JIM WIMBERLY, YOUR HONOR.

6 THE COURT: GOOD AFTERNOON, JIM, HOW ARE YOU  
7 DOING?

8 MR. WIMBERLY: FINE. THANK YOU, SIR.

9 MR. BERNHOFT: YOUR HONOR, GOOD AFTERNOON.  
10 ATTORNEY ROBERT BERNHOFT FROM BERNHOFT LAW.

11 THE COURT: IT'S NICE TO MEET YOU.

12 MR. BERNHOFT: IT'S A PLEASURE TO BE IN YOUR  
13 COURT. TO MY IMMEDIATE LEFT IS MR. MARCHELLETTA, SR.

14 THE COURT: HELLO, MR. MARCHELLETTA. HOW YOU  
15 DOING?

16 MR. MARCHELLETTA, SR: ALL RIGHT, SIR.

17 THE COURT: HOW ABOUT YOU, MR. MARCHELLETTA?

18 MR. MARCHELLETTA, JR: FINE, THANK YOU.

19 MR. BERNHOFT: AND TO GERRY MARCHALETTA, JR.'S  
20 LEFT IS MY COLLEAGUE, DAN TREUDEN FROM BERNHOFT LAW, BRET  
21 TOLLEFSON, AND MAURICE PEARSON.

22 THE COURT: GOOD AFTERNOON. OKAY, GENTLEMEN. I  
23 WANT TO BEGIN BY JUST TALKING FIRST ABOUT THIS RIGHT OF  
24 INDEPENDENT COUNSEL THAT BOTH OF THE DEFENDANTS HAVE.  
25 I UNDERSTAND, MESSRS. MARCHELLETTA, THAT YOU WANT TO BE

1 REPRESENTED TOGETHER BY THE SAME LAWYER OR LAW FIRM. AM I  
2 RIGHT ABOUT THAT?

3 MR. MARCHELLETTA, JR: YES, SIR.

4 MR. MARCHELLETTA, SR: YES, SIR.

5 THE COURT: OKAY. I NEED TO EXPLORE THAT JUST A  
6 LITTLE BIT. I FIRST NEED TO ADVISE YOU BOTH THAT YOU HAVE  
7 THE RIGHT TO BE REPRESENTED INDEPENDENTLY. DO YOU  
8 UNDERSTAND THAT?

9 MR. MARCHELLETTA, JR.: YES, SIR.

10 MR. MARCHELLETTA, SR: YES, SIR.

11 THE COURT: YOU EACH HAVE THE RIGHT TO YOUR OWN  
12 LAWYER. DO YOU UNDERSTAND THAT?

13 MR. MARCHELLETTA, JR: YES, SIR.

14 MR. MARCHELLETTA, SR: YES, SIR.

15 MR. BLY: JUDGE, IF I CAN INTERRUPT FOR ONE  
16 SECOND. I THINK MR. MARCHELLETTA, SR. AND JR. BOTH NEED TO  
17 RESPOND VERBALLY TO YOU.

18 THE COURT: THEY DID.

19 MR. BLY: I'M SORRY, I MISSED MR. MARCHELLETTA,  
20 SR.'S RESPONSE.

21 THE COURT: THEY BOTH HAVE RESPONDED. I AM MAKING  
22 SURE IT IS ON THE RECORD.

23 MR. BLY: I'M SORRY.

24 THE COURT: THAT'S ALL RIGHT, MR. BLY.

25 ONE THING I NEED TO KNOW, COUNSEL, IS IF THEY ARE

1 BOTH -- IF EITHER OF THEM IS GOING TO TESTIFY, BECAUSE I AM  
2 NOT GOING TO LET THEM BE REPRESENTED BY ONE LAWYER IF ONE OF  
3 THEM IS GOING TO TESTIFY AND THE OTHER ONE IS NOT. AT THE  
4 LAST TRIAL NEITHER OF THEM TESTIFIED. I ASSUME THAT YOUR  
5 PRESENT INTENTION IS THAT NEITHER OF THEM IS GOING TO  
6 TESTIFY. AM I RIGHT ABOUT THAT?

7 MR. BERNHOFT: YES, SIR.

8 THE COURT: ALL RIGHT. GENTLEMEN, YOU NEED TO  
9 UNDERSTAND THAT THE REASON IT IS IMPORTANT TO HAVE YOUR OWN  
10 LAWYER IS TO MAKE SURE THAT YOUR OWN INTERESTS ARE ADVANCED.  
11 AND THIS IS PARTICULARLY IMPORTANT IN THE CONTEXT OF  
12 CO-DEFENDANTS LIKE YOURSELVES WHO ARE FAMILY MEMBERS. IT'S  
13 ONE THING FOR MR. SMITH AND MR. JONES, WHO ARE DEFENDANTS,  
14 TO AGREE TO BE REPRESENTED BY THE SAME LAWYER, BUT WHEN  
15 YOU'VE GOT A FATHER/SON, THERE IS AN EVEN STRONGER TENDENCY  
16 OR RISK, I SHOULD SAY, THAT THERE WOULD BE A CONFLICT OF  
17 INTEREST, BECAUSE YOU LOVE EACH OTHER, AND ONE OF YOU MIGHT  
18 BE INCLINED OR WILLING TO SUBJUGATE OR RELEASE HIS OWN  
19 INTEREST FOR THE BENEFIT OF THE OTHER, AND I WANT TO MAKE  
20 SURE THAT'S NOT WHAT'S HAPPENING HERE TODAY.

21 DO EACH OF YOU FEEL THAT YOU ARE GOING TO BE FULLY  
22 REPRESENTED BY THE SAME LAWYER, THAT YOUR OWN INTERESTS WILL  
23 BE PROTECTED, AND THAT YOU ARE NOT RELEGATING YOUR OWN  
24 INTERESTS IN A FAIR TRIAL AND IN FULL AND ADEQUATE  
25 REPRESENTATION TO THE OTHER JUST SO YOU CAN HAVE THE SAME

1       LAWYER. DO YOU BOTH FEEL THAT WAY?

2               MR. MARCHELLETTA, JR.: YES, SIR.

3               MR. MARCHELLETTA, SR.: YES, SIR.

4               THE COURT: ALL RIGHT. COUNSEL, ARE YOU AWARE OF  
5 ANY CONFLICTS THAT MIGHT ARISE BY YOUR JOINTLY REPRESENTING  
6 BOTH OF THESE GENTLEMEN?

7               MR. BERNHOFT: I AM NOT, YOUR HONOR.

8               THE COURT: ALL RIGHT. IS THE GOVERNMENT?

9               MR. BLY: NO, JUDGE. THERE IS ONLY ONE OTHER FACT  
10 THAT I WOULD ASK YOU TO JUST DISCUSS WITH MR. MARCHELLETTA,  
11 JR. AND SR., AND THAT IS THE FACT THAT THERE HAS BEEN A  
12 GLOBAL PLEA OFFER EXTENDED IN THIS CASE. THERE ARE COURTS  
13 THAT HAVE RECOGNIZED THE INHERENT CONFLICTS THAT THAT CAN  
14 CREATE IN THAT IT MAY BE BENEFICIAL FOR ONE, BUT NOT FOR THE  
15 OTHER, AND THE PROBLEMS THAT THAT PUTS AN ATTORNEY IN IN  
16 ADVISING BOTH OF THEM. SO I WOULD JUST ASK YOU TO POINT OUT  
17 THAT ADDITIONAL FACT.

18               THE COURT: THAT IS RIGHT. MR. BLY HAS MADE THE  
19 POINT THAT THE GOVERNMENT, IT IS MY UNDERSTANDING, HAS MADE  
20 A PLEA OFFER TO ALL THREE DEFENDANTS.

21               AND GOOD AFTERNOON, MS. KOTTWITZ. AND, JERRY, HOW  
22 YOU DOING?

23               MR. FROELICH: GOOD AFTERNOON, YOUR HONOR.

24               THE COURT: IT IS MY UNDERSTANDING THAT THE  
25 GOVERNMENT HAS MADE A GLOBAL PLEA OFFER, IN OTHER WORDS, A

1 PROPOSAL WHEREBY ALL THREE OF YOU WOULD PLEAD GUILTY. AND  
2 IT'S MY UNDERSTANDING THAT MS. KOTTWITZ IS WILLING TO ACCEPT  
3 THE PROPOSAL, BUT THAT EACH OF YOU IS NOT WILLING? IS THAT  
4 CORRECT, WHAT I HAVE SAID SO FAR?

5 MR. MARCHELLETTA, JR.: YES, SIR.

6 MR. MARCHELLETTA, SR.: YES, SIR.

7 THE COURT: OKAY. I JUST WANT TO MAKE SURE YOU  
8 UNDERSTAND, AS MR. BLY SAID, THE RISK OF A CONFLICT INHERENT  
9 IN A SITUATION LIKE THAT WHERE A GLOBAL SETTLEMENT OFFER OR  
10 A GLOBAL PLEA DEAL IS BEING OFFERED.

11 I DON'T THINK IT APPLIES AS MUCH, MR. BLY, IN THIS  
12 SITUATION SINCE IT'S MS. KOTTWITZ WHO IS WILLING TO ACCEPT  
13 THE PLEA, BUT IT STILL MATTERS AND YOU NEED TO UNDERSTAND,  
14 AND HERE IS WHY:

15 THE REASON IT DOES STILL MATTER IS THAT ONE OF YOU  
16 MIGHT BE WILLING TO ACCEPT THE PLEA DEAL, BUT THE OTHER  
17 MIGHT NOT. I WANT TO MAKE SURE ON THE RECORD THAT BOTH OF  
18 YOU ARE ADAMANT THAT YOU ARE UNWILLING TO ACCEPT THE  
19 GOVERNMENT'S CURRENT GLOBAL PLEA PROPOSAL; IS THAT CORRECT?

20 MR. MARCHELLETTA, JR.: YES, SIR.

21 MR. MARCHELLETTA, SR.: YES, SIR.

22 MR. BLY: I THINK THAT COVERS IT, JUDGE.

23 THE COURT: ALL RIGHT, THEN GENTLEMEN. YOUR  
24 MOTION, YOUR REQUEST TO BE JOINTLY REPRESENTED IS GRANTED.

25 MR. BERNHOFT: THANK YOU, JUDGE.

1 THE COURT: NOW, WE ALSO HAVE A MOTION TO SEVER.  
2 I HAVE READ THAT MOTION, AND THE DEFENDANT, MS. KOTTWITZ,  
3 HAS FAILED TO CARRY HER BURDEN OF SHOWING THAT SEVERANCE IS  
4 PROPER, AND THE COURT FINDS THAT IT IS NOT IN THE BEST  
5 INTEREST OF JUSTICE TO ALLOW A SEVERANCE. AND, THEREFORE,  
6 THE DEFENDANT KOTTWITZ'S MOTION TO SEVER IS GOING TO BE  
7 DENIED.

8 NOW, THE MEAT OF THE ISSUE IS --

9 MR. BLY: JUDGE, I'M SORRY. THERE IS ONE OTHER,  
10 IF YOU WERE GOING TO GET TO THE MOTION TO DISMISS, THERE IS  
11 ONE OTHER REQUEST THAT I HAD.

12 THE COURT: ALL RIGHT.

13 MR. BLY: I WOULD LIKE TO DO SOMETHING AKIN TO A  
14 FRYE OR A LAFLER HEARING. IN LIGHT OF THE TWO SUPREME COURT  
15 CASES THAT CAME DOWN THIS YEAR, MISSOURI VERSUS FRYE AND  
16 LAFLER VERSUS COOPER, THAT EXTENDED THE THEORY OR THE CASE  
17 LAW OF INEFFECTIVE ASSISTANCE OF COUNSEL TO THE PLEA HEARING  
18 STAGE. ONE OF THOSE CASES INVOLVED A PLEA OFFER THAT WAS  
19 NOT REPRESENTED OR NOT PASSED ALONG TO THE DEFENDANT, AND  
20 THE DEFENDANT CAME BACK LATER ON AND SAID, LOOK, IF I HAD  
21 KNOWN ABOUT THAT PLEA OFFER, CERTAINLY I WOULD HAVE TAKEN IT  
22 AND PLED GUILTY.

23 I WOULD LIKE TO JUST PUT ON THE RECORD WHAT THE  
24 PLEA OFFER WAS THAT WAS EXTENDED TO THE DEFENDANTS, THAT WAY  
25 THERE IS NO ARGUMENT LATER ON THAT ANYBODY WAS UNSURE ABOUT

1 THE PARTICULAR DETAILS OF IT OR WHAT IT WAS THAT THE  
2 GOVERNMENT OFFERED. IT CLEANS UP THE 2255 PROBLEMS LATER  
3 ON.

4 THE COURT: ALL RIGHT. PLEASE DO SO. AND,  
5 GENTLEMEN AND MS. KOTTWITZ, PLEASE LISTEN TO WHAT HE SAYS  
6 BECAUSE WHEN HE IS FINISHED I AM GONNA ASK YOU IF YOU  
7 UNDERSTOOD THAT THAT WAS THE PLEA OFFER. ACTUALLY, IT IS  
8 REALLY THE MARCHELLETTAS ARE THE ONLY ONES THAT I'M SO  
9 INTERESTED IN BECAUSE MS. KOTTWITZ HAS INDICATED HER  
10 INCLINATION TO ACCEPT THE PROPOSAL. SO, GENTLEMEN, LISTEN  
11 TO WHAT HE SAYS. TELL ME WHEN HE IS FINISHED, YEP, THAT IS  
12 OUR UNDERSTANDING OF WHAT THE PROPOSED DEAL IS OR, NO, THAT  
13 IS NOT OUR UNDERSTANDING.

14 MR. BLY: OBVIOUSLY, JUDGE, WE DON'T WANT YOU TO  
15 ENGAGE IN THESE DISCUSSIONS.

16 THE COURT: NO, I AM NOT HAVING ANYTHING TO DO  
17 WITH IT. IT IS BETWEEN YOU --

18 MR. BLY: I WILL READ FROM THE LETTER THAT I SENT  
19 TO MR. BERNHOFT AND MR. FROELICH ON JUNE 6TH OF 2012. I AM  
20 NOT GOING QUOTE THE WHOLE THING, BUT THE GUTS OF THE PLEA  
21 OFFER I WILL READ.

22 "THE UNITED STATES ATTORNEY OFFICE OFFERS EACH OF  
23 YOUR CLIENTS THE OPPORTUNITY TO RESOLVE THE ABOVE-CAPTIONED  
24 CASE BY PLEADING GUILTY TO A MISDEMEANOR. THIS IS AN OFFER  
25 FOR A GLOBAL RESOLUTION, AND AS SUCH IT IS ONLY AVAILABLE IF



1 ALL OF THE DEFENDANTS ACCEPT IT. THE UNITED STATES WILL  
2 RECOMMEND A SENTENCE OF PROBATION WHICH, UNDER THE  
3 CIRCUMSTANCES, AMOUNTS TO TIME SERVED."

4 WE STATED THAT THE DEPARTMENT OF JUSTICE TAX  
5 DIVISION HAD NOT YET APPROVED THE PLEA RESOLUTION, AND THAT  
6 THE OFFER WAS CONTINGENT UPON THAT APPROVAL. WE ALSO  
7 INDICATED THAT THE UNITED STATES ATTORNEYS OFFICE WOULD NOT  
8 OBJECT TO A BINDING PLEA THAT INCORPORATES THE TERMS NOTED  
9 ABOVE, BUT WE NOTED THAT THAT IS OBVIOUSLY SOMETHING THAT IS  
10 UP TO YOUR HONOR. WE WERE NOT SURE WHETHER THAT IS  
11 SOMETHING THAT YOUR HONOR WOULD ACCEPT OR REJECT, SO WE  
12 STATED THAT: "TO THE EXTENT THAT JUDGE BATTEN IS UNWILLING  
13 TO ACCEPT A BINDING PLEA, THE GOVERNMENT WOULD PLEDGE TO  
14 ARGUE IN FAVOR OF A PROBATIONARY TIME-SERVED SENTENCE, EVEN  
15 IN THE NONBINDING PLEA."

16 THE COURT: ALL RIGHT. THE RECORD SHOULD REFLECT,  
17 ALSO, GENTLEMEN, SO YOU'LL KNOW, THAT I WOULD ACCEPT SUCH A  
18 NONBINDING PLEA.

19 NOW, ARE YOU -- ARE YOU -- WHAT MR. BLY JUST READ,  
20 COUPLED WITH MY IMPRIMATUR THAT I WOULD ACCEPT THE BINDING  
21 PLEA, DID HE ACCURATELY DESCRIBE THE TERMS OF WHAT YOU  
22 UNDERSTOOD TO BE THE PLEA OFFER IN THIS CASE?

23 MR. MARCHELLETTA, JR: YES, SIR.

24 MR. MARCHELLETTA, SR: WHAT ARE WE PLEADING TO?

25 MR. BLY: JUDGE, WE INDICATED IN THE LETTER THAT

1 IT WOULD BE A MISDEMEANOR.

2 THE COURT: THE CHARGE WOULD BE?

3 MR. BLY: I INDICATED IN THE LETTER THAT I  
4 ENVISIONED A PLEA TO 26 UNITED STATES CODE SECTION 7203,  
5 WHICH MAKES IT A CRIME TO FAIL TO PAY AN ESTIMATED TAX.

6 HOWEVER, I INDICATED TO BOTH ATTORNEYS THAT I AM  
7 NOT WED TO THAT PARTICULAR RESOLUTION WITH THAT PARTICULAR  
8 MISDEMEANOR, AND THAT I WAS OPEN TO SUGGESTIONS FOR A  
9 DIFFERENT MISDEMEANOR CRIME IF THEY FELT THERE WAS ONE THAT  
10 WAS MORE APPROPRIATE.

11 THE COURT: DOES THAT ANSWER YOUR QUESTION,  
12 MR. MARCHELLETTA, SR? WHAT HE BASICALLY SAID IS THERE IS  
13 ONE STATUTE, FAILURE TO PAY THE TAXES -- WHAT IS IT? WHAT  
14 DID YOU CALL IT?

15 MR. BLY: IT MAKES IT A CRIME TO FAIL TO PAY  
16 ESTIMATED TAXES, QUARTERLY ESTIMATED TAXES.

17 THE COURT: FAILURE TO PAY YOUR ESTIMATED TAXES.  
18 THAT IS WHAT HE IS ASKING YOU TO PLEAD GUILTY TO. BUT HE  
19 ALSO SAID THAT IF YOU DIDN'T LIKE THAT ONE, HE WOULD COME UP  
20 WITH A DIFFERENT FLAVOR.

21 MR. MARCHALETTA, SR.: I DIDN'T DO THAT. THE  
22 ESTIMATED TAXES WAS HELD UP BY THE LAWYERS AND THE  
23 ACCOUNTANT THAT WE HAD.

24 THE COURT: YOU DON'T REALLY NEED TO EXPLAIN WHAT  
25 YOUR POSITION IS, BUT JUST TELL ME. SO YOU ARE STILL NOT

1 INCLINED TO ACCEPT THAT DEAL?

2 MR. MARCHALETТА, SR.: NO, SIR.

3 THE COURT: GERRY, JR.?

4 MR. MARCHALETТА, JR.: NO, SIR.

5 THE COURT: JULEE, WHERE IS THE DOCKET SHEET?

6 MR. BLY: JUDGE, I THINK IT WOULD BE HELPFUL JUST  
7 TO PUT ON THE RECORD MS. KOTTWITZ'S VIEW ON THAT PLEA OFFER  
8 THAT WAS EXTENDED TO HER, AS WELL.

9 THE COURT: IS THAT CORRECT, MS. KOTTWITZ, OR,  
10 JERRY, IS THAT CORRECT?

11 MR. FROELICH: YES, YOUR HONOR. WE WOULD HAVE  
12 WORKED SOMETHING OUT.

13 THE COURT: ALL RIGHT. THIS FITS IN THE CATEGORY  
14 OF "YOU'VE GOT TO BE KIDDING ME." GOSH A'MIGHTY.

15 WELL, I CAN'T DENY THAT I WOULD LIKE TO GET  
16 INVOLVED IN THE PLEA NEGOTIATIONS, BUT I CAN'T. I AM BARRED  
17 BY LAW FROM GETTING INVOLVED IN THE PLEA NEGOTIATIONS, AND I  
18 HAVE NO INTENTION TO.

19 ALL RIGHT. I AM GOING TO HEAR ARGUMENT. I AM  
20 GOING TO GIVE 15 MINUTES A SIDE ON THIS ARGUMENT ON THE  
21 MOTION TO DISMISS.

22 MR. BERNHOFT: PERMISSION TO PROCEED, YOUR HONOR?

23 THE COURT: YES, SIR.

24 MR. BERNHOFT: THANK YOU. GOOD AFTERNOON, AGAIN,  
25 YOUR HONOR. THANKS FOR THE OPPORTUNITY TO BE HEARD, I

1 APPRECIATE IT.

2 THE MARCHELLETTAS HAVE FILED A MOTION TO DISMISS  
3 THE INDICTMENT, THE RETRIAL INDICTMENT IF YOU WILL, ON THE  
4 GROUNDS OF OUTRAGEOUS GOVERNMENT MISCONDUCT. AND THAT  
5 MOTION, IN ADDITION TO SUMMARIZING THE AGGREGATE MISCONDUCT  
6 DETAILED AND SUPPORTED BY EXHIBITS IN THE MARCHELLETTAS'  
7 RULE 33 MOTION FOR A NEW TRIAL THAT WAS FILED ON OCTOBER 4TH  
8 OF 2010 --

9 THE COURT: WHY DOESN'T THE NEW TRIAL VITIATE THE  
10 MOTION?

11 MR. BERNHOFT: I AM SORRY, YOUR HONOR?

12 THE COURT: WHY DOES NOT THE GRANT OF A NEW TRIAL  
13 VITIATE YOUR MOTION ALTOGETHER?

14 MR. BERNHOFT: THE RULE 33, SIR?

15 THE COURT: THIS MOTION. THE MOTION TO DISMISS.  
16 YES. BECAUSE THE GOVERNMENT'S TAKING THAT POSITION THAT YOU  
17 ARE GETTING A NEW TRIAL -- ARE YOU BASICALLY -- I AM  
18 ASSUMING YOUR ANSWER TO THAT QUESTION IS THAT THE  
19 GOVERNMENT'S CONDUCT IS SO EGREGIOUS THAT THE ONLY PROPER  
20 SANCTION IS DISMISSAL. DO YOU HAVE ANY OTHER ARGUMENT  
21 BESIDES THAT? I'LL BE GLAD TO HEAR YOU EXPOUND ON THAT, BUT  
22 IS THERE ANY OTHER REASON BESIDES THAT REASON?

23 MR. BERNHOFT: YES, YOUR HONOR.

24 THE COURT: WHAT OTHER REASONS ARE THERE BESIDES,  
25 WELL, THIS IS JUST SO HEINOUS WHAT THE GOVERNMENT HAS DONE

1 THAT WE HAVE TO TEACH THEM A LESSON AND PROTECT THE  
2 INTEGRITY OF THE SYSTEM AND THE DUE PROCESS RIGHTS OF MY  
3 CLIENTS AND THEREFORE WE NEED TO DISMISS THIS CASE?

4 MR. BERNHOFT: SURE. I APPRECIATE THE COURT'S  
5 DIRECTION.

6 FIRST, A RETRIAL WOULD BE A DUE PROCESS VIOLATION  
7 BECAUSE THE ENTIRE EVIDENCE POOL HAS BEEN IRREPARABLY  
8 CONTAMINATED; FIRST THROUGH THE DOCUMENTED INTIMIDATION AND  
9 THREATENING OF WITNESSES BY S. A.'S BERGSTROM AND SELLERS.  
10 THIS WAS MEMORIALIZED IN OUR RULE 33. THE WITNESS  
11 STATEMENTS WERE TENDERED AS EXHIBITS TO THE RULE 33, AND  
12 THEY WERE FURTHER SUPPORTED BY MR. PEARSON'S DECLARATION.  
13 MR. PEARSON IS A FORMER HOOVER-APPOINTED FBI SPECIAL AGENT,  
14 HE IS MY SPECIAL AGENT IN CHARGE OF THIS CASE, MY PRIVATE  
15 INVESTIGATOR.

16 PARTICULARLY, SPECIAL AGENT BERGSTROM HAD A  
17 CUSTOM, PRACTICE, AND PATTERN OF USING ECONOMIC COERCION AND  
18 INTIMIDATION WITH WITNESSES. SHE THREATENED MANY OF THEM  
19 THAT SHE WOULD SIT THEM OUT ON THE COURTHOUSE BENCH OUT HERE  
20 FOR A WEEK TO TWO WEEKS AND DIDN'T CARE ABOUT THEIR JOBS.  
21 EACH ONE OF THESE WITNESSES TESTIFIED THAT THAT WAS  
22 THREATENED TO THEM. THEY TOOK IT SERIOUSLY BECAUSE THEY  
23 WOULD BE HARMED IN THEIR JOB.

24 THE COURT: WHY SHOULDN'T SHE GET HER KNUCKLES  
25 RAPPED INSTEAD OF THE CASE BEING DISMISSED?

1 MR. BERNHOFT: BECAUSE THE SINS OF THE  
2 INVESTIGATIVE AGENTS ARE IMPUTED TO THE PROSECUTION TEAM  
3 UNDER THE CONTROLLING LAW OF THIS CIRCUIT AND SUPREME COURT  
4 AUTHORITY. THIS IS AN IRS TAX CASE, AFTER ALL, AND OF  
5 COURSE IF THIS CASE GOES TO RETRIAL, YOU ARE GOING TO HAVE  
6 THE SPECIAL AGENT IN CHARGE, THE SUPERVISORY SPECIAL AGENT  
7 OVER HERE, IRS CHIEF COUNSEL'S OFFICE, AND THEY WILL ALL BE  
8 HERE LOOKING FOR THE OUTCOME THAT THE IRS DESIGNED FROM AT  
9 LEAST SINCE 2000 WHEN THEY BEGAN THIS INVESTIGATION, OR I  
10 SHOULD SERIES OF INVESTIGATIONS. SO THE ENTIRE EVIDENCE  
11 POOL IS IRREPARABLY TAINTED.

12 WE ALSO HAVE, AS WE SET FORTH IN OUR CURRENT  
13 MOTION TO DISMISS, A RECENT MEMORANDUM OF CONVERSATION THAT  
14 WAS FINALLY RELEASED. IT WAS IDENTIFIED IN THE IRS FOIA  
15 LITIGATION. BUT FOR THAT FOIA LITIGATION, WE WOULDN'T HAVE  
16 THAT DOCUMENT TODAY. AND THERE SPECIAL AGENT BERGSTROM IS  
17 ACTUALLY INSERTING HERSELF AS A MATERIAL PARTICIPANT IN HER  
18 OWN CRIMINAL INVESTIGATION. AND THIS IS SPECIAL AGENT 101.  
19 THIS IS ABSOLUTELY TABOO.

20 ATTORNEY MORRIS, MR. GORMAN, THE NAMED  
21 UNIDENTIFIED COCONSPIRATOR IN THE FIRST TRIAL, HIS ATTORNEY,  
22 BRUCE MORRIS, CONTACTED SPECIAL AGENT BERGSTROM AND SAID,  
23 LOOK, MY CLIENT WANTS TO DEMAND REPAYMENT OF THAT \$250,000  
24 LOAN, AND I WANT TO MAKE SURE THAT IS NOT A PROBLEM. AS  
25 SPECIAL AGENT BERGSTROM FAITHFULLY MEMORIALIZES, SHE TELLS

1 THEM, OH, THAT IS A PROBLEM. IF YOUR CLIENT DEMANDS PAYMENT  
2 OF THAT \$250,000 LOAN, I WILL CONSTRUE THAT AS AN OVERT ACT  
3 IN FURTHERANCE OF A CONSPIRACY. SO SPECIAL AGENT BERGSTROM  
4 THREATENS THE WITNESS'S LAWYER AND SAYS, IF YOUR CLIENT  
5 PURSUES A LAWFUL COURSE OF ACTION, I AM GOING TO CONSIDER  
6 THAT A CONSPIRATORIAL ACT AND I WILL PUT YOU ON THE WRONG  
7 SIDE OF THE "V". THAT'S A COLLOQUIAL PARAPHRASE, BUT IT'S A  
8 FAIR SUMMARY OF THE M.O.C.

9 THE PROBLEM WITH WHAT WE KNOW IS WHAT WE KNOW.  
10 AND THE ONLY REASON THAT WE ARE HERE TO TODAY WITH THESE  
11 DOCUMENTS AND INFORMATION IS THAT FOR THE PAST THREE AND A  
12 HALF YEARS THE MARCHELLETTAS HAVE INVESTED SUBSTANTIAL  
13 RESOURCES IN INVESTIGATING THIS CASE AFTER WE HAD A VIEW,  
14 FROM READING THE TRIAL TRANSCRIPT AND THEN PROSECUTING THE  
15 APPEAL, WHICH ULTIMATELY OVERTURNED ALL OF THE CONVICTIONS  
16 FOR RETRIAL SAVE THE COUNT 6 -- 7206 SUB EIGHT COUNT, WHICH  
17 WAS REVERSED WITH PREJUDICE FOR INSUFFICIENT EVIDENCE.

18 IF THEY HAD NOT INVESTED THOSE RESOURCES AND THE  
19 TIME DURING THE PENDENCY OF THE APPEAL TO DO FOIA  
20 LITIGATION -- IRS FOIA LITIGATION WAS BEFORE THIS HONORABLE  
21 COURT AS WAS THE CUSTOMS BORDER PATROL ICE FOIA  
22 LITIGATION -- WE WOULDN'T KNOW ANYTHING ABOUT THESE  
23 DOCUMENTS.

24 AND I RESPECTFULLY SUBMIT, YOUR HONOR, THAT  
25 WITHOUT THE TIME OF THESE THREE YEARS AND THEIR AGGRESSIVE

1 FOIA LITIGATION AND THE INCREDIBLE AMOUNT OF RESOURCES THEY  
2 HAVE DEVOTED TO THE INVESTIGATION, THAT THIS RETRIAL WOULD  
3 HAVE OCCURRED WITHIN THE LAST YEAR. AND, FRANKLY, IT WOULD  
4 HAVE BEEN THE SAME SORT OF FRAUD UPON THE COURT, THESE  
5 DEFENDANTS, AND A TRAMPLING OF CONSTITUTIONAL RIGHTS OF DUE  
6 PROCESS AND CONFRONTATION THAT OCCURRED IN 2007.

7 THE COURT: WHY DID THE GOVERNMENT AGREE TO THE  
8 CONTINUANCES, THEN?

9 MR. BERNHOFT: I'M SORRY, YOUR HONOR?

10 THE COURT: YOU JUST SAID THAT BUT FOR THE FOIA  
11 LITIGATION YOU WOULDN'T HAVE GOTTEN SOME OF THE DOCUMENTS  
12 THAT PROVE THE BASIS FOR YOUR MOTION.

13 MR. BERNHOFT: YES.

14 THE COURT: AND THAT FOIA LITIGATION TOOK PLACE IN  
15 2011 AND 2012, DURING WHICH TIME THREE CONTINUANCES OF THE  
16 NEW TRAIL HAD BEEN GRANTED.

17 MR. BERNHOFT: YES.

18 THE COURT: AND THE GOVERNMENT'S CONSENTED TO A  
19 ALL THREE. WHY WOULD THEY CONSENT TO THAT WHICH GAVE YOU  
20 THE TIME TO GET THE DOCUMENTS IN THE FOIA LITIGATION?

21 MR. BERNHOFT: YES, YOUR HONOR. THE FIRST  
22 CONTINUANCE WAS AT THE INSTANCE OF THE GOVERNMENT. AND I  
23 THINK IT AS FORMER AUSA ANAND WHO FILED THE MOTION WITH THE  
24 COURT AND INVOKED THE 180-DAY RULE UPON RETRIAL. AND THEN I  
25 BELIEVE THE COURT SET A CALENDAR AND CONTROL TRIAL DATE JUST



1 INSIDE OF THE 180 DAYS IN NOVEMBER 2011. OR WAS IT -- YEAH,  
2 2011. AND I THINK MR. BLY CONTACTED ME AS THE MAY 7 TRIAL  
3 DATE APPROACHED, AND HE ADVISED ME THAT HIS WIFE AND HE WERE  
4 EXPECTING THEIR FIRST CHILD AND WOULD I AGREE TO A  
5 CONTINUANCE, AND WE DID.

6 SO IT IS TRUE THAT THE TWO PREVIOUS CONTINUANCES  
7 IN THE CASE FOR RETRIAL PURPOSES WERE MADE AT THE  
8 GOVERNMENT'S INSTANCE, AND WE DIDN'T DISAGREE WITH EITHER OF  
9 THOSE.

10 THE COURT: I SAID THREE CONTINUANCES. IT WAS TWO  
11 CONTINUANCES, THREE TRIAL DATES; RIGHT?

12 MR. BERNHOFT: YES, SIR. THAT'S CORRECT. AND I  
13 AM NOT AT LIBERTY TO GET INSIDE OF THE MINDS OF THE  
14 GOVERNMENT IN TERMS OF THEIR STRATEGIC THINKING. ALL I CAN  
15 SAY IS THAT MOST PEOPLE WOULDN'T EXPECT, FOR EXAMPLE, IN THE  
16 IRS FOIA LITIGATION, THAT A SPECIAL AGENT OF MANY YEARS'  
17 EXPERIENCE WOULD PERJURE HERSELF AND FILE DECLARATIONS UNDER  
18 OATH AND MAKE MATERIAL MISSTATEMENTS ABOUT THE ORIGIN AND  
19 SCOPE OF HER INVESTIGATION. I DON'T THINK ANYBODY COULD  
20 HAVE ANTICIPATED THAT. AND IT'S AN OPEN QUESTION WHAT THE  
21 LEVEL OF KNOWLEDGE WAS WITH THE LINE AUSA'S THAT PROSECUTED  
22 THIS CASE IN 2007.

23 MR. MONNIN WAS ON THE CASE FOR A LONG TIME. IN  
24 FACT, HE LED THE UNDISCLOSED FBI ORGANIZED CRIME LA COSA  
25 NOSTRA INVESTIGATION AGAINST THE MARCHELLETTAS. MR. BLY

1 RECENTLY DISCLOSED ONE 302. THERE WERE SIX OTHER SERIALS  
2 THAT WE GOT THROUGH FOIA THAT HAVE NOT BEEN DISCLOSED. AS  
3 WE POINTED IN OUT IN OUR PAPER, EITHER -- I DON'T KNOW  
4 WHETHER THESE AGENT CANVASSING CONDUITS ARE CONCEALING  
5 DOCUMENTS FROM THE PROSECUTION. WE HAVE NO WAY TO KNOW.  
6 BUT THE IDEA THAT BUT FOR THE MARCHELLETTAS CONSUMPTION OF  
7 RESOURCES AND ALLOCATION OF RESOURCES IN THREE,  
8 THREE-AND-A-HALF YEARS, WE WOULD NOT KNOW ANYTHING ABOUT  
9 THESE DOCUMENTS AND THESE PREVIOUS INVESTIGATIONS, ALL OF  
10 WHICH ARE EXTREMELY PROBATIVE REGARDING THE CURRENT TAX  
11 CHARGES.

12 FOR EXAMPLE, WE ARE ENTITLED TO QUERY THE ORIGIN,  
13 SCOPE, COMPETENCY, AND GOOD FAITH OF THE CORE INVESTIGATION.  
14 I MEAN, NO FEDERAL CRIMINAL TAX TRIAL PROCEEDS WITHOUT THE  
15 LEAD SPECIAL AGENT TAKING THE STAND AND BEING QUERIED ON  
16 OATH.

17 AND HERE WE HAD AN FBI -- WE HAD A CUSTOMS  
18 INVESTIGATION THAT, CONTRARY TO SPECIAL AGENT SELLERS' FALSE  
19 STATEMENTS AT THE ORIGINAL TRIAL, SHE WAS DOING AN  
20 AGGRESSIVE CRIMINAL INVESTIGATION TWO WEEKS AFTER THAT CHECK  
21 SEIZURE, AND THAT IS IN THE DOCUMENTS, AGAIN DOCUMENTS NOT  
22 DISCLOSED TO THE DEFENSE DURING THE FIRST TRIAL. SO SHE  
23 ROLES OUT AN AGGRESSIVE GRAND JURY INVESTIGATION. WELL,  
24 THAT INVESTIGATION YIELDS NO CRIMINAL VIOLATIONS BY THE  
25 MARCHELLETTAS OR CIRCLE. NO MONEY LAUNDERING.

1           NOW, THE NEW FBI DOCUMENTS THAT THE GOVERNMENT HAS  
2 NOT IDENTIFIED OR DISCLOSED IN DISCOVERY, THEY DEMONSTRATE  
3 THAT WITHIN TWO WEEKS, IN EARLY MARCH OF 2003, SPECIAL  
4 AGENT BERGSTROM AND FORMER AUSA PAUL MONNIN ARE JAWBONING  
5 THE FBI TO OPEN UP AN LCNOC STRIKE FORCE INVESTIGATION FOR  
6 MONEY LAUNDERING.

7           NOW, WHEN I AM QUERYING THAT SPECIAL AGENT, THE  
8 FACT THAT SHE OPENED UP ANOTHER INVESTIGATION THAT CUSTOMS  
9 HAD ALREADY CONCLUDED THERE WAS NO CRIMINAL VIOLATIONS  
10 WHATSOEVER, INCLUDING MONEY LAUNDERING, AND SHE STEPS OVER  
11 WITH MR. MONNIN, GOES TO FBI AND GINS UP ANOTHER  
12 INVESTIGATION FOR MONEY LAUNDERING, THAT DESTABILIZES THE  
13 CREDIBILITY AND THE COMPETENCY OF HER INVESTIGATION AND THAT  
14 JURY IS ENTITLED TO HEAR THE RESULTS OF THESE PREVIOUSLY  
15 UNDISCLOSED INVESTIGATIONS AND THE FACT THAT EACH AND EVERY  
16 ONE OF THEM WAS ZERO CRIMINAL VIOLATIONS. AND THAT'S THE  
17 MATERIALITY OF THIS.

18           NOW, THE GOVERNMENT HAS TOLD ME, RATHER SNARKILY,  
19 I THINK, THAT THEY DON'T INTEND TO CALL SPECIAL  
20 AGENT BERGSTROM TO THE RETRIAL. THEY DON'T INTEND TO CALL  
21 HER AS A PRINCIPAL WITNESS.

22           THE COURT: IS THAT TRUE, GENTLEMEN?

23           MR. BLY: I DON'T REMEMBER SAYING THAT. I'M NOT  
24 SAYING I DIDN'T, BUT I DON'T REMEMBER SAYING THAT.

25           MR. BERNHOFT: I RECALL THAT MR. BLY ADVISED THAT

1 WE DON'T INTEND TO CALL SPECIAL AGENT BERGSTROM, BUT WE  
2 WOULD LOVE IT IF YOU WOULD. NOW, WHY IS THAT? BECAUSE IN  
3 ORDER TO CROSS-EXAMINE SPECIAL AGENT BERGSTROM EFFECTIVELY I  
4 HAVE TO BRING UP THE FIRST TRIAL AND I HAVE TO BRING UP HER  
5 FALSE REPRESENTATIONS TO THAT FIRST TRIAL JURY, AND I CAN'T  
6 DO THAT.

7 THE COURT: WHY NOT?

8 MR. BERNHOFT: BECAUSE THAT WOULD BE THE SIN OF  
9 DEATH FOR THE DEFENSE.

10 THE COURT: WHY?

11 MR. BERNHOFT: I HAVE TO RAISE THE SPECTER OF A  
12 FIRST TRIAL WHERE A JURY OF SIMILAR PEOPLE CONVICTED ON  
13 PARTICULAR TAX COUNTS. THAT WOULD BE EXCLUDED UNDER 403.

14 THE COURT: WHY WOULD THE JURY CONFER THAT THERE  
15 HAD BEEN A CONVICTION?

16 MR. BERNHOFT: WELL, WE CAN TRY AND BE ARTFUL IN  
17 OUR JURY INSTRUCTIONS AND WE COULD BE ARTFUL IN OUR  
18 QUESTIONING --

19 THE COURT: I AM ACTUALLY PRETTY GOOD AT THAT. I  
20 THINK I COULD CONVINCED THE JURY THAT IT SHOULD INFER NOTHING  
21 FROM THE FACT THAT THERE HAS BEEN A MENTION -- THE FACT THAT  
22 THIS IS THE SECOND TIME THIS CASE HAD BEEN TRIED. I CAN  
23 TELL YOU, I'VE BEEN MARRIED TO MY WIFE FOR 25 YEARS, I'VE  
24 BEEN A JUDGE FOR SIX, AND I WAS A LAWYER FOR 22, AND SHE  
25 WOULD HAVE NO CLUE, IF SHE WAS SITTING OVER THERE, AS TO

1       WHETHER OR NOT THERE WAS AN ACQUITTAL OR A CONVICTION AFTER  
2       THE FIRST ONE.

3               MR. BERNHOFT:   I HAVE BEEN MARRIED FOR 27 YEARS,  
4       MY WIFE PROBABLY WOULDN'T KNOW DIFFERENCE EITHER, JUDGE.  
5       BUT AT THE END OF THE DAY, THE GOVERNMENT HAS DECLARED ITS  
6       INTENTION NOT TO EVEN CALL THE LEAD SPECIAL AGENT UP THERE:

7               THE COURT:   THE GOVERNMENT HAS NOT MADE THAT  
8       DECLARATION.   I JUST HEARD MR. BLY DISAVOW ANY RECOLLECTION  
9       OF SUCH A REPRESENTATION.   MAYBE HE DID MAKE IT.   HE SAYS HE  
10      DOESN'T REMEMBER.   BUT AT THIS POINT, THE GOVERNMENT HAS NOT  
11      MADE A COMMITMENT THAT IT WILL NOT CALL SPECIAL  
12      AGENT BERGSTROM.

13              MR. BERNHOFT:   SURE.   I APPRECIATE THAT, JUDGE.  
14      THE OTHER --

15              THE COURT:   I'VE GOT A FEELING -- I TEND TO THINK  
16      IT WOULD BE ODD IF THE GOVERNMENT DID NOT, FOR THE VERY  
17      REASON YOU SAID.   IT WOULD BE -- IT WOULD NOT BE THE TYPICAL  
18      TAX PROSECUTION FOR THE SPECIAL LEAD AGENT TO NOT BE CALLED.

19              MR. BERNHOFT:   AGREED.   AGREED, YOUR HONOR.

20              THE COURT:   SO -- BUT, FRANKLY, I'M TRYING TO  
21      THINK LIKE A LAWYER, AND I DON'T SEE HOW YOU ARE SO HARMED  
22      IF SHE IS NOT CALLED.   I MEAN, YOU GET TO TELL THE JURY,  
23      THEY DIDN'T EVEN CALL HER.   THEY DIDN'T EVEN WANT HER.   I  
24      WOULD HAVE A LOT OF FUN WITH THAT.   YOU SIT UP HERE AND YOU  
25      THINK HOW FUN IT WOULD BE.

1           MR. BERNHOFT: WELL, I DON'T KNOW IF -- BECAUSE  
2 LIBERTY IS AT STAKE HERE, YOUR HONOR. I APPRECIATE THE  
3 COURT'S SENSE OF HUMOR.

4           THE COURT: I DON'T MEAN IT AS A SENSE OF HUMOR.  
5 I JUST MEAN -- WHAT I MEAN IS THAT BECAUSE -- LISTEN, I WANT  
6 TO CONVEY TO YOU AS PRECISELY AS I CAN, AND FORCEFULLY AS I  
7 CAN, THAT IT'S BREATHTAKING TO THE COURT WHAT THESE PEOPLE  
8 HAVE BEEN THROUGH, OKAY. I DON'T KNOW WHAT, IF ANYTHING,  
9 THEY ARE GUILTY OF. BUT I KNOW THAT, WHETHER THEY ARE  
10 GUILTY OR INNOCENT, THEY HAVE ALREADY PAID A LOT JUST BY THE  
11 ENTIRE ORDEAL. OKAY?

12           SO YOU WOULD BE -- YOU OR YOUR CLIENTS WOULD BE  
13 GROSSLY MISTAKEN IF YOU LEFT THIS COURTROOM TODAY THINKING  
14 THAT THE JUDGE WAS NOT APPRECIATIVE OF AND COGNIZANT OF THE  
15 FACT THAT YOUR CLIENTS HAVE BEEN THROUGH HELL, BOTH  
16 EMOTIONALLY AND FINANCIALLY. I KNOW THAT. OKAY.

17           MY POINT I WAS MAKING A MINUTE AGO IS THAT ON A  
18 LEGAL ISSUE OF WHETHER THIS CASE SHOULD BE DISMISSED, YOU  
19 HAVEN'T CONVINCED ME THAT YOU CAN'T CORRECT THE PROBLEMS  
20 WITH A LESS SEVERE SANCTION, THAT A LESS SEVERE SANCTION IS  
21 NOT APPROPRIATE.

22           AND WHEN I SAID "HAVE FUN," WHAT I MEANT WAS THAT  
23 IF THE GOVERNMENT DOESN'T CALL SPECIAL AGENT BERGSTROM --  
24 YOU'VE ALREADY CONVINCED ME THAT YOU ARE AN OUTSTANDING  
25 TRIAL LAWYER, AND I MEAN THAT. I CAN TELL A GOOD ONE.

1 OKAY? SO I KNOW THAT YOU ARE A VERY GOOD TRIAL LAWYER. I  
2 CAN'T BELIEVE THAT YOUR CROSS-EXAMINATION, WHICH WOULD BE  
3 THOROUGH AND SIFTING, WOULD NOT BE EXTREMELY PREJUDICIAL TO  
4 THE GOVERNMENT. AND I THINK THAT MAY BE GOOD ENOUGH.

5 I DON'T KNOW THAT YOU'VE CARRIED YOUR BURDEN OF  
6 SHOWING THAT THAT'S NOT GOOD ENOUGH AND WE HAVE TO DISMISS  
7 THE CASE, WHETHER I WILL PERSONALLY WANT TO DISMISS THE CASE  
8 OR NOT.

9 MR. BERNHOFT: I APPRECIATE ALL OF THE COURT'S  
10 COMMENTS IN ALL OF THOSE RESPECTS, YOUR HONOR, VERY  
11 SINCERELY. I DO WANT -- IF THE COURT WILL PERMIT ME TO MOVE  
12 FORWARD.

13 THE COURT: I WILL GIVE YOU MORE THAN 15 MINUTES  
14 BECAUSE I AM TALKING UP SOME OF YOUR TIME.

15 MR. BERNHOFT: I APPRECIATE IT.

16 THE COURT: AND YOU HAVE COME A LONG WAYS.

17 MR. BERNHOFT: THANK YOU, JUDGE. SO WE DO HAVE  
18 THE WITNESS THREATENING AND COERCION, AND THAT'S  
19 CONTAMINATED THE WITNESS POOL.

20 THE MARCHELLETTAS HAVE A 6TH AMENDMENT RIGHT TO  
21 CONFRONTATION. AND THERE ARE CERTAIN WITNESSES THAT WON'T  
22 TALK TO US THAT WE CAN'T LOCATE. I JUST TALKED TO A COUPLE  
23 OF WITNESSES THE OTHER DAY WITH MY INVESTIGATOR ON THE  
24 PHONE, ANTHONY CONTRINO, AND INTERESTINGLY HE SAID THAT  
25 SPECIAL AGENT BERGSTROM CALLED HIM IN LATE SPRING OR EARLY

1 SUMMER OF 2001. SPECIAL AGENT BERGSTROM TESTIFIED AT TRIAL  
2 SHE DIDN'T GET INVOLVED IN THE CASE UNTIL LATE 2002, 2003.  
3 AND ONE OF THE THINGS SHE SAID TO HIM WAS, I AM GOING TO GET  
4 YOU FOR CONTEMPT IF YOU DON'T RETURN MY PHONE CALLS. HE  
5 WILL TESTIFY TO THAT FACT. THIS IS SERIOUS WITNESS  
6 INTIMIDATION AND COERCION, AND IT HAS CONTAMINATED THE  
7 ENTIRE WITNESS POOL, AND ALSO IN WAYS THAT WE CAN'T KNOW.

8 SECONDLY, THE CRUCIAL -- IT'S NOT THE DOMINANT  
9 DOCUMENT SET ANYMORE. IF THE COURT WOULD PERMIT ME, THIS IS  
10 THE TOTALITY OF THE FILINGS THE MARCHELLETTAS HAVE MADE  
11 RESPECTING MISCONDUCT ALLEGATIONS IN THE EXHIBITS. THIS IS  
12 THE RULE 33 AND THE CURRENT MOTION TO DISMISS, AND THESE ARE  
13 SPECIMEN DOCUMENTS FROM THE U.S. DEPARTMENT OF LABOR OFFICE  
14 OF INSPECTOR GENERAL CRIMINAL INVESTIGATION AND THE FBI  
15 STRIKE FORCE INVESTIGATION OF PROBABLY 10 TO 20,000 PAGES OF  
16 DOCUMENTS THAT WE BELIEVE ARE RELEVANT AND PROBATIVE OF THE  
17 CURRENT CHARGES.

18 NOW, WITH RESPECTING THE IRS DOCUMENTS, WHICH FORM  
19 THE CORE OF ANY TAX CASE, SPECIAL AGENT BERGSTROM HAS HAD  
20 EXCLUSIVE CUSTODY AND CONTROL OF THOSE DOCUMENTS SINCE THE  
21 INVESTIGATION'S INCEPTION. I EXPECT AT SOME POINT SOMEBODY  
22 GOT WISE, AFTER THE FOIA LITIGATION, AND MAYBE TOOK CUSTODY  
23 OF THOSE. BUT WE CAN'T KNOW WHAT SHE HAS CONCEALED,  
24 SECRETED OR, FRANKLY, FORGED.

25 THE COURT: IF ANYTHING.



1           MR. BERNHOFT: WELL, WE HAVE GOT TWO U.S. ATTORNEY  
2 REQUEST LETTERS NOW, ONE DATED AUGUST 14TH, 2002 PROVIDED BY  
3 THE U.S. ATTORNEYS OFFICE, WE PRESUME THAT'S BONA FIDE. AND  
4 THEN, ALTHOUGH IT WAS NOT IDENTIFIED AS A RESPONSIVE  
5 DOCUMENT IN THE FOIA LITIGATION, WHEN THE U.S. ATTORNEYS  
6 OFFICE DISCLOSED THE COMPLETELY WITHHELD DOCUMENTS FROM THE  
7 INFAMOUS G.J. SUPER DOUBLE SECRET SET OF DOCUMENTS IN THE  
8 IRS FOIA LITIGATION, LO AND BEHOLD THERE IS ANOTHER U.S.  
9 ATTORNEYS REQUEST LETTER DATED JULY 11, NOT COINCIDENTALLY  
10 ONE WEEK BEFORE BERGSTROM FILES HER 9131 AND WANTS THAT  
11 AUTHORITY. AND ONE OF THE FOREMOST DOCUMENT EXAMINERS IN  
12 THE COUNTRY WILL TESTIFY THAT THAT IS NOT THE SAME PERSON  
13 WHO SIGNED THOSE TWO LETTERS.

14           AND THAT BEARS AN EVIDENTIARY HEARING TO FIGURE  
15 OUT EXACTLY WHAT IS GOING ON WITH THOSE LETTERS. THESE ARE  
16 LETTERS ON THE LETTERHEAD OF THIS UNITED STATES ATTORNEY'S  
17 OFFICE FOR THE NORTHERN DISTRICT OF GEORGIA. THEY CONTAIN  
18 DIFFERENT DATES, AND THERE IS NO EXPLANATION, AND THE SAME  
19 PERSON DIDN'T SIGN BOTH OF THE LETTERS.

20           SO BERGSTROM -- AGAIN, IT BEARS NOTING THAT THE  
21 ONLY REASON WE KNOW ABOUT ANY OF THESE DOCUMENTS IS BECAUSE  
22 OF THE FOIA LITIGATION, WITHOUT WHICH WE WOULD HAVE HAD A  
23 RETRIAL MAYBE A YEAR AGO, AND THAT WOULD HAVE BEEN A WALKING  
24 TAKING DUE PROCESS VIOLATION.

25           THE OTHER THING THAT WE HAVE HERE IS SPECIAL

1 AGENT BERGSTROM SECRETING MOI'S OF -- OR NOT MEMORIALIZING  
2 CONVERSATIONS AND INTERVIEWS AT ALL -- OF PEOPLE THAT WERE  
3 GIVING EXCULPATORY STATEMENTS DURING THE CORE OF THE  
4 INVESTIGATION. AND WE'VE GOT A LITANY OF EXAMPLES THAT HAVE  
5 BEEN SET FORTH IN OUR MOTION TO DISMISS, AND SOME OF THEM  
6 WERE TALKED ABOUT IN THE RULE 33 FILING.

7 SO, YOU KNOW, THE GOVERNMENT'S GOT THE RESOURCES,  
8 THEY HAVE THE INVESTIGATORS, AND THAT IS WHY THE DISCOVERY  
9 RULES IMPOSE BURDENS ON PARTIES WHO ARE PREDISPOSED TO BE  
10 ABLE TO PERFORM THE DUTY. AND THE GOVERNMENT HAS  
11 CONSTITUTIONAL AND STATUTORY DISCOVERY OBLIGATIONS, AND WE  
12 HAVE NO IDEA WHAT THESE WITNESSES SAID.

13 SO TO GO FORWARD WITH A RETRIAL UNDER THOSE  
14 CIRCUMSTANCES WITH SPECIAL AGENT BERGSTROM EITHER NOT  
15 MEMORIALIZING AT ALL EXCULPATORY STATEMENTS, BRADY, GIGLIO,  
16 AND JENCKS, OR MEMORIALIZING AND SECRETING, WE HAVE NO IDEA.  
17 AND THAT IS ONE OF THE CRUCIAL IMPLICATIONS FOR A RETRIAL.  
18 IT IS A WALKING TALKING DUE PROCESS VIOLATION, AND IT'S A  
19 BRADY VIOLATION.

20 AND I WOULD POINT OUT THAT THE GOVERNMENT DOESN'T  
21 ADDRESS THE MAIN THRUST OF THAT ARGUMENT IN THEIR RESPONSE  
22 PAPER AT ALL. THEY FOCUS ON LACK OF PREJUDICE.

23 THE COURT: THAT IS WHAT YOU SAID IN YOUR REPLY  
24 BRIEF, TOO.

25 MR. BERNHOFT: I DID, SIR. AND ALSO I WANT TO BE

1 ON THE RECORD -- AND I HOPE I HAVEN'T MISSTATED  
2 CONSTITUTIONAL LAW -- THAT THE MARCHELLETTAS STAND HERE  
3 TODAY PRESUMED INNOCENT OF ALL CHARGES BEFORE THIS RETRIAL,  
4 CONTRARY TO THE GOVERNMENT'S STATEMENT ON BRIEF.

5 NOW, THE OTHER REASON WE CAN'T HAVE A DUE PROCESS  
6 CONFORMING RETRIAL, IN ADDITION, THE GOVERNMENT IS  
7 INCAPABLE, AS A PRACTICAL METAPHYSICAL MATTER, OF  
8 IDENTIFYING ALL OF THE DOCUMENTS THAT ARE REQUIRED BY THE  
9 CONSTITUTION AND LAWS OF THE UNITED STATES TO BE PRODUCED TO  
10 THE MARCHELLETTAS PRIOR TO ANY RETRIAL FOR THE REASONS I  
11 HAVE STATED AND OTHERS.

12 THE DOL OIG DOCUMENTS, THESE ARE VERY OLD, THEY  
13 ARE HEAVILY REDACTED. THERE IS PROBLEMS WITH GETTING ANY  
14 DOCUMENTS AT THIS AGE. THE AGE OF THIS CASE MEANS THAT THE  
15 LIKELIHOOD THAT DOCUMENTS ARE NOT AVAILABLE IS INCREASED,  
16 AND WE ARE SEEING THAT IN THE FOIA DISCLOSURES THEMSELVES.

17 IN ONE CASE WE HAD THE AFOSI, THE AIR FORCE OFFICE  
18 OF SPECIAL INVESTIGATIONS, AND THEY ACTUALLY HAD IN THEIR  
19 FILE SOME CRUCIAL MEMORANDAS OF INTERVIEW THAT S. A. JUPPON  
20 DID IN HIS DOL INVESTIGATION, BUT THEY WEREN'T IN THE DOL  
21 DOCUMENTS. THE PASSAGE OF TIME CREATES HUGE PROBLEMS FOR  
22 MAINTAINING THESE RECORDS AND DOCUMENTS.

23 AND THEN OF COURSE WE HAVE THE PROBLEM WITH  
24 SPECIAL AGENT BERGSTROM'S RECORDS, WHICH ARE WHOLLY  
25 UNRELIABLE. SHE CONCEALED, SHE DECEIVED, SHE MISLED, AND

1 THEN SHE COMMITTED PERJURY BEFORE THIS COURT TO TRY AND  
2 CLEAN IT UP AND CREATE SOME EXCUSE FOR HER CONDUCT.

3 SO THE GOVERNMENT'S INABILITY TO CERTIFY TO THIS  
4 COURT THAT IT HAS DISCHARGED ITS CONSTITUTIONAL AND  
5 STATUTORY DISCOVERY OBLIGATIONS IS FATAL TO A RETRIAL. THAT  
6 IS THE PREJUDICE. AND THIS U.S. ATTORNEY'S OFFICE CANNOT  
7 STAND UP BEFORE THE COURT AND SAY, YEAH, WE DID IT. THEY  
8 GOT EVERYTHING. THEY GOT EVERYTHING, JUDGE. WE GOT ALL OF  
9 THE DOL OIG STUFF, WE GOT THE FBI LCM ORGANIZED CRIME STRIKE  
10 FORCE STUFF. YEAH, WE WOODSHEDDED BERGSTROM AND WE GOT HER  
11 TO GO TO HER SECRET FILE IN THE CLOSET. AND, BY THE WAY,  
12 YOUR HONOR, FOR THE RECORD, IN OUR STRUCKMAN CASE IN SEATTLE  
13 WHERE JUDGE TAKASUGI CONVENED AN EVIDENTIARY HEARING,  
14 SPECIAL AGENT HARDAWAY, WHEN PUT TO IT ON THE WITNESS STAND,  
15 ADMITTED THAT HE HAD KEPT A HUGE AMOUNT OF DOCUMENTS OF HIS  
16 CASE FILE SEPARATE FROM THE MAIN CASE INVESTIGATION FILES,  
17 AND THAT IS ON THE RECORD IN THE STRUCKMAN CASE IN SEATTLE,  
18 AND IT WAS SHOCKING TESTIMONY FOR EVERYBODY.

19 AND HERE WE DON'T KNOW WHERE ANY OF THESE  
20 DOCUMENTS ARE, BUT WE SUSPECT THAT, AS SPECIAL AGENT  
21 HARDAWAY DID IN SEATTLE, SPECIAL AGENT BERGSTROM SIMILARLY  
22 HERE KEPT A SEPARATE FILE WITH EXCULPATORY INFORMATION.

23 WHEN YOU LOOK AT THE DISCOVERY THE GOVERNMENT  
24 PROVIDED TO THE DEFENSE BEFORE FIRST TRIAL, AND EVEN WITH  
25 THE THINGS THAT ARE POPPING UP NOW TO US, AND POPPING UP

1 ONLY BECAUSE OF THE FOIA LITIGATION, THERE IS NO EXCULPATORY  
2 INFORMATION IN THERE WHATSOEVER. SHE SYSTEMATICALLY  
3 DEEP-SIXED, CONCEALED, AND/OR DESTROYED ANYTHING THAT WOULD  
4 BE HELPFUL TO THE DEFENSE.

5 THE COURT: HOW DO YOU KNOW THERE WAS EXCULPATORY  
6 INFORMATION IN THERE?

7 MR. BERNHOFT: WELL, WE HAD THE WITNESS  
8 INTERVIEWS. AND THEY SAY, FOR EXAMPLE, YEAH, SPECIAL AGENT  
9 BERGSTROM TALKED TO ME AND THIS IS WHAT I TOLD HER. AND  
10 THAT IS MEMORIALIZED IN OUR MOTION AND SET FORTH IN THEIR  
11 SWORN STATEMENTS. FOR EXAMPLE, THE WHOLE CANARD ABOUT NO  
12 CLIENTS AT THE GOLD CLUB, THAT IS FALSE, AND THE PROSECUTION  
13 TEAM HAD REASON TO KNOW IT WAS FALSE, BECAUSE SHE IDENTIFIED  
14 AND INTERVIEWED WITNESSES WHO SAID THAT GERRY MARCHELLETTA,  
15 JR., WAS ALWAYS AT THE GOLD CLUB WITH CLIENTS.

16 AND I READ THE TRIAL TRANSCRIPTS, AND I HAVE TO  
17 POINT OUT, JUDGE, THAT CONTRARY TO SOME OF THE BAD TAX LAW  
18 THAT WAS BEING RECITED DURING TRIAL BY BOTH THE DEFENSE AND  
19 THE PROSECUTION, THAT IS CLIENT DEVELOPMENT EXPENSES, AND  
20 THOSE ARE 100 PERCENT DEDUCTIBLE. I HAD A LITTLE  
21 CONVERSATION WITH THE 11TH CIRCUIT PANEL ON AUGUST 28TH,  
22 2010 ABOUT THAT VERY ISSUE. THOSE ARE 100 PERCENT  
23 DEDUCTIBLE EXPENSES.

24 THE GOVERNMENT CAME BEFORE THE FIRST PETIT JURY  
25 AND THEY SAID HE WAS THERE JUST PARTYING WITH HIM AND GEORGE

1 FOREMAN, NO CLIENTS, WHEN THE PROSECUTION TEAM HAD SPECIFIC  
2 STATEMENTS FROM SPECIFIC WITNESSES THAT THAT WAS ABSOLUTELY  
3 UNTRUE.

4 NOW, TURNING TO SUPERVISORY JURISDICTION, IF I  
5 MIGHT, JUDGE?

6 THE COURT: YES, SIR.

7 MR. BERNHOFT: THERE HAS BEEN A LOT OF DISCUSSION  
8 IN THE FEDERAL JUDICIARY, ACADEMIC COMMENTATORS, LAW  
9 PROFESSORS, AFTER THE FORMER SENATOR STEVENS CASE AND ITS  
10 CASCADING EFFECT ON OUR FEDERAL JUDICIAL CRIMINAL PROCESS  
11 SPILLED OUT INTO THE AMERICAN CONSCIOUSNESS. AND NOT JUST  
12 FOR THE INSIDERS, AMERICANS STARTED TO READ ABOUT THIS. AND  
13 USA TODAY, WASHINGTON POST, WALL STREET JOURNAL, NEW YORK  
14 TIMES, ALL COLLECTING THOUSANDS OF INSTANCES OF SIGNIFICANT  
15 FLAGRANT MISCONDUCT THAT DEPRIVED INDIVIDUALS OF FAIR  
16 TRIALS.

17 AND AS THESE INVESTIGATIONS SET FORTH, THERE IS  
18 ALMOST NO DISCIPLINING FUNCTION. THE OFFICE OF PROFESSIONAL  
19 RESPONSIBILITY AT THE DOJ HAS BE WHOLLY INEFFECTIVE AS TO  
20 DISCIPLINE PROSECUTORS. AND THE FACT IS THE STATE BARS  
21 HAVEN'T DONE ANYTHING ABOUT IT AT ALL. AND SO WHAT WE ARE  
22 LEFT WITH, FRANKLY, IS THE ARTICLE III FEDERAL JUDICIARY ARE  
23 THE GATEKEEPERS OF INTEGRITY OF DUE PROCESS AND FAIRNESS.  
24 AND, YEAH, THESE ARE OLD-FASHIONED WORDS, BUT YOU KNOW, I  
25 LIVE AND BREATHE IN THESE FEDERAL COURTHOUSES. IT MATTERS.

1 IT MEANS SOMETHING. IT MEANS SOMETHING TO ME, IT MEANS  
2 SOMETHING TO THE VAST MAJORITY OF FEDERAL DISTRICT COURT  
3 JUDGES THAT APPEAR IN FRONT OF, AND IT MEANS SOMETHING TO MY  
4 GOOD COUNTERPARTS IN DOJ TAX DIVISION AND PROSECUTING  
5 ATTORNEYS THAT I DO CASES AGAINST. IT'S NOT THE RULE, IT'S  
6 STILL THE EXCEPTION. BUT THE EXCEPTION THREATENS TO SWALLOW  
7 THE RULE.

8 AND, YOU KNOW, THE GOVERNMENT PROSECUTION TALKS  
9 ABOUT HARSH SANCTIONS. WELL, YOU KNOW, WHAT'S THE GOAL OF A  
10 FEDERAL CRIMINAL TAX CASE? TO GET TO TRIAL, OBTAIN  
11 CONVICTIONS, AND GET PRISON SENTENCES. AND IT'S LIKE  
12 DISCIPLINING JOHNNY WHEN HE IS IN THE KITCHEN AND HE STEALS  
13 THE COOKIES. HE GETS THE COOKIES AND HE EATS THEM. NOW, IF  
14 MOM DOESN'T SAY, JOHNNY, NO COOKIES FOR 30 DAYS, JOHNNY  
15 KEEPS STEALING THE COOKIES. AND, I MEAN, I'M NOT TRYING TO  
16 BE TRITE ABOUT THIS, BUT THIS IS BASIC HUMAN NATURE.

17 THE COURT: YOU WANT AN EVIDENTIARY HEARING WITH  
18 BERGSTROM?

19 MR. BERNHOFT: YES, SIR.

20 THE COURT: YOU WANT TO CROSS-EXAMINE HER?

21 MR. BERNHOFT: YES, SIR.

22 THE COURT: OKAY.

23 MR. BERNHOFT: SO I THINK THAT ON THESE FACTS ON  
24 THIS RECORD, WHICH IS THIS RECORD AND THAT RECORD, AS  
25 AGAINST THE GOVERNMENT'S 12 OR 13 PAGES OF LEGAL ARGUMENT ON

1 PREJUDICE AND DUE PROCESS, WHICH WAS DECIDEDLY UNPERSUASIVE  
2 AND UNAVAILING, I THINK A FULL EVIDENTIARY HEARING IS  
3 WARRANTED. WE CAN GET IT RIGHT OUT HERE IN THE COURT. WE  
4 WILL HAVE THE COURT'S COMPULSORY PROCESS, WE WILL SUBPOENA  
5 OUR WITNESSES, AND EVERY MAN AND WOMAN WILL TAKE THEIR BEST  
6 HOLD AND WE WILL FIND OUT ABOUT ALL OF THIS STUFF. BECAUSE  
7 FRANKLY, I AM STUNNED THAT THE GOVERNMENT DIDN'T MAKE ANY  
8 FACTUAL REBUTTAL TO THESE MISCONDUCT ALLEGATIONS.

9 THE COURT: WELL, THE GOVERNMENT DIDN'T HAVE A  
10 LOT OF TIME, YOU'VE GOT TO AGREE.

11 MR. BERNHOFT: NEITHER DID I.

12 THE COURT: WELL, IT WAS EASIER TO STATE YOUR  
13 POSITION WHEN YOU HAVE ALREADY FILED A THREE MILLION PAGE  
14 MOTION FOR A NEW TRIAL WITH A EIGHT MILLION PAGES OF  
15 EXHIBITS --

16 MR. BERNHOFT: FAIR ENOUGH, JUDGE.

17 THE COURT: -- AND YOU ADOPT THEM BY REFERENCE.

18 MR. BERNHOFT: I OFFERED TO JOIN WITH THE  
19 GOVERNMENT WITH A JOINT MOTION TO EXTEND THE BRIEFING  
20 SCHEDULE TO GIVE THEM FAIR OPPORTUNITY. THEY DECLINED.

21 THE COURT: THAT IS PROBABLY BECAUSE THEY HAD THE  
22 WISDOM AND FORESIGHT TO KNOW THAT THE ANSWER WOULD HAVE BEEN  
23 NO.

24 MR. BERNHOFT: I SUSPECTED THAT, TOO, FROM THE  
25 COURT'S ORDER.



1           SUPERVISORY JURISDICTION IS A POWER UNIQUE TO OUR  
2 FEDERAL JUDICIARY, AND THE ORIGINS OF IT GO WAY BACK,  
3 UNDEFINED ORIGINS. AND IT'S THE ESSENTIAL POWER AND  
4 AUTHORITY TO DISCIPLINE THE PROCEEDINGS BEFORE IT AND TO  
5 ENSURE THAT ALL OF THE PLAYERS AND PARTICIPANTS IN THE  
6 SYSTEM ARE OBEYING THE RULES. AND THE PROSECUTOR STANDS IN  
7 A VERY UNIQUE POSITION, SOMEWHAT AT, FAIRLY SPEAKING, AT A  
8 DISADVANTAGE IN CERTAIN RESPECTS. WHEREAS IT MAY BE THE  
9 CASE THAT PURELY PRIVATE LAWYERS CAN TAKE THEIR BEST HOLD,  
10 REGARDLESS OF ANYTHING, AS LONG AS THEY OBEY THE ETHICAL  
11 STRICTURES, THE GOVERNMENT DOES HAVE TRANSCENDENT DUTIES TO  
12 MAKE SURE THAT JUSTICE IS DONE.

13           AND WE HAVE ALL THE SEEN THE QUOTES FROM JUSTICE  
14 BRANDEIS AND JUSTICE HOLMES. THESE ARE ANTIQUATED QUOTES,  
15 BUT THEY DO HAVE SOME POWER. THEY CAN STRIKE HARD BLOWS,  
16 BUT THEY HAVE TO BE FAIR BLOWS, AND THEY HAVE AN OBLIGATION  
17 TO ENSURE THE INTEGRITY OF THIS PROCESS. AND IT IS NOT AN  
18 EXAGGERATION TO SAY THERE WAS A MASSIVE FAILURE OF THAT  
19 DURING THE FIRST TRIAL.

20           SO WITH RESPECT TO SUPERVISORY JURISDICTION -- AND  
21 I AM NOT GOING TO, AT LENGTH, RECOUNT THE FIRST TRIAL THAT  
22 WAS AMPLY SUMMARIZED IN THE RULE 33 AND THEN RE-SUMMARIZED  
23 IN OUR MOST RECENT MOTION TO DISMISS, BUT I WILL MAKE A  
24 COUPLE OF POINTS ABOUT MY VIEW OF THAT TRIAL TRANSCRIPT AND  
25 THE DOCUMENTS THAT WE HAVE.

1 THE THEMES THAT THE PROSECUTION TEAM PUT TO THE  
2 JURY WERE FALSE. SIRENS IN THE REAR VIEW MIRROR,  
3 HAPPENSTANCE SEIZURE AT THE FED EX STOP. BOTH SPECIAL AGENT  
4 SELLERS AND SPECIAL AGENT BERGSTROM GOT UP ON THAT STAND AND  
5 LIED TO THAT JURY ABOUT THE SCOPE AND ORIGIN OF THEIR  
6 INVESTIGATION. BUT OF COURSE YOU CANNOT HAVE THAT SORT OF  
7 MISCONDUCT UNLESS YOU'VE GOT CORRESPONDING DISCOVERY  
8 VIOLATIONS, AND THERE IS AN INTENTIONAL COMPONENT HERE THAT  
9 IS DEEPLY DISTURBING. SOMEONE -- BECAUSE THERE IS 20  
10 CUSTOMS REPORTS, NOT THE SIX THAT WERE GIVEN TO THE DEFENSE  
11 BEFORE THE FIRST TRIAL. THERE IS 20.

12 THE COURT: HOW DO YOU EXPLAIN FACT THAT 12  
13 JURORS BELIEVED THEM?

14 MR. BERNHOFT: TWELVE JURORS BELIEVED WHO?

15 THE COURT: BERGSTROM AND SELLERS.

16 MR. BERNHOFT: HECK, IT WAS DOGGONE GOOD LYING.  
17 DOGGONE GOOD LYING. IF YOU READ THAT TRIAL TRANSCRIPT, IT  
18 IS VERY EFFECTIVE LYING. IN FACT, IT WAS A LOT EFFECTIVE  
19 LYING DURING THE 2007 TRIAL. SHAWN MCBRIDE LIED  
20 EFFECTIVELY, PERJURING HIMSELF ON THE STAND WHEN HE SAID  
21 THAT HE USED TO BABY-SIT GERRY MARCHELLETTA, JR.'S WIFE  
22 SANDY'S CHILDREN. SANDY MARCHELLETTA WOULDN'T LET THAT  
23 HULK, THAT THUG, NEAR HER CHILDREN. A LOT OF PERJURY GOING  
24 ON UP THERE, AND A LOT OF EFFECTIVE LYING AND PERJURY.

25 THE FACT IS, IS THAT IF THE 20 CUSTOMS REPORTS HAD

1 BEEN GIVEN TO THE DEFENSE, THOSE LIES COULDN'T HAVE BEEN  
2 TOLD. AND THERE IS A CONNECTION BETWEEN DISCOVERY  
3 VIOLATIONS AND FALSE TRIAL THINGS, AND THEY ARE INEXTRICABLY  
4 LINKED. NOW SOMEBODY KNEW ABOUT THOSE 20 REPORTS. WHEN WE  
5 FOIA'D CDD ICE, THEY HAD THEM. THEY WERE THERE. SO WHAT  
6 HAPPENED?

7 I MEAN, YOU ARE AT A DISCOVERY TABLE WITH THE U.S.  
8 ATTORNEY'S OFFICE. I DON'T KNOW WHO IS THERE. I WOULD  
9 ASSUME SOME AUSA'S ARE THERE. AND YOU HAVE SPECIAL AGENT  
10 SELLERS AND SPECIAL AGENT BERGSTROM, AND THEY HAVE THE 20  
11 REPORTS LAID OUT ON THE TABLE. WHO MADE THE DECISION TO  
12 CULL SIX REPORTS FROM THAT 20 AND SAY, SCREW IT, THEY DON'T  
13 GET THE OTHER 14? I MEAN, THAT IS A REALLY IMPORTANT  
14 QUESTION. WHO KNEW ABOUT THAT. THAT IS A -- WHERE THERE IS  
15 A DESIGN, THERE IS A DESIGNER. AND THERE WASN'T JUST A  
16 RANDOM, YOU KNOW, EXTRUSION OF THE SIX CUSTOMS REPORTS. IN  
17 FACT, IT WAS MUCH LESS THAN RANDOM BECAUSE EACH CUSTOMS  
18 OFFICE SEQUENTIALLY NUMBERS ITS REPORTS. SO YOU EITHER HAVE  
19 TO HAVE SIX REPORTS FROM ATLANTA, SEVEN FROM MEMPHIS, THREE  
20 FROM NEW ORLEANS, AND SOMEBODY SAT THERE AND SAID, OKAY, WE  
21 ARE GOING TO TELL THIS PARTICULAR STORY, IT'S NOT EXACTLY  
22 TRUE, SO WE WILL TAKE REPORT 1 FROM ATLANTA, 2 FROM MEMPHIS,  
23 3, 4, 5, AND SOMEBODY CONSTRUCTED THAT.

24 AND THEN WE HAD THE INFAMOUS REPORT 6, WHICH IS  
25 NOT THE DOCUMENT IT WAS PURVEYED TO BE, IT IS TWO PAGES FROM

1 REPORT 7 AND THE COVER PAGE FROM REPORT 6. AND WHEN YOU  
2 LOOK -- AND WE CAN SHOW THIS AT AN EVIDENTIARY HEARING. WE  
3 CAN PUT A BIG SCREEN UP HERE AND POP THROUGH IT. IT IS  
4 SPECTACULAR. THERE IS WILLFUL -- AND SOMEBODY WILLFULLY AND  
5 INTENTIONALLY VIOLATED DISCOVERY RULES IN THIS U.S.  
6 ATTORNEY'S OFFICE ON THIS PROSECUTION TEAM. AT A MINIMUM  
7 IT'S THE AGENTS, BECAUSE THE REPORTS WERE THERE.

8 SELLERS FILED HER CLOSING REPORT ON FEBRUARY 21ST,  
9 2003. SHE STANDS UP ON THE STAND OVER THERE AT THE 2007  
10 SEPTEMBER TRIAL AND SHE SAYS: "I WAS DOING ADMINISTRATIVE  
11 COLLATERAL INQUIRY. I WAS DONE IN OCTOBER OF 2001. I WAS  
12 DONE. SHE STARTS ISSUING GRAND JURY SUBPOENAS IN 2002."  
13 THAT IS JUST REMARKABLE.

14 THESE AREN'T MISTAKES OF RECOLLECTION. THESE ARE  
15 NOT MISAPPREHENSIONS. THIS IS DELIBERATE PERJURY. AND SHE  
16 SHOULD BE HELD ACCOUNTABLE, AS SHOULD S. A. BERGSTROM. AN  
17 EVIDENTIARY HEARING WOULD CERTAINLY AID THE TRUTH-FINDING  
18 FUNCTION.

19 THE OTHER THING THAT IS VERY DISTURBING IS FORMER  
20 AUSA MONNIN'S STATEMENTS TO THIS COURT ABOUT THE STATUS OF  
21 SHAWN MCBRIDE. SHAWN MCBRIDE, FROM THE REPORTS THAT HAVE  
22 NOW BEEN DISCLOSED, BOTH IRS AND CUSTOMS, THAT OF COURSE  
23 WEREN'T DISCLOSED TO THE DEFENSE, EVERYBODY KNEW THAT SHAWN  
24 MCBRIDE WAS A PAID CONFIDENTIAL INFORMANT, AND HIS FBI  
25 HANDLER WAS FBI S. A. MARK SEWELL. AND YET MR. MONNIN STOOD

1       HERE AT COUNSEL TABLE, NOT IN THIS COURTROOM, BUT HE WAS AT  
2       COUNSEL TABLE AND HE SAYS -- IT IS LIKE QUAD IMBEDDED  
3       HEARSAY -- I'M NOT SURE WHO MY WITNESS IS, I'M NOT REALLY  
4       CERTAIN, BUT, YOU KNOW, I WILL TALK TO SPECIAL AGENT  
5       BERGSTROM AND I WILL REPORT BACK.

6               HE COMES BACK TO THE COURT, HE IS ON THE RECORD,  
7       AND HE SAYS, I TALKED TO SPECIAL AGENT BERGSTROM OVER LUNCH,  
8       AND SHE ADVISED ME THAT SHE TALKED TO, IN TURN, FBI S. A.  
9       SEWELL OVER LUNCH, AND SHE RELATED TO ME THAT FBI AGENT  
10      SEWELL RELATED TO HER THAT MCBRIDE IS NOT EVEN A COOPERATING  
11      SOURCE IN THE FBI PARLANCE.   AND THAT WAS A FLAT OUT LIE.

12             AND THE THREAT WITH SHAWN MCBRIDE AS AN INTENT  
13      WITNESS WAS PARTICULARLY PERNICIOUS.   BECAUSE A GUY LIKE  
14      THAT, WHO IS A PATHOLOGICAL LIAR, HE WILL SAY ANYTHING.   AND  
15      SO THE DEFENSE ATTORNEYS WERE DULY INTIMIDATED BY THIS, AND  
16      THEY DIDN'T HAVE ALL OF THE ROI'S AND MOI'S AND MCBRIDE'S  
17      INTERVIEWS TO START.   ALL THEY HAD WAS THE THREE TWENTY-ONE  
18      DOUBLE-AUGHT DEBRIEF.   BUT THERE IS ALSO ONE FROM FEBRUARY  
19      3RD OF 2002, THAT WAS IDENTIFIED AND FOIA DISCLOSED, TELLS A  
20      COMPLETELY DIFFERENT STORY FROM THAT ONE MCBRIDE TOLD IN THE  
21      ORIGINAL DEBRIEF, AND THE DEFENSE WAS DEPRIVED OF ALL THAT  
22      MATERIAL TO EFFECTIVELY NEUTRALIZE A PERJURER.   YOU KNOW,  
23      THE MCBRIDE SITUATION IS HORRIBLE.

24             AND --

25             THE COURT:   WRAP IT UP.

1 MR. BERNHOFT: I'M SORRY, JUDGE?

2 THE COURT: WRAP IT UP.

3 MR. BERNHOFT: YES, SIR. YOU KNOW, I HAVE SET  
4 FORTH THESE ITEMS AND MATERIAL IN THE RULE 33. I APPRECIATE  
5 THE COURT'S INDULGENCE OF THIS EXPANDED ARGUMENT. I WOULD  
6 VERY RESPECTFULLY BUT VERY URGENTLY REQUEST THAT THE COURT,  
7 AT A MINIMUM, CONVENE AN EVIDENTIARY HEARING SO WE CAN MAKE  
8 A FULL RECORD AND THE COURT CAN VIEW THE ENTIRE RECORD AS A  
9 WHOLE WHEN MAKING THE DIFFICULT AND SERIOUS DECISION ABOUT  
10 DISMISSING AN INDICTMENT WITH PREJUDICE.

11 THE COURT: THANK YOU, SIR.

12 THE COURT: MR. BLY?

13 MR. BLY: THANK YOU, JUDGE.

14 AS I PUT IN THE WRITTEN RESPONSE THAT WE FILED, WE  
15 DID NOT RESPOND TO THE FACTS, NOT BECAUSE WE AGREE WITH  
16 THEM. I WOULD ENDEAVOR TO SAY WE DISAGREE WITH PRETTY MUCH  
17 EVERYTHING THAT THE DEFENDANTS HAVE ALLEGED FACTUALLY, THE  
18 INSINUATIONS AND ALLEGATIONS THAT THEY MAKE FROM THOSE  
19 FACTS. NOT BECAUSE WE AGREE WITH THEM, BUT SIMPLY, YOU  
20 KNOW, IN THE 48 HOURS THAT WE HAD THE MOTION WE DID NOT HAVE  
21 TIME TO RESPOND TO IT. OF COURSE WE HAVE INVESTIGATED THE  
22 RULE 33, BUT, LIKEWISE, WE DID NOT HAVE TIME TO MEMORIALIZE  
23 THE RESPONSE TO THAT IN 48 HOURS.

24 SO I REALLY, YOU KNOW, WHAT I HAVE FOR YOU HERE  
25 TODAY, IS WHAT I PUT IN MY BRIEF. I DON'T THINK THEY HAVE

1 SHOWN PREJUDICE. IT SEEMS THAT THERE ARE TWO POINTS THAT  
2 MR. BERNHOFT MAKES. ONE, IT'S A SANCTION. THAT IS SIMPLY  
3 NOT CONSISTENT WITH SUPREME COURT PRECEDENT. IT IS THE  
4 UNITED STATES VERSUS HASTING CASE, WHICH IS 461 U.S. 449  
5 (SIC) --

6 THE COURT: LET ME JUST TELL YOU RIGHT NOW, THEY  
7 HAVE NOT -- I AM NOT SATISFIED THAT DISMISSAL IS  
8 APPROPRIATE, BUT I WANT TO KNOW WHAT YOU HAVE TO SAY ABOUT  
9 AN EVIDENTIARY HEARING TO GET TO THE TRUTH.

10 MR. BLY: I DON'T THINK -- IF THEY HAVEN'T ALLEGED  
11 PREJUDICE, THEN AN EVIDENTIARY HEARING DOESN'T CHANGE IT.  
12 YOU CAN TAKE EVERYTHING THAT THEY ALLEGE AS TRUE, WHICH  
13 OBVIOUSLY WE DON'T DO, BUT IF YOU WANTED TO, YOU COULD TAKE  
14 THAT, AND THEY HAVEN'T ALLEGED PREJUDICE.

15 THE COURT: HOW CAN YOU SAY THEY HAVEN'T ALLEGED  
16 PREJUDICE? I THINK I JUST HEARD ABOUT 40 MINUTES OF  
17 ALLEGATIONS OF PREJUDICE BECAUSE OF CALUMNY, I THINK WAS ONE  
18 OF HIS WORDS, I KNOW I HEARD HIM SAY LIES.

19 MR. BLY: JUDGE, IT'S BECAUSE THEY HAVE A NEW  
20 TRIAL ON WHOLLY UNRELATED GROUNDS. IT IS THE DERRICK CASE  
21 FROM THE 4TH CIRCUIT. THE FACTS ARE NEARLY IDENTICAL TO  
22 THAT CASE. THE DEFENDANTS WERE TRIED, THEY WERE CONVICTED,  
23 THE 4TH CIRCUIT REVERSED BECAUSE OF ISSUES OF JURY  
24 INSTRUCTIONS AND EVIDENTIARY ISSUES. IT GOES BACK TO THE  
25 DISTRICT COURT. THE DEFENDANTS FILE A MOTION BASED ON

1 DISCOVERY AND BRADY VIOLATIONS FOR A NEW -- TO HAVE THE  
2 INDICTMENT DISMISSED. THE DISTRICT COURT DOES SO, AND THE  
3 4TH CIRCUIT JUDGE LUTTIG REVERSES, AND HE SAYS THAT ANY  
4 PREJUDICE THAT ARGUABLY EXISTED AS A CONSEQUENCE OF  
5 DISCOVERY VIOLATIONS IS FULLY REMEDIED BY THAT COURT, THE  
6 4TH CIRCUIT'S ORDERS OF NEW TRIALS.

7 THERE IS A NEW TRIAL ON WHOLLY UNRELATED GROUNDS.  
8 SO THIS ISN'T, AS HE SUGGESTS IN THE MOTIONS, YOU KNOW, THE  
9 GOVERNMENT GETTING OFF, YOU KNOW, SCOTT FREE WITH A NEW  
10 TRIAL. IT IS A NEW TRIAL FOR WHOLLY UNRELATED REASONS. WE  
11 ARE NOT GETTING A PASS BECAUSE OF ANY ALLEGED VIOLATIONS,  
12 IT'S A NEW TRIAL BECAUSE OF THE JURY INSTRUCTION ISSUES THAT  
13 THE 11TH CIRCUIT IDENTIFIED.

14 THE COURT: ALL RIGHT.

15 MR. BLY: SO I JUST THINK THAT THAT CURES THE  
16 PROBLEM, THAT IS WHAT THAT 4TH CIRCUIT CASE SAID. THERE IS  
17 ANOTHER 4TH CIRCUIT CASE, BOROKINNI, WHICH IS VERY SIMILAR.  
18 THERE JUST ISN'T PREJUDICE.

19 I DO WANT TO CORRECT JUST ONE THING. I DON'T  
20 REMEMBER MAKING THE STATEMENT THAT MR. BERNHOFT ATTRIBUTES  
21 TO ME. I AM NOT GOING TO SAY I DIDN'T MAKE IT, BECAUSE I  
22 WOULD SO NEVER CASUALLY LOB ANYTHING LIKE THAT OUT IN OPEN  
23 COURT. I DON'T REMEMBER IT, AND THAT IS ALL I CAN SAY.

24 THE COURT: I TAKE YOUR WORD AT THAT. HAS THE  
25 GOVERNMENT MADE A DECISION YET AS TO WHETHER IT WILL CALL



1 SPECIAL AGENT BERGSTROM?

2 MR. BLY: I DON'T THINK WE HAVE, JUDGE.

3 THE COURT: AND YOU HAVE THAT PREROGATIVE TO NOT  
4 YET MAKE THAT DECISION. ALL RIGHT.

5 MR. BLY: IF I CAN OFFER JUST ONE THING? IF THE  
6 COURT IS NOT COMFORTABLE WITH THE RESOLUTION THAT WE HAVE  
7 SUGGESTED, THAT EVEN IF YOU TAKE THE FACTS AS TRUE, THERE IS  
8 SIMPLY NO PREJUDICE. WE WOULD ASK FOR AN OPPORTUNITY TO  
9 FULLY INVESTIGATE THE NEW MOTION. THERE ARE FACTS AND  
10 ALLEGATIONS CONTAINED IN THERE THAT ARE NOT IN THE RULE 33,  
11 AND WE WOULD ASK FOR AN OPPORTUNITY TO FULLY INVESTIGATE  
12 THAT AND GIVE THE COURT A POINT-BY-POINT RESPONSE BEFORE  
13 THERE IS A DECISION ON AN EVIDENTIARY HEARING. I THINK WE  
14 HAVE THAT RIGHT TO RESPOND FACTUALLY BEFORE YOUR HONOR MAKES  
15 A DECISION AS TO WHETHER AN EVIDENTIARY HEARING IS  
16 WARRANTED.

17 THE COURT: AND THE MATTER IS SET FOR TRIAL IN  
18 OCTOBER; CORRECT? OR SEPTEMBER 23RD?

19 MR. BLY: SEPTEMBER 24TH. AND TO BE PERFECTLY  
20 FRANK, JUDGE, I COULD NOT DO THAT AND PREPARE FOR TRIAL FOR  
21 A SEPTEMBER 24TH TRIAL DATE.

22 THE COURT: ALL RIGHT. I AM GOING TO TAKE IT  
23 UNDER ADVISEMENT. YOU WILL HAVE AN ORDER ON MONDAY.

24 MR. BLY: THANK YOU, JUDGE.

25 (END OF HEARING AT 3:47 P.M.)

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REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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LORI BURGESS  
OFFICIAL COURT REPORTER  
NORTHERN DISTRICT OF GEORGIA

DATE: DECEMBER 3, 2012