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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
vs.	)	
	)	No. 13-cr-10238-DPW
	)	
DIAS KADYRBAYEV (1),	)	
AZAMAT TAZHAYAKOV (2)	)	
AND ROBEL KIDANE PHILLIPOS (3),	)	
	)	
Defendants.	)	

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

DAY ONE OF MOTION HEARING

John Joseph Moakley United States Courthouse  
Courtroom No. 1  
One Courthouse Way  
Boston, MA 02210  
Tuesday, May 13, 2014  
9:00 a.m.

Brenda K. Hancock, RMR, CRR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way  
Boston, MA 02210  
(617) 439-3214

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APPEARANCES:

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

THE CLERK: All rise.

(The Honorable Court entered the courtroom at 9:00 a.m.)

THE CLERK: This Honorable Court is now in session.  
You may be seated.

This is Criminal Action 13-10328, The United States  
versus Dias Kadyrbayev, Azamat Tazhayakov and Robel Phillipos.

THE COURT: You may be seated.

We have a number of motions to get through here in the  
next several days, and the way in which I think I am going to  
organize it is as follows:

First, I am going to deal with the charging document.  
There are a series of Motions to Dismiss, and for Bills of  
Particulars that deal with that. I will deal with those on the  
papers. I am going to indicate briefly my resolution of them.

Then, there are a series of motions that I will say  
are trial-related, a Motion to Sever, which is affected by the  
Government's 11th-hour determination that they were not going  
to oppose severance here, which means not trial, but trials, I  
assume, although I at some point will want to have an  
understanding from the Government how it came to pass that this  
lack of opposition to the Motion to Sever was filed, as I say,  
at the 11th hour, maybe a little later than the 11th hour.

The third set of issues are the Motions to Suppress.  
I think they will take up most of our time in the next several

1 days.

2           There is one preliminary matter, and I guess,  
3 Mr. Stahl, it is addressed to you. In your filings there is a  
4 suggestion that the defendant is insufficiently competent in  
5 the English language and needs some sort of translator or  
6 something. I have looked through the materials. He has never  
7 had a translator before. One was not even asked for here. So,  
8 I guess I want to understand what the story is on that.

9           MR. STAHL: The argument is not as to his level of  
10 English skills now, Judge, which are multiple times better than  
11 they were back over a year ago when he was arrested. Dr. Aneta  
12 Pavlenko's submission goes to his understanding, his fluency,  
13 his level of comprehension in English back at the time of this.

14           THE COURT: So, in the period since he has been in  
15 custody his English language skills have increased  
16 dramatically?

17           MR. STAHL: Dramatically, your Honor.

18           First of all, since the time he was first in, I  
19 believe it was Sussex (sic) County Jail, which was the  
20 immigration detention --

21           THE COURT: Suffolk.

22           MR. STAHL: Suffolk, sorry. Suffolk. He realized  
23 that, "I'm going to be here for a while."

24           THE COURT: Let me just pause. I saw it, made  
25 arrangements for a translator to be present, if it were asked

1 for, but it had not been asked for. That being the case, I  
2 take it that there is no need to keep the translator.

3 MR. STAHL: Judge, what we had for both Mr. Kadyrbayev  
4 and Mr. Tazhayakov, at the first official proceeding of any  
5 substance was the deposition of the immunized witness, and we  
6 had a translator standing by for technical terms, and they both  
7 used them, and so did that witness. There were some  
8 difficulties about certain phrases, certain phraseology back  
9 then.

10 I don't believe that it's necessary today at this late  
11 stage, meaning a year and some months past, where  
12 Mr. Kadyrbayev has been in jail, speaking with guards, with  
13 other inmates, reading English language books, working very  
14 diligently on his English skills, that he needs it for these  
15 hearings.

16 THE COURT: All right. Well, then, we will simply  
17 release the translator.

18 MR. STAHL: Yes. And I apologize if there was some  
19 confusion, because I would have alerted the Court whether we  
20 needed a translator or not.

21 THE COURT: So, let me deal, first, with the charging  
22 documents issues. Of course, I have reviewed all of the  
23 motions, which fall into two categories of relief, one to  
24 dismiss, one Motion for Bill of Particulars. As far as the  
25 Bill of Particulars are concerned, I deny that. The charging

1 document itself is clear enough for present purposes to alert  
2 the defendants to the charges that are going to be pursued by  
3 the Government. The charging document is not bare bones; it is  
4 rather fleshy. In any event, it is sufficient to tell the  
5 defendants what it is that they are facing.

6 Turning to the question of Motions to Dismiss, the  
7 defendants have, I think, kind of allocated responsibility  
8 among each other as to this.

9 The first is Mr. Kadyrbayev's challenge to the  
10 Section 1519 charge, which is the basic fundamental charge  
11 here. I am going to deny that as well. I do not personally at  
12 this point find it to be vague or overbroad or Constitutionally  
13 infirm in any fashion. It is a new statute, to be sure, but it  
14 is clear what it is that the statute itself provides and what  
15 the charge is, and I simply do not see this as something to be  
16 resolved on a Motion to Dismiss.

17 Now, I will add one further point. About two days  
18 after the Government's opposition was filed on April 25th, the  
19 parties may be aware that the Supreme Court granted certiorari  
20 in a 1519 case, and, of course, we will follow along in the  
21 briefing. The briefing will take place I think this summer.  
22 The petitioner has 45 days from April 28th to file the merits  
23 brief and then 30 days thereafter for the parties.

24 Having spent some time with the Sarbanes-Oxley Act and  
25 some of the challenges it presents, I can fully understand why

1 the Supreme Court would grant cert to tidy it up a bit, but  
2 nothing in the Petition itself or in the case law suggests to  
3 me that 1519 is going to be held vague on its face, and it does  
4 not seem to me, on the basis of the papers that I have now,  
5 that the Government is going to be unable to prove a 1519  
6 violation as to the defendants here.

7 I emphasize that this is all a matter subject to proof  
8 at trial, but we are just dealing with the charging document.  
9 As I indicated in a prior hearing, Motions to Dismiss are not  
10 generally a useful way to get at the substance of the case,  
11 except in the most extreme cases. I will talk a little bit  
12 about my attitude toward Motions to Dismiss generally and  
13 Motions for Judgment on the basis of evidence before a jury  
14 verdict.

15 I then come to the motion that has been filed, and I  
16 probably, for Mr. Lovett's benefit, should be clear about this.  
17 The Motion to Dismiss of Mr. Kadyrbayev is No. 117, and his  
18 Bill of Particulars is also 117. That is denied.

19 Then, turning to Mr. Tazhayakov's Motion to Dismiss  
20 and his Motion for Bill of Particulars, those too will be  
21 denied. As I indicated, the Bill of Particulars is not  
22 necessary here. It is an initiative that is meant to provide  
23 some specificity in the indictment. I find that the indictment  
24 is clear enough here not to require a Bill of Particulars.

25 And then, turning to the Motion to Dismiss itself that



1 is addressed to the aiding and abetting dimension to it, it is  
2 both imaginative and retrospective in its desire to have  
3 affirmed the dissents in Nye & Nessen, but the case law on  
4 aiding and abetting is substantial. The case can properly  
5 proceed on that basis.

6 For the parties' purposes, I do want to direct your  
7 attention, if you have not had a chance to review it, to  
8 Justice Kagan's decision in Rosemond v. The United States,  
9 which I think is a pretty useful overview of what "aiding and  
10 abetting" means. It is 134 S.Ct. 1240.

11 Not to emphasize a kind of pride of authorship, but  
12 just so the parties are familiar with things that I have done  
13 in this area, I find that 22 years ago I wrote about this issue  
14 sitting by designation on the First Circuit in United States v.  
15 O'Campo. It is 973 F.2d 1015, which, in the context of  
16 sentencing, I talked about what you can call "vicarious  
17 liability." I suppose it also can be called "associative  
18 liability." But, in any event, it discusses what I think may  
19 be theories of prosecution here that the parties may want to  
20 familiarize themselves with, at least as it appeared to me  
21 then; and it does not, I think, appear to me differently now,  
22 after reviewing it. That deals not merely with conspiracy but  
23 aiding and abetting and also Pinkerton charges.

24 So, in any event, No. 120, the Tazhayakov Motion to  
25 Dismiss, is denied, and No. 121, the Bill of Particulars, is

1 denied.

2 Then, I turn to the Motion to Dismiss of  
3 Mr. Phillipos, and this provides me with an occasion to talk  
4 about my approach to Motions to Dismiss generally.

5 I view Motions to Dismiss in the criminal setting as  
6 efforts, obviously, to pretermite the trial of the case, but  
7 generally they arise at a time it is impossible to make a  
8 determination about it. You have to see the evidence before  
9 you can really deal with this.

10 That is particularly true, I think, of Mr. Phillipos'  
11 Motions to Dismiss. They essentially ask me to function as the  
12 fact-finder in this area. I do not know the facts yet. The  
13 facts have not been developed. In any event, it is not my  
14 responsibility; it is a jury's responsibility to deal with  
15 that.

16 The way in which I have approached, generally, Motions  
17 to Dismiss and their sister kind of motions is this: I am  
18 intensely aware of the asymmetry of appellate rights between  
19 the Government and a defendant. The defendant has appellate  
20 rights if there is an adverse decision after trial. The  
21 Government does not. That is one of the reasons, I think, that  
22 the Congress has provided appellate rights, interlocutory  
23 appellate rights, to the Government on Motions to Dismiss; but,  
24 as I have indicated, my view about Motions to Dismiss is that  
25 the substance of them, as a generality, not in particulars,

1 really does not get fleshed out until there is a trial.

2           There is the potential for a judge to grant a judgment  
3 on the basis of the evidence at the conclusion of the  
4 Government's case, at the conclusion of all of the evidence in  
5 the case. I try never to do that. The reason I try never to  
6 do it is that the Government does not get an appeal right if I  
7 do it; double jeopardy effectively prevents that. In the  
8 course of my period on the Bench, I do not think I have done it  
9 fully in any case, and have only done it when it was simply  
10 impossible intelligently to instruct a jury as to particular  
11 counts, and that will be what guides me here. It is not an  
12 ultimate determination about the underlying issues until I look  
13 at it, if I have to, after a jury verdict.

14           So, while the parties, for their own purposes, will  
15 undoubtedly make such motions at the appropriate times and, in  
16 fact, have to to preserve their rights, I suspect that I will  
17 not deal with the substance of the underlying claims of the  
18 Motion to Dismiss as a factual matter until after a jury  
19 verdict, if the jury verdict is adverse to the defendants.

20           So, I think that deals with what I will call the  
21 "charging document" issues, but in that connection I am denying  
22 No. 118, which is Mr. Phillipos' Motion to Dismiss.

23           Now I come to the question of what I will call "trial  
24 structure." This has been, as I indicated, somewhat rearranged  
25 by the Government's view that the case that it jointly charged

1 the defendants must separately be tried for severance reasons.  
2 The reasons offered in the rather crisp response -- I think it  
3 is three sentences -- is that there are colorable Bruton and  
4 Crawford issues. Yes. I think that was evident from the very  
5 outset, and so I am a little concerned and interested in why it  
6 took the Government until, as I say, the 11th hour, because  
7 their response was due on May 9th, and this filing, according  
8 to the Court's clock, was made at Military Time 23:35 and 5  
9 seconds, so it is the 11th hour plus.

10 So, why so long to address the obvious? Is the  
11 Government thinking about trying this case without implicating  
12 Bruton and Crawford?

13 MR. CAPIN: Well, your Honor, of course, were  
14 cognizant at the charging stage of a potential Bruton rule. We  
15 also know that, as the Court knows, that under Richardson v.  
16 Marsh it can be cured through redaction. It seemed to us  
17 possible that we could so cure it. As the evidence developed,  
18 it became clearer that the normal remedy isn't really  
19 appropriate here, and we didn't want to risk the appellate  
20 issue.

21 Moreover, we thought that there was some efficiency  
22 because we --

23 THE COURT: "Some efficiency"?

24 MR. CAPIN: Efficiency to -- well, if the question is  
25 why we didn't respond more timely --

1 THE COURT: That is one of them. Just a moment, so I  
2 clarify.

3 Part of this is to now sequence the trials. I will  
4 look to the parties, of course, for their views about this, but  
5 I have two people in custody, one person not in custody, one  
6 person in custody who at least initially said he wanted a  
7 prompt trial. So, it would have been helpful to have more time  
8 to reflect on that and for the parties to reflect on that.

9 Knowing as little as I do about this case, I was  
10 interested in how the Government had thought they were ever  
11 going to get around Bruton and Crawford problems here with what  
12 seemed to me to be necessarily cross-inculpatory evidence in  
13 the case.

14 So, I guess, yes, I would like to know why it took  
15 until 11:35 and 5 seconds, not to put too fine a point on it.

16 MR. CAPIN: Okay. Your Honor, in response to an  
17 earlier motion, I think it was in connection with the  
18 Bill of Particulars, we did indicate that we would not be  
19 objecting to the severance motion.

20 THE COURT: I think you said it was under advisement.

21 MR. CAPIN: The Court could be right. I am fairly  
22 certain that the document said very clearly "for reasons it  
23 will state later," and it was one of those, you know, meeting  
24 of deadline issues, and this is, of course, the possibility for  
25 a Bruton issue had been discussed among the parties earlier.

1 We indicated that we would not be opposing severance. So, we  
2 thought we had put -- in fact, I had an exchange with Mr. Stahl  
3 that very evening several weeks ago, when we filed that motion  
4 on the Bruton issue.

5 So, we thought we had apprised the parties as timely  
6 as -- well, timelier than necessary to respond to the Bruton  
7 motion, and if the response to the motion itself was unduly  
8 pithy, it's perhaps because, as the Court notes, the Bruton  
9 issue sort of jumps out at you.

10 THE COURT: Well, the issue goes back now to so what  
11 is the order of trial? Because what started as one trial is  
12 now three, and I do not know what the Government's view is with  
13 respect to it. Obviously, I will be interested in it. I  
14 suspect the defendants' view is somebody else goes first, and  
15 each one will take that position.

16 I guess I should go back to what I have made clear all  
17 along. We are starting on June 30th on this.

18 MR. CAPIN: And the Government, of course, is ready.

19 THE COURT: Well, it was acquiescent in a prior filing  
20 for additional time here, but it is good to know the Government  
21 is going to be ready.

22 So, do you have any views about order?

23 MR. CAPIN: I think we have two views, your Honor.

24 First of all, the caption, which is alphabetic, is as  
25 logical a choice as any. It would be Kadyrbayev, Tazhayakov,

1 Phillipos. Actually, Phillipos is charged later, but he is not  
2 in custody, so there is no question he should not go first.  
3 You may hear from Mr. Tazhayakov's attorney that he wants to go  
4 first, and since he was the one asserting his speedy trial  
5 right, that might be a logical way to proceed, if that's what  
6 he wants to do.

7 THE COURT: The other aspect of it is, I am raising  
8 this because, obviously, I want to hear from the defendants,  
9 but in reading the motion that sought to delay the deadlines, I  
10 think, Mr. Wooldridge, you have got some pretty important  
11 things happening to you and your family.

12 MR. WOOLDRIDGE: Yeah, in September, Judge, my wife is  
13 having a baby. We do want to go first. We do want to go  
14 June 30th. We do want to be the first ones to go up.

15 THE COURT: Then that deals, then, with that issue.

16 Now, then, we deal with the question of back-to-back,  
17 how to address these trials. Because they have a way of then  
18 creating a publicity of their own. I will get to the question  
19 of change of venue in a minute.

20 My present view is to arrange my schedule to permit  
21 what I thought was one trial to become three trials this summer  
22 through September 8th, that is, September 8th being the last  
23 date here, but to get all of them done during the summer. Now,  
24 that may pose some jury-selection problems for either side. We  
25 do not know yet.

1           If the Government is unsuccessful in the Tazhayakov  
2 trial, that may mean that they are having a new venire that has  
3 been told that one defendant has been found not guilty. By  
4 contrast, if there is a guilty finding, that means that the  
5 co-defendants may find a venire that knows a defendant has been  
6 found guilty.

7           I raise it, but I am not sure it is so determinative  
8 here. I will talk about the Motion for Change of Venue in just  
9 a moment, but I do not know if the Government has a position  
10 with respect to that issue, that is, the timing and sequencing  
11 of these cases.

12           MR. CAPIN: I think generally it is both from the  
13 perspective of -- in addition to the impanelment issue, the  
14 jury issue, the difficulty finding jurors in the summer, we  
15 have the same type of vacation-type conflicts with counsel and  
16 with witnesses. We haven't polled the witnesses, because,  
17 frankly, discussion among the parties initiated by the defense  
18 was that in the event there was a continuance, their  
19 preference, at least other than Mr. Wooldridge's client, would  
20 be to proceed in September. We think that would be preferable.

21           THE COURT: Well, what does that mean?

22           MR. CAPIN: It means starting in September.

23           THE COURT: Doing Tazhayakov, assuming that that is  
24 the case that goes forward, on June 30th?

25           MR. CAPIN: Yes, your Honor.



1 THE COURT: The next trial, which presumably would be  
2 Mr. Kadyrbayev, on September 8.

3 MR. CAPIN: My understanding is that is  
4 Mr. Kadyrbayev's pleasure.

5 THE COURT: But there was also an expression from the  
6 Government about, "Summer is when people have vacations. We  
7 would like to have one."

8 MR. CAPIN: We would like to have one. We know our  
9 witnesses would like to have one, and jurors often like to have  
10 them.

11 THE COURT: Well, jurors try cases in the summer.  
12 Judges are even here during the summer.

13 MR. CAPIN: We think that a September trial, from  
14 everybody's perspective, is preferable, and we would defer to  
15 Mr. Kadyrbayev's desire to proceed in September.

16 THE COURT: Well, there is one other point. I am  
17 tossing these out so the parties can -- I am sure they have  
18 thought about it, but I am thinking about it as well, which is  
19 bumping up against the current Tsarnaev trial date. I do not  
20 want in any fashion to cause issues to be exacerbated in terms  
21 of pretrial publicity for that case as well.

22 MR. CAPIN: So, that's a November trial. It seems to  
23 me if we went back-to-back in September, especially doing these  
24 trials individually -- we don't think either one will be more  
25 than two weeks. So, we should be able to wrap it up in

1 September.

2 THE COURT: All right.

3 So, Mr. Wooldridge, you have expressed your view now  
4 that you are ready to go on June 30th.

5 MR. WOOLDRIDGE: June 30th, Judge, yes.

6 THE COURT: Is there any objection from either  
7 Mr. Phillipos or Mr. Kadyrbayev about that?

8 MR. STAHL: No objection on behalf of Mr. Kadyrbayev.

9 MR. DEMISSIE: No objection from Mr. Phillipos.

10 THE COURT: So, let me, then, turn to Mr. Kadyrbayev,  
11 because he will be the next in line on this. You indicated  
12 that you are prepared to go on September 8, I guess it is.

13 MR. STAHL: Yes, your Honor. I have a scheduled  
14 vacation right before and then one in the middle of October.

15 THE COURT: I saw that. I was envious of all the  
16 opportunities to travel.

17 MR. STAHL: You haven't met my wife. She tells me  
18 when to travel.

19 But, yes. So, September 8th is our preference.

20 THE COURT: All right. So, I think we will go, then,  
21 for September 8th on that. And then we are talking about a  
22 two-week period for the trial. I will allocate three weeks.  
23 So, the end of September for Mr. Phillipos, if that is  
24 agreeable with Mr. Phillipos.

25 MR. DEMISSIE: Are we going to pick a specific date?

1 THE COURT: I think I will. So, let me just pull off  
2 -- September 29th.

3 MR. DEMISSIE: That would be good for us, your Honor.

4 THE COURT: So, those are the three trial dates, then,  
5 here.

6 The Motion to Change Venue is -- if I can just pause  
7 for a moment, though, so that Mr. Lovett can get these down.

8 I am allowing Motion No. 148 of Mr. Kadyrbayev for  
9 Severance, Motion No. 173 of Mr. Tazhayakov for Severance,  
10 Motion Nos. 168 and 172 of Mr. Phillipos for Severance, and  
11 establishing the trial dates as I have so far.

12 MR. STAHL: Excuse me, your Honor.

13 THE COURT: Yes.

14 MR. STAHL: Also in our Motion to Dismiss was a motion  
15 to strike surplusage. I don't think you have ruled on that.

16 THE COURT: Right. Let me talk about that. I think  
17 that is useful in this context, that is, the context of trial  
18 structuring and so on.

19 I do not see a reason to strike the surplusage at this  
20 point. What generally happens for me is, I will submit an  
21 indictment to the jury if I think it is helpful to them. I  
22 will require redactions of the indictment, as necessary, if the  
23 Government does not prove something. If it appears that the  
24 charging document, which, as I have indicated, is at this stage  
25 fleshy, is a little too overweight, I will try to slim it down

1 a little bit.

2 But I do not think I need to get to the question of  
3 surplusage at this point, and so I am denying it at this point,  
4 subject to talking about what it is that goes to the jury to  
5 shape their views about the case.

6 MR. STAHL: If I could follow up with a question?

7 THE COURT: Sure.

8 MR. STAHL: Is this something in your practice that we  
9 would file a motion *in limine* before the Government's opening  
10 as to what they would be allowed to open on and how much they  
11 would be able to go into the details of the bombing itself?

12 THE COURT: I think it is two parts. The first is for  
13 motions *in limine* as to which I think I can only provide in  
14 response to a motion *in limine* a tone poem.

15 MR. STAHL: I'm sorry?

16 THE COURT: A tone poem. I am not going to be writing  
17 their opening statement for them. I will give them a sense of  
18 where they could get themselves in a lot of trouble, if they  
19 alluded to evidence or matters that simply are immaterial from  
20 my perspective on it. But I think we will be getting to know  
21 each other more as things go along, and you will get to see the  
22 dealings with Mr. Wooldridge and his client. Motions *in limine*  
23 will kind of shape some of that.

24 To the degree that something is in the charging  
25 document does not necessarily mean that it gets presented to

1 the jury. I said it was two parts. The second part is what  
2 document goes to the jury, if any. I generally think it is  
3 useful for the jury to understand what the Government has  
4 undertaken to prove, but it frequently is the case that that  
5 needs a redaction. So, for instance, there will be a redaction  
6 in this case to take out the caption for the other defendants  
7 that are to be tried at any particular time. There may be  
8 overt acts that are not proved in the case that will be taken  
9 out, and it may be that after a discussion I say the jury  
10 understands this case enough, they do not need the charging  
11 document to go in. But that is the way I will deal with it.

12 The short of it is, again, this is a kind of premature  
13 motion. That is why I am denying the motion. I think I  
14 understand the underlying purposes behind it.

15 So, back to change of venue.

16 My present view about this is that there has not been  
17 demonstrated as of yet a basis to change the venue in this  
18 case. Of course, it is a case that has generated a great  
19 deal -- not this case itself -- but the general subject matter  
20 has generated a great deal of press coverage. I have reviewed  
21 what the parties have submitted in that regard. I do not find  
22 it to be the kind of press coverage that on the whole can raise  
23 some sort of presumption of the change of venue. There has  
24 been commentary on what the press has been able to find out  
25 about various things and reporting about it. Obviously, it is

1 a matter of continued interest and became particularly active  
2 surrounding the anniversary.

3 But the submissions on the Motion to Change Venue seem  
4 to me to be premature as well. The proof of the pudding is the  
5 selection of the jury and the evidence stated. I will put it  
6 into context for the parties, as I did with my standard way of  
7 dealing with Motions to Dismiss, in dealing with their family  
8 of suppression motions.

9 I think a good portion of my professional life has  
10 been either observing or participating in one form or another  
11 in high-profile cases. As a newspaper reporter in Chicago and  
12 Washington, particularly during the time period of Watergate  
13 and those prosecutions, I had an opportunity to observe how  
14 jury selection can be conducted and how in a Metropolitan area  
15 jurors can be selected that provide a fair and impartial  
16 evaluation of the case.

17 I think for lawyers involved, maybe even judges  
18 involved and the press involved it is inconceivable that people  
19 are not reading every story, but it is not inconceivable.  
20 People have lives of their own. They are not spending a great  
21 deal of time reading all of this stuff or viewing it on TV.  
22 More than that, the life experiences I have had suggest to me a  
23 properly vetted jury will be fair and impartial, take seriously  
24 their responsibilities, and can be chosen even in the community  
25 in which some extraordinary event took place.

1           So, I do not find a presumption here. I have a view  
2 that the way in which this has to be dealt with is by jury  
3 selection. I have tested this against other kinds of  
4 approaches.

5           Mr. Demissie suggested Portland or Providence. I have  
6 looked at the question of other venues in the  
7 First Circuit, and that is affected by availability of a  
8 facility as well as the likelihood that some other venue would  
9 be less affected and it would not be inconvenient to all of the  
10 parties here. Within the First Circuit, the only other venue  
11 that I think is potential is Springfield. It is in this  
12 District, but it is different media markets, of some distance,  
13 probably more than both -- although I have not walked it off --  
14 more than both Portland or Providence.

15           So, in that connection you should be aware that I have  
16 dealt with the Clerk's Office here to arrange for panels to be  
17 assembled in both Springfield and Boston for June 30th. My  
18 expectation is we will be going in Boston. If something  
19 arises, we will have available the potential for Springfield.  
20 Springfield, I think, is also convenient to out-of-state  
21 counsel here; just up the road, as I understand it.

22           I should also say that I have considered and explored  
23 other Districts and other Circuits. I do not think they are  
24 necessary. There are a number that would be quite inconvenient  
25 for the parties.

1           But I mean to indicate that this is still a work in  
2 progress. We do not know yet whether we are going to get an  
3 impartial jury. If I were a betting person, which I am not, I  
4 would bet that we can with the kinds of jury questionnaires and  
5 tailored inquiry of the jurors that I would propose to  
6 undertake.

7           So, let me tell you what is likely to happen, although  
8 this is the subject of some further discussion. The model that  
9 I found, I think, particularly useful, and so far as I know,  
10 successful, was the Bulger model, in which Judge Casper  
11 structured matters so that, to apply it to this case, something  
12 like 200 jurors came in in the morning on Monday. They filled  
13 out questionnaires after being instructed by Judge Casper, in  
14 this case by me, about their responsibilities and the need for  
15 candor in their questionnaires, but also an understanding of  
16 what their larger responsibilities are.

17           Those questionnaires will be taken out, put on a disc.  
18 The disc will be provided to the parties immediately. We will  
19 do the same thing in the afternoon, another 200 people,  
20 perhaps. Same thing Tuesday morning, same thing Tuesday  
21 afternoon. That could come to as many as 800 people. I am not  
22 sure about the numbers yet, but I have arranged for the Clerk's  
23 Office to have available a panel that can do that much.

24           We are all going to be working hard that week, and so  
25 you are going to be expected to review those discs, and



1 together we will deal with those that seem to be the subject of  
2 a challenge for cause, at least on their face.

3 I am not yet sure what I will do by way of individual  
4 voir dire of those who survive a challenge for cause. I have  
5 in the past done each remaining available juror. That may take  
6 Wednesday and Thursday to do it. I am intensely aware, at  
7 least in the first case, that we have got July 4th coming up.  
8 I hate to tell you, but we are going to be working on July 4th  
9 if we have not picked a jury at that point in the selection  
10 process. I should not say "you are." We *all* are, because we  
11 will get it done. We are not going to be bringing jurors in on  
12 July 4th, but we are going to be going through the process of  
13 the exercise of peremptories.

14 I suspect that the peremptories are going to be  
15 sufficient after the kind of cause analysis that I do. The  
16 current number of peremptories will be acceptable, but I will  
17 think about whether or not additional peremptories are  
18 appropriate in this case.

19 But that is it in the kind of broad outline. A  
20 similar process will be used in Springfield, if it is necessary  
21 to choose to go to Springfield here. I have it as a backup. I  
22 do not think it is going to be necessary, but we will see.

23 In any event, turning to the change of venue, I am  
24 denying the Change of Venue Motions, Mr. Kadyrbayev, No. 133,  
25 Mr. Tazhayakov -- these are joined kinds of issues in

1 No. 133 -- and Mr. Phillipos' on this kind of change of venue,  
2 with the understanding that it is not over until it is over on  
3 this.

4 The touchstone of this is to be sure that the  
5 defendants are tried by a fair and impartial jury that is going  
6 to decide this case solely on the basis of the evidence that is  
7 presented to them and in light of the law that I will give to  
8 them and not on some other basis, and I will try to be as  
9 probing as possible.

10 The parties, I know, are familiar with Skilling, but  
11 it bears rereading. I think it is the modern statement of a  
12 fair trial, free press and change of venue. There were some  
13 notorious cases that, as notorious cases sometimes do with  
14 extraordinarily bad facts, create law that may be a little  
15 difficult to deal with, at least in terms of bumper-sticker  
16 snippets. Skilling, it seems to me, provides the modern  
17 Supreme Court view with respect to this, and Justice Ginsburg's  
18 opinion, I think, is very, very helpful on this.

19 That said, I am sensitive to the dissent that  
20 Justice Sotomayor had on this, and I mean to do whatever I can  
21 to avoid the kinds of concerns that she I think properly raised  
22 and reservations that she properly raised. But this is an  
23 undertaking we are all going to keep working on.

24 The bottom line of this, and maybe a reason for my  
25 burdening you with some aspects of my own past experiences, is

1 I have been and I remain of the view that a properly vetted  
2 jury takes its job very seriously and provides what the parties  
3 are entitled to: a fair and impartial trial. That has been my  
4 experience over 40 years of observation and involvement. While  
5 there are challenges in this case, I do not now see a reason  
6 why this will not be yet another piece of evidence in support  
7 of that proposition for me.

8 So, that, I think, deals with, as best we can at this  
9 point, the question of the kind of trial structuring.

10 So, then that gets us to what I will broadly call the  
11 Motion to Suppress issues. Let me put this in the larger  
12 context as well.

13 There are rules about criminal discovery that are  
14 meant to be observed, and it is my responsibility to enforce  
15 them. A lingering concern that I have had over the years, and  
16 it has been present in this case as well, is that events like  
17 Motions to Suppress that are potentially evidentiary are used  
18 for dual purposes, the Motion to Suppress itself, but also for  
19 obtaining discovery that the parties are not properly entitled  
20 to.

21 So, I outline for you a form of procedure that I have  
22 used in previous cases to ensure that the appropriate purpose,  
23 that is, to test a Motion to Suppress, does not become a  
24 vehicle for an improper purpose, which is expansion of  
25 discovery beyond what is appropriate.

1 I have before me a Motion to Quash some subpoenas that  
2 suggests that there is a -- how best to describe this -- a  
3 latitudinarian view of what is available by way of evidence and  
4 the production of evidence in a Motion to Suppress, and we will  
5 talk about that in just a moment.

6 I do not want to put too much emphasis on it, but the  
7 Government has filed a Motion to Strike a letter brief that  
8 sought, at least as a matter of correspondence, to obtain  
9 reconsideration.

10 Certainly, my Session, and this District generally,  
11 does not conduct proceedings by correspondence school, and so  
12 letter briefs are just not appropriate, and I think counsel  
13 became familiar with that after the back-and-forth. But it did  
14 raise the question of what was being asked for was some form of  
15 reconsideration.

16 I am not going to strike the letter brief. It is what  
17 it is. But to the degree it sought reconsideration, it is  
18 denied. I dealt with most of this discovery early on and ruled  
19 with respect to it, and I know of no reason to depart from that  
20 ruling.

21 Nevertheless, the parties have, I think quite  
22 helpfully, started to proliferate the meaning of the  
23 differences between burdens of production and burdens of proof,  
24 and it seems to me a useful way of beginning the discussion  
25 about the way in which I would like to conduct the Motion to

1 Suppress to deal with that.

2 Perhaps the most striking, kind of cutting through  
3 this, as he did with the timing of trial, is Mr. Wooldridge's  
4 reference to Rule 104(d).

5 There are two parts of this. It seems to me that a  
6 defendant has to put in play in some fashion the  
7 appropriateness of the Motion to Suppress; that is, that there  
8 is some reason to believe, broadly stated here, that the  
9 statements that were offered by the defendant that are sought  
10 to be excluded and in a related sort of way consents that were  
11 given to searches and so on, were not voluntary. That is a  
12 memorandum inquiry, but is a broader factual inquiry as well.

13 One of the things that I have seen, and one of the  
14 reasons why I scheduled this or stated this view about order of  
15 proof, is that in the absence of affidavits, and even with  
16 affidavits, it turns out that the presentation of the  
17 defendants is nonexistent or does not include the underlying  
18 testimony that is in an affidavit, and so it is a kind of bait  
19 and switch for purposes of Motion to Suppress. That, it seems  
20 to me, is inappropriate, because it then turns out that the  
21 Motion to Suppress was not a Motion to Suppress; it was a  
22 discovery device that is not acceptable.

23 By the same token, this is not an opportunity for the  
24 Government to goad the defendants into offering testimony.  
25 While the testimony is immunized to the degree necessary, that

1 is to say, it cannot be used against them at trial, it is also  
2 the case that if there are inconsistencies in trial testimony  
3 and testimony that is given in a Motion to Suppress, then it is  
4 available, and it is also available for consideration, if it  
5 ever comes to that, in sentencing in terms of the candor of the  
6 defendants.

7 So, it is a serious choice that a defendant has to  
8 make concerning a Motion to Suppress. Stepping back a little  
9 bit on this, I have affidavits submitted by the defendants. I  
10 do not know if the Government takes the position, it seems to  
11 me to be a hard position to take, that those affidavits do not  
12 state a *prima facie* case for lack of voluntariness.

13 Do you take that position? That is to say, if the  
14 only evidence in this case were those affidavits, then it seems  
15 to me that there is a question, factual question, about  
16 voluntariness.

17 (Pause)

18 THE COURT: You will not have until 11:00.

19 (Laughter)

20 MR. CAPIN: Military time, your Honor?

21 I think it's a close call. I think certainly with  
22 regard to Mr. Phillipos, I think the Court could take  
23 everything he says in his affidavit and deny the motion on its  
24 face, because it comes nowhere near satisfying the burden of --  
25 it comes nowhere near, viewed in the light of what the Court

1 could take judicial notice of, finding that there was either  
2 involuntary waiver of Miranda or an involuntary confession for  
3 the purposes of due process clause, or any consent form he  
4 signed was done involuntarily.

5 A somewhat closer call with regard to the other  
6 defendants, but I think that, while very colorful, what they  
7 say in their affidavits is somewhat mushy. I mean, there was a  
8 lot going on when they were called out of their residence, a  
9 lot that the Court could take judicial notice of and find that,  
10 based on what we all know, it was a Terry stop. And questions  
11 of duration, of time and how they were spoken to, I think that  
12 the prudent course, for the reasons you have articulated, is to  
13 have the defense go first, articulate more specifically what it  
14 is that they are saying was done on that day, let that be  
15 fleshed out somewhat, with the understanding that they do have  
16 the safety of Simmons and the Constitutional protections  
17 against having that used at trial against them.

18 So, I think the answer is no. I think our position is  
19 they haven't really made a *prima facie* case.

20 THE COURT: If forced to come to that conclusion now,  
21 I think it probably is a close question, but I would be  
22 inclined to say I will have a Motion to Suppress evidentiary  
23 hearing on the basis of that.

24 That leads me to the second point, which is what  
25 appears to be ambivalence, perhaps, on the part of the

1 defendants, the suggestion that, while their affidavits are  
2 sufficient, they have not decided whether to testify. The  
3 problem there is that if they do not testify, then it is a bait  
4 and switch. They have submitted an affidavit that they are not  
5 prepared to support by actual testimony, and that is the  
6 potential abuse that I want to address.

7 Now, I say "abuse." I do not mean to make this  
8 personal but to understand that in order to enforce the rules  
9 with respect to discovery and observe the Constitutional rights  
10 of the defendants, and balance them together properly, I think  
11 it is not appropriate for a defendant to file an affidavit and  
12 then not be prepared to support it with live testimony; because  
13 the grounds for having a hearing, which are that there is a  
14 basis for finding involuntariness, however close the question,  
15 disappears like the mists over San Clemente if they do not  
16 testify. And that is where the insight provided, again at the  
17 last minute, to some degree, by Mr. Wooldridge seems to me to  
18 be helpful.

19 What I propose to do, or would propose to do, is to  
20 say that each of the defendants may support their Motion to  
21 Dismiss with direct testimony and then ordering my proof,  
22 because it is necessary to limit this to the issues involved.  
23 If it is sufficient, raises the question sufficiently, again,  
24 having in mind Mr. Capin's reservations about whether, in fact,  
25 it does, but in my view that I am likely to think it does for



1 present purposes, and with the direct testimony of the  
2 defendants, and then turn to the Government and say, "So, what  
3 evidence do you have that it was voluntary," and proceed in  
4 that fashion.

5 That, it seems to me, balances the respective rights  
6 and obligations of the parties in this matter.

7 MR. STAHL: Your Honor, may I be heard on that?

8 THE COURT: Sure. I am outlining it because I want  
9 you to understand it, and I am going to take a break as well,  
10 but I want to hear you before we take the break on that.

11 MR. STAHL: Sure.

12 THE COURT: I do not think it is the case that someone  
13 just gets a Motion to Suppress hearing by saying, "I would like  
14 one." I do think that there are foundational requirements  
15 here, but they are minimal, putting into play the issues. That  
16 is why the structure that I have outlined is the one that I am  
17 disposed to pursue here. But, as I said, I will obviously  
18 listen to whatever you have to say, because this is a somewhat  
19 more refined version of what we discussed earlier.

20 So, without holding you to a snap response to a  
21 late-filed Wooldridge motion, I am interested in what you have  
22 to say.

23 So, Mr. Stahl.

24 MR. STAHL: Your Honor --

25 THE COURT: I do not mean to cut you off. If you want

1 to take the break at this point to think about --

2 MR. STAHL: That would be helpful.

3 THE COURT: -- this kind of outline.

4 Is there anything else that people want to take up  
5 before that break? Because now we are talking about how we are  
6 going to structure the Motion to Suppress, if it goes forward;  
7 that is, if there is reason to say that there is a factual  
8 basis for this.

9 MR. WOOLDRIDGE: Before we do have a restroom break,  
10 your Honor, I would say one thing, and that we submitted an  
11 affidavit in support of our Motion to Suppress. The Government  
12 comes back, and they make a bunch of factual allegations but  
13 don't support their motion in opposition with any affidavit.  
14 It would have been nice -- like if we have to do an affidavit,  
15 then the Government should also have to do an affidavit.

16 THE COURT: This, I think, is in the class of  
17 oppositions or observations that I call the "Prodigal Son"  
18 objections to procedures. There is no question in my mind that  
19 the Government could -- they should have, but they did not, but  
20 this is fine points -- the Government could attach an affidavit  
21 of the case agent with every one of the 302s and other reports  
22 of investigation. That would be sufficient. They did not do  
23 it, and, frankly, it was not altogether that clear that they  
24 should. But this addresses that irrespective, that is, this  
25 process addresses that irrespective. The Government could

1 stand up after the testimony of the defendants and say, "We  
2 have nothing else to offer," and if they do, I will make the  
3 determination on the basis of what has been provided with  
4 respect to voluntariness by the defendants.

5 So, I understand the sense of resentment and  
6 disappointment that they did not do what you did; they did  
7 square their corners the way you did, at my suggestion, but  
8 that is not going to trip this.

9 MR. WOOLDRIDGE: I just think in all fairness, your  
10 Honor, if we submit an affidavit, and if they don't submit an  
11 affidavit, that's our proof and your Honor should rule that  
12 way. We shouldn't have to come forward with testimony.

13 THE COURT: One thing that is clear from the  
14 affidavits you submitted is that, in order to resolve them,  
15 there is a credibility determination that has to be made to  
16 establish the grounds for supporting suppression. The  
17 existence of the affidavit is enough for me to convene a  
18 hearing, as I have, for purposes of taking testimony, which I  
19 will, but it is not enough simply to submit the affidavit and  
20 say that is enough to show -- at least these affidavits --  
21 enough to show, or at least enough to satisfy me that you have  
22 shown that statements, all of them, were involuntary.

23 MR. DEMISSIE: If I may, your Honor?

24 THE COURT: Yes, Mr. Demissie.

25 MR. DEMISSIE: Just, I'm asking for clarification,

1 your Honor, and what you have outlined as the intended  
2 procedure. Is the Court not allowing the defendants to call  
3 witnesses other than the defendants themselves?

4 THE COURT: No, you do misunderstand, and it is useful  
5 that you ask for clarification. I am not forestalling  
6 anything. I am talking about a course of the presentation of  
7 evidence, which is very much in the control of the Court. I  
8 order the proof in the case, particularly when it is non-jury.  
9 I do it for purposes of efficiency, for purposes of clarity,  
10 and for purposes of serving the underlying values that I have  
11 outlined here.

12 You may well have other witnesses that you want to  
13 offer here, and if at the conclusion of testimony by the  
14 defendants, or a defendant, I think it is insufficient to go  
15 forward on the question of voluntariness -- I do not now  
16 believe that is the case in light of what I have read in the  
17 affidavits -- then I will afford you that opportunity.

18 MR. DEMISSIE: I think what I am asking is in the  
19 order of witnesses that we call, is the order to require us to  
20 call the defendants first before we call other witnesses?

21 THE COURT: Yes. The defendants will be called first  
22 to establish that they have a grounds for a Motion to Suppress.  
23 On the basis of what I now know, if they do not call them, then  
24 those affidavits are meaningless.

25 MR. DEMISSIE: I believe, your Honor, there are ways

1 that we can make of showing by calling other witnesses other  
2 than the defendants, and the defendants should then be able to  
3 be in a position to listen to the testimony of other witnesses,  
4 evaluate what has been presented and then decide to testify or  
5 not.

6 THE COURT: Well, that is a refinement, and I think I  
7 understand it. If that is the way you want to proceed, you  
8 can. But I will tell you, after listening to those other  
9 witnesses -- and let me be clear about this. This does not  
10 mean you call the Government's witnesses. The Government is  
11 going to call those witnesses.

12 MR. DEMISSIE: All right.

13 THE COURT: This does not mean that you have these 17  
14 subpoenas that go well beyond anything that is available for  
15 discovery and that seem to me to be nothing more than an  
16 effort, another effort, at reconsideration of discovery.

17 So, I will see what the witnesses are. We are going  
18 to talk about those Motions to Quash in a bit. But, while it  
19 may be strategy or tactics for the parties, this is fundamental  
20 to me of exercising my responsibility to hold the scales true  
21 in balancing the several considerations that are involved in  
22 this kind of matter, which I have outlined here.

23 So, back to the earlier question. If you think that  
24 you can show involuntariness by some other means than the  
25 defendants themselves, in short, if you are not relying on

1 their affidavits, then I will consider it. But it is not going  
2 to be a case of, "Tell you what. We think we can do this by  
3 calling the Government's witnesses." Because you do not get to  
4 do that, unless there is a foundation for it.

5 Now, it may be that somebody was next to Mr. Phillipos  
6 at a time in which there was some sort of coercion that took  
7 place, just to use that as an example -- I do not know if that  
8 is the case. Sure, put that witness on, and I will consider  
9 that.

10 MR. DEMISSIE: Or the person who actually did the  
11 interview. We will take the break.

12 THE COURT: No, no. I think you understand my point.  
13 You do not do it that way.

14 MR. DEMISSIE: So long as there is the issue of  
15 coercion that involves that individual. I don't intend to call  
16 witnesses just who are present, but if there is an  
17 individual --

18 THE COURT: As far as I am concerned, you do not get  
19 to the point of a Motion to Suppress and the testimony  
20 regarding the Motion to Suppress by saying, "I would like a  
21 hearing, and I am going to call the other side." You provided  
22 a foundation for the hearing. The foundation was  
23 Mr. Phillipos' affidavit. You are going to have to decide  
24 whether or not that is the grounds. If it is not the grounds,  
25 if you are not prepared to support it by testimony like that,

1 then I will have to think about it. But one does not have a  
2 hearing by saying, "I would like a Motion to Suppress. By the  
3 way, bring them all in." You have got to have a foundation.

4 MR. DEMISSIE: I understand.

5 THE COURT: The foundation you provided was that  
6 affidavit. Now, if there is somebody else who is going to say  
7 Mr. Phillipos -- I am somewhat surprised that I didn't see  
8 their affidavit -- but if there is somebody else there is a  
9 good-faith basis for believing that will testify in a fashion  
10 that is supportive of Mr. Phillipos's position, I will  
11 obviously consider that.

12 But right now, my view is that the way in which this  
13 is going to be ordered is it is going to be the testimony of  
14 the defendants, that is, direct testimony, not  
15 cross-examination. It will not be cross-examination of those  
16 defendants until after there is an offer from the Government,  
17 to which you can cross-examine during that time period.

18 MR. WOOLDRIDGE: Your Honor, I have something that I  
19 think may allow the defendants to meet that level that you are  
20 asking for, and that is the Government had their immunized  
21 witness that we all had an opportunity to cross-examine. I  
22 didn't bring the transcript here today, but much of what she  
23 said is what's contained in the defendant's affidavit, and I  
24 don't know if maybe we should submit that to your Honor.

25 THE COURT: You can.

1 MR. WOOLDRIDGE: Okay.

2 THE COURT: I have reviewed portions of it, as you  
3 know. I have actually provided, I believe, a dramatic reading  
4 from it the last time we were here. You may have gathered that  
5 my evaluation of it did not establish in my own mind lack of  
6 voluntariness. But you can certainly submit that.

7 MR. WOOLDRIDGE: Okay.

8 THE COURT: And if that is what you want to rely on,  
9 okay.

10 MS. SIEGMANN: Your Honor, I just was wondering, so  
11 you just indicated that the Government's not going to be able  
12 to cross-examine the defendants.

13 THE COURT: Not initially. I have not been clear  
14 about this proposition. This is the ordering of proof. I am  
15 going to hear direct testimony, because that is going to be the  
16 shape of the 104(d) issue that Mr. Wooldridge raised. I am  
17 going to hear the direct testimony of the defendants. Then, if  
18 that creates an issue, sufficient issue, and my view is that it  
19 is likely to, if it follows more or less the outline of the  
20 affidavits, then I will put the Government to its proof.

21 Your proof is to show that these were, in fact,  
22 voluntary statements, and you will call whatever witnesses you  
23 call to do that, and at the conclusion of that you will have  
24 the opportunity to cross-examine the defendants, I believe, if  
25 it remains an issue.



1           Now, it may be that after I hear the Government's  
2 proof I am going to say, "This is not voluntary at all. This  
3 is the best the Government can do." And that is the order of  
4 proof, because the burden of proof in this context for most all  
5 of these challenged statements is on the Government.

6           MS. SIEGMANN: I understand that, your Honor, but the  
7 defense will get an opportunity to cross-examine the  
8 Government's witnesses when they testify.

9           THE COURT: Right.

10          MS. SIEGMANN: And the defendants, by their affidavits  
11 and their testimony, will then be putting their credibility in  
12 question, and the only way we can actually test that is by  
13 cross-examination.

14          THE COURT: You are in the same position as Mr.  
15 Demissie, and that is saying, "Oh, well, we get to  
16 cross-examine the defendants themselves if we put on our own  
17 case," and that is just simply not true. I will determine  
18 whether or not you have made a *prima facie* -- probably more  
19 than that -- showing that these are voluntary, and if you have,  
20 then we will move to the next stage, which is the  
21 cross-examination of the defendants themselves. If you have  
22 not, then the defendants have done all that is necessary to get  
23 their Motion to Dismiss evidentiary hearing, and the Government  
24 does not get its chance to do some sort of discovery.

25          Let us be candid about this in practical terms. What

1 happens? There are created prior statements, inevitably,  
2 because we are all practical people, we understand what happens  
3 in examination. There are inconsistencies of some sort,  
4 greater or lesser degrees of inconsistency. The office of the  
5 Motion to Suppress hearing is not to create inconsistencies or  
6 additional opportunities for cross-examination. It is to get  
7 at the issue of whether or not here it is voluntary.

8 So, in order to balance all of those separate values,  
9 I am going to order the proof in this fashion, or I intend to.  
10 I am, obviously, going to hear more from you, and in the spirit  
11 of Mr. Wooldridge's "Prodigal Son" observation, let me offer  
12 this observation. There is sauce for the goose and there is  
13 sauce for the gander in this. So, you are both going to  
14 consider the practical aspects of how you put on your  
15 respective cases for this, and this is the structure in which I  
16 am going to follow, I think, but, again, subject to some  
17 discussion.

18 So, why don't we take -- I think a half hour might be  
19 sufficient.

20 MR. CAPIN: Could I just mark one issue, your Honor?

21 THE COURT: Sure.

22 MR. CAPIN: As I understand it, the Court is denying  
23 the Motion to Quash as -- denying the motion -- I'm sorry. No.  
24 Allowing the Motion to Quash the 17 subpoenas.

25 THE COURT: Not yet. I have to hear -- if somebody

1 explains to me why it is necessary to have these subpoenas --  
2 and they are *subpoenas duces tecum*, which seem to have been  
3 done not by a human being but, perhaps, by a word processor who  
4 cannot spell "memorandum."

5 MR. CAPIN: And if we are going to deal with it later,  
6 I simply want to point out it is *duces tecum* as regards to 17 of  
7 them. As regards to one of them, it's also *ad testificandum*,  
8 and that's Megan Dolan.

9 THE COURT: We will talk about that. None of them, I  
10 think, are the Government's initial witnesses, but maybe they  
11 are.

12 MR. CAPIN: They're not, your Honor.

13 THE COURT: All right. So, we will take a half-hour  
14 break.

15 THE CLERK: All rise.

16 (The Honorable Court exited the courtroom at 10:20 a.m.)

17 (Recess taken)

18 THE CLERK: All rise.

19 (The Honorable Court entered the courtroom at 10:55 a.m.)

20 THE CLERK: This Honorable Court is back in session.  
21 You may be seated.

22 THE COURT: Well, just one housekeeping matter, and  
23 that is, the parties are expected to be here on time when we  
24 take a break. If you are not here, that is your fault. I will  
25 be in court when I say I will be in court. So, being outside

1 for ten minutes past the time period is probably not a good  
2 idea, if your purpose is to represent your clients.

3 So, where do we stand now? Mr. Stahl?

4 MR. STAHL: Thank you, your Honor. I will put my  
5 position on the record for you and hope to have you modify your  
6 view of this.

7 Your Honor, I think that it's clear by the Court's  
8 statements, and even the Government, although they're hedging,  
9 I think the defendants have clearly met their burden of  
10 persuasion. I'll talk about Mr. Kadyrbayev, in particular. We  
11 submitted a very detailed affidavit under oath about the  
12 circumstances of the seizure, the circumstances of the  
13 statements, the lack of voluntariness, the circumstances about  
14 understanding, the circumstances about holding an individual  
15 for 12 hours, and then going back the next day and seizing them  
16 again, using the Immigration's arrest, even though the FBI was  
17 working hand in glove.

18 We have, under the case law, then, the District of  
19 Massachusetts, Levasseur, citing the Fifth Circuit, Longmire,  
20 as we submitted in our reply brief that your Honor allowed us  
21 to file, met the burden of production. The Government, then,  
22 has the burden. They have submitted nothing under oath, they  
23 have nothing before you. Mr. Capin stood up before and said,  
24 "We all know what happened." Quite frankly, the only thing we  
25 know what happened that's under oath of any form is from the

1 defendants themselves that submitted affidavits. The rest is  
2 whatever people may think they know about the case. But there  
3 has been nothing before your Honor about the facts of the case,  
4 except as presented by the defense.

5 So, I believe that the case law is clear that it's now  
6 up to the Government to go forward and put its witnesses on to  
7 show that this warrantless search, the warrantless seizure of  
8 these individuals, that the statements were then voluntary and  
9 their will was not overborne, and that they knowingly and  
10 intelligently waived their rights. These were un-counseled,  
11 unwarranted seizures of these individuals, and then they  
12 supposedly got consent searches.

13 So, we have put that all into play under oath by the  
14 detailed affidavits. We have now met our burden for the  
15 hearing, and now we are talking about the order of the hearing.

16 THE COURT: Let me ask you straightforward, are you  
17 going to permit cross-examination of the affidavit?

18 MR. STAHL: Excuse me?

19 THE COURT: Are you going to permit cross-examination  
20 of the affidavit?

21 MR. STAHL: Your Honor, I think that the --

22 THE COURT: Well, at the risk of being too peremptory,  
23 but I will be peremptory. Yes or no?

24 MR. STAHL: Perhaps I don't understand the question.  
25 Are you saying --

1           THE COURT: You have offered an affidavit. The  
2 question is whether or not that affidavit is illusory in the  
3 sense that it will not be tested because the defendant will not  
4 be offered as a witness in the case, nor will he be permitted  
5 to be cross-examined. So, if it is an affidavit that is here  
6 today gone tomorrow, it is evanescent, it is illusory, and I do  
7 not find that it provides an adequate foundation.

8           So, you can answer the question yes or no. Are you  
9 going to permit examination?

10          MR. STAHL: Well, if it becomes necessary.

11          THE COURT: Let me just be clear. That is an issue  
12 about necessity. There are a variety of ways of dealing with  
13 this, I suppose. I can say, upon the representation of a  
14 defendant that he will submit to cross-examination, I will  
15 permit the direct examination to be the affidavit itself, and  
16 then we will move on. That is one way of dealing with it.

17          But I must tell you that if the foundation is not  
18 sustained, if it proves to be made of sand, then it is no  
19 foundation at all. That, at the outset, depends upon whether  
20 or not the affiant is going to offer himself for  
21 cross-examination, or the party is going to offer the witness  
22 for cross-examination.

23          MR. STAHL: I guess what I am saying, Judge, is we  
24 have a sworn affidavit. It's not illusory. It's sworn to  
25 under penalties of perjury. It's notarized. And my

1 understanding was that your order was -- that you were  
2 proposing, you hadn't ruled yet, is the defendant would testify  
3 on direct. So, I would put Mr. Kadyrbayev on, and I would walk  
4 him through basically the outlines of his affidavit.

5 THE COURT: However you want to do it.

6 MR. STAHL: However I want to do it, and somehow your  
7 Honor would judge the credibility of Mr. Kadyrbayev's testimony  
8 without the Government crossing just yet.

9 THE COURT: No. I would determine whether or not  
10 there is a foundation for saying that we should have a Motion  
11 to Suppress hearing. The affidavit is meaningless unless it is  
12 available for cross-examination. It could lack sufficiency. I  
13 have gone beyond that. I have not made a determination about  
14 sufficiency, except as an instrumental sort of thing, but it is  
15 sufficient to justify -- the facts provided are sufficient to  
16 justify a hearing, but only if that can be subject to  
17 cross-examination.

18 MR. STAHL: The way I read the case law, and the way  
19 that I have seen other suppression hearings -- and I'm just  
20 doing that by general experience; I understand your Honor does  
21 in your courtroom what you do -- is that we have made the *prima*  
22 *facie* showing. The Government now has the burden of persuasion  
23 to put its agents on, not for a fishing expedition, and I will  
24 explain the subpoenas in a moment, because it dovetails into  
25 this, to put their agents on to talk about the voluntariness,

1 the timing. So, "What was the timing?" "When did you first  
2 go? When did you first seize these individuals," or whatever  
3 term they would like to use. "When did you first handcuff  
4 them?" "For how long were they cuffed?" "For what period of  
5 time was that?" "What justified that seizure?" "What  
6 justified continuing?" Establish that it was voluntary that  
7 they volunteered to go to the State Police Barracks, establish  
8 that it was voluntary for the next 12 hours, and then I get to  
9 cross, and your Honor would then judge at the end of that, the  
10 Government going through with the burden of persuasion, has  
11 enough been heard that your Honor has decided that there it not  
12 voluntary by the testimony and the cross of the Government's  
13 witnesses, because it's their burden of persuasion.

14 And then, if not, your Honor would tell us at the end  
15 of that presentation, "Well, Mr. Stahl, you have a choice now,  
16 because I am not completely convinced, or I'm not convinced  
17 enough, based upon what I have heard from the agents that you  
18 have shown, demonstrated that it's involuntary. You have a  
19 choice now to put your client on." And at that point then the  
20 client would testify, and then your Honor would decide whether  
21 the client is subject to cross. That seems to make sense under  
22 the case law. And that we've come forward with enough to put  
23 the issues that matter for this hearing into play, that your  
24 Honor, reading that affidavit, can determine that there are  
25 substantial issues of fact about the voluntariness and the



1 coercive atmosphere and whether there was a violation of  
2 Miranda, and, therefore, it's the Government's obligation to  
3 then go forward.

4 THE COURT: I think we are to some degree ships  
5 passing in the night on this. I will hear you if you say you  
6 can support your motion without the affidavit. I do not think  
7 you can on this record.

8 MR. STAHL: I'm sorry. I missed --

9 THE COURT: I do not think you can on this record  
10 support the motion without the affidavit. So, then I look at  
11 the affidavit, and I ask myself, is this an illusion, illusion  
12 in this sense, that if it puts it into play the defendant does  
13 not get to pick up the ball and leave the field after that. He  
14 has to be subject to examination. Now, I have ordered the way  
15 in which the examination can proceed. The Government is not  
16 happy with it either, but it seems to me the clean way to test  
17 all of the relevant dimensions of this.

18 Now, let me add something further. Oddly enough,  
19 except for the discovery opportunities, scheduling a Motion to  
20 Suppress and having a hearing on a Motion to Suppress and  
21 establishing voluntariness before the jury is sworn, which is  
22 what the Rules call for, or permit, is a benefit to the  
23 Government. I still have to make a determination, will have to  
24 make a determination at trial, whether or not it is voluntary.  
25 If I make the determination at trial it is not voluntary, I

1 will order a mistrial, and the Government will not get the  
2 opportunity to retrial, because the Government will have taken  
3 a position that did not permit before trial the resolution of  
4 this case. That is that question of voluntariness. It is a  
5 protection for the Government. Now, they may view this as  
6 macho and they will push their way through it, but I think this  
7 U.S. Attorney's Office knows that if I find that it is not  
8 voluntary, they are dead, and it is not going to be inflected  
9 by some idea of I will let them save themselves. No.

10 The whole process of criminal procedure is a kind of  
11 Rube Goldberg machine that adjusts the balance of advantage  
12 among the parties, and this mechanism of dealing with the  
13 presentation of evidence with respect to voluntariness that I  
14 have outlined is designed to deal with that. But you do not  
15 get to say that, "I have an affidavit that is sufficient, but I  
16 am not going to represent to the Court that the defendant is  
17 going to testify in cross-examination," because if you say  
18 that, if you are not prepared to say, "I will permit the  
19 defendant to be cross-examined at the appropriate time," then  
20 the affidavit is meaningless. It does not provide any basis  
21 for the foundation that is necessary for a Motion to Suppress.

22 The parties will make their own, as I keep saying,  
23 tactical decisions with respect to all of this, but in the  
24 final analysis, if there is not a foundation for the Motion to  
25 Suppress because I am presented with evidence that is written

1 in disappearing ink, that is, it cannot be challenged, then I  
2 am not going to have a Motion to Suppress, and we will have  
3 these issues resolved at trial.

4 Now, the Government may say, "Wait a minute. We want  
5 some protection on this," after reflection, but that is their  
6 choice.

7 MR. STAHL: I would like to follow up for  
8 clarification.

9 THE COURT: Sure.

10 MR. STAHL: If I understand correctly, it is you would  
11 be amenable, I think, if I understood correctly, for the  
12 Government to go first with its burden of persuasion, as long  
13 as I represent to the Court that at the end of their case,  
14 their order of witnesses, that if your Honor finds that it is  
15 insufficient for you to rule at that stage, that I would put my  
16 client on, and then he would be subject to cross-examination.

17 THE COURT: Yes, and bearing in mind that the  
18 affidavit, which may be the basis for it, the refinement that I  
19 might offer on this is I will receive the affidavit. I will  
20 treat that as the direct testimony of the defendant, rather  
21 than going through the process of walking the defendant through  
22 his affidavit. The motion hearing will be limited to the  
23 issues raised in that affidavit, that is, the cross-examination  
24 that the Government could conduct ultimately on that, but also  
25 the issues that can be raised in the examination of the

1 witnesses will be limited to what is fairly raised in an  
2 affidavit.

3 MR. STAHL: Would I be permitted to do some direct to  
4 amplify things that are in there and to deal with some issues  
5 that the Government has presented through some recent  
6 discovery?

7 THE COURT: Yes, you would. But this is based upon  
8 representation that the defendant will be subject to  
9 cross-examination, if cross-examination becomes necessary.

10 Now, we are all doing this kind of hypothetically. My  
11 sense -- it is more than a sense, because I have read these  
12 papers fairly carefully -- is that the Government is going to  
13 raise issues sufficiently for me to say the question of  
14 voluntariness is the Government has met a burden to show that  
15 these were voluntary, and that we are going to expect the  
16 defendant to testify. I do not want them to be sitting there,  
17 or you to be sitting there, I do not think you are, that maybe  
18 the judge will decide not to have testimony. I do not think  
19 that is going to be the case.

20 MR. STAHL: No. I hear you. I hear you. With that,  
21 could I have a few moments with co-counsel?

22 THE COURT: Sure. But let me just talk to each of the  
23 parties, including the Government, which may or may not have  
24 been fully sensitive to the idea that if they choose not to  
25 have a Motion to Suppress even on this basis, that ultimately I

1 am going to be resolving this, and if I have to resolve it at  
2 trial, they are exposed because jeopardy is attached, and they  
3 have made the choice, the tactical choice, to let jeopardy  
4 attach before there is a resolution of the question of  
5 voluntariness.

6 MR. STAHL: Your Honor, I would just like to reserve  
7 the issue of the subpoenas. I don't want to clutter the record  
8 right now, but I would like to explain those at some period, I  
9 think it will become apparent, and the purpose.

10 THE COURT: What I propose to do, not that this is one  
11 step forward, one step back, but what I propose to do is hear  
12 all of the parties and then give you little bit of time to  
13 think further about it.

14 MR. STAHL: Thank you.

15 THE COURT: Mr. Wooldridge.

16 MR. WOOLDRIDGE: Sure, your Honor. Your Honor, with  
17 all due respect, I oppose your ruling. I don't think that the  
18 defendant has to be cross-examined on his affidavit. I think  
19 that if you did shift the burden on us for additional  
20 production, I think that we should be able to call whatever  
21 witnesses that we want. I understand that you say that the  
22 agent s are the Government's witnesses.

23 THE COURT: No. I say that there is no basis, unless  
24 you have a good-faith basis for showing that there is  
25 involuntariness, you do not get to call somebody. As it stands

1 right now, I am not aware of a good-faith basis for you to say  
2 that the Government agents are going to testify differently  
3 from the 302s and the various discovery materials.

4 Now, let me pose a hypothetical that may clarify this.

5 MR. WOOLDRIDGE: Of course, your Honor.

6 THE COURT: You ask for a Motion to Suppress and for a  
7 hearing on a Motion to Suppress because you contend, or your  
8 client contends that he was beaten up. That is not this case.  
9 But that he was beaten up, okay?

10 MR. WOOLDRIDGE: That is hypothetical, not in this  
11 case.

12 THE COURT: Right. I would require the affidavit to  
13 be submitted. I would not permit you to call the agent unless  
14 you had a good-faith basis for saying that the agent would  
15 agree that he beat him up, even in the face of a 302 that says  
16 otherwise.

17 Now, how would you do that? Well, the agent may be at  
18 a restaurant and say it to a friend: "You know, if I had to  
19 testify, I would have to say I beat him up." That would be a  
20 good-faith basis. But you do not get to say, "Gee, I would  
21 like to inquire of this guy, because maybe I can get him to  
22 contradict himself." That does not happen.

23 So, you have to have a good-faith basis for alleging  
24 that these other witnesses would say something that is in  
25 support of your Motion to Suppress. Otherwise, we run into the

1 problem that I have identified before, of transgressing the  
2 limitations on discovery that the Supreme Court, through the  
3 promulgation of the *Federal Rules of Criminal Procedure*, has  
4 outlined and the cases have developed.

5 MR. WOOLDRIDGE: I understand, Judge. I believe my  
6 good-faith basis is the facts that me and my client allege in  
7 the Motion to Suppress, and then the Government hasn't put  
8 anything into play that --

9 THE COURT: Is your client going to permit himself to  
10 be cross-examined?

11 MR. WOOLDRIDGE: I don't think we are doing that,  
12 Judge, at this time.

13 THE COURT: So, I understand your position.

14 MR. WOOLDRIDGE: I'm just making my objection to your  
15 ruling. That's all. Thank you.

16 THE COURT: I think you have raised all of the issues  
17 that you want to raise about this. I am not trying to  
18 foreclose you. Your client does not want to testify, I  
19 understand.

20 MR. WOOLDRIDGE: No, Judge, not under that scenario.

21 THE COURT: Right, understood.

22 Yes.

23 MS. CHURCH: If I could be heard, your Honor.

24 Mr. Phillipos also objects to the procedure as  
25 outlined by the Court, and one of the major reasons, as your

1 Honor is possibly aware, is that that is not the procedure that  
2 is implemented by, from what I understand, any of the other  
3 Federal District Court Judges in this Court. I have never  
4 heard of a Federal District Court Judge in this court going  
5 through that procedure.

6 The reason that that's important is not that every  
7 judge has to follow the same procedure, but it's an issue of  
8 parity for these defendants. That this is a very substantial  
9 right. It's a right described in Jackson v. Denno. It has to  
10 be both a fair hearing and a reliable determination of  
11 voluntariness.

12 It's the burden of the Government to prove that these  
13 statements are voluntary. It's not the burden of the  
14 defendant. And to allow this procedure that the Court has put  
15 in place to force our client to choose, really we are choosing  
16 between a trial right and a very substantial Motion to Suppress  
17 right, because as --

18 THE COURT: Is your client going to expose himself to  
19 cross-examination?

20 MS. CHURCH: That's exactly the word, "expose  
21 himself." No, your Honor, he is not.

22 THE COURT: So, let me just be clear about this.  
23 Apart from the invocation of rights and purported knowledge of  
24 the way in which judges in this court proceed, which I do not  
25 necessarily share, the short of it is that he will put forth an



1 affidavit that he is not willing to or for your reasons does  
2 not want to permit to be tested before trial. That means that  
3 there is no foundation. It is absolutely illusory. One does  
4 not get a Motion to Suppress hearing on the basis of a  
5 narrative that disappears, because it cannot be tested.

6 MS. CHURCH: It's not illusory for an extremely  
7 important reason, and that is that that affidavit is admissible  
8 at trial for cross-examination purposes. So, you will often  
9 see affidavits submitted in Motions to Suppress that are six,  
10 seven lines long, and they say, "I was arrested without  
11 probable cause."

12 THE COURT: Or you see affidavits in which they say,  
13 "This is some of the facts but not all of the facts, and I  
14 purport to elucidate those facts further," as is *your*  
15 affidavit. So, the point I guess --

16 MS. CHURCH: Just as the police do and the FBI does in  
17 their 302s. At every trial they will testify, "This is not  
18 everything," because the details of these cases, especially in  
19 this highly charged environment, are complicated. These agents  
20 wrote their notes sometimes four or five days after the  
21 incident occurred, and in this case the events occurred over a  
22 year ago. So, it's not illusive to put in there that this may  
23 not be everything, because --

24 THE COURT: Why is it not illusory to say, "I will put  
25 in only my side, and they do not get to cross-examine?" Why is

1 that not illusory? Why is that not very much the same as the  
2 traditional Fifth Amendment treatment of a witness who gets on  
3 the stand, testifies on direct examination, and then refuses to  
4 be crossed? At that point it is stricken, the direct  
5 examination is stricken.

6 MS. CHURCH: Because the important part of this case,  
7 your Honor, is that it's the Government's burden of proof, and  
8 traditionally the party with the burden of proof has to go  
9 first, and that means that the Government has to put their  
10 witnesses on. If, after hearing --

11 THE COURT: If I may, just address this question. Is  
12 there any foundational requirement? Do you just simply not  
13 even have to file an affidavit, you just stand up and say,  
14 "There are statements in this case, we want a hearing?"

15 MS. CHURCH: In this case, your Honor, you have  
16 already indicated that the affidavits made out --

17 THE COURT: We are testing the analysis that you  
18 provided. So, is it your position, under the kind of analysis  
19 that you provided, that all you have to do is say, "We want a  
20 hearing; there is a question of voluntariness because there is  
21 a statement, and we have to decide whether or not the witness  
22 was voluntary"?

23 MS. CHURCH: Traditionally, your Honor, the affidavit  
24 is sufficient. And, more importantly, in this case we expect  
25 the agents to testify truthfully, and we expect the agents to

1 get up and testify consistently with what our client has  
2 indicated occurred during the numerous and repeated  
3 interrogations, one of which was 4:00 in the morning.

4 THE COURT: If I may.

5 MS. CHURCH: Sorry.

6 THE COURT: Apart from the sterile incantation of the  
7 *Baltimore Catechism* regarding the availability of a hearing no  
8 matter what in a Motion to Suppress, I would like you to answer  
9 my questions.

10 So, I guess the first question that I have is, do you  
11 get a hearing, irrespective of whether you have an affidavit or  
12 not, by merely asking for it and saying, "There are a series of  
13 statements in this case -- "

14 MS. CHURCH: Yes, your Honor.

15 THE COURT: " -- now it is the Government's  
16 responsibility to deal with that"?

17 MS. CHURCH: No, your Honor, and that's why we did  
18 file the affidavit, but we know that affidavit is subject to  
19 cross-examination of our client at trial, so we have to make  
20 sure --

21 THE COURT: Only if your client testifies at trial.

22 MS. CHURCH: Correct.

23 THE COURT: And so, what happens is, you file an  
24 affidavit, and then you effectively withdraw it as a tactical  
25 choice.

1 MS. CHURCH: We can't, though.

2 THE COURT: Sure you can. You do not put the  
3 defendant on.

4 So, what you have done is you have obtained a basis,  
5 as you say -- you have to have an affidavit to have a Motion to  
6 Suppress hearing. You filed an affidavit, you got the Motion  
7 to Suppress hearing, and never intended to permit the defendant  
8 to be examined, even within the confines of immunity that is  
9 provided in a Motion to Suppress. That is what I mean about an  
10 illusory affidavit. It is an affidavit that is here today,  
11 gone tomorrow, a bait and switch is I think not an unfair way  
12 of saying that.

13 MS. CHURCH: But it would be different, your Honor, if  
14 it were not a case where the Government had the burden. So,  
15 the Government clearly has the burden. They clearly have to go  
16 forward to prove the voluntariness of these statements. The  
17 defendant needs to just raise enough of an issue to obtain a  
18 trial. That is the standard procedure that is followed.

19 THE COURT: That is a burden, and that is called the  
20 "burden of production," and if the burden of production is  
21 illusory, then it has not been met, and it is illusory if it  
22 is here today and gone tomorrow.

23 So, that is the conundrum. I understand your position  
24 that you can file an affidavit and you do not have to back it  
25 up, but that is not my position with respect to that. And that

1 is what is fundamental for purposes of having a Motion to  
2 Suppress hearing.

3 MS. CHURCH: And, your Honor, again, we are starting  
4 to go around a little bit in a circle here, but --

5 THE COURT: At least one of us is.

6 MS. CHURCH: -- we are not discussing not backing up  
7 the affidavit. We are discussing expecting the agents who  
8 conducted these interrogations to get on the stand and testify  
9 truthfully as to what occurred during the course of these  
10 interrogations.

11 THE COURT: Now, what is your good-faith basis for  
12 saying that you will, through the testimony of those agents, be  
13 able to establish lack of voluntariness? Point me to the 302s  
14 that do that, point me to some statements that do that. That  
15 is the discussion I had with Mr. Wooldridge on the hypothetical  
16 of the agent who somewhere says, "I know what I said in my 302,  
17 but that is not what happened."

18 MS. CHURCH: Again, those 302s are prepared -- as  
19 every agent will testify in every case, they are prepared --

20 THE COURT: I am asking you to show me where I can  
21 find in those 302s that this was not voluntary.

22 MS. CHURCH: I think our client went through a very  
23 long outline of what happened, but this was an interrogation of  
24 our client --

25 THE COURT: I think it would be helpful to avoid going

1 around in circles.

2 MS. CHURCH: No.

3 THE COURT: Just a moment. To answer the question.  
4 Where in the 302s am I going to find this?

5 MS. CHURCH: In the 302s you will hear the agents  
6 admit that they interrogated our client over the course of many  
7 different days, that they came up on one occasion at 4:00 in  
8 morning, asked him to come outside of his house in the middle  
9 of the night, that they repeatedly came after him over and over  
10 again, and then on the last day in the last statement conducted  
11 an extensive, I believe four- or five-hour interview.

12 That is just what the 302s say. That is not even what  
13 we expect to obtain out of the cross-examination.

14 THE COURT: What is the basis for your expectation  
15 that there is going to be something different from that?

16 MS. CHURCH: Your Honor, in every case I have ever  
17 tried there has been something different. There has been a  
18 supplementation by agents. There has been, "Well, I didn't  
19 really mean it that way." Otherwise, then why do we have a  
20 trial? Why don't we just put the police reports in and let the  
21 jury decide based on the police reports. That is the essence  
22 of courtroom advocacy and cross-examination.

23 THE COURT: It certainly is, and now we are talking  
24 about how we use the process of Motions to Suppress. Of course  
25 that is part of the trial. It is putting someone on and

1 letting them be cross-examined. But if nobody comes on because  
2 they withdraw their affidavit, then there is not a foundation  
3 for it. That is where I am on this.

4 Saying that, "We think we can ask some questions and  
5 maybe we will be successful," is not enough. That is not a  
6 good-faith basis. Looking at someone and saying, "I know what  
7 he said, but he is going to say the opposite because sometimes  
8 in trials people say the opposite," is not enough to meet your  
9 burden.

10 MS. CHURCH: And I would suggest, your Honor, that  
11 this case is a little different from kind of a regular case  
12 where the defendant writes an affidavit that is absolutely  
13 contradictory with everything that is in the 302s, and it's a  
14 question of who is telling the truth. The defendant's  
15 affidavit is not outside the realm of possibility based on what  
16 is in the 302s. In fact, it's largely consistent. So, again  
17 it's not illusory in the sense that it's out from left field.  
18 There is a lot of what he says in his affidavit that is  
19 consistent with the 302.

20 THE COURT: Right. And that is why I suppose  
21 Mr. Capin argued, not without force, that that affidavit may  
22 not be sufficient itself.

23 But taking a broad view, I am prepared to permit this  
24 case to go forward on a Motion to Suppress, if we have an  
25 affidavit that the defendant will stand behind; and the way in

1 which I have defined "stand behind" is permit himself to be  
2 subject to cross-examination in the context of the Motion to  
3 Suppress with the immunity that is provided for a defendant.  
4 It is not complete immunity, you are absolutely right. He can  
5 be subject to cross-examination if he testifies at trial.

6 But without involving myself in trial choices,  
7 strategic choices at trial, I think it is not likely that  
8 someone who will not testify under the immunity provided by a  
9 Motion to Suppress will testify at trial. Maybe it could  
10 change, maybe not. But we are talking about what you get on a  
11 Motion to Suppress, that is what we are talking about right  
12 now, and what you need to do to get a Motion to Suppress, and I  
13 have suggested, as I have indicated, that you get it if you can  
14 supply an affidavit that is supportable and is going to remain  
15 supportable for purposes of examination. Otherwise, I will  
16 look at this without consideration of the affidavit to decide  
17 whether or not there is sufficient evidence in the record to  
18 raise a question that has to be resolved in a  
19 Motion to Suppress before trial.

20 I am not sure that counsel has completed.

21 MR. STAHL: I'm sorry.

22 THE COURT: Is there anything further that you wanted  
23 to raise?

24 MS. CHURCH: No. Note my objection, your Honor.

25 THE COURT: All right.



1 MR. STAHL: Your Honor, I just have two quick points,  
2 and then a point of clarification for your Honor again.

3 THE COURT: Sure.

4 MR. STAHL: I want to go back for a second. It's the  
5 Government's burden to prove that there was an exception to the  
6 warrant requirement and that there were exigent circumstances.  
7 We are focusing so far on the discussion of the defendant's  
8 knowledge as to voluntariness and the circumstances, but the  
9 defendant doesn't have knowledge to what Ms. Siegmann put in  
10 her brief.

11 We now know, according to unsworn statements with  
12 nothing but good faith of counsel going forward, that there was  
13 some sort of indications that Jahar might have been in the  
14 apartment, that Jahar was close to the apartment, that a phone  
15 was pinging, that a hostage rescue team out of Quantico  
16 presumably came up, a Hostage Rescue Team was authorized by the  
17 Director of the FBI himself. We have all these things, and  
18 it's the Government that has the knowledge, we don't, of how  
19 that came about, and what was the exigency.

20 Why wasn't a search warrant obtained? They started  
21 gathering this information, we don't know for sure, but  
22 according to the papers, again unsworn, sometime earlier that  
23 morning, 6:00 in the morning, or the night before, and then  
24 they had surveillance.

25 THE COURT: If I may interrupt you, you have

1 identified a discrete category of material that may be the  
2 subject of a Motion to Suppress. That is to say, it does not  
3 depend upon the testimony of the defendant to explore it. That  
4 is, I guess, the kind of -- it is a little much to call this a  
5 Terry stop, but the Terry stop quality of the initial encounter  
6 at Carriage Road. That may be carved out separately, and I  
7 mean to do that once we get to the point of what is left if we  
8 do not have these affidavits.

9 MR. STAHL: So, that is one part. And then, if we  
10 look through the 302s, which is what we have, and we now have  
11 from last evening provided to us some e-mails now between  
12 agents working on this portion of the case and interrogating  
13 these individuals and doing the searches. We now have some of  
14 their e-mails provided to us about timing and about different  
15 issues.

16 So, we now have a little bit more, but we still don't  
17 have anything under oath from the Government as to the  
18 voluntariness of the statements either. So, we go back to we  
19 have what is the exigency and then what are the circumstances  
20 of their interrogation? We have some times only on the Miranda  
21 forms. Then we have some general comments in 302s. They spend  
22 very short shrift, just a couple of lines, about how, a couple  
23 of lines about how the people were Mirandized, supposedly, and  
24 then we go into pages and pages of other things, and then we go  
25 into, "We nicely drive them home afterwards, and then we see

1 some more things." I mean, that's all we have. So, we don't  
2 have any information or testimony from the 302s as to the exact  
3 circumstances that the Government even claims went into those  
4 circumstances.

5 So, that leads me to -- my question, then, is if we  
6 are doing this order where I will represent, and your Honor has  
7 graciously given me more time to then think about that, is if  
8 the Government goes first, do we get to cross-examine those  
9 witnesses as we go along, as we would normally do, limited to  
10 the relevant issues -- this is not a fishing expedition for  
11 trial. This is going strictly to those discrete areas that we  
12 have outlined in our brief. Or was your Honor saying before  
13 that the Government would do the direct, you would hear that,  
14 we would not cross and then the defendant --

15 THE COURT: No, no.

16 MR. STAHL: Okay. If I misunderstood, that's fine.

17 THE COURT: If I was not clear, I thought I was, but  
18 of course you get to cross-examine limited to the issues that  
19 are in play in this case.

20 MR. STAHL: That are relevant, yes. Okay. All right.  
21 That cleared it up. I completely misunderstood that.

22 THE COURT: Does the Government have anything to  
23 offer?

24 MS. SIEGMANN: Your Honor, just from what we have  
25 heard today, it sounds like Mr. Tazhayakov and Mr. Phillipos

1 are now withdrawing their affidavits.

2 THE COURT: Well, they are not standing behind them.  
3 I suspect they would not say that they are withdrawing, but I  
4 view that as effectively withdrawing their affidavit, because  
5 they will not permit that affidavit to be the subject of  
6 cross-examination.

7 MS. SIEGMANN: And, yes, last night in advance of the  
8 hearing we produced Jencks materials for witnesses that we  
9 thought might be testifying today and we weren't sure if they  
10 were being called as Government witnesses or defense witnesses  
11 so that we produced those in advance of the case. And we do  
12 stand by every statement of fact in our brief, and we will be  
13 able to call witnesses and prove those to the Court.

14 THE COURT: What does that mean? Now you want to have  
15 a hearing on the Motion to Suppress?

16 MS. SIEGMANN: No, we would only actually want a  
17 hearing if -- right now it sounds like the only person -- I  
18 didn't hear definitively from Mr. Stahl whether they are going  
19 to stand by the affidavit and have their client subject to  
20 cross-examination. But if that's the case, then the hearing  
21 would only be as to Mr. Kadyrbayev and not as to the two --

22 THE COURT: There are other dimensions of this, which  
23 is the foundation for a Terry stop, which is established  
24 through the 302s. That is, agents say that they had all of  
25 this information about the locus being a place that they were

1 concerned might be where Mr. Tsarnaev was then located. That  
2 is not something that their affidavits can deal with. So, the  
3 question then becomes do we have a hearing on that, or is the  
4 Government satisfied to simply rest on the state of the  
5 submissions, which I will permit to be updated with affidavits  
6 saying that they are truthful?

7 MS. SIEGMANN: With regards to the Terry stop, as the  
8 Government indicated in its papers, we are not relying upon the  
9 exigent -- anything that was said during the exigent search by  
10 the defendants. The issue with the Terry stop was just to  
11 prove that the defendants were not unlawfully arrested at the  
12 time that they were taken.

13 THE COURT: So, I understand the Government to be of  
14 the view that, "We are not using any of these statements. As a  
15 consequence, we do not need this hearing."

16 MS. SIEGMANN: And they were subsequently Mirandized  
17 at the Barracks before they confessed to the crimes charged.

18 THE COURT: And you understand that all of this will  
19 have to be resolved at trial, that is, independently, the  
20 question of voluntariness, at trial after jeopardy has  
21 attached?

22 MS. SIEGMANN: Yes, your Honor, we understand that.

23 THE COURT: All right.

24 So, do you want to take additional time, Mr. Stahl?

25 MR. STAHL: Yes.

1 THE COURT: As I understand it, unless I hear  
2 something further from Mr. Wooldridge, or Mr. Demissie, or  
3 Ms. Church, that the defendants will not permit examination on  
4 the affidavit?

5 MR. WOOLDRIDGE: Just one issue I had, your Honor.  
6 Just for clarification, did I hear the Government correctly  
7 that they are going to submit affidavits in support of the  
8 factual allegations?

9 THE COURT: No, you did not hear them say that. You  
10 heard me say that I would afford the opportunity to do so.

11 MR. WOOLDRIDGE: And I did hear them correct that they  
12 stand by the facts alleged in their opposition papers?

13 MS. SIEGMANN: Yes, your Honor. As I indicated, that  
14 we would call witnesses, if we were going to have a hearing, to  
15 support every fact in that brief.

16 THE COURT: I'm sorry, Mr. Demissie. I think this is  
17 a second round of replies.

18 MR. DEMISSIE: Yes, your Honor. I just want to  
19 clarify we stand by the affidavit we submitted. We simply  
20 object to the requirement that we have to make the decision to  
21 put on our client prior to the Government meeting its burden of  
22 proof, and we just ask the Court to note that objection, and we  
23 will obviously address the issue at trial, as your Honor  
24 suggested.

25 THE COURT: I understand that that is the case for

1 both, and I just want to be sure that in the case of both  
2 Mr. Tazhayakov and Mr. Phillipos you do not suggest that you  
3 have laid a foundation for a Motion to Suppress other than  
4 through the affidavit, that there is anywhere in the evidence  
5 in this case that would support your Motion to Suppress, the  
6 foundation for your Motion to Suppress, of involuntariness.

7 MR. DEMISSIE: Your Honor, I don't want to belabor the  
8 issue; I think my co-counsel addressed it.

9 But we believe that the affidavit raised sufficient  
10 facts that made out a *prima facie* case, and the procedure the  
11 Court should follow, and I understand your Honor's position, is  
12 then to require the Government to meet its burden of proof,  
13 allow the defendant at *that* point, once the Government rests,  
14 to decide whether or not to submit additional evidence by way  
15 of testimony or additional witnesses.

16 We believe we have met a *prima facie* case. We are not  
17 withdrawing the affidavit, we are standing by it, but if the  
18 Court decides that the only way we can proceed is by indicating  
19 at this point whether or not our client would take the stand,  
20 we are not willing to make that commitment.

21 THE COURT: I understand your response.

22 Mr. Wooldridge, anything further?

23 MR. WOOLDRIDGE: The only thing, your Honor, I was  
24 thinking, and I don't have the immunized witness's deposition  
25 here with me, I would like to be able to review that and submit

1 some of that testimony to your Honor.

2 THE COURT: Well, what I think, then --

3 MR. WOOLDRIDGE: See if that would be enough for your  
4 Honor to say I have met my burden of production.

5 THE COURT: Because I have carved out this whole week  
6 to have these hearings.

7 MR. WOOLDRIDGE: I understand, Judge.

8 THE COURT: I am kind of surprised that the defendants  
9 have taken the position that they take concerning this, but  
10 that is their choice, or, as I say, tactic. But I will review  
11 anything further that you offer in support like that --

12 MR. WOOLDRIDGE: Thank you, your Honor.

13 THE COURT: -- to support having some sort of  
14 evidentiary hearing on a Motion to Suppress.

15 MR. WOOLDRIDGE: Okay.

16 THE COURT: But I really think I want it by the end of  
17 the day here. I mean, it is one deposition, you took it so,  
18 you can show me what supports it.

19 MR. WOOLDRIDGE: Thank you, your Honor.

20 THE COURT: All right. So, we will take another  
21 break. How long do you think you need here?

22 MR. STAHL: Just, if I could have till 12:00, your  
23 Honor?

24 THE COURT: Sure.

25 MR. STAHL: Your Honor, just so the record is



1 complete, I don't know your courtroom procedure. I join in the  
2 other defense counsels' motions.

3 THE COURT: You are standing alone on this. There is  
4 no joinder on this.

5 MR. STAHL: All right. So, then I join in -- you are  
6 saying there is no automatic joinder, so I am saying I join in  
7 Mr. Demissie's --

8 THE COURT: But to the degree that it applies, and it  
9 does not, you are making an individual determination regarding  
10 this defendant and what position you take. You do not get to  
11 join in that objection, unless you individually raise it.

12 MR. STAHL: Well, your Honor, I am individually  
13 raising that I also object that the defendant has to make a  
14 commitment now to your Honor to testify and be subject to cross  
15 at the end of the Government's presentation without seeing  
16 whether it's necessary or not and committing to that in  
17 advance. I understand that if I say we are going to do that  
18 and go forward, that's what we're going to do. I think I still  
19 have a right to object for the appellate record that your Honor  
20 is telling me I must do it that way, and there's a shifting of  
21 the burden.

22 THE COURT: That is noted. It is not quite what was  
23 said as the foundation. What was said is that there is an  
24 inadequate foundation for this Motion to Suppress, having a  
25 hearing on this Motion to Suppress, unless the affidavit is

1 considered. The affidavit can only be considered if there is a  
2 commitment to permit it to be examined. If there is not a  
3 commitment to permit it to be examined, cross-examined, then it  
4 is illusory, as far as I am concerned.

5 MR. STAHL: I understand your Honor's ruling, and I  
6 would simply note for the record that I don't believe it's  
7 illusory. I think your Honor can give it less weight, but it  
8 still is admissible, and it's still a fact to be considered,  
9 but it goes to the weight --

10 THE COURT: Whenever there is a factual dispute,  
11 virtually whenever -- there are modest circumstances in which  
12 this changes -- I want to hear the witnesses. I am being asked  
13 to make a determination with respect to voluntariness. I want  
14 to be sure that I am hearing all of the witnesses, and I want  
15 to be sure that there is a foundation for someone to ask for it  
16 that is not designed to advance a discovery initiative that is  
17 not authorized by the Federal Rules.

18 MR. STAHL: I understand, your Honor.

19 THE COURT: If you want to take over the lunch period,  
20 that is fine. I am not trying to force this issue any more  
21 than that.

22 MR. STAHL: No. That's very generous, your Honor. I  
23 would take you up on that. I didn't want to push my luck, but  
24 that would be good.

25 THE COURT: Well, it is no longer a matter of luck; it

1 is a matter of whether or not you have got something  
2 persuasive. If it is 12:30, do you want that? I am not  
3 pressing beyond the fact that if we are going to have a hearing  
4 I would like to have the hearing.

5 MR. STAHL: Yes, your Honor. If this is going to be  
6 our lunch break, I would just ask for the full hour.

7 THE COURT: So, we will be back here at 12:45.

8 MR. STAHL: Thank you, your Honor.

9 THE COURT: And those who wish to participate will be  
10 here at 12:45. If they are not, then the matter is going  
11 forward in their absence.

12 THE CLERK: All rise.

13 (The Honorable Court exited the courtroom at 11:40 p.m.)

14 (Lunch recess taken)

15 THE CLERK: All rise.

16 (The Honorable Court entered the courtroom at 12:50 p.m.)

17 THE CLERK: This Honorable Court is back in session.  
18 You may be seated.

19 THE COURT: So, Mr. Stahl, where are we?

20 MR. STAHL: Yes, your Honor. We are prepared to  
21 proceed.

22 THE COURT: So, let's talk about the -- although, I  
23 guess we do not have to reach it today, the question of the  
24 subpoenas.

25 MR. STAHL: No, your Honor. I subpoenaed the agents

1 and what I thought were relevant documents to what they would  
2 be testifying about, and I presumed that when we first  
3 discussed this I think back in January that I would be putting  
4 the agents on. So, I wanted to make sure that, number one,  
5 they were here and available, and, number two, that they had  
6 the documents. The Government has started to provide us some  
7 documents. I am sure as things come up we will have other  
8 things. So, I don't think it's an issue right now.

9 THE COURT: All right. So, how do you want to proceed  
10 with respect to Mr. Kadyrbayev's affidavit? I indicated a  
11 willingness to receive the affidavit as direct testimony. You  
12 indicated you might want to expand on some of the issues.

13 MR. STAHL: Yes. I would like to proceed where the  
14 Government puts on their agents. They have talked about who is  
15 going first. It will be Agent Walker. At cross, we will hold  
16 Mr. Kadyrbayev to the end. I will do some direct in addition  
17 to the affidavit, just to highlight some things and to bring  
18 some things out, and then, pursuant to your Honor's ruling at  
19 the time, whether he needs to be crossed, and then that's it.

20 THE COURT: So, let me, then, turn to the procedures.  
21 I understand that there may be some further submission on  
22 behalf of Mr. Tazhayakov.

23 MR. WOOLDRIDGE: Of course, your Honor.

24 THE COURT: I am not sure the people who practice  
25 principally in the Second Circuit would understand this

1 reference, but the way in which I am going to treat the  
2 question of voluntariness is in the cases of those who are not  
3 submitting something further, or whatever they submit is  
4 insufficient, is what we call a Petrozziello determination. At  
5 the conclusion of all of the evidence in the case -- it arises  
6 out of a case called United States v. Petrozziello, but that is  
7 the treatment of co-conspirator hearsay -- a judge in the First  
8 Circuit is required to make a finding, if asked, to make a  
9 finding as to the admissibility of co-conspirator hearsay.  
10 Generally it is made at the conclusion of all of the evidence,  
11 but sometimes the Government wants to get that clarified  
12 before.

13 In any event, here the Government has not indicated a  
14 desire to have this clarified before the conclusion of all of  
15 the evidence in the case, and that is when I will make the  
16 determination with respect to voluntariness. I emphasize what  
17 I have said before. If I find that those statements are not  
18 voluntary, I will order a mistrial, I will consider it to be on  
19 the Government's back, and, as a consequence, there will be no  
20 retrial, or at least as far as I am concerned there is no  
21 retrial on it. So, everybody understands the rules of the game  
22 with respect to this. All right?

23 MR. WOOLDRIDGE: Yes, Judge.

24 THE COURT: Mr. Demissie, similarly?

25 MR. DEMISSIE: Yes.

1 MR. STAHL: I always think you are pointing at me.

2 THE COURT: No. There is a guilty mind at work.

3 (Laughter)

4 MR. DEMISSIE: So, I just take it what you just said  
5 applies to my client?

6 THE COURT: Yes, it does as well. There are a couple  
7 of *ex parte* submissions that some of the parties have made. I  
8 do not think I need to deal with them immediately now.

9 MR. DEMISSIE: No, your Honor.

10 THE COURT: I assume that both counsel for  
11 Mr. Tazhayakov will be remaining and also Mr. Phillipos and his  
12 counsel will be remaining during these examinations. The  
13 examination will be conducted only by Mr. Stahl. All right?

14 MR. DEMISSIE: Yes.

15 MS. SIEGMANN: That was going to be my question.

16 MR. WOOLDRIDGE: Yes, your Honor.

17 MS. SIEGMANN: Your Honor, just some clarification on  
18 one issue. The exigent search and then the Terry stop. The  
19 circumstances were very similar for both Kadyrbayev and  
20 Tazhayakov, and the question the Government would pose is, if  
21 you are making a determination concerning Kadyrbayev that the  
22 Government would, at least up to the point of the Miranda,  
23 request a decision be made as to both, up to that point.

24 THE COURT: Only if they both participate.

25 MS. SIEGMANN: And if the Government asks for that to

1 be done, just for that portion of it, we wouldn't be calling  
2 witnesses on the Miranda issue with regards to Tazhayakov, just  
3 at the initial justification for the Terry stop, and that would  
4 only allow Mr. Tazhayakov to cross-examination on that issue.  
5 Would that be what the judge would allow?

6 THE COURT: Yes, and so would I. Both the judge  
7 and I.

8 (Laughter)

9 MS. SIEGMANN: No. What you would allow, your Honor.

10 THE COURT: Right.

11 MS. SIEGMANN: One second.

12 So, I think that it makes sense to do it that way,  
13 because since we are presenting the same testimony that we  
14 would, because the witness, Special Agent John Walker, will be  
15 testifying as to the circumstances as to both defendants at the  
16 scene on that day in question, but we wouldn't be asking the  
17 Court for an advanced ruling on the Miranda waiver.

18 THE COURT: Does that work for you, Mr. Wooldridge?

19 MR. WOOLDRIDGE: That's fine, your Honor.

20 THE COURT: All right. So, that is how we will  
21 proceed, then.

22 MR. CAPIN: One further clarification. Will the Court  
23 be ruling, then, with regard to Kadyrbayev, who is fulsomely  
24 participating, on the question of voluntariness of his  
25 confession at this juncture?

1 THE COURT: Yes.

2 MR. CAPIN: Thank you.

3 THE COURT: Now, he has a right to raise it again at  
4 trial.

5 MR. CAPIN: Understood.

6 THE COURT: And I will think about it at trial, and it  
7 may be that the testimony at trial is different than it is  
8 here. But he has asked for a Motion to Suppress. He has met  
9 the foundational requirements, unlike, in my view, the other  
10 two defendants. So, he is entitled to the Motion to Suppress  
11 determination. He is also entitled to the determination at  
12 trial, as are all three defendants at that point.

13 So, what I understand is I have before me the  
14 affidavit of Mr. Kadyrbayev, and the Government can call its  
15 first witness.

16 MS. SIEGMANN: The Government calls Special Agent John  
17 Walker to the witness stand.

18 SPECIAL AGENT JOHN WALKER, DULY SWORN BY THE CLERK

19 THE CLERK: Please state your full name, spelling your  
20 last.

21 THE WITNESS: My name is John Walker, W-A-L-K-E-R.

22 MR. STAHL: Excuse me, your Honor. I just want to  
23 make sure. I did talk to the Government before we started  
24 about sequestration of witnesses. I want to make sure no other  
25 FBI agents are in the room that will be testifying.



1 MR. CAPIN: Agent Quinn.

2 THE COURT: I will look to the parties to police this,  
3 but it is any person -- that there has been a request for  
4 sequestration, I guess, and any person whose reasonable belief  
5 is they are going to be a witness in the case should be out of  
6 the courtroom, except, of course, obviously, the defendant.

7 DIRECT EXAMINATION

8 BY MS. SIEGMANN:

9 Q. Sir, could you tell us how you're employed.

10 A. I'm a Special Agent of the Federal Bureau of  
11 Investigation.

12 Q. How long have you been employed by the Federal Bureau of  
13 Investigation?

14 A. In August I will have been employed in that capacity for  
15 23 years.

16 Q. What is your current assignment?

17 A. I am assigned to a Criminal Investigative Squad of the  
18 Boston Division of the FBI, but for the past 13 months I've  
19 been effectively seconded to the Boston Marathon Bombings Task  
20 Force.

21 Q. Sir, can you tell us what the JTTF is?

22 A. The JTTF, the Joint Terrorism Task Force, one of which is  
23 resident here in Boston, is one of 56 or more Terrorism Task  
24 Forces that the FBI established with multi-agency participation  
25 in order to investigate most all, or perhaps all, of the

1 terrorism complaints, cases that arise in the course of our  
2 work.

3 Q. You indicated a moment ago that you have close to 23  
4 years' experience as an FBI Agent. Could you briefly describe  
5 what positions you've held over that 23 years as an FBI Agent.

6 A. For my first six years I was assigned to a small office in  
7 Oregon where I primarily investigated violations of -- violent  
8 crimes violations and domestic terrorism violations.

9           Thereafter, for 2 1/2 years I investigated public  
10 corruption matters arising from the 1996 Presidential Election  
11 cycle. I was promoted to a position in the Criminal  
12 Investigator Division, the Violent Crimes and Major Offenders  
13 Section at FBI headquarters. A couple of years later I was  
14 promoted to a field supervisory position here in Boston, where  
15 I supervised a squad of the Boston Joint Terrorism Task Force.

16           About three years later I started effectively six  
17 years of overseas assignments for the FBI, the last portion of  
18 which I was resident in Western Europe, and returned to Boston  
19 about three years ago and, as I mentioned, have been employed  
20 for a little more than a year with regard to the Marathon  
21 investigation generally.

22 Q. Have you ever served in any capacity as an emergency  
23 management or in crisis management for the FBI?

24 A. I have. When I was on the JTTF, I had responsibility. My  
25 portfolio, that of my squad, was both domestic terrorism and

1 counterterrorism preparedness. In that role I was the  
2 Division's Crisis Management Coordinator. I supervised various  
3 of the critical incident response elements in the Division,  
4 Special Agent Bomb Technicians, Hazardous Materials Response  
5 Team, Evidence Response Team and so forth.

6 I also in that role supervised our counterterrorism  
7 preparedness for large-scale events that might be susceptible  
8 to acts of terrorism, including the Boston Marathons that  
9 occurred during my supervision, the 2004 Democratic National  
10 Convention. I supervised the FBI's about a two-year effort  
11 building up to that. So, that would answer it.

12 Q. So, before the Boston Marathon bombing had you worked on  
13 any other cases that involved attacks that resulted in  
14 fatalities?

15 A. Yes.

16 Q. And could you just briefly describe those instances.

17 A. From the explosion of the Murrah Building in Oklahoma  
18 City, to notably the first and second World Trade Center  
19 bombings, every agent in the FBI, including myself, was working  
20 leads in that regard. When 9/11 occurred I was in Washington.  
21 I spent the first days in our Strategic Information and  
22 Operations Center, because I had a responsibility criminally  
23 for the Crime Aboard Aircraft Program for the FBI. When I came  
24 to Boston I began a national security profile in terrorism.

25 Most of my work overseas for just shy of six years,

1 the vast bulk of it was also in the national security arena,  
2 although not all counterterrorism, but the majority of it was.

3 Q. And, sir, over your 23 years of experience, how many  
4 interviews would you estimate you have conducted?

5 A. Well over a thousand.

6 Q. Now, directing your attention to the week of the Marathon  
7 bombing, I would like to go through and discuss what knowledge  
8 and what information the FBI knew at the time that they  
9 encountered the defendants.

10 So, going back at 2:49 p.m. on April 15th, 2013, what  
11 happened?

12 A. Two explosive devices detonated in close succession on  
13 Boylston Street in Boston, killing three people and seriously  
14 injuring, maiming approximately 260.

15 Q. How soon after the bombings did the investigation begin?

16 A. Immediately.

17 Q. Were command posts set up?

18 A. A command post was established for a little less than a  
19 day. A unified command was set up, and an initial command post  
20 was set up at the Weston Hotel in Boston. At the same time,  
21 the FBI set up its Joint Operations Center in Boston within  
22 moments of the explosions, and various other command posts were  
23 established throughout the week as developments warranted.

24 Q. What were the first investigative steps taken that day?

25 A. After establishment of the unified command and, naturally,

1 after life-saving efforts and without interfering with  
2 life-saving efforts, a perimeter was established in the  
3 Back Bay of Boston so that evidence could be secured. Evidence  
4 Response Teams, Special Agent Bomb Technicians, all manner of  
5 investigators at I think all three levels of Government. All  
6 three levels of Government began working in earnest in the Back  
7 Bay. We conducted immediately a logical investigation in a  
8 case of this kind. We sent out investigators from the FBI but  
9 also many -- all of our JTTF partners to each of the hospitals  
10 where victims were reported as having been transported. We  
11 began interviews of those victims, collecting physical evidence  
12 from those victims, to include their clothing, any remnants,  
13 potential remnants of explosive devices from their persons.

14 We brought in and began to establish a unified  
15 evidence response effort and team involving different agencies.  
16 We obtained various telephone data. On and on and on  
17 throughout the week, yes.

18 Q. So, it's fair to say there was a lot of work done to  
19 collect as much evidence as possible?

20 A. Yes.

21 Q. Who took the lead in the investigation, what agency?

22 A. Ultimately, the FBI assumed, with the acquiescence or the  
23 concurrence of that unified command, to assume a lead role for  
24 the investigation.

25 Q. But at all times this was a JTTF investigation, correct?

1 A. Yes.

2 Q. Law enforcement agencies were sharing information?

3 A. Yes.

4 Q. And after assisting the wounded, the next immediate  
5 concern was to prevent further loss of life; is that your  
6 understanding?

7 A. Precisely correct, yes.

8 Q. Is it fair to say that the FBI was concerned about other  
9 attack plans?

10 A. Yes.

11 Q. Can you explain to the Court what the concerns were at  
12 that time?

13 A. Immediately we had apprehension that a coordinated attack  
14 of this nature in and of itself was a sophisticated crime,  
15 sophisticated act of terrorism, if only because in a highly  
16 populated but also a highly secure area of a city like this, in  
17 a special event that had gone on for, obviously, decades, that  
18 persons were able to infiltrate the security setup in the area,  
19 they were able to explode, detonate devices with large-scale  
20 casualties. They were able to effectively flee the scene.

21 We did not, for instance, see -- as is often or can be  
22 the case with regard to suicide bombings, we did not, for  
23 instance, see decapitated heads on the scene. There were clues  
24 that led us to believe that the bomber had escaped the area.

25 And as the information was developed early on Monday, and

1 certainly was bolstered by the evidence collection on Tuesday  
2 at the scene, we developed a much closer sense of the types of  
3 devices and the level of sophistication, and, therefore, that  
4 it was likely not one person but likely two or more people or  
5 some broader conspiracy.

6 Q. You mentioned a moment ago that there was some preliminary  
7 analysis by Bomb Technicians about the bombs, the improvised  
8 explosive devices. Could you tell us what the preliminary  
9 analysis -- briefly, what did the preliminary analysis reveal  
10 as to how this bomb was constructed?

11 A. I will, with the caveat that the FBI has not but will soon  
12 issue its final exhaustive analysis and report of the devices  
13 themselves and how they were constructed and detonated.

14 But with regard to our working knowledge at the time,  
15 we had an understanding, based on evidence that we gathered at  
16 least by Tuesday, Tuesday morning, that there were two devices  
17 likely contained -- or the conveyance devices were likely  
18 backpacks; that the devices themselves were likely constructed  
19 of pressure cookers designed to delay the expansion of the  
20 gases sufficiently that the pressure would build up so much  
21 that it would multiply by an order of magnitude the impact of  
22 the explosions.

23 We gathered different components of those devices, to  
24 include shrapnel, generically, designed to kill and maim; and  
25 so, we had a fairly good understanding, including we had a

1 working hypothesis with regard to how the devices were  
2 detonated.

3 Q. And they were detonated remotely?

4 A. They were.

5 Q. So, how much of the FBI's resources were dedicated to this  
6 investigation during the week of April 15th, 2013?

7 A. There was no greater obligation of the FBI broadly  
8 throughout the World that week, throughout the entirety of the  
9 week. It was all hands on deck for the Boston Division. We  
10 were supplemented very early on and successively by specialized  
11 teams of Bomb Techs and people with different skill sets and  
12 evidence response, crisis management, from various divisions, a  
13 huge augmentation from the headquarters, and the Quantico  
14 Critical Incident Response Group Teams. But also from --  
15 increasingly as the week went on and was ramping up on  
16 Thursday, we began simply to receive more investigators, line  
17 investigators, from New York and New Haven and Albany and  
18 places to assist us and to keep us pressing forward.

19 Q. At approximately 5:00 p.m. on Thursday, April 18, 2013,  
20 what happened?

21 A. At approximately about 5:15 that day, on Thursday, the  
22 18th, the Special Agent in Charge of then -- the SAC of the  
23 Boston Division released photographs and sought the assistance  
24 of the public in identifying two men whom we believed were  
25 responsible for the bombings.



1 Q. And by 6:50 a.m. Friday morning, April 19th, had the  
2 suspected bombers in those photographs been identified?

3 A. By 6:50 a.m. the FBI was certainly aware of the identity  
4 of one of those persons, then deceased, and the FBI publicized  
5 the name of the second person in the photograph, colloquially  
6 referred to as "White Hat" or "Bomber Number Two." But, yes,  
7 we had.

8 Q. And how was it that the FBI was able to identify the  
9 individuals in those photographs?

10 A. We identified the first individual based on a positive  
11 comparison of his known fingerprints. A fingerprint from the  
12 decedent was transmitted to our facility in West Virginia, the  
13 repository for fingerprints, and within moments we had a  
14 positive identification on that person.

15 Q. Well, how was that person -- the decedent you are  
16 referring to was Tamerlan Tsarnaev, correct?

17 A. It is.

18 Q. How was that person killed?

19 A. Perhaps another caveat. I would not want to weigh in on a  
20 -- there may be some pending determination of that, but he came  
21 into --

22 MR. STAHL: I am going to object. I don't know what  
23 the relevance is of how Tamerlan was killed.

24 THE COURT: I sustain the objection.

25 MR. STAHL: The fact is he is deceased, and we can

1 move on.

2 THE COURT: I do not see it is relevant. If you are  
3 trying to bring out there was a fire fight, you can do that.

4 MS. SIEGMANN: Yes, your Honor. Then, I'll ask.

5 BY MS. SIEGMANN:

6 Q. Earlier that morning, on April 19th, had there been a fire  
7 fight in Watertown?

8 A. Yes.

9 Q. And who was believed to be involved in that fire fight?

10 A. We believe that Tamerlan Tsarnaev and his younger brother,  
11 Dzhokhar Tsarnaev, engaged in a violent confrontation with law  
12 enforcement, wherein they were shooting in the direction of  
13 police officers and lobbing improvised explosive devices at  
14 those police officers.

15 Q. And during that fire fight, Tamerlan Tsarnaev, at the  
16 conclusion of that fight, was actually deceased, correct?

17 A. Yes.

18 Q. And was law enforcement able to capture the younger  
19 brother, Dzhokhar Tsarnaev, during that fire fight?

20 A. No.

21 Q. So, by 6:50 a.m., after this fire fight on April 19th, did  
22 the FBI believe that the Tsarnaevs had committed any other  
23 violent crime?

24 A. Yes.

25 Q. What was that, Special Agent?

1 A. We believed at the time that they were responsible for the  
2 murder of a police officer in Cambridge at about 10:31 on the  
3 evening of Thursday, April 18. We believe they committed a  
4 carjacking, a violent crime, when they carjacked a getaway car,  
5 if you will. We believed at that time that they may have been  
6 involved and were involved in a robbery at the time in a  
7 convenience store, but we then thereafter believed they were  
8 involved in this violent confrontation in Watertown.

9 Q. How big of a threat did the FBI believe Dzhokhar Tsarnaev  
10 was on April 19th, 2013?

11 A. An enormous threat to the general public and to law  
12 enforcement seeking his apprehension, sufficiently so that our  
13 Government leaders considered it prudent to effectively shut  
14 down a major metropolitan area for 12 hours or more.

15 Q. As a result, were there any special instructions issued to  
16 law enforcement what to do if he was spotted?

17 A. There were special instructions given to law enforcement,  
18 including myself and my FBI colleagues, even with regard to how  
19 to conduct leads during that day, that we would, because of the  
20 perceived level of threat, even with -- we talked to many,  
21 many, hundreds of people during that week, and we began that  
22 morning to go out and talk to every conceivable person that we  
23 even thought knew Dzhokhar Tsarnaev. But we were instructed to  
24 do things in a manner that we don't normally do, for instance,  
25 telephoning ahead before knocking on a door, if you will,

1 because we did not know at the time -- we had within hours  
2 before identified persons we believed responsible for this  
3 bombing and other violent crimes.

4 And so, I don't know that I recall specific  
5 instruction with regard to what to do if we come upon the  
6 fugitive, if you will, but I don't think we needed to be told  
7 that. I would have exercised extraordinary caution.

8 Q. Well, after there was public -- the media was reporting  
9 who the individuals in the photographs were, Tamerlan and  
10 Dzhokhar Tsarnaev, did the FBI believe that now that's the only  
11 people that were involved in this bombing?

12 A. No, to the contrary. We believed that there were very  
13 likely more people involved, that there were possible cells.  
14 Our enormous and abiding focus was to ensure that we did not  
15 see a third bomb go off, if you will.

16 Q. So, how many resources were dedicated on April 19th, 2013  
17 into finding Dzhokhar Tsarnaev?

18 A. I have come to learn over the course of the last 13 months  
19 that there were thousands here in Massachusetts, and the leads  
20 likely spun around the World at that time, literally. The  
21 Legal Attaché Officers of the FBI in different places I know  
22 were engaged immediately. Again, I know of no -- nothing of  
23 greater moment during that year and in recent term of the FBI.  
24 It was of enormous significance of national consequence.

25 Q. Now, by the time the Tsarnaevs were publicly identified,

1 were any manhunts already underway?

2 A. Yes.

3 Q. And where was that?

4 A. There was a massive manhunt that was underway in  
5 Watertown, where a huge swath of a residential neighborhood was  
6 effectively cordoned off, and tactical teams were going house  
7 to house to effect his arrest.

8 Q. So, is it fair to say that on April 19th, 2013, finding  
9 Dzhokhar Tsarnaev and determining whether there were any other  
10 bombs, bombers, or conspirators, or other attack plans was an  
11 urgent public safety concern?

12 A. Without question.

13 Q. Special Agent, where were you on April 19th, 2013?

14 A. In the morning I was in Boston, and at or about 9:00 I was  
15 dispatched to New Bedford. Actually, North Dartmouth,  
16 Massachusetts, for a related investigation.

17 Q. So, you said you actually were sent to North Dartmouth?

18 A. Yes.

19 Q. Where, specifically?

20 A. I went to the Barracks of the Massachusetts State Police  
21 in North Dartmouth, Massachusetts.

22 Q. And what was the purpose that you were sent there?

23 A. I was to speak with a complainant who had said that he had  
24 gone to school at one point with the fugitive, Dzhokhar  
25 Tsarnaev, and it was one of hundreds of leads to, as I

1 described earlier, go out and develop lead information that  
2 could lead us to effecting the arrest.

3 Q. What did you determine that morning as to where  
4 Dzhokhar Tsarnaev went to school?

5 A. When I got down into the South Coast, if you will, I  
6 learned that, in fact, he was matriculated at the University of  
7 Massachusetts at Dartmouth, and as the morning went on it  
8 became clear that, in fact, he wasn't simply a former student  
9 or a sometimes student, but that he was a student there, and  
10 that the campus itself might be a locus for a search.

11 Q. So, did you actually eventually go to UMass Dartmouth that  
12 day?

13 A. I did.

14 Q. And when you arrived at UMass Dartmouth, what was going on  
15 there?

16 A. The campus was nearing completion of a total campus  
17 evacuation. The University had decided, for student and public  
18 safety, to shut down the University.

19 Q. In addition to being a student at the University, at UMass  
20 Dartmouth, were you provided any other information from the  
21 University about Tsarnaev on that day, April 19th?

22 A. I was.

23 Q. Can you describe what you learned from UMass Dartmouth  
24 from the administrators or the Police Department there?

25 A. Sure. I learned that Tsarnaev was a resident on campus in

1 a dormitory called "Pine Dale," and that, in fact, he was last  
2 thought to have gained access to that particular dormitory as  
3 late as 4:02 p.m. on Thursday, April 18th.

4 I learned later, but not too much later, we received a  
5 report on campus from the campus technology infrastructure that  
6 at 6:19 a.m. on the morning of Friday, April 19, that Tsarnaev  
7 had logged onto the system on campus. While I was determining  
8 whether that logon was remote or was -- would suggest that he  
9 was physically present on campus, I received a second report  
10 from campus authorities that he logged on and was thought to be  
11 physically present on campus at 6:21 a.m. that Friday.

12 Q. On the morning of April 19th, had the FBI received any  
13 information about telephones subscribed to Tsarnaev?

14 A. We had. We knew that Tsarnaev, Dzhokhar Tsarnaev,  
15 subscribed to four telephones with AT&T, and that the address  
16 that he provided and the address to which his telephone bills  
17 were sent was 69 Carriage Drive, New Bedford, Massachusetts.

18 One of those telephones was significant to us  
19 immediately, because the telephone showed enormous and  
20 continuing and temporally significant connectivity with the  
21 late Tamerlan Tsarnaev, including around the time of the  
22 bombings.

23 Almost as importantly for my work there that day, a  
24 second of the telephones again subscribed by Tsarnaev happened  
25 to show connectivity with Dzhokhar Tsarnaev a few hours before

1 the bombings on that Monday, April 15th. The other two phones  
2 showed little, if any, recent connectivity to either of the  
3 Tsarnaev brothers.

4 Q. Special Agent, was there a belief at the FBI at that time  
5 that telephones, mobile phones, were used during the execution  
6 of the bombing attack?

7 A. Yes.

8 Q. So, based upon that information, this telephone  
9 information that you had received, subscriber information, what  
10 did the FBI do next?

11 A. Well, we were naturally all week long very concerned with  
12 regard to phones, because, as I have mentioned, we suspected  
13 that phones were used in the general commission of the act of  
14 terrorism on the Monday. We were also interested in  
15 potentially exploiting intelligence from the phones to locate  
16 the fugitive Tsarnaev.

17 I was told, and it caused me to that morning leave the  
18 Barracks in North Dartmouth and proceed with all haste and with  
19 blue lights flashing over to the campus, because I received a  
20 call from the FBI Command Post in Boston that about 20 minutes  
21 earlier -- and the time I received it I thought about 10:40  
22 a.m. -- but about 20 minutes earlier that the second phone in  
23 question that I just mentioned had transmitted a message, and  
24 the report that I received was it transmitted a message to  
25 Russia, and that message had bounced off a tower located about



1 a mile from the campus at UMass Dartmouth.

2 So, I believed at the time that there was a stronger  
3 possibility that Tsarnaev may have actually eluded capture in  
4 Watertown and might be transmitting communications from down in  
5 the New Bedford/North Dartmouth area.

6 Q. Now, talking about this phone, were the last four digits  
7 9049?

8 A. Yes.

9 Q. And did you subsequently learn that that phone was used by  
10 one of the defendants?

11 A. I did.

12 Q. And which defendant was that?

13 A. Mr. Tazhayakov.

14 Q. And a moment ago you said approximately shortly after  
15 10:00 a.m. that one of the phones had sent a text message or  
16 had some activity with Russia?

17 A. Yes.

18 Q. How far was that tower that it bounced off from the  
19 defendants' apartment?

20 A. From the defendants' apartment it was -- and I know this  
21 because I mapped it out after the fact -- but it's  
22 approximately 900 meters.

23 Q. Now, what, if any, belief -- sorry. Strike that.

24 During the afternoon of April 19th, 2013, was the FBI  
25 able to determine the location of any of Tsarnaev's phones,

1 Dzhokhar Tsarnaev's phones?

2 A. Yes.

3 Q. And can you tell us what was learned that afternoon about  
4 where that phone was located?

5 A. We learned that the phone ending or having the suffix 9049  
6 was physically present within, because we could not see it on  
7 the outside, but within 69 Carriage Drive in New Bedford. It's  
8 a two-story, four-apartment building amidst a larger complex of  
9 similarly constructed buildings.

10 Q. So, based on that information, the FBI believed that one  
11 of Tsarnaev's phones was located in 69 Carriage Drive; is that  
12 what you said?

13 A. Yes.

14 Q. And did the FBI research that apartment, that address?

15 A. The FBI separately, including down in the South Coast, and  
16 I was witness to some of this, separately began developing  
17 intelligence with regard to the persons that we believed to be  
18 resident within an apartment at 69 Carriage, specifically  
19 within 69A Carriage, a first-floor apartment.

20 Q. And who did the FBI determine were the residents of the  
21 69A Carriage Drive apartment?

22 A. We knew at the time, including from Mr. Phillipos, that  
23 Mr. Kadyrbayev, a Dias Kadyrbayev and someone named Azamat, was  
24 a resident there, that they were Kazakhstan nationals, and that  
25 was our working knowledge at the time.

1 Q. And during the course of that afternoon, what, if  
2 anything, did you learn about the defendants and their  
3 relationship to Dzhokhar Tsarnaev?

4 A. We learned from their friends that they were very close  
5 friends or associates of Dzhokhar Tsarnaev. We learned from  
6 their friends that 69A Carriage was a frequent -- that Dzhokhar  
7 Tsarnaev frequently visited that apartment, and that people  
8 would see them coming back and forth between the school to that  
9 apartment.

10 Q. What did the Joint Terrorism Task Force learn that day  
11 about the immigration status of Dias Kadyrbayev?

12 A. We knew in the mid-afternoon of Friday, April 19th that  
13 Mr. Kadyrbayev had suffered revocation of his Student Visa.  
14 His F1 Visa had been revoked, and, therefore, we knew that he  
15 was unlawfully present within the United States. He was an  
16 overstay following Visa revocation.

17 Q. Were any Internet searches done on April 19th by anyone on  
18 the JTTF?

19 A. Many, many, many, including with regard to Mr. Kadyrbayev.  
20 In particular, we received at about 9:00 in the morning, we  
21 received intelligence from our U.S. Department of State that  
22 had been doing some logical Internet search, and they  
23 identified him. They provided us information suggesting that  
24 he was a close associate of Dzhokhar Tsarnaev. They indicated  
25 further that they found suspicious the fact that a photograph

1 had been somewhere on the Internet showing Dzhokhar Tsarnaev  
2 and Dias Kadyrbayev, but that photograph had been removed hours  
3 later.

4 So, with that information, an immediate lead was set,  
5 bearing officer-safety caution statements, and to locate and  
6 interview Kadyrbayev, because he may be at the two addresses  
7 given. One happened to be coincidentally in Watertown, but the  
8 second one was in Carriage Drive in New Bedford.

9 Q. So, did the FBI have any other information connecting  
10 Dzhokhar Tsarnaev to 69 Carriage Drive?

11 A. We did.

12 Q. Can you please describe that to the Court.

13 A. We received information from the Massachusetts State  
14 Police and its Fusion Center that on April 17 and April 18  
15 three Skype calls were made between Dzhokhar Tsarnaev and  
16 Tamerlan Tsarnaev, and that each of the three Skype  
17 communications was made from an Internet protocol address, an  
18 IP address, resolving to Dias Kadyrbayev at 69A Carriage Drive  
19 in New Bedford, Massachusetts.

20 Q. And based upon that information, did you or the FBI have a  
21 belief as to where Mr. Tsarnaev was on April 18th?

22 A. Yes. As of the afternoon of April 18, the FBI, the JTTF,  
23 Special Agent Walker, thought there to be a high probability  
24 that the fugitive was located within the apartment bearing the  
25 address 69A Carriage Drive in New Bedford.

1 Q. Did Tsarnaev also receive mail at 69A Carriage Drive?

2 A. He received his AT&T bill there.

3 Q. So, based upon all this information, what did the FBI do?

4 A. The FBI, as the information developed from the early part  
5 of the afternoon, decided it prudent to establish some type of  
6 a perimeter around the apartment, lest the fugitive, as we  
7 increasingly suspected was in the apartment, lest he flee, and  
8 we did that -- as the information hardened over the course of  
9 the afternoon, we hardened up the perimeter around the  
10 apartment.

11 That perimeter was almost exclusively the  
12 Massachusetts State Police, but we were working -- I was  
13 working in the unified command there at the -- we set up a  
14 unified command post at the library of UMass Dartmouth, and I  
15 was communicating and spent most of my day together, for  
16 instance, with the State Police Major, having geographic  
17 responsibility for that area, with the State Police Major  
18 having tactical responsibility for their tactical assets, and  
19 so we agreed that it would be prudent to set up the perimeter,  
20 and we did.

21 Q. And later that day was there a decision made as to whether  
22 to execute a search of that apartment?

23 A. Yes.

24 Q. And what was the reason that there was a search executed,  
25 a decision to search that apartment made?

1 A. Because we thought it highly probable that the fugitive,  
2 who had demonstrated enormous proclivity toward violent  
3 confrontation, was physically present in the apartment, that we  
4 believed, because of surveillance early in the afternoon, that  
5 he was probably still in the apartment, including with regard  
6 to the electronic emissions of the telephone that he subscribed  
7 to, and we were concerned as an agency, as a Task Force, as  
8 individuals there, that the more time that he had within a  
9 close space unbeknownst to -- hiding out there, that there was  
10 an increased threat of violence to the neighbors, to law  
11 enforcement.

12 Q. When you say "neighbors," was this a small apartment  
13 building that only had just one apartment, or were there  
14 numerous apartments within this complex?

15 A. The complex itself was large. The building itself is a  
16 four-unit, as I mentioned, two on the bottom level and two up  
17 top, but otherwise across the street are single-family homes.  
18 It's sort of a busy, close-in neighborhood there.

19 Q. So, it's a heavily populated residential area?

20 A. Yes, yes, yes.

21 Q. So, is it fair to say that there was a decision made to do  
22 an exigent warrantless search that day of the apartment?

23 A. Yes.

24 Q. Who made that decision at the FBI?

25 A. The Director of the FBI.

1 Q. And that decision was made so you could find a person who  
2 was believed to be armed and dangerous and had attacked the  
3 Boston Marathon, bombing and committed violence throughout the  
4 State; is that right?

5 A. That is my clear and direct inference. I obviously -- I  
6 knew what the facts were, and those were the facts as of the  
7 time that decision was made. So, yes, that's my clear  
8 inference.

9 Q. When the FBI Director made the decision to search the  
10 Carriage Drive apartment, where were you?

11 A. I was, again, at the library of UMass Dartmouth.

12 Q. Had you had any contact with the FBI's Hostage Rescue Team  
13 at that point?

14 A. I had.

15 Q. And what is the FBI's Hostage Rescue Team?

16 A. The Hostage Rescue Team, or HRT, is a large, full-time,  
17 highly professional tactical force that the FBI deploys when  
18 confronting its most significant criminal or terrorist threats.  
19 I say this at the risk of seeming to flatter the Agency. It is  
20 undoubtedly the World's finest Civilian Tactical Force. It  
21 includes members of the World's finest military tactical  
22 forces, and it has been employed in very, very high-level  
23 investigations over its 30-year history.

24 Q. Did they have any involvement in the search?

25 A. They executed -- yes. They were deployed to execute the

1 search of the apartment for Tsarnaev, yes.

2 Q. So, they went into the apartment to find Dzhokhar  
3 Tsarnaev?

4 A. Ultimately, yes.

5 Q. What role did you play in this search?

6 A. I didn't play any role in the search itself.

7 Q. Were you in the vicinity of the apartment when the search  
8 was conducted?

9 A. I was.

10 Q. And what role were you playing by being in the area?

11 A. I was there in entirely an investigative, in contrast to a  
12 tactical, capacity with the FBI. I deployed from the library  
13 where HRT -- where we briefed, and they briefed with a few  
14 local SWAT Teams that they integrated into their team in order  
15 to take perimeter duty. But I deployed from there with the  
16 thought that I would likely need to come in contact with  
17 Tsarnaev for investigative purposes as soon as he was safely  
18 arrested and had come into FBI custody.

19 Q. So, is it fair to say that you were acting in an  
20 investigative agent capacity at the scene?

21 A. Exclusively, yes.

22 Q. And how many other investigative agents were there present  
23 at 69 Carriage Drive that day?

24 A. Because of the suddenness of our deployment, I was the  
25 only, sole investigative body there at the scene. It was



1 otherwise a tactical element of HRT with -- again, they  
2 involved some other local tactical teams.

3 Q. When did you arrive at 69 Carriage Drive that day?

4 A. I arrived just behind HRT. We effectively rolled up  
5 together. I was in a vehicle driven -- a State Police vehicle  
6 with the two Majors from the State Police I just mentioned, as  
7 well as a ranking officer from the Rhode Island State Police.  
8 We staged about a block from the apartment, a block down on  
9 Carriage Drive.

10 Q. What happened after you and HRT had arrived at the scene?

11 A. The HRT pulled up effectively in front of the apartment on  
12 Carriage Drive. They deployed other SWAT Teams to establish a  
13 perimeter around the building in a good distance, in some  
14 instances, behind and to the side of the building, and then HRT  
15 called out using a megaphone. They called out the occupants of  
16 the building. They effectively called out Dzhokhar Tsarnaev  
17 and told him to exit the building.

18 Q. And what happened next?

19 A. Dzhokhar Tsarnaev did not exit the building.

20 Dzhokhar Tsarnaev was, obviously, not in the building.  
21 Three persons who were in the building did exit the building at  
22 the instruction of HRT.

23 Q. And, obviously, Special Agent Walker, you didn't know at  
24 the time that Dzhokhar Tsarnaev wasn't in the building, because  
25 you believed he was?

1 A. We firmly believed -- I firmly believed, and I know my  
2 Agency did, yes.

3 Q. Where were you standing when the people came out of the  
4 apartment?

5 A. I was a block away. Where was I standing?

6 Q. Yes.

7 A. First, I was sitting in the same police vehicle, and as  
8 the callout procedure was concluding, I went to the back of the  
9 police vehicle and donned my ballistic vest and my FBI raid  
10 jacket for purposes of identification and awaited contact from  
11 those on scene that it was appropriate for me to approach.

12 Q. So, what happened after the people came out of the  
13 apartment?

14 A. They were instructed to come out with their hands up.  
15 They were instructed to -- they followed the commands of the  
16 HRT in ensuring that they did not possess any weapons, to  
17 include explosives, and they were restrained by Hostage Rescue  
18 Team members with plastic flex cuffs, and then they were placed  
19 into three different unmarked vehicles. They may have been  
20 leased vehicles; I simply don't know. But I didn't recognize  
21 them as being FBI vehicles with radio packages and so forth.  
22 And those cars were situated on Carriage Drive.

23 Q. At that point, when they were pulled out of the apartment  
24 and they are restrained, did the FBI believe that these  
25 individuals, the defendants in question, were involved in

1 either the bombing or concealing Tsarnaev?

2 A. I thought it highly possible that, yes, in fact, but my  
3 immediate focus was to determine who was in the apartment,  
4 because at this point the apartment hadn't been cleared by FBI.  
5 We had simply called out. This was not a warrantless entry  
6 that was effected by a dynamic force into the apartment. That  
7 would have been foolhardy for obvious reasons. So, instead, we  
8 did a relatively -- for HRT what would have been a relatively  
9 routine, but the safest exercise, calling out the residents so  
10 that we had full command as they exited the premises.

11 Q. So, what happens after the occupants of the apartment are  
12 then restrained and put into unmarked vehicles?

13 A. I was called forward, if you will, and I began to speak  
14 with the three residents, three occupants of the apartment, and  
15 my colleagues in the HRT and my Special Agent Bomb Tech  
16 colleagues, the SABTs, there were two of them that were  
17 dispatched with HRT including because -- insofar as there may  
18 be explosives in the apartment, and they began the work of  
19 safely entering the apartment, determining whether the fugitive  
20 was there, and then ensuring that the apartment was secured  
21 from other hazards other than a person, namely explosives or  
22 components thereof.

23 Q. So, was there a preliminary or cursory inspection done of  
24 the apartment at that time to see if there were any bombs or  
25 explosives in it?

1 A. No, I don't believe that it was done immediately, and I  
2 don't think it would have been safe. So, I immediately began  
3 questioning intermittently and briefly and quickly and with  
4 enormous focus the residents who had come out of the apartment,  
5 namely, where was Dzhokhar Tsarnaev, was he in the apartment  
6 and, perhaps importantly, was there any thing, person within  
7 the apartment that might pose a threat to my colleagues who  
8 were preparing to enter the apartment.

9 Q. At this point, when you are questioning the occupants, how  
10 quickly were you able to identify who the occupants of the  
11 apartment were?

12 A. Immediately upon my first encounter with each of them.

13 Q. And at this point do you see two of the occupants that you  
14 spoke to that day in the courtroom?

15 A. I see -- yes, I see both of them.

16 Q. Can you name them for the Court?

17 A. Azamat Tazhayakov and Dias Kadyrbayev.

18 Q. And at that time on April 19th, when you are speaking to  
19 them in the unmarked vehicles, did you have any belief as to  
20 what threat was posed by them?

21 A. Yes. As I mentioned, I had both concern that they  
22 possessed information that might allow a quick resolution of  
23 our strong suspicion, strong belief that a fugitive potentially  
24 bearing arms and IEDs was inside the apartment. Separately, I  
25 came upon three people that I had never laid eyes on before,

1 and I naturally had heightened suspicion that they, having been  
2 described as so close to a terrorist, an accused terrorist,  
3 suspected terrorist, that suspected terrorist having been in  
4 that area 24 hours earlier, and that terrorist, that accused  
5 terrorist, excuse me, having been described as visiting that  
6 particular location on so many occasions, I naturally needed to  
7 rule out that they were either involved in the bombing itself  
8 or that they were involved in some manner in harboring the  
9 fugitive, because the fugitive naturally at this time was still  
10 a fugitive.

11 Q. Because this is at a time when you are still looking, the  
12 FBI is actively looking for a person that has committed  
13 multiple acts of violence in Massachusetts, correct?

14 A. We are both looking there actively in Watertown and  
15 throughout Massachusetts, but at the same time literally we are  
16 receiving different intelligence streams from New Bedford and  
17 North Dartmouth that the fugitive may be located in other areas  
18 there right at that time.

19 Q. At that exact time as the defendants had come out of the  
20 apartment, right?

21 A. While I am speaking with them we had -- yes, yes.

22 Q. And where in that vicinity were the reports that Tsarnaev  
23 might be?

24 A. Prior to, and perhaps after, but I'm aware that prior to  
25 intelligence that suggested to us that a device used by --

1 subscribed by Dzhokhar Tsarnaev was located and active within  
2 that particular apartment. We had similar information  
3 suggesting to us that another of the phones that was also  
4 subscribed by Tsarnaev was active at two locations about a  
5 quarter of a mile away, within the whole Carriage Road  
6 apartment complex.

7 Further afield, slightly, at UMass Dartmouth we  
8 received another, I believed to be erroneous, a false, in  
9 retrospect, indication that at or about 4:40 p.m. Dzhokhar  
10 Tsarnaev had again logged onto the UMass Dartmouth network I  
11 think specifically within the Physics Department. So, some  
12 tactical units at the University were deploying to that  
13 location. Ultimately, some of my colleagues on HRT left  
14 Carriage to respond there. Another group left to respond to  
15 basically a couple of streets away, because we thought that  
16 another phone was active there.

17 Q. So, is it fair to say that there was a lot of information  
18 that you and the FBI had at the time that pointed to the fact  
19 that Tsarnaev was in that general vicinity?

20 A. Yes.

21 Q. So, you indicated a few minutes ago that you started  
22 speaking to both defendants. And was there another individual  
23 that came out of the apartment as well?

24 A. There was.

25 Q. And who was that?

1 A. The girlfriend of Dias Kadyrbayev.

2 Q. And what was her name?

3 A. Her name is Bayan Kumaskali.

4 THE COURT: Ms. Siegmann, I am going to have to take a  
5 short break, because I have to make a telephone call at this  
6 point. So, we will take maybe five minutes.

7 THE CLERK: All rise.

8 (The Honorable Court exited the courtroom at 1:48 p.m.)

9 (Recess taken)

10 THE CLERK: All rise.

11 (The Honorable Court entered the courtroom at 1:54 p.m.)

12 THE CLERK: This Honorable Court is back in session.  
13 You may be seated.

14 MS. SIEGMANN: Your Honor, do you want me to go find  
15 counsel?

16 MR. DEMISSIE: I'll go.

17 MS. SIEGMANN: Okay.

18 THE COURT: You may proceed.

19 MS. SIEGMANN: Thank you, your Honor.

20 BY MS. SIEGMANN:

21 Q. Special Agent Walker, you indicated before the break that  
22 you had spoken to the defendants and Kadyrbayev's girlfriend in  
23 the vehicles. Do you remember?

24 A. Yes.

25 Q. Can you tell us who did you speak to first?

1 A. Ms. Kumaskali.

2 Q. Why did you choose to speak to her first?

3 A. At that point she was unknown to me, and I decided that I  
4 would speak with her first and Kadyrbayev last in order to  
5 develop information that I could best use when speaking with  
6 Mr. Tazhayakov and Mr. Kadyrbayev.

7 Q. Why did you decide to speak to the defendant Kadyrbayev  
8 last?

9 A. His name, of all the intelligence that we developed that  
10 day relative to Tazhayakov, I just had more suggesting that  
11 Kadyrbayev had a closer link to Tsarnaev, and so I wanted to  
12 start from the periphery and go to the core. I had a  
13 relatively short period of time to be speaking with them, so  
14 that's the order I chose.

15 Q. What information did you learn from Ms. Kumaskali that  
16 day?

17 A. I learned some basic identifiers. I needed to know who  
18 she was. She told me who she was. She told me a date of  
19 birth. I asked her where she lived. She told me she was a  
20 Kazakhstan national. She gave me an address in Almaty. She  
21 told me that she was the girlfriend of Dias Kadyrbayev. She  
22 told me that she was simply there for the weekend.

23 She told me that she, Tsarnaev, Kadyrbayev and  
24 Tazhayakov participated in a family plan, a calling plan with  
25 the mobile telephones, and she gave me Dias' telephone number.



1 Most importantly, and preliminarily, she told me that she did  
2 not know where Tsarnaev was located, and she did not know of  
3 any threat by person or thing that might cause injury to my  
4 colleagues preparing to enter the apartment.

5 Q. And then did you speak to both defendants?

6 A. I did.

7 Q. And were the questions that you posed to them similar?

8 A. Similar especially with regard to, "Where is Tsarnaev? Is  
9 he in your apartment? Are there threats? Are you telling me  
10 the truth? Is he in your apartment? Are there threats to my  
11 colleagues about to enter the apartment?"

12 Thereafter, because of, again, the intermittent  
13 quality, the relatively short exchanges that I had with them,  
14 as I went car to car and then returned car to car, I did not  
15 duplicate information that I perceived to be effectively  
16 accurate. In other words, I didn't challenge, ask necessarily  
17 Tazhayakov or Kadyrbayev what the association was with this  
18 woman, Kumaskali. Certain things I took for granted, but then  
19 I moved and I spoke with the defendants as they sat in the  
20 cars.

21 Q. And could you give the Court an idea and describe as much  
22 as you recall about your demeanor when you were talking to them  
23 at this time, and what you said and how they responded?

24 A. Yes. Initially, my demeanor was quite, very direct. It  
25 was stern, it was focused, and it was that part of it, "Where

1 is he? What threats are there in the apartment?", as the  
2 relatively short interviews continued, and I began to perceive  
3 that those answers were accurate. I did not perceive with  
4 regard to those questions, i.e., threats to personnel or  
5 neighbors, that they were deceiving me.

6 As the information got to more -- I needed to  
7 determine the weight of this information, who these people were  
8 and what their association was with the fugitive to give it  
9 weight, and as the focus shifted from, "Where is Tsarnaev?", to  
10 simply, "What is your association, where do you think he could  
11 be now?", it became less stern; continually focused but less  
12 stern.

13 With regard to the two defendants, actually, each of  
14 them, I asked each initially whether they spoke English. They  
15 all replied in the affirmative. When I addressed the two  
16 defendants, I asked them at different times, as they both  
17 looked away a little bit, I perceived that they weren't  
18 necessarily being deceptive, but they weren't entirely  
19 forthcoming, and I just perceived that there may be more  
20 information.

21 And so I asked them each to look at me, a couple of  
22 times each, "Look at me," and I asked them each, as I spoke  
23 with them, to tell me what I just said. And I described for  
24 both of them, in order to impress upon them the gravity and the  
25 urgency of the information that I required, i.e., "Is there a

1 threat to my colleagues about to enter that apartment?", I said  
2 words to both, words to the effect of, "This is enormously  
3 important." I think I used the words, "This is the biggest  
4 thing to ever happen in Massachusetts. You have to understand  
5 this is your opportunity, and you must tell me the truth."

6 And I said to each of them, effectively, "Dzhokhar  
7 Tsarnaev, he's dead. Whether he is still living, or whether he  
8 is going to go away, his life is over. Your life does not have  
9 to be over, and you must tell me the truth. Look back at me,"  
10 and again in a couple of instances, "Repeat back what I just  
11 said," and they did that.

12 When it became apparent that he wasn't in the  
13 apartment, or at least I believed we would not find him in the  
14 apartment, the demeanor changed.

15 Q. And how did it change?

16 A. It changed to me as receiving information from any witness  
17 that I interview, and it has been my experience that the single  
18 best, perhaps only way, to receive information is to have the  
19 person to show all manner of respect, to have the person, if  
20 nothing more, if no other words, to like you, or at least not  
21 dislike you.

22 Q. And, Special Agent, did you use vulgarity when you were  
23 speaking to the defendants?

24 A. I do not believe I used any vulgarity. My sternness of  
25 tone was sufficient to impress upon them the gravity of the

1 situation.

2 Q. Well, in your 23 years of experience, or based upon your  
3 23 years of experience, is it your practice to use vulgarity  
4 when speaking with subjects or witnesses?

5 A. It is neither my professional practice or my personal  
6 comportment to use vulgarity, particularly gratuitously and to  
7 spice up. It is inelegant. It is I think a mark of an  
8 uneducated person, and I don't need to do it in the course of  
9 my work in the FBI, and I do not believe that I did it there,  
10 notwithstanding -- I do not believe that I did it there.

11 Q. So, Special Agent Walker, was anyone else besides you  
12 talking to the defendants at this time when they're in the  
13 vehicles?

14 A. I did not observe any of my colleagues speak with them  
15 while they were in the vehicles.

16 Q. So, you were the only one that was speaking to them in the  
17 vehicles?

18 A. Yes, but I was at one vehicle at a time. But I did not  
19 observe any of my colleagues speak with any of them as they sat  
20 in the vehicles.

21 Q. And how was it that you were speaking to them, through an  
22 open door, or through the front passenger seat of the vehicles?

23 A. Both.

24 Q. So, at times you would speak to them through the door and  
25 sometimes from the front passenger seat?

1 A. Yes.

2 Q. Did either of the defendants appear to have any problems  
3 understanding you?

4 A. None whatever.

5 Q. Did their responses appear appropriate and coherent?

6 A. Yes.

7 Q. Did either of them tell you they didn't understand  
8 English?

9 A. No.

10 Q. In response to your questions, what did Defendant  
11 Tazhayakov tell you?

12 A. He told me that he was a student at UMass Dartmouth. He  
13 told me that he and Mr. Kadyrbayev resided together and were  
14 the joint and only lessees of that apartment. He told me that  
15 he had seen Tsarnaev a couple of days after the bombing, and he  
16 further told me that he last saw him at or about 4:00 on  
17 Thursday, April 18, when Tsarnaev, driving a green Honda,  
18 dropped him off at the 69A Carriage apartment, and that he and  
19 Tsarnaev and someone named Robel, whose last name  
20 Mr. Tazhayakov did not know, departed the area of the  
21 apartment.

22 Q. As a result of hearing this information, were you more or  
23 less concerned about the defendants?

24 A. It heightened my suspicion that I needed to rule out their  
25 potential involvement in crimes.

1 Q. And did you also obtain any information from defendant  
2 Kadyrbayev?

3 A. I did.

4 Q. And was it similar to what you had heard from  
5 Mr. Tazhayakov?

6 A. Similar. Actually, Mr. Tazhayakov provided his mobile  
7 telephone number, and I did not ask the same of Mr. Kadyrbayev,  
8 because, again, at that point in time I had more knowledge from  
9 Kumaskali, and I did not effectively repeat myself as I went  
10 along.

11 But he mentioned that they were both residents and  
12 co-lessees. He may have not used that particular term, but I  
13 needed to establish who had ownership and control over the  
14 apartment, and that's effectively what he told me.

15 Q. So, while you were talking to the defendants and  
16 Ms. Kumaskali, did HRT go into the apartment?

17 A. They eventually did, yes.

18 Q. And by around 6:00 p.m. that evening did you know whether  
19 Tsarnaev was in the apartment?

20 A. Yes. I knew that he was not, based on the work of the  
21 HRT.

22 Q. When, approximately, did you start talking to the  
23 defendants that evening while they were in the vehicles?

24 A. I started speaking with Ms. Kumaskali at approximately  
25 5:15; I started speaking with Mr. Tazhayakov at approximately

1 5:20; and I started speaking with Mr. Kadyrbayev at about  
2 5:25 p.m.

3 Q. So, by around 6:00 p.m. you learned that Tsarnaev is not  
4 in the apartment; is that right?

5 A. Correct.

6 Q. And what did you do at that point in time?

7 A. I asked each one of the residents, the occupants,  
8 Kumaskali and the two defendants, I said to them that the FBI  
9 was very much interested in speaking with them in greater  
10 detail and in a more discreet, comfortable setting, and I asked  
11 each of them whether they would be willing to accompany law  
12 enforcement to the Barracks of the Massachusetts State Police  
13 at North Dartmouth. I explained to them I had been there that  
14 morning, that it was close, that it was, in fact, a discreet  
15 location.

16 At the time, there was a minor spectacle on Carriage  
17 Drive and a growing spectacle with neighbors, residents,  
18 people, I perceived a gathering crowd of media there, and it  
19 became an untenable environment to speak with them. So, I  
20 asked each of them to go elsewhere with us to talk with us.

21 Q. How did they respond to that request?

22 A. They responded positively, and immediately or close to  
23 immediately they responded with a seeming eagerness. They  
24 seemed as eager as I was to leave that location, because I  
25 perceived that they were exposed to growing onlookers, and I

1 perceived they felt some discomfort as a result of that.

2 Q. How did they agree? Did they agree verbally to go?

3 A. They agreed verbally, and they agreed by also shaking  
4 their head and evidencing, again, a seeming eagerness to leave  
5 that location as quickly as possible.

6 Q. Now, by the time that you asked these questions of the  
7 defendants whether they were willing to go answer further  
8 questions by the FBI at the State Police Barracks, had you been  
9 able to eliminate your suspicions about them and their  
10 involvement with Tsarnaev?

11 A. No.

12 Q. Why is it, Special Agent Walker, that you didn't attempt  
13 to interview them in the apartment?

14 A. The apartment was not a safe location to do anything other  
15 than to have Special Agent Bomb Technicians go in and ensure  
16 there were no explosives within the apartment, and that had not  
17 occurred at that time. Separately, it would have been, and it  
18 was later, a subject of enormous public and media attention,  
19 the apartment itself, and that, too, would have been an  
20 untenable place for any interview.

21 Q. So, the defendants agreed to be transported, then, to the  
22 State Police Barracks?

23 A. They did.

24 Q. By this time had any additional investigative personnel  
25 arrived to assist you in your efforts?



1 A. Not there on Carriage Drive, no.

2 Q. Were people actually leaving that scene at this time?

3 A. The troops were saddling up and heading off to the  
4 other -- I came to learn they were heading off to the other two  
5 threats that we perceived at the time, other locations where  
6 Tsarnaev may be located, one down on -- the name of the road  
7 escapes me right now -- but about a quarter of a mile away from  
8 Carriage Drive in that neighborhood and, secondly, I believe,  
9 heading back to UMass Dartmouth, where on the closed campus  
10 they were running about trying to locate Tsarnaev because of  
11 the login at about 4:40.

12 Q. After the defendants agreed to go to the Barracks, did you  
13 arrange transportation for them?

14 A. Yes.

15 Q. With whom?

16 A. With the New Bedford Police Department.

17 Q. Why didn't you transport them yourself?

18 A. I didn't have a car, and even myself I would not have  
19 transported one agent, one person under those circumstances.  
20 Typically, we do it two at a time, but I didn't have the  
21 resources to do so.

22 Q. Was anyone at the Mass. State Police Barracks to meet  
23 them?

24 A. Not at the time they agreed to go there, no.

25 Q. So, what did you do to ensure that there was someone there

1 to interview them?

2 A. I responded to a message I had received from a colleague,  
3 from our New York Joint Terrorism Task Force that evidently had  
4 been deployed to the area at an earlier request that I made for  
5 additional personnel there, and I told him at 6:19 p.m., I  
6 said, "Go to MSP Dartmouth."

7 MR. STAHL: Judge, could we use names so it's just  
8 easier?

9 THE COURT: Yes.

10 If you could identify the agent.

11 THE WITNESS: Absolutely, Judge. Special Agent Farbod  
12 Azad.

13 BY MS. SIEGMANN:

14 Q. And can you spell the last name for the court reporter,  
15 please.

16 A. A-Z-A-D.

17 Q. Now, sir, I'm sorry, you said that the New Bedford Police  
18 Officers agreed to transport the defendants?

19 A. Yes.

20 Q. And how quickly did the New Bedford Police Officers  
21 transport the defendants or leave the scene with the  
22 defendants?

23 A. It seemed pretty quickly, perhaps even more quickly than I  
24 would have expected. But they left fairly quickly.

25 Q. And after they left, did you ask that anyone come back to

1 the scene?

2 A. I did.

3 Q. Why was that?

4 A. Because I wanted to seek the consent from the two lessees  
5 of the apartment to conduct a search of the apartment, and so I  
6 asked that they return. They hadn't been gone too long, and I  
7 did not perceive they had made it to, and they, in fact, had  
8 not made it to the State Police Barracks yet, so I asked that  
9 they be returned to Carriage Drive.

10 Q. Were the defendants both brought back to the scene?

11 A. They were not.

12 Q. Who was?

13 A. Mr. Kadyrbayev.

14 Q. What did you do with Mr. Kadyrbayev when he arrived back  
15 at the scene?

16 A. He arrived in a police vehicle. In this instance, I  
17 stooped down next to an open door and talked to him through the  
18 open door. I explained to him that the FBI was interested in  
19 searching his apartment, and that the FBI, if he would allow  
20 consent, would take from the apartment anything the FBI  
21 considered material to its investigation. I told him that he  
22 didn't have to agree to afford consent for such a search, but  
23 he indicated preliminarily that he would do so.

24 He was restrained at the time, continued to be  
25 restrained with the flex cuffs. I asked that a police officer

1 from New Bedford assist me in cutting the cuffs off of his  
2 hands, and then I read to Mr. Kadyrbayev a standard form, a  
3 Consent to Search Form that the FBI uses in those cases.

4 MS. SIEGMANN: Your Honor, at this point the  
5 Government would like to -- let me mark this. Can I mark it  
6 Exhibit No. 1, your Honor?

7 THE COURT: Yes.

8 MS. SIEGMANN: The original is with the Court Clerk,  
9 Mr. Lovett.

10 THE COURT: Okay.

11 MS. SIEGMANN: Just for the witness at this point,  
12 Jarrett.

13 MR. STAHL: Your Honor, again, could we have the name  
14 of that police officer?

15 THE COURT: If you know the name of the police  
16 officer.

17 THE WITNESS: Yes, I do, your Honor. I believe it's  
18 Officer DeMello (ph).

19 MS. SIEGMANN: For some reason this is not coming up.  
20 Hold on. The ELMO, can you make it -- it's showing the witness  
21 now on the screen. Thank you.

22 BY MS. SIEGMANN:

23 Q. Special Agent Walker, do you recognize what I have put up  
24 on the screen just for the witness?

25 THE COURT: There are screens around, and in the back

1 row of the jury box between the chairs there are screens  
2 accessible that you can pull out. They are a little bit like  
3 the old TV screens on airplanes. For everybody in the back  
4 row, in between your chairs there should be -- in the back row  
5 itself, not only in the front row -- there should be the  
6 screens.

7 We will be taking names about damage to federal  
8 property.

9 (Laughter)

10 MR. STAHL: He's treating it like an airplane, Judge.

11 THE COURT: Yes, I see that. That is why there is not  
12 going to be any food.

13 I am permitting everyone to see this now. It is  
14 admitted.

15 (Exhibit No. 1 received into evidence)

16 BY MS. SIEGMANN:

17 Q. Special Agent Walker, do you recognize the document that  
18 has been marked Government Exhibit 1?

19 A. I do.

20 Q. What is it?

21 A. From memory, it's an FD-26, but I don't see the top.

22 Q. Oh, sorry. Here, let me show it to you.

23 A. Is it an FD? Yes, FD-26. It's a standard form, old line  
24 Consent to Search Form of the FBI, and that is the document  
25 that I read to and executed with the defendant.

1 Q. So, can you take us through what did you read on this form  
2 to the defendant?

3 A. I read the entirety of the form, beginning with numbered  
4 Paragraphs 1 through 4.

5 Q. So, "I have been asked by Special Agents of the Federal  
6 Bureau of Investigation to permit a complete search of..."

7 So, you read that part there?

8 A. I did, and I did not read the parenthetical. What I did  
9 when it described the premises, I asked him and I pointed, I  
10 said, "I need to now describe where I am going to search," and  
11 I asked him what his address -- how he described his apartment.

12 Q. So, did he give you that information that you wrote on the  
13 form?

14 A. He did.

15 Q. And then, moving on to No. 2, did you read that as well to  
16 him?

17 A. Yes.

18 Q. "I have been advised of my right to refuse consent"?

19 A. Yes.

20 Q. "I give this permission voluntarily"?

21 A. I read that, yes.

22 Q. "I authorize these agents to take any items which they  
23 determine may be related to their investigation."

24 Did you read that as well?

25 A. I did.

1 Q. And when you asked Mr. Kadyrbayev for his consent, what  
2 was his response?

3 A. He indicated a willingness to sign the form, and so with  
4 that, I asked him, I said, "Well, presuming that you would  
5 continue to like to proceed," I gave him the form.

6 Q. What did you ask him to do?

7 A. I asked him to read the form.

8 Q. What was his response when he was reading the form?

9 A. He began to read the form, and after a matter of some  
10 seconds he looked up at me sort of quizzically, and he looked  
11 at me and he said, "That's what you just read to me."

12 Q. What did you say?

13 A. I said, "Exactly. Please continue to read the form."

14 Q. Did you watch him as he continued to read the form?

15 A. I did.

16 Q. And after he had finished reading it, what happened?

17 A. I asked him whether, having read the form, he was still  
18 willing to permit a search of his apartment, and he said,  
19 "Yes." I said, "Great. We're going to both sign here. You're  
20 going to sign --" that is my date. I put the date down. I  
21 asked him to sign, and then I told him I would be signing as a  
22 witness, and I did sign as a witness.

23 Q. What did you do next? Or what happened next? Excuse me.

24 A. I think I thanked him, but that concluded our business  
25 there. And I said, "All right. Now, you're heading on to the

1 Barracks."

2 Q. And before getting back into the police vehicle after  
3 having signed this, what happened?

4 A. He had not left the police vehicle when he signed it. He  
5 simply was unrestrained. He was sitting in the backseat of the  
6 car. He was leaned over and he had -- when he was reading the  
7 form, he had the form on the backseat of the cruiser next to  
8 him. I was directly in front of him, stooped in the middle of  
9 the street, and then the police officer began to put cuffs on  
10 him, handcuffs, metal cuffs.

11 Q. What did you do in response to seeing this?

12 A. What did he do?

13 Q. What did you do in response to seeing the police officer  
14 putting handcuffs on the defendant?

15 A. Yes. I advised the police officer that he was not under  
16 arrest, and he did not need to be handcuffed -- that he was not  
17 under arrest, he was not a prisoner, but he did not need to be  
18 handcuffed.

19 Q. And how did the New Bedford Police Officer respond?

20 A. The New Bedford Police Officer responded that he was still  
21 going to handcuff him for his protection, and, given the  
22 circumstances, given what the police officer likely just  
23 witnessed, I acquiesced in that further restraint.

24 Q. Was he handcuffed in the front or behind?

25 A. In the front.



1 Q. And what happened after he was handcuffed?

2 A. He was driven away.

3 Q. Now, Special Agent Walker, you indicated that the  
4 defendant Tazhayakov wasn't brought back to the 69A Carriage  
5 Drive vicinity; is that right?

6 A. That's correct.

7 Q. But did the agents wait for his consent before executing  
8 the consent search of the apartment?

9 A. Yes, that's my understanding, they did.

10 Q. At about the same time the defendants were being  
11 transported to the Mass. State Police Barracks what was going  
12 on in Watertown?

13 A. A 911 call came in to Watertown Dispatch at approximately  
14 6:45, it may have been a few minutes earlier, and it was from  
15 the owner of the boat, if you will, I think on Franklin Street.  
16 He reported having seen a person inside his boat, and the  
17 Dispatch call reported that complaint to whom I believe to have  
18 been the Field Commander, and then for the next two hours there  
19 was a sizeable police response to that sighting in the boat.

20 Q. So, did that at that point in time become the priority of  
21 the FBI and the JTTF, to figure out if Tsarnaev was in that  
22 boat in Watertown?

23 A. The priority of the FBI, and seemingly the focus of much  
24 of the World, but certainly Massachusetts, yes.

25 Q. Is it fair to say that at this time there were few

1 available resources to conduct witness interviews?

2 A. Yes.

3 Q. What time was Dzhokhar Tsarnaev arrested?

4 A. At approximately 8:46, I've seen 8:47, he was taken into  
5 custody and positively identified.

6 Q. At any point that evening did you go back or go to the  
7 Massachusetts State Police Barracks?

8 A. I returned -- as I mentioned, I left the State Police  
9 Barracks that morning to go to UMass, and I was next at the  
10 Massachusetts State Police Barracks in North Dartmouth at  
11 between approximately 12:30 a.m.

12 Q. So, it was actually on April 20th?

13 A. On April 20th, yes, excuse me.

14 Q. And what were the defendants doing when you arrived at the  
15 Mass. State Police Barracks?

16 A. I think they were sleeping. I didn't see Mr. Kadyrbayev.  
17 Mr. Tazhayakov was visible up front. I think he was sleeping.  
18 He was very quiet at the time. And I don't think until we  
19 drove them home I did not see Ms. Kumaskali at all.

20 Q. At that point what had the FBI learned about the  
21 defendants' involvement in criminal activity?

22 A. At the time that I arrived?

23 Q. Yes.

24 A. We learned that -- we believed, suspected, based on their  
25 statements, statements of the two defendants and Ms. Kumaskali,

1 that they had likely obstructed our investigation of  
2 Dzhokhar Tsarnaev.

3 Q. And, specifically, had they removed evidence from his  
4 dormitory room?

5 A. They told us that they removed evidence of --

6 THE COURT: Just so it is clear, the person to whom  
7 these statements are made was not you?

8 THE WITNESS: No, Judge.

9 THE COURT: Go ahead.

10 MR. STAHL: Judge, I also would object on relevancy  
11 grounds to the suppression hearing. The actual statements are  
12 not at issue in this hearing, it is the circumstances of the  
13 statements, and I would move to strike and bar any testimony by  
14 any agent.

15 THE COURT: I do not think it has to be very specific,  
16 but, according to Agent Walker, they learned additional  
17 information concerning involvement of the defendants, and we  
18 will leave it at that. Because I understand that the  
19 Government is not going to be offering these statements.

20 MS. SIEGMANN: I'm sorry?

21 THE COURT: You are not going to be offering these  
22 statements at trial.

23 MS. SIEGMANN: The statements at the Barracks? We are  
24 talking about the Barracks now, the interviews at the Barracks.  
25 We will be offering the substance of the confessions that

1 Special Agent Walker is talking about right now, but not  
2 through this witness.

3 THE COURT: Not through this witness.

4 BY MS. SIEGMANN:

5 Q. Special Agent Walker, based upon the information that the  
6 defendants had provided that evening, were any searches  
7 conducted that you were involved with between the hours of  
8 1:00 a.m. and 4:00 a.m. on April 20th?

9 A. Yes. I was involved in searching a garbage dumpster  
10 located not far from the defendants' apartment.

11 Q. What were you looking for?

12 A. We were looking for the items that the defendants had  
13 described --

14 THE COURT: No. What were you looking for, not  
15 indirectly telling us what the defendants said?

16 THE WITNESS: Okay. We were looking for a black  
17 plastic garbage bag with red ties, within which there may be a  
18 backpack containing spent or manipulated fireworks.

19 BY MS. SIEGMANN:

20 Q. And who went with you to conduct this search?

21 A. FBI Special Agents Megan Dolan and Steven Schiliro from  
22 New York.

23 Q. Was your search successful?

24 A. We completed the search. We did not find the bag that I  
25 described.

1 Q. Did you return to the Barracks after the search?

2 A. Yes.

3 Q. And when you returned to the Barracks, did you have any  
4 conversations with either of the defendants?

5 A. I did.

6 Q. Can you please describe that conversation?

7 A. I saw Mr. Tazhayakov, and he made a statement to me at the  
8 time, and he said, "I am beginning to think we are being held  
9 here against our will."

10 Q. How did you respond?

11 A. I said, "You're free to leave. There is a taxicab waiting  
12 outside for you, and you're free to take that taxicab, or we're  
13 finishing up here and would be pleased to drive you home," and  
14 he accepted the offer of a ride home.

15 Q. So, rather than go in the taxicab that was waiting outside  
16 the Barracks, he wanted you to drive him home, the FBI?

17 A. He made that decision, yes.

18 Q. Do you recall who you drove that evening back to the  
19 Carriage Drive apartment?

20 A. I do. Mr. Kadyrbayev was sitting in the passenger seat  
21 next to me.

22 Q. And when you arrived at the Carriage Drive address, did  
23 you get out of the car?

24 A. Yes.

25 Q. Can you describe what happened after you got out of the

1 vehicle?

2 A. There were six agents in three vehicles with the two  
3 defendants and Ms. Kumaskali. We walked toward their  
4 apartment, and we asked if we could come in, and they said,  
5 "Yes." We walked in as a group inside the apartment, and we  
6 stood for a few minutes near their dining room table adjacent  
7 to their kitchen.

8 Q. What was the demeanor of the defendants at this time?

9 A. They seemed very happy to be home. They were friendly.  
10 They were joking at one point. They seemed very pleasant.

11 Q. And they were speaking to you and pleasant -- with  
12 pleasantries at this time?

13 A. Yes. And just as they had been pleasant, and they were  
14 very pleasant when they got home, back to the apartment.

15 Q. And what happened when you were inside the apartment?

16 A. There was some agent, I don't know whom, noticed two  
17 items, and there was some conversation about an ashtray and a  
18 baseball cap. It became clear to me -- I inferred that it was  
19 clear to them, based on interview or other information, that  
20 somehow the ashtray and the baseball cap were meaningful,  
21 specifically that they belonged to Dzhokhar Tsarnaev.

22 THE COURT: You said, "Clear to them." Who is the  
23 "them"?

24 THE WITNESS: To the five agents that I was with.

25 BY MS. SIEGMANN:

1 Q. Well, was there a discussion or a question posed to the  
2 defendants whether those are the items that they took from  
3 Tsarnaev's room?

4 A. It was either a question or a statement that those items  
5 were not only his, but they had been taken from his room, and  
6 we asked -- I may have asked, I don't recall, but -- "Would you  
7 mind if we took those? You don't have any interest anymore in  
8 those, I assume." I think it was me. "Can we take those  
9 items, because they belong to Dzhokhar Tsarnaev?"

10 Q. What was the response of the defendants?

11 A. The defendants immediately agreed, proffered the ashtray  
12 and the baseball cap. Mr. Kadyrbayev put on the baseball cap  
13 briefly and was, in joking tone, kind of words to the effect  
14 of, "Well, I kind of like this hat, I might want to keep it,"  
15 smiling. And Mr. Tazhayakov and Ms. Kumaskali seemingly  
16 admonished him to tell him to give the hat to the FBI or to  
17 give up the hat, and he handed us the hat.

18 Q. So, those items were willingly given to the FBI by the  
19 defendants at that point?

20 A. Yes, yes.

21 Q. After obtaining those items did you have either of the  
22 defendants sign some type of receipt?

23 A. I did. I had Mr. Tazhayakov sign a property receipt. I  
24 listed the two items, and we both executed the form.

25 Q. After that what happened?

1 A. We left. We, the FBI, six FBI agents, left the apartment.

2 MR. STAHL: Judge, I'm sorry. Again, could we have  
3 the names? We are talking about five other agents.

4 THE COURT: If you know the names of the persons.

5 THE WITNESS: I think I do, your Honor. Special Agent  
6 Megan Dolan, Steven Schiliro, Farbod Azad, Sara Wood and  
7 Michael Blane.

8 MR. STAHL: Thank you.

9 BY MS. SIEGMANN:

10 Q. When next did you see the defendants?

11 A. At approximately 3:15 that afternoon, April 20th.

12 Q. Can you describe how it was that you saw them?

13 A. Yes. About an hour, an hour and a half before that I was  
14 conducting an investigation on the UMass campus. I received a  
15 call and/or email from my Command Post. They advised me that  
16 Special Agents of the Homeland Security Investigations were  
17 going out to arrest Mr. Kadyrbayev and Tazhayakov.

18 I was instructed to join in that effort. I did join  
19 in that effort. I met up with my colleagues. We surveilled  
20 for a short period of time a vehicle owned by the defendants,  
21 and ultimately I arrived at the apartment, back at the  
22 apartment, and saw the two defendants and Ms. Kumaskali.

23 Q. By the time you arrived, had HSI agents already entered  
24 the apartment?

25 A. They had.



1 Q. And specifically they were being arrested for what?

2 A. For the immigration violation. They were both overstays.  
3 Both of their F1 Student Visas had been revoked, and they were  
4 arrested by HSI.

5 Q. So, when you entered the apartment that day, what were the  
6 defendants doing?

7 A. The defendants were sitting on a couch together in the  
8 living room.

9 Q. Were they restrained?

10 A. No.

11 Q. Were they talking?

12 A. Yes.

13 Q. And how did the defendants react to seeing you enter the  
14 apartment?

15 A. They smiled, gave me a greeting. I was a friendly face.  
16 I said something to the effect to them, "I bet you guys didn't  
17 expect to see me again or see me so soon."

18 I communicated with my Command Post that I had  
19 arrived, and that things were quiet, and then I went over and  
20 spoke briefly with the defendants.

21 Q. How were the defendants dressed when you arrived?

22 A. They were sitting. Neither of them had shirts on, but I  
23 don't know whether they were wearing shorts or long pants, and  
24 I didn't see or don't recall what shoes they may have had on.

25 Q. And you're aware that the prior evening, when they were

1 interviewed at the Barracks, they also didn't have shirts on?

2 A. I am aware of that, yes.

3 Q. Could you please describe to the judge the conversation  
4 you had with the defendants in the apartment at that time?

5 A. I can. The two defendants were sitting on an L-shaped  
6 couch in the living room with --

7 THE COURT: Let me just pause for a minute. They were  
8 under arrest at that point, is that right, if you know?

9 THE WITNESS: I don't know, Judge, yes.

10 THE COURT: And do you know whether or not they had  
11 been given Miranda warnings before your conversation by anyone?

12 THE WITNESS: I don't know to this day.

13 THE COURT: Go ahead.

14 A. They were sitting on the couch with  
15 Ms. Kumaskali and a woman whom I learned was Mr. Kadyrbayev's  
16 mother. I saw a backpack laying next to the back of the couch,  
17 a black backpack. I said to them that the FBI was very much  
18 interested in recovering the backpack they had described the  
19 night before. I asked them whether the backpack was then  
20 located within the apartment. They both denied that, and they  
21 told me in unison that the backpack had been thrown into a  
22 dumpster, and that they had seen the dumpster removed by a  
23 refuse truck on Friday.

24 Q. So, the dumpster had been emptied, right?

25 A. Yes. The ref. (ph) truck had taken the dumpster away.

1 Q. So, how did you respond to hearing this?

2 A. Well, I asked them to describe for me where the dumpster  
3 was located, and a description was given. Mr. Kadyrbayev  
4 described in accurate measure where the dumpster was located  
5 that I had searched the night before.

6 Q. What was their demeanor, the defendants' demeanor, that  
7 is, when you talked to them on the couch that day?

8 A. As pleasant as they were the morning -- when I last saw  
9 them that morning.

10 Q. And what do you mean by, "As pleasant as they were in the  
11 morning?" Can you just give us some more information as to  
12 what you mean by that?

13 A. I didn't sense that they were under any -- I didn't sense  
14 that they were anxious. Their response with regard to having  
15 seen the dumpster leave was similarly sort of enthusiastic.  
16 They happened to do it at the same time in the same manner as  
17 when I asked them whether they would be willing to come with me  
18 or come with law enforcement to the State Police Barracks.  
19 There was a little bit of head shake as well, and they  
20 seemed -- there was a short but a cooperative, pleasant  
21 exchange.

22 Q. At any point the prior evening when you were questioning  
23 the defendants did you see either of them cry?

24 A. No.

25 MS. SIEGMANN: Your Honor, if I could just have a

1 moment with co-counsel?

2 THE COURT: Yes.

3 (Counsel conferred off the record)

4 MS. SIEGMANN: Your Honor, no further questions.

5 THE COURT: Mr. Stahl, this would be a point to take  
6 an afternoon break, if it is agreeable to you.

7 MR. STAHL: I'm sorry, your Honor?

8 THE COURT: This would be a point to take an afternoon  
9 break, if it is agreeable to you.

10 MR. STAHL: Yes, it is.

11 THE COURT: So, we will take a 15-minute break. Let  
12 me outline the schedule.

13 I do want to take up a series of *ex parte* motions that  
14 have been made by several of the parties, and I want the other  
15 parties to be present. I would like to do that I think at the  
16 end, and I would say probably at 3:30. That will finish the  
17 testimony for today.

18 I know that Mr. Demissie had another obligation, I  
19 believe, tomorrow. But you are no longer effectively in this  
20 part of it, and I assume that you have no objection to the  
21 hearing going forward tomorrow.

22 MR. DEMISSIE: Yes.

23 THE COURT: So, we will have a full day tomorrow, 9:00  
24 to 1:00, 2:00 to 4:00. Now, beyond that I said --

25 MR. DEMISSIE: And I would ask that I be allowed to

1 come and attend the afternoon session.

2 THE COURT: Yes. I understand that you will be able  
3 to be here for some portions of it, but because you are not  
4 directly involved, I think we can go forward in your absence,  
5 and the transcript will be available.

6 MR. DEMISSIE: Thank you.

7 THE COURT: So, I will deem 15 minutes to be 2:45.

8 THE CLERK: All rise.

9 (The Honorable Court exited the courtroom at 2:35 p.m.)

10 (Recess taken)

11 THE CLERK: All rise.

12 (The Honorable Court entered the courtroom at 2:50 p.m.)

13 THE CLERK: This Honorable Court is back in session.  
14 You may be seated.

15 THE COURT: You may inquire.

16 MR. STAHL: Thank you, your Honor. Do I have to --

17 THE COURT: I prefer it. It is just easier to keep  
18 track of where people are.

19 CROSS-EXAMINATION

20 BY MR. STAHL:

21 Q. Good afternoon, Agent Walker.

22 A. Good afternoon.

23 Q. We've met a number of occasions, correct?

24 A. It's been my pleasure, yes. Thank you.

25 Q. Thank you. And you know that I represent Dias Kadyrbayev,

1 correct?

2 A. I do.

3 Q. I take it from your direct -- and there is no doubt that  
4 you are a very, very experienced FBI Agent, correct? You've  
5 got 23 years on the job?

6 A. I have 23 years on the job, yes.

7 Q. What did you do before you were an FBI Agent?

8 A. I was an attorney.

9 Q. Really? Where?

10 A. Here in Boston.

11 Q. Did you practice criminal law?

12 A. I did not.

13 Q. And you went into the Bureau, then, after your JD program,  
14 or you practiced for a number of years?

15 A. I practiced for six years here at a Boston firm, yes.

16 Q. And, in addition to your basic training at FBI in  
17 Quantico, you have received on-the-job training, correct?

18 A. With the FBI, yes.

19 Q. Yes. From folks on the FBI?

20 A. Yes.

21 Q. And you have attended other formal training seminars at  
22 various locations through the FBI as well, correct?

23 A. Many, yes.

24 Q. And were a number of those classes interview techniques of  
25 individuals?

1 A. No.

2 Q. You have never received training in how to interview a  
3 subject?

4 A. At the FBI Academy, but not thereafter.

5 Q. And that is a skill that you have developed, then, on the  
6 job?

7 A. Yes.

8 Q. And as you said before on your direct, you have approached  
9 things when you were -- you said you were basically an  
10 interviewing agent, correct?

11 A. When?

12 Q. As opposed to, you are not HRT, you are not --

13 A. Precisely correct. At the time in question I was there  
14 strictly in an investigative but not a tactical capacity, yes.

15 Q. Have you ever worked in a tactical capacity?

16 A. I have.

17 Q. And when was that?

18 A. I was a member of the FBI SWAT Team in the Portland  
19 Division when I was in Oregon.

20 Q. Just, approximately, what years was that?

21 A. 1995 through 1997.

22 Q. And when you say the "SWAT Team for the Portland  
23 Division," is that different from this very elite full-time  
24 unit, the HRT team you were talking about?

25 A. Yes.

1 Q. What is the difference?

2 A. They are the varsity of the varsity. They are a selection  
3 process, two-week, think of SEAL Team Six, introduction, highly  
4 skilled group, full-time trained. We were part-time trained  
5 and part-time or infrequently deployed.

6 Q. So, HRT, that's all they do, correct?

7 A. They train and deploy in high-risk situations, yes.

8 Q. They are the hardcore, real-deal guys?

9 A. As I described, I think they are the World's finest  
10 Civilian Tactical Team, yes.

11 Q. And you said you were a supervisor for a period of time?

12 A. For 11 1/2 years, yes.

13 Q. And was that at the Boston Field Office?

14 A. In addition to other places, yes.

15 Q. In your capacity now, are you a supervisory Special Agent?

16 A. I am not.

17 Q. You were talking on direct about your involvement in this  
18 investigation. Let me clarify. You started talking about  
19 overall the Marathon bombing investigation, correct?

20 A. Yes.

21 Q. Were you involved with that from day one?

22 A. From the first hour, yes.

23 Q. And so, you and your colleagues were kept up-to-date, you  
24 had briefings at different command centers, or via email  
25 messages, or other forms of communications as the course of the



1 investigation went on?

2 A. Yes.

3 Q. And were you at the beginning tasked with specific roles,  
4 in other words -- let me try to be clearer. Were different  
5 groups of agents broken out to different assignments?

6 A. They were.

7 Q. And were you in charge of a group of agents?

8 A. No.

9 Q. Who did you work for or report to at the time?

10 A. That week, early on that week and in the first hours I was  
11 tracking leads around the City of Boston. So, a few hours  
12 after the bombing I was on Boston Common interviewing people.  
13 For the next couple of days I continued to respond to random  
14 leads that arose toward the latter part of the week before my  
15 assignment down to North Dartmouth. I assisted in the office  
16 in streamlining our lead process.

17 Q. And during the course of the week, how many FBI agents  
18 from around the country were TDY-ed to the Boston area?

19 A. Over 100, probably, FBI personnel generally. Probably  
20 less than 200, but certainly over 100.

21 Q. Approximately, how many FBI agents are in the District of  
22 Massachusetts normally?

23 A. The Boston Division -- it's a little difficult. I don't  
24 know the answer to that. We have a four-state region, and if I  
25 recall correctly, we have a couple of hundred in the Division.

1 I don't know how many are here in the District.

2 Q. So, approximately a couple of hundred here locally in this  
3 four-state area, and then approximately a couple of hundred  
4 other agents came in to assist, correct?

5 A. Yes.

6 Q. And was HRT -- where are they based out of?

7 A. Quantico, Virginia.

8 Q. And were they temporarily assigned up here as well during  
9 that week?

10 A. They were temporarily assigned here during a portion of  
11 the week. I don't know when they first arrived.

12 Q. Just skipping ahead for a moment, on April 19th where were  
13 they located when you called for their assistance?

14 A. I didn't call for their assistance.

15 Q. Who did?

16 A. They were deployed by our command post.

17 Q. And that command post was somewhere in the Boston area,  
18 correct?

19 A. We had two command posts. I don't know who deployed them,  
20 and I don't know from which command post they were deployed. I  
21 think it was probably from a forward command post in Watertown,  
22 because they were flown from Watertown down to New Bedford to  
23 respond to this particular threat that afternoon.

24 Q. By helicopter?

25 A. Yes.

1 Q. Now, I want to focus your attention on April 19th. You  
2 spoke about on direct that you were tasked down to the  
3 North Dartmouth, the UMass area, correct?

4 A. Yes.

5 Q. And you spoke generally and then a little more  
6 specifically about intelligence information that started to be  
7 gathered about this area of the state, correct?

8 A. Yes.

9 Q. And when is the first bit of intelligence information  
10 developed that leads anyone, whether it's you or anyone from  
11 the FBI or the JTTF, to the North Dartmouth/UMass area?

12 A. Sometime in the early morning hours of April 19.

13 Q. And by "early morning," I think I have seen emails that  
14 the Government provided last night to us, it started at  
15 approximately 6:00 a.m., early morning, correct?

16 A. We were aware sometime during the early morning hours, I  
17 don't know the time, that the fugitive, Mr. Tsarnaev,  
18 subscribed to four phones at that address, and that work was  
19 relatively early in the morning. I don't know exactly what  
20 time.

21 Q. And that intelligence information, one was that there were  
22 phones registered that were of interest to Carriage Drive,  
23 correct?

24 A. That four phones were subscribed by Tsarnaev at that  
25 address, yes.

1 Q. Did you or any of the JTTF members contact the provider,  
2 meaning -- I believe it was AT&T in this instance, correct?

3 A. Yes.

4 Q. Did you or any JTTF member contact AT&T to inquire further  
5 what was going on with the phones?

6 A. I'm not sure what you mean.

7 Q. Well, you are familiar that there can be multiple people  
8 on family plans or friend plans or group plans, correct?

9 A. I think my family has one. I'm not part of it. But, yes.

10 Q. Those ads on TV now about invite your friends and family  
11 as a way of saving money, correct? You just have to answer out  
12 loud.

13 THE COURT: If there is a question before you, you  
14 have to answer it verbally as well as by expressive conduct.

15 A. My family has one, because I'm sure it saves us some  
16 money. So, yes. I will allow that, yes.

17 BY MR. STAHL:

18 Q. Okay. What I am specifically referring to is did you or  
19 anyone from the JTTF contact AT&T? This was Thursday during  
20 the day, correct, and you have the ability to contact the  
21 carrier providers, correct?

22 A. Absolutely.

23 Q. And it is something you do in the normal course of your  
24 everyday investigations, correct?

25 A. It's something we did here, yes.

1 Q. And so, then I take it someone did contact AT&T to develop  
2 further hard evidence about what those phones were and who they  
3 were registered to, correct?

4 A. Likely, and every bit of data the phone company possessed  
5 with regard to those phones, including data that might allow us  
6 to locate Tsarnaev, yes.

7 Q. If I understand you correctly, you just don't know that  
8 aspect of the investigation?

9 A. No, I just didn't do that aspect of the investigation.  
10 But I know firmly that we obtained every bit of information and  
11 data we could from AT&T, the toll records and any data that  
12 would assist us in locating the user of any of those phones.

13 Q. So, was Mr. Kadyrbayev's name one of those linked with  
14 this group plan of cell phones?

15 A. Within AT&T's database?

16 Q. In any information you received from AT&T, correct.

17 A. I don't believe so, no.

18 Q. Did you review those records personally, or you are going  
19 on some hearsay?

20 A. I did not review those records personally.

21 Q. You also said that approximately 6:19 a.m. on the morning  
22 of April 19th, that information was received that Jahar had  
23 logged onto a computer system on the UMass Dartmouth campus,  
24 correct?

25 A. It was not contemporaneously received, but it was received

1 that at 6:19 that did, in fact, occur, yes. I came in receipt  
2 of that information hours later.

3 Q. About how long, how many hours later?

4 A. Probably about six hours later.

5 Q. So, about noon?

6 A. Or slightly after, yes.

7 Q. And so, it's fair to say at least by noon you have several  
8 pieces of information that in your mind is tying this  
9 Carriage Drive address to something to do with Jahar, correct?

10 A. Yes.

11 Q. You then had information about some of the content of the  
12 phones and their communications, at least the phones, not  
13 knowing who, but with contacts with Russia and other locations,  
14 correct?

15 A. I know of one, and I described it at 10:06 a.m.

16 Q. And then at 10:20 a.m., I think you testified that another  
17 phone bounced off a tower that you thought was about a mile  
18 from campus, correct?

19 A. Let me clarify. My receipt of the information about the  
20 10:06 call, which is the only call that I am aware of that  
21 bounced off a tower that morning, I received about 20 minutes  
22 after that. It caused me to do something, that is, go over to  
23 the campus. So, I am only aware to date of a call, and it  
24 occurred at 10:06 a.m.

25 Q. I'm sorry. Did you just say you learned about that

1 contemporaneously, so at 10:06 you learned about that call near  
2 the campus?

3 A. Nearly contemporaneously. I probably received the call at  
4 about 10:40 that morning, when I was at the State Police  
5 Barracks, and my command post told me that about 20 minutes ago  
6 a phone linked to -- and it was told to me -- I recall  
7 receiving a report that it was a "Black Hat's" phone. That  
8 told me that they were telling me that Tamerlan Tsarnaev's  
9 phone had transmitted a message to Russia 20 minutes earlier.  
10 They were referring to, I know retrospectively, to a single  
11 call that was transmitted from the phone bearing the suffix  
12 9049 at 10:06 a.m., is the only one I am aware of.

13 Q. I'm sorry. You said that the information was "Black Hat"  
14 was Tamerlan, the older brother, correct?

15 A. That's what I heard when my command post called me, yes.

16 Q. And that he had sent the phone message?

17 A. Yes. The message I received was that a message on  
18 Tamerlan's phone to his parents in Chechnya was transmitted  
19 20 minutes ago, and it bounced off a tower a mile from the  
20 UMass Dartmouth campus.

21 Q. When was the shootout with Tamerlan?

22 A. Sometime before 1:00 a.m. same day.

23 Q. So, hours before?

24 A. Yes.

25 Q. About eight hours before. We could do military time.

1 A. (Witness nodded head).

2 THE COURT: I may be confused now. Just so I  
3 understand, the phone call that you referred to was on the  
4 morning of April 19th; is that right?

5 THE WITNESS: Yes, your Honor.

6 THE COURT: The shootout, or fire fight, or however we  
7 characterize it, was concluded by what time?

8 THE WITNESS: Judge, I think that by 1:01 a.m. we were  
9 in contact with the late Tamerlan Tsarnaev, so it had to  
10 precede that, Judge. I think it was before 1:00 a.m.

11 THE COURT: 1:00 a.m. on the 19th?

12 THE WITNESS: Yes, sir.

13 BY MR. STAHL:

14 Q. So we are correct, that it couldn't have possibly been a  
15 phone call that Tamerlan had instigated, correct?

16 A. No, sir. It was reported his device, his phone.

17 Q. So, you had the computer logons near the University or at  
18 the University, you had the cell phones, and you had some  
19 information from another student that Jahar was friends with or  
20 friendly with the residents at 69A Carriage Drive, correct?

21 A. In fact, more than one student, but, yes. And other  
22 information, yes.

23 Q. And all of this information you have somewhere around  
24 12:00 noon to 1:00 p.m., correct?

25 A. No.



1 Q. You have the cell phone information and the computer  
2 information by then, certainly? You just testified about that?

3 A. Yes, sir.

4 Q. And then you have information from a number of students  
5 that Jahar was friends with some of the people in that  
6 apartment and had visited that apartment, correct?

7 A. Likely only one by the time that you described. Several  
8 later in the afternoon.

9 Q. Okay. I'm sorry. Likely only one by that time? I don't  
10 understand. Likely only friends with one person in that  
11 apartment by 1:00 that afternoon?

12 A. Yes. We had probably only received collectively  
13 information from a single friend of Tsarnaev. We were  
14 interviewing many associating Carriage Drive to Tsarnaev.  
15 During the course of the afternoon we heard from several  
16 others, the last of whom was the defendant Phillipos.

17 Q. You testified on direct that at this point, meaning the  
18 knowledge that we have been talking about, that you suspected  
19 that Jahar could be hiding out at 69A Carriage Drive, correct?

20 A. By the end of the afternoon I firmly believed it, yes.

21 Q. And even before that you were suspecting it, correct?

22 A. Yes.

23 Q. Your beliefs became firmer as the day went on, correct?

24 A. Yes.

25 Q. Or that it could be where another cell is located, I think

1 you said?

2 A. I don't believe I said that, no.

3 Q. Well, you have said that in the investigation, the FBI's  
4 investigation, and you said you were, in particular, concerned  
5 that there were other cells out there, meaning potential other  
6 people involved in the bombing, correct?

7 A. Yes.

8 Q. Or that there could be other bombs planned, correct?

9 A. Without question, yes.

10 Q. Other attacks?

11 A. Yes.

12 Q. And April 19th was a Thursday, correct?

13 A. No, April 19th was a Friday.

14 Q. Friday. And as the agent -- were you in charge of this  
15 part of the investigation by that time?

16 A. What part?

17 Q. The Carriage Drive part.

18 A. I was the senior and one of very few FBI Agents in that  
19 region. So, yes, I was working with the unified command,  
20 speaking for the FBI.

21 Q. Agent Walker, you have been an agent for 23 years,  
22 correct?

23 A. Yes.

24 Q. You have testified, what, hundreds of times?

25 A. No, no.

1 Q. Fifty times or more?

2 A. A dozen, perhaps. Not 50.

3 Q. And you have been an investigative agent, case agent, or  
4 lead agent on I think you said thousands of investigations?

5 A. No. I said that I had interviewed over a thousand people,  
6 but I have been case agent probably hundreds of cases.

7 Q. And as case agent or line agent, have you applied for  
8 search warrants?

9 A. Yes.

10 Q. And approximately how many search warrants would you say  
11 you've applied for?

12 A. Dozens.

13 Q. And I am sure you have been involved in many dozens more  
14 as not the affiant but a participant in the search warrants,  
15 correct?

16 A. Many more, yes.

17 Q. So, you understand what it takes to put together an  
18 affidavit for probable cause to search a residence or a  
19 location, correct?

20 A. Yes.

21 Q. And, in fact, you did not apply for a search warrant for  
22 69A Carriage Drive, did you?

23 A. Are you asking me personally or my agency?

24 Q. You personally.

25 A. I did not.

1 Q. And I am focusing on the time period before 5:05 p.m.,  
2 when the assault on the residence occurs --

3 A. Yes.

4 Q. -- not after, okay?

5 A. Yes.

6 Q. And no one from the FBI applied for a search warrant from  
7 the time that intelligence information was developed till HRT  
8 hit the residence, correct?

9 A. You mean coming to a Court and seeking Court approval when  
10 you say "applying;" is that right?

11 Q. Correct.

12 A. I do not believe that anyone did that by that time, yes,  
13 correct.

14 Q. Well, certainly you had no search warrant on scene when  
15 you first surrounded the residence, correct?

16 A. Correct.

17 Q. And certainly you had no search warrant on the scene once  
18 the individuals were forcibly removed from the apartment and  
19 cuffed, because you needed Mr. Kadyrbayev's consent to search  
20 the apartment, correct?

21 A. I don't know that they necessarily follow, but I did not  
22 have a search warrant, the FBI did not, by the time of the  
23 events you describe, correct.

24 Q. And you certainly had time to apply for a search warrant,  
25 correct?

1 MS. SIEGMANN: Objection.

2 THE COURT: He may answer the question.

3 BY MR. STAHL:

4 Q. I'm just focusing on time, Agent. Given the number of  
5 hours between, let's say, 1:00, when you developed this  
6 information, and in your words you have -- well, you had  
7 reasonable suspicion, correct?

8 A. I don't necessarily agree that we had sufficient time to  
9 apply for a search warrant, as I have come to understand the  
10 process by which search warrants are obtained and authorized in  
11 terrorism investigations.

12 Q. Well, Agent Walker, you're certainly aware from your  
13 decades on the FBI and your involvement in other search  
14 warrants that search warrants can be obtained quickly when the  
15 circumstances arise, correct?

16 A. Yes.

17 Q. And you are aware that there are even provisions for  
18 telephonic search warrants, affidavits and search warrants,  
19 correct?

20 A. I don't know if that pertains with regard to this  
21 investigation. Specifically, I don't know whether the  
22 Department of Justice will authorize a telephonic search  
23 warrant in a terrorism investigation, so I am not competent to  
24 answer that.

25 MS. SIEGMANN: Objection to this line, because the

1 witness just said he is not competent to testify on that.

2 THE COURT: Well, it is probing the areas that he  
3 understands. I think it is probably peripheral, but I will  
4 permit it.

5 BY MR. STAHL:

6 Q. In any event, no search warrant was obtained before entry  
7 into the apartment, correct?

8 A. Yes.

9 Q. Now, without going back and repeating the history of the  
10 investigation, I just want to focus on, you spoke about the  
11 extreme caution and dangerousness of the situation as you and  
12 the FBI perceived the Carriage Drive location, correct?

13 A. Correct.

14 Q. And you testified on direct that in your mind there was a  
15 high probability that Jahar was present at the location,  
16 correct?

17 A. Yes.

18 Q. And that, based upon the information that was developing,  
19 he was your suspect -- one of the suspects in the bombing,  
20 correct?

21 A. Yes.

22 Q. And, therefore, the extreme caution and the massive amount  
23 of manpower was brought to bear on the Carriage Drive location,  
24 correct?

25 A. I don't understand your question.

1 Q. You have testified on direct that you were going to  
2 surround a location where you thought a very violent criminal  
3 was present, correct?

4 A. Yes, sir. Yes, sir.

5 Q. And that that demanded special measures, special tactics?

6 A. Yes.

7 Q. And that it would not be a normal situation, where you or  
8 other interviewing agents would just go up and knock on the  
9 door and see if he was there, correct?

10 A. Correct.

11 Q. And so, that's where we come in to set up surveillance,  
12 first, of the apartment, correct?

13 A. Surveillance was established, yes.

14 Q. And I think you testified that that was mainly done by  
15 Massachusetts State Police, correct?

16 A. Yes, sir.

17 Q. And they were part of your Joint Terrorism Task Force?

18 A. Yes.

19 Q. Who else is part of the Joint Terrorism Task Force to this  
20 case?

21 A. Twenty-five, thirty different agencies, federal, state and  
22 local. Every agency that participates on the Joint Terrorism  
23 Task Force participated in this investigation.

24 Q. All right. So, at least, just briefly, I'm not going to  
25 try and name all 25, but we have FBI, correct?

1 A. Yes.

2 Q. Homeland Security, correct?

3 A. Yes, sir.

4 Q. ATF?

5 A. Yes.

6 Q. DEA?

7 A. They participated, yes. They are not typically party to  
8 the JTTF, but they were working it, along with many agencies  
9 that we normally don't see. OIG, for instance, yes.

10 Q. Office of the Inspector General?

11 A. Yes.

12 Q. U.S. Customs?

13 A. Yes. They don't exist anymore. They exist within the  
14 Department of Homeland Security. Yes.

15 Q. A very large, all-encompassing agency.

16 And the Massachusetts State Police. I think you  
17 mentioned Rhode Island State Police were involved?

18 A. Yes.

19 Q. Was New Bedford Police Department part of the JTTF?

20 A. No.

21 Q. How about UMass Campus Police?

22 A. No.

23 Q. When an agency is part of the JTTF, how is it structured?

24 Who do they report to? So, you have all these agents and  
25 police officers assigned, and they report to the FBI?



1 MS. SIEGMANN: Objection, your Honor. This is beyond  
2 the scope of --

3 THE COURT: Oh, not really. It was opened up, not  
4 altogether fruitfully. But, in any event, I will permit some  
5 response to get a sense of the hierarchy.

6 A. The different agencies come to a common investigative  
7 platform that the FBI found meaningful in the late, perhaps  
8 early '90s in New York, and we're operating with common  
9 reporting. FBI reports were a common -- typically a memorandum  
10 of understanding for each agency. We're sitting in FBI space.  
11 We're typically -- each colleague is furnished with FBI  
12 equipment, and what we're doing is we're communicating and  
13 acting as if we were a group of FBI agents. We're fungible in  
14 that regard, and the agencies are varied.

15 So, when the JTTF goes and conducts either a minor  
16 interview or a major investigation, it really doesn't matter so  
17 much to us whether it's an FBI Agent going out and doing it, or  
18 a State Police Trooper or Boston Police Officer. They are  
19 coming back, the information is coming into the FBI system. We  
20 are all sharing and sharing intelligence.

21 The leadership in a critical incident like this  
22 typically will devolve automatically to the FBI Special Agent  
23 in Charge, but we're reasonable people. If one Agency's  
24 internal administrative procedures conflict, we'll work that  
25 out. But we're one group working together toward a common

1 cause.

2 BY MR. STAHL:

3 Q. Okay. And just a brief follow-up, I don't want to go too  
4 far, but this is significant for certain reasons, is, so you  
5 said that all the law enforcement people that are assigned to  
6 JTTF then work with the FBI and out of FBI space, and they  
7 write 302s, correct?

8 A. Yes.

9 Q. So, whether they are Massachusetts State Police or Boston  
10 Police, they're not going to write Boston Police reports when  
11 they are assigned to the JTTF; they will write FBI-style forms  
12 onto your computer system, correct?

13 A. If they are furthering the work of the JTTF, that's  
14 correct, yes.

15 Q. And they are deputized as Federal Agents, correct?

16 A. Those that need Federal deputation, yes.

17 Q. Now, approximately when did the first surveillance start  
18 of 69 Carriage Drive?

19 A. Shortly before noon.

20 Q. How was it set up? Let me be specific. How many, we'll  
21 say agents or police officers, law enforcement, were assigned  
22 around the apartment?

23 A. I don't know.

24 Q. Were they in SWAT clothes, meaning -- you understand what  
25 I mean by "SWAT clothes," right --

1 A. I do.

2 Q. -- whether it's camouflage, like HRT, or the solid colors  
3 by Boston SWAT or other SWAT Teams?

4 A. I understand that early on I knew that we had what we call  
5 a "soft perimeter," and later we hardened the perimeter. Early  
6 on I do not believe anyone was in any tactical regalia. Later,  
7 I believe that at actually quite a distance from the apartment  
8 there were members of the Massachusetts State Police Tactical  
9 Team, their STOP Team.

10 Q. In fact, your ASAIC, Assistant Supervisory Agent in  
11 Charge, emailed you and was curious or wanted to confirm that  
12 there was no marked police presence around the apartment,  
13 correct?

14 A. Yes.

15 Q. The purpose of the surveillance was to gather intelligence  
16 information?

17 A. No.

18 Q. The purpose was to ensure that no one left the area?

19 A. To ensure that Tsarnaev did not flee the area, and people  
20 that were occupants of the apartment did not flee the area  
21 without us having an opportunity to talk to them.

22 Q. Now, you said that your concern and the concern of the FBI  
23 was that this location, 69 Carriage Drive, could have contained  
24 Jahar, correct?

25 A. Yes.

1 Q. And it also could have contained explosives or bomb-making  
2 devices, correct?

3 A. Yes.

4 Q. And that was based upon your misinformation, as it turns  
5 out, that Jahar was present, correct?

6 A. I don't, again, know that the two follow. He was not  
7 there, correct. Yes.

8 Q. Well, and you found no bomb-making materials on the  
9 premises, correct?

10 A. Correct.

11 Q. But at the time, meaning April 19th, starting around  
12 midday and moving later into the afternoon, that was your  
13 concern and your fear, is that there was a danger to that  
14 community and it had to be contained, correct?

15 A. Among other things, yes.

16 Q. So, did any law enforcement officer, SWAT Team or anyone  
17 from the FBI, start to move and evacuate the surrounding  
18 buildings and the neighbors from that four-person apartment?

19 A. I do not believe so.

20 Q. So, you described the premises, and it is an  
21 apartment-style complex, correct?

22 A. Yes.

23 Q. Two-story buildings?

24 A. Yes, two-story buildings within the complex. Yes.

25 Q. And they are aluminium-sided or vinyl-sided in a light

1 color, correct?

2 A. Yes.

3 Q. And each entryway, the front entrance, leads to a common  
4 hallway, and there will be two apartments on the first floor  
5 and then two apartments above, correct?

6 A. At least in that building. I have not been elsewhere in  
7 the interior of the buildings, but at least in that building.

8 Q. And then you said that this was a -- I believe your  
9 description was it was a heavily populated, heavily trafficked  
10 area, correct?

11 A. Yes.

12 Q. So, a good-size apartment complex, correct?

13 A. Yes.

14 Q. And then you testified that Carriage Drive itself, across  
15 the street are single-family residences, correct?

16 A. Correct.

17 Q. And your testimony is, to the best of your knowledge, no  
18 effort was made to move the residents of any of the  
19 single-family homes or the surrounding apartments to an area of  
20 safety, correct?

21 A. Not until HRT arrived, correct.

22 Q. Well, even once HRT arrived, no one was moved until well  
23 after the people were taken out of the apartment, correct?

24 A. I believe that's correct. No one was moved prior to the  
25 occupants of the apartment leaving the apartment.

1 Q. Now, you testified that you were on scene with HRT,  
2 correct?

3 A. Correct.

4 Q. I think your term was you "rolled" in together?

5 A. Yes.

6 Q. So, from the best of your recollection, how many officers  
7 were present surrounding 69A Carriage Drive?

8 A. Probably in excess of 50, perhaps 60 or more.

9 Q. Fifty, 60 or more, correct?

10 A. Yes.

11 Q. And what type of vehicles were they in?

12 A. Most operated unmarked cars. Some of them may have been  
13 leased by HRT when they arrived. I don't know that. But  
14 unmarked. At one point later in my work there, I saw a  
15 Mass. State Police tactical vehicle, black, might have been  
16 lightly -- probably lightly armored, but a tactical vehicle.

17 Q. Right. The ones we have seen throughout the pictures of  
18 Boston, the armored-up, big vehicles that the SWAT Team hangs  
19 on the side as they approach, correct?

20 A. A sizeable vehicle, yes, sir.

21 MR. STAHL: Judge, I am about to move into another  
22 area, and I would like to pre-mark some exhibits, so perhaps  
23 this is a good time.

24 THE COURT: So, we will break for the testimony today.

25 I was just talking to Mr. Lovett. Both of us feel far

1 from home, and I am probably going to ask the Marshal's Service  
2 and Systems about the prospect of going back to Courtroom One.

3 We chose this courtroom because it provided the  
4 maximum amount of places that people could view this, but I am  
5 not sure that in-person interest is that substantial at this  
6 point. So, I think that is what we will try to do, if we can  
7 work that out.

8 So, we will try and probably try this case tomorrow  
9 morning in Courtroom No. One.

10 But we will take the break at this point, and I do  
11 want to take up a couple of *ex parte* matters. The first one is  
12 one that is raised by the Government. I would ask, however,  
13 that counsel for the other defendants remain present, because I  
14 may want to discuss that with them afterwards. By "present," I  
15 mean outside of the courtroom.

16 MR. STAHL: Your Honor, I presume that we are  
17 following our normal procedure, that the witness is on cross,  
18 the Government won't talk to --

19 THE COURT: If you want me to issue an order --

20 MR. STAHL: I think that's appropriate.

21 THE COURT: -- to that effect, I will.

22 So, now that you are on cross-examination, no  
23 discussion of the substance of your testimony with anybody.  
24 Let us put it that way.

25 THE WITNESS: Yes, your Honor.





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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *United States v. Kadyrbayev, et al*, No. 1:13-cr-10238-DPW.

Date: May 23, 2014

/s/ Brenda K. Hancock  
Brenda K. Hancock, RMR, CRR  
Official Court Reporter