

A. That's correct, I did not see anyone with that bag.

MR. BOSTIC: I have nothing else, Your Honor. Thank you.

THE COURT: Anything from other defense counsel before we go back to the government?

MR. EDELIN: I have no questions, Your Honor.

THE COURT: Mr. Edelin?

MR. EDELIN: No, Your Honor. Thank you.

THE COURT: Mr. McAndrew.

BY MR. McANDREW:

Q. Have you heard of the word Vistakon before?

A. I made a living pushing Vistakon products.

Q. What are Vistakon products?

A. Contact lenses. Among other things.

MR. McANDREW: Your Honor, permission to approach?

THE COURT: You may.

BY MR. McANDREW:

Q. If I show you again 241, we keep calling it the Vistakon bag, there is a Vistakon label on it?

A. Correct.

Q. That just reads Division of?

A. Johnson & Johnson.

Q. Vision Care, Incorporated?

A. Sure.

Q. There is a picture of contact lenses. And you know about Vistakon why?

A. Well, I worked as a contact lens fitter for close to thirty years.

Q. And for some period, how many years did you work for David Matusiewicz?

A. About five of those years.

Q. - And it was in that capacity; correct?

A. That's correct.

Q. And Mr. Bostic just asked you about the comments he read to you from an FBI report; correct?

A. Indeed.

Q. You didn't write that report;

right?

A. No, I did not.

Q. So those aren't your words exactly in that report, those are words that an agent wrote?

A. Correct.

MR. McANDREW: Thank you, sir.
Just one moment, Your Honor.

Thank you, sir.

MR. BOSTIC: I'll be very brief.

BY MR. BOSTIC:

Q. You said you worked for David Matusiewicz for years; is that right?

A. That's right.

Q. And there were plenty of those Vistakon bags around the Vision Center Delaware, would that be correct?

A. I'm sure there were, yes.

Q. And one last question for you.

MR. BOSTIC: If I may approach,
Your Honor.

THE COURT: You may.

BY MR. BOSTIC:

Q. When did you start working for

David Matusiewicz?

A. You're starting to ask difficult questions now.

Q. Yes. When did you start working for David Matusiewicz?

A. 2002 through 2006, perhaps.

Q. Thank you. I want you to lift up that bag and I want you to read the date inscribed on the front of that bag. The other side.

A. All right. June 18th to the 22nd, 2003.

MR. BOSTIC: Thank you, Your Honor. I have nothing else of this witness.

THE COURT: Government?

MR. BOSTIC: I'll take the bag down, Your Honor, so the witness isn't stuck with it. If I may approach.

THE COURT: Government, are we excusing the witness?

MR. McANDREW: Yes, we're excusing the witness, Your Honor. Thank you, Mr. Mitchell.

THE WITNESS: Thank you.

THE COURT: You may step down, sir.

MR. BOSTIC: Your Honor, if I may, there was an earlier matter that we discussed prior to the jury being here. I need to have the Court --

THE COURT: Shall we take our midafternoon break? We have been at it about an hour-and-a-half. It would be a good time.

(Jury leaving the courtroom at 2:26 p.m.)

THE COURT: All right. Counsel, please be seated. Mr. Bostic, I mean, I assume we're back to Mr. Osborne?

MR. BOSTIC: No, Your Honor. This would be with respect to the website materials.

MR. EDELIN: Your Honor, if I may, this was a conversation we were having at side-bar I believe on purpose.

THE COURT: That's an excellent recollection, Mr. Edelin, and we will follow-up at side-bar.

(Side-bar discussion:)

MR. BOSTIC: Your Honor, if I may,

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I have Mr. Capuchina waiting in the wings possible to testify via VTC with respect to his website. He will tell me that it was up since approximately 2009, and that that's the advertising that he puts out there. And he believed that that's how Lenore Matusiewicz and Amy Gonzalez came in contact with him. That's what he has out there. And that's what he has on his website, he has the pages that are up there since that time. I will call him for that limited purposes.

MR. IBRAHIM: Judge, I would object to what Capuchina believes is the reason because I have a different belief. Him testifying about this is my website, this is when I put it up to me is a separate issue, but him testifying as to what he thinks my client was thinking, I don't think that there is a basis to get that in any way, but I would object to it.

MR. BOSTIC: That's fine, Your Honor. I can limit it to when he put it up to his public space via that website to the world, and to those in Texas and around the country.

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THE COURT: Well, that would seem to take care of hearsay and that would seem to take care of foundation. I would sustain an objection to him speculating as to what was on the mind of Lenore Matusiewicz or Amy Gonzalez.

But I would also ask counsel to reconsider what the implications are of this depending upon where you go with Mr. Capuchina.

MR. BOSTIC: Your Honor, as I said, it would be for that limited purpose and I could do it through my investigator who actually found the site as he was trying to locate Mr. Capuchina, and this way we don't run afoul of any potential issues in the case. It would be very limited and directed testimony.

THE COURT: Well, I mean, if there is no evidentiary basis that either of the two defendants found their way to Mr. Capuchina through the website, isn't the purpose for displaying the website for some way to buttress the polygraph results? If it's buttressing the polygraph results, doesn't that get us into a whole chain of problems.

MR. BOSTIC: If the Court does

rule that, I would abide by the Court's ruling. I would intend to put up Mr. Capuchina for that limited purpose.

THE COURT: We'll come back to relevance for me, Mr. Bostic. Absent a linkage to the two defendants having gotten to Mr. Capuchina through the website, then the only purpose would be to buttress the polygraph results, or am I wrong about that?

MR. BOSTIC: I never thought of it in terms of buttressing the polygraph results. However, I can see the Court making that determination with respect to future rulings in this case. I do not have a polygraph expert. It was not an area I went down, but the government has displayed Mr. Capuchina and this polygraph throughout this case, and I would see it was a fair statement for us to put forward from the defense so we can build upon --

THE COURT: Counsel, on Thursday, I asked all counsel in the case to address what we do about the polygraphs in the absence of any expert testimony and you were going to confer and I believe we offered facilities which did

you not need. Has any progress been made on that?

MR. McCALL: Judge, I thought we had reached an agreement as to how we were going to proceed and did not realize that this was still an issue until yesterday.

MR. IBRAHIM: My understanding is the polygraph is in evidence. The government is going to argue that the questions asked in the polygraph when you look at the other questions displayed on -- whether it's been e-mails, in terms of Amy Gonzalez, e-mails or other communications, how there is differences in the different questions that are asked. What I am obviously going to be arguing is that as has been testified she passed a lie detector test.

As far as anything else, that's why I have been very cautious in terms of what I ask about that and what gets put up and hence my objection to Mr. Capuchina getting on the stand and talking about his evaluation of the exam he took, as opposed to him saying this is my website.

So I think the new game, the new

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variable has been not between counsel that took
the -- whose clients took the polygraph and how
it would be used in closing, it's been another
defendant's decision to use evidence that's been
put in and address it, that's where the conflict
is, obviously.

MR. McCALL: Just for the record,
the way we intended to argue the polygraph based
on our conversation on Friday, the government
was going to say, look, you don't know how --
you don't have any information about how it was
administered, who administered it, what you know
is what, the factual recitation which was
provided and you know that there has been
evidence that's cut against what was described
in the polygraph, and that certain questions
weren't asked, for instance, on Lenore
Matusiewicz's polygraph didn't ask about the
hymen being torn, that's what we would have, or
we intend to argue, not that -- and that would
be the extent of it.

MR. IBRAHIM: I agree that that's
fair in terms of your discussions because we're
really arguing, we're free to argue

circumstances around it.

THE COURT: Let me hear from Mr. Edelin.

MR. EDELIN: My position is the same as Mr. Ibrahim and this is what we spoke of on Friday. Since there has been no expert testimony from the government saying the polygraph was faulty or that it was administered incorrectly, my concern is that they can't argue those points in their closing.

They can certainly argue the differences in the other questions or questions they would have like to have seen, but they can't say it was a bad polygraph or the person didn't know what he was doing because they didn't offer that evidence.

THE COURT: Can we agree we don't know any of the details of that, we don't know anything about that?

MR. EDELIN: Sure.

MR. IBRAHIM: It is in evidence, because I asked about Mr. Capuchina's licensure, there is both sides to it, I think it's fair based on the document that was divorced from a

third defendant's own defense.

MR. BOSTIC: Your Honor, let me ask this, because I think you heard me say you asked whether he was licensed.

MR. IBRAHIM: Yes. I read out the licensure.

THE COURT: You did.

MS. CHAVAR: That's on the record, right.

MR. IBRAHIM: It is.

MR. McANDREW: That was to Agent Gordon.

MR. IBRAHIM: Yes. I think everybody was approaching it, the government and at least I was kind of like with kid gloves to get what you wanted out of it knowing that you were giving something up.

MR. McANDREW: It says what it says and doesn't say other things.

MR. BOSTIC: Your Honor, let me suggest this to the Court. One of the things that I have been trying to do is to put my case in a certain way, with certain type of evidence, in terms of witnesses, and I wanted this

resolved because I wanted to determine whether I call my remaining witnesses now before I put Mr. Capuchina on.

I'm going to ask the Court to do this. Let me have a little more time to consult. I'm going to put my case order out of whack at this point and proceed with the other witnesses. Give me a little more time to think about this, because I want to go back and read the record with respect to his licensure and what have you, because we may be able to find a way to do this without --

THE COURT: Right. Which I would strongly encourage because I just think that we have managed to deal with this issue up until now, and I think a non objectionable way from an evidentiary standpoint, once we get further into the caverns it gets harder to keep the torch lit from the standpoint of the rulings from the bench because the juris prudence is so uncertain on so many different levels.

How many more witnesses do you have, Mr. Bostic?

MR. BOSTIC: Your Honor, with that

being said, I have asked for Bill David to be available and I told the Court I can give the proffer why I would want him. I have Bob --

THE COURT: Is he available?

MR. WEEDE: He's here and he has a suit on.

MR. BOSTIC: I have Bob Donovan and then I have Diana Kula and I think that would be our case.

THE COURT: Why don't I suggest we get through those witnesses, and then we break for the day. Does that work for everyone?

MR. IBRAHIM: Breaking for the day works.

THE COURT: And then we, at the end of the day, we'll reconvene here, maybe go into the back and sit down and we'll just figure out where we think we're going to go tomorrow. But it sounds to me as if we're very close to the end of the evidence.

Government, do you have significant rebuttal?

MR. McCALL: No.

THE COURT: Without telegraphing,

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can you give me a window of timeframe wise?

MR. McCALL: I'm not sure we have any.

MR. McANDREW: If we do, I think we're talking about an hour to two hours top, but I'm not sure we have any.

THE COURT: I'm not quite seeing the gapping need for rebuttal.

MR. IBRAHIM: Let me know so I can get my surrebuttal ready.

MR. McANDREW: There is another disincentive.

MR. BOSTIC: With respect to Mr. David, I have never spoken with him about this case. If I have an opportunity to speak with him quickly, I may be able to tell him the questions I'm looking for.

THE COURT: He's the marshal. Government, do you object to that?

MR. McCALL: No.

THE COURT: I think that makes good sense. He's a public official, presumably he's going to say what he knows.

MR. EDELIN: Which I guess, Your

Honor, if I may, goes to scheduling. If we're essentially done today, if we may have a witness tomorrow, if we may have an hour or two of rebuttal tomorrow, what's the Court's preference in terms of closing?

THE COURT: I would like to close tomorrow at a minimum. This jury has worked long and hard.

MR. BOSTIC: Your Honor, I do want to say one thing. I talked about the agent on some clean-up issues, one of which relates to the notion that David Matusiewicz had a gun collection that relates back to 2006 that the government pulled out. I don't know how to deal with that at this point because it opens up the land of prejudice so to speak, which everybody has been trying to avoid, so I want to put that on the Court's door.

THE COURT: I didn't hear.

MR. BOSTIC: The land of prejudice in terms of been everybody has tried to keep the PFA --

MR. McANDREW: If we could review the testimony on the witness and just see

because I haven't had a chance to review the testimony. My recollection when she said he had a gun collection in 2006 when they lived at the Middletown house.

MS. CHAVAR: Right.

MR. McANDREW: I don't think it was that he had a gun collection at any point after that.

MS. CHAVAR: It doesn't say that it ever ended, so it's not on the record. Also, in 2006, as a result of the PFA, all of his guns as a result of that collection were collected and turned in by Tom.

MR. McANDREW: Can we look at the testimony and see if we can stipulate to something and take care of it?

MS. CHAVAR: Yes.

THE COURT: Do I have all counsel's permission to have Mr. Vogel deliver my bag of Dove Bar chocolates to the jury?

MR. McANDREW: Yes.

MS. CHAVAR: Yes.

MR. EDELIN: What I missed was the portion that was reserved for defense counsel.

You did miss it. You said yes, you did miss it.

THE COURT: We will make certain that there is a round through the courtroom before the jury, Mr. Vogel. So ordered.

MR. McANDREW: Thank you, Your Honor.

MR. EDELIN: And just so I'm clear, it's the Court's preference that we start closings after lunch?

THE COURT: Please. If we have to give the jury a longer morning break, the other reason I said what I said about reading material is I'm thinking of the alternates, because I don't intend to let the alternates out of here. Although I may ask you to consider this, do we need to keep all four? And if we don't need to keep all four, do you need them to stay in numerical order, or doesn't it matter?

Because, for example, the very last alternate is a pilot for United. It doesn't make no difference whether he's here or not here. For strategic reasons how you read, we're going 13, 14, I'll respect that, that's your right. Again, given the diligence of this

jury, I think we're only going to lose some if there is a real sickness or misfortune. If you say we keep all four, we you keep all four.

MR. BOSTIC: Your Honor, my objection, we're very unlikely to reach the pilot.

MR. IBRAHIM: He may be able to stay.

THE COURT: I also understand you may have a preference for one juror over another and that's your right, and I will never step on your ability to maneuver as lawyers unnecessarily.

MR. BOSTIC: I missed what the Court was saying.

THE COURT: Let's take a break and we'll buy ourselves some time with the Doves.

(A brief recess was taken.)

MR. BOSTIC: I have my final witness here pending the resolution of the stips. Dianna Kula, I can put her on now and get it out of the way and all I would have to do is get the stips finalized and give them to you first thing in the morning.

THE COURT: So in other words we might have one witness instead of three witnesses?

MR. BOSTIC: Yes.

THE COURT: And where are we with this discussion this morning?

MR. BOSTIC: I think between us, given a little opportunity, we'll work that out.

THE COURT: I think I made it clear I would like counsel to be practical.

MR. McCALL: Yes.

MR. BOSTIC: So we'll work that out as well, Your Honor.

THE COURT: All right. What we will do is we will proceed with the testimony of Ms. Kula. Ms. Strickland, please bring in the jury.

(Jury enters.)

THE COURT: I will note for the record that with counsels' permission the Court shared a supply of Dove dark chocolates with the jury and I want to report on the record that when he delivered it, the juror who accepted the delivery said, tell the judge we can't be

bought. I say this just because we can ask for no finer sentiment to come from the jury room. So, we have, as we often do, spent this intervening time working. We expected to present you with three more witnesses this afternoon. Now appears that we will only present one more witness this afternoon and we will reach stipulations hopefully with respect to other witnesses. If we can't, we'll call them and it's no fault to either side if we can't, but if we can we will avoid that, and then there's a very strong possibility that we could make the closing argument tomorrow, all right. But also don't want to prejudice anyone's rights to do what they need to do on either side of the case. But for now we'll have an earlier today because of the three witnesses we anticipated we will have one. But I assure you, we're doing this by cooperation among the parties to the case. So with that, Mr. Bostic, I believe you have another witness to present?

MR. BOSTIC: Thank you, Your Honor. If I may I call Ms. Dianna Kula on behalf of David Matusiewicz.

DIANNA KULA,

the deponent herein, having first
been duly sworn on oath, was
examined and testified as

follows:

BY MR. BOSTIC:

Q. Good morning, Ms. Kula. Would you
state your name for the record again before I
start my direct?

A. My name is Dianna Kula.

Q. And what area do you generally
live in, so the jury knows?

A. I'm from Bayville, New Jersey.

Q. And how old are you?

A. I'm 20 years old.

Q. Okay. Are you in school, working,
what's going on?

A. I have a full-time job and I am in
school full-time as well.

Q. And where are you in school?

A. I go to Ocean County College in
Toms River, New Jersey.

Q. And I want to ask you to slow
down. I know I move fast too. So you're in

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school in Toms River, New Jersey?

A. Yes.

Q. What are you studying in college?

A. I'm study addictions counseling and psychology for children.

Q. And you're a full-time student when school is in session?

A. Yes.

Q. Okay. And you said that you also work?

A. I do.

Q. And you said full-time?

A. Yes.

Q. And is that when school is in session you also work?

A. I work full-time year round.

Q. And what is it that you do again?

A. I'm a barista, a training and crew lead at the Starbucks in our area.

Q. Okay. Now, do you know David Matusiewicz?

A. I do.

Q. You see him over there next to Ms. Chavar?

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A. I do.

Q. Okay. Do you know Amy Gonzalez?

A. Yes.

Q. And Lenore Matusiewicz?

A. Yes.

Q. You see them over there at counsel
table also?

A. Yes.

Q. And what, if any, are their
relationship to you individually?

A. Lenore is my aunt, David is my
cousin, Amy is also my cousin.

Q. And when you said Lenore is your
aunt, your father is Lenore's brother?

A. Yes.

Q. Did I get it right. Okay. And
did you know Thomas Matusiewicz?

A. I did. He's my uncle.

Q. Okay. Now, I want to turn your
attention to about February of 2013. Did there
come a point in time that David Matusiewicz,
Lenore Matusiewicz and Tom Matusiewicz were at
your family residence in Bayville, New Jersey?

A. They did. They stayed with us for

I believe four days.

Q. And for four days?

A. Yes.

Q. Now, during that four-day stay, did you have occasion to be involved in conversation with Thomas Matusiewicz?

A. I did.

Q. And did there come a point in time when Tom, Thomas Matusiewicz, and I'm calling him Thomas Matusiewicz, I don't know what you called him. What did you call him anyway?

A. Uncle Tom.

Q. When Uncle Tom discussed with you an invitation?

A. Yes.

Q. Okay. And what was the general gist of that invitation?

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A. My Uncle Tom wanted my brother and myself and any other member of the family that was available to spend time with my Uncle Tom and my Aunt Lenore at their house in Texas. They wanted us to -- he specifically wanted us to be able to meet the horses, because I've never ridden a horse before, I don't know how,

but he was going to teach me how to ride the horse. They apparently had just had puppies at the time that he wanted us to meet. My father does gardening, so Thomas wanted my father to be able to, you know, see the new fruit trees that they were planting. They had a bunch of grapefruits that he was really exited about, but just to get to know that area, get to know animals and have that experience with them.

Q. Over that four days course, were you in school at the time?

A. I was. I was in school and working.

Q. About how often would you say you got to spend time with Uncle Tom?

A. Pretty much every day I was there, Thursday and Friday I did have school in the morning, but after that I was with my family. The weekends I had work in the morning, but I was with my family afterwards.

Q. And how many times were you roughly in Tom Matusiewicz presence?

A. From about probably 3 o'clock on, for all four of those days I was with them.

Q. Okay. And you said he extended this invitation to visit the property in Edcouch, Texas?

A. I'm sorry.

Q. Is it Edcouch, Texas?

A. I believe so. I don't really know the name, but --

Q. But it was in Texas?

A. Yes.

Q. We're talking about their home and property in Texas?

A. Yes.

Q. All right. When it first came up, the discussion about you visiting the property there, who was present?

A. My entire family. My father, Tom Kula, my mother, Belinda, my brother Franklin and myself, as well as all of them.

Q. When you say all of them, was David Matusiewicz present?

A. Yes, he was.

Q. Was Lenore Matusiewicz present?

A. Yes, she was.

Q. And over the course of that four

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days when further discussion was had about the trip to Texas, were the same people all time present?

A. Yes, they were.

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Q. You guys did a lot of socializing in those four days?

s?

A. Yes, we hadn't seen them in quite some time so we were very excited to be able to see them again.

their home an

Q. Now, when Tom Matusiewicz was talking to you about coming down to Texas and teaching you to ride a horse and do the other things and see the animals, what was his demeanor like when he was talking to you about doing this activity?

first came up
the property

A. He was very excited, he was excited to be able to spend time with us, again, he was excited that we were going to be able to go down there. We already planned roughly that we wanted to spend two weeks down there if we could because both my brother and I were working down there at the time. Very excited, very jovial about the whole experience, really looking forward to us being there.

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Q. And when was it that you planned to go down for those two weeks?

A. We -- my brother and I decided that the best choice for us would be to wait until school finished in like the beginning of ~~*~~ June and then we'd have a little break before we ended up having to go back to school and work, so we were going to take our vacation time during the first two weeks of June.

Q. And was that notion of going in June discussed or expressed by you or your brother to Thomas Matusiewicz?

A. Yes, everyone. The whole family we all decided that that was going to be the best choice.

Q. And in that discussion, you said the whole family agreed. Did Tom Matusiewicz agree as to that date in the future?

A. Yes, he was happy with whatever time that we could have been able to spend their. He was totally open to any time that was best for us.

Q. Okay. From your perspective, when Thomas Matusiewicz, Uncle Tom was talking to you

about the visitation, did you reach an opinion with respect to whether this was -- let me ask this way. In your mind, did you intend and were you prepared to travel down there in June of 2013 to visit with Uncle Tom and the rest of the family?

A. Absolutely. I was beyond excited. *

Q. And conveyed that excitement to Thomas Matusiewicz and the others presence?

A. Yes, I did.

Q. And I think you testified he was equally excited in the exchange? *

A. Yes, absolutely.

MR. BOSTIC: Thank you. I have nothing else.

MR. McCALL: No questions, Your Honor.

THE COURT: All right.

MR. EDELIN: Nothing, Your Honor. Thank you.

MR. IBRAHIM: No questions.

THE COURT: All right. You're excused, ma'am.

THE COURT: All right. I believe

ladies and gentlemen of the jury, that finishes our business with you today. We'll still be here trying to see if we can expedite the presentation of the remaining factual issues. Anything else that needs the jury's attention before we adjourn, counsel?

MR. McCALL: Not from the government, Your Honor.

MR. BOSTIC: No.

MR. EDELIN: No, Your Honor.

MR. IBRAHIM: No, Your Honor.

THE COURT: All right. Ladies and gentlemen, we'll get back to our ordinary 9 a.m. start time tomorrow. Same rules apply. We're well into the case, all right. Ever stay true. Please rise in respect for the service of our jury.

(Jury exits.)

THE COURT: In terms of matter on the record, we have previously circulated I think we did it on late Thursday of last week, proposed jury instructions from court and then we've had some discussions about that along the way. As of this point with the proposed

instructions, is there any input from counsel.

MR. McANDREWS: There is, Your Honor, for the Government. Generally speaking I think we're fine with the instructions. One instruction that came out that we thought was very important in criminal cases, particularly in this one, is the disjunctive instruction that we proposed, just when crimes are alleged to have been committed in multiple ways the jury needs to find one way, not all the ways. And if I could just grab my notes I could see.

THE COURT: Yeah, why don't other counsel grab their notes as well.

MR. EDELIN: Your Honor, I was just going to say I noticed most of them were the Third Circuit jury instructions and I know the mere presence of falls in one, falls in all is usually included in that, and the Court has that.

THE COURT: And you're content to have that in there?

MR. EDELIN: Yes.

THE COURT: All right.

MR. McANDREW: Disjunctive was the

big one, Your Honor, and I think that was page 39 of our proposed instructions.

THE COURT: Of your proposed?

MR. McANDREW: Proof may be disjunctive.

THE COURT: Did we amend that or did we delete that?

MR. McANDREW: I believe it's deleted unless I just missed it.

THE COURT: We'll check that in terms of the, just the drafting. But let me come to the defense, and with respect to that, government request the following instruction: Although the indictment may charge the defendant with committing a defense in several ways using conjunctive language, I instruct you it is not necessary for the government to prove that the defendant did each of those things. It is sufficient that the government prove beyond a reasonable doubt that the defendant did any of these alternative acts as charged, citing actually precedent from other circuits, I believe.

Mr. McAndrew, is it your

representation that's part of the Third Circuit model instructions?

MR. McANDREW: I don't know that it's part.

THE COURT: And that was a mouthful I read, so defense counsel doesn't have it in front of them, I'm happy to reread it.

MR. McANDREW: I have a variety of case law, but I'm not sure it's in the Third Circuit model.

MR. IBRAHIM: That's the only issue I have, Judge, because sometimes, the problem I'm having with that instruction is that it suggest to the jury the elements of the crime and what it's showing in the indictment as to what has to be proven. And I think when you go over the instruction on the elements, it's pretty clear what needs to be proven. I think it actually adds something else to the soup that's not needed and may serve as a point of confusion and hence the Third Circuit is not adopted.

MR. McANDREW: My response on that, Your Honor, is this statute in particular

is hyper technical. I believe there are five or
six different mens rea that can be met here to
satisfy the criminal intent element.

THE COURT: That is set forth in
the substantive element of the charge addressing
the offenses?

MR. McANDREW: It is, but we
nowhere tell the jury that they have to find
every one of them.

THE COURT: I think when you say
or, most folks know what that means.

Let's go back to whether the Third
Circuit has endorsed the instruction, because we
did a fair amount of work on the instructions
and my vague memory is that that's where it
fell.

MR. McANDREW: I recognize that
our cites are to decisions out of various other
circuits, so I'm not sure if the Third Circuit
has --

THE COURT: I'm just going to take
this under advisement. I will do a little more
homework. I will tell you my leaning is that if
it's not proof specific, there are court of

appeals, I'm unlikely to add it in, but I'm confident the charge will address the nature of some of the offenses.

Anything else from the defense? I know I pointed everyone to the amendments I made to the proximate cause standards and the additional requirements I placed on the government, I know I had pointed everyone to the way we dealt with the conspiracy charges, and particularly the verdict form as to Ms. Gonzalez, so anything else before I address the two supplemental instructions that the government presented today?

MR. McANDREW: We have something on the verdict form, you know, but we can wait if you want to go through the instructions first.

THE COURT: You mean the supplemental instructions you proposed?

MR. McANDREW: No, the verdict form itself.

THE COURT: So let's go back to the defense. Anything on the substance of the instructions?

MR. BOSTIC: Your Honor, nothing other than I apologize to the Court. I was supposed to get the Court a couple of supplemental requests on behalf of David Matusiewicz, one being in the presence, one being the two equal inferences can be taken from substantial evidence.

I'll tell the Court now in another context, I was looking for the particular language for it, another context the Third Circuit said that instruction disfavored, but it wasn't at the defense request. So I will get that to the Court as soon as I get back to the office.

THE COURT: The second instruction is disfavored?

MR. BOSTIC: Right. The two inferences. And I have -- I told the Court that we were looking for defamation instruction because I think the Court has to instruct on what defamation is. And that truth is a defense, and it's the plaintiff's obligation to prove that the defamed statement or alleged defamed statement is false.

The government has that in their indictment, and they say that the statements and allegations are defamatory, so I think that using such a technical term in the indictment, this Court, it would be incumbent on this Court to instruct on what defamation is. I have an instruction that hopefully I can get to the Court as soon as I get back to the office also proposed instruction on that.

THE COURT: Let me comment on mere presence. My memory is that there is a model instruction in the Third Circuit on mere presence and it would be my intent to deliver that. I'm going to study the two inferences. I agree with you, Mr. Bostic, there has been criticism of that, but it may depend on the posture. We'll look at that and let you know. And the same way I told the government, we'll look at disjunctive proof, but I think Mr. McAndrew wants to be heard on the issue of defamation.

MR. McANDREW: Absolutely, Your Honor. The indictment alleges there were statements that were defamatory. Defamatory is

a term that is defined all over the law. You can go right to Prosser on Torts, you can go to the Statement on Torts, it means that the statement tends to so harm the reputation of another as to lower him in the estimation of the community.

If we want to define the term defamatory, I suppose we can. But what I'm concerned about is in graphing on to a Section 2261(a) indictment an element that relates to defamation when there is none, and that being, what we have to prove here is as it relates to the defamatory nature of the statements, that is there was a criminal intent, one of the criminal intents required by the statute is met.

Now, if the defendants were to make statements that are defamatory, and defamatory being a question of law, not for the jury, that is, or could be circumstantial evidence of an intent to harass, intimidate, cause emotional distress, so forth and so on. But that's not to say that the jury needs to make a factual finding that there has been a false and defamatory statement here in order to

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find that the criminal intent burden has been satisfied. And I think right there we're conflating two things that's going to lead them right into the land of confusion. There is no such requirement in the law.

THE COURT: Let me take you back in time to a motion to dismiss the indictment on First Amendment grounds and the argument we had and some debate as to whether, that's a certain of the overt acts if it represented speech that was, in fact, true whether that would be beyond the reach of criminal prosecution. And at least I understood the government at the time to say that if that were the case, then there might be merit to the First Amendment objection.

So I'm trying to pull the transcript on that, but I do recall that in the colloquy, I actually put that question to the government because I was concerned about the implications of an indictment that includes as part of the criminal behavior statements that in a certain context would otherwise be protected, that is statements of concern by a family member about another family member.

So I need to think about this some more. I am looking for the transcript, but I recall as part of the argument that we had that was one of the issues, at least I thought I understood the government to say at the time that truth might indeed be something that the jury would need to at least consider.

Now, I agree with you that given the breath of the overt acts, my instruction is going to have to be tailored carefully, and on that score, it is not my practice to send out the entire indictment, but if necessary would provide the jury only with that section of the indictment that has overt acts in it.

And I would note that the way the indictment was drafted is practical in that sense because it does have the overt acts specifically innumeraed and segregated in the body of the document. We'll get to that. Hold this for a minute. I see Mr. Ibrahim.

MR. IBRAHIM: Judge, all I wanted to offer, I believe the Court was referring to the motions argument that was handled in Philadelphia, was in terms of defamation, there

is an element of maliciousness that's involved
in that also in terms of what someone believed,
and one of the inquiries made of the government
was whether or not if there was a genuine belief
in something, does that -- would that change the
landscape and obviously I'm paraphrasing because
I don't remember precisely. *

THE COURT: That goes to intent
which was a separate issue.

MR. McANDREW: Belief has no basis
in defamation law. It's a statement of fact or
opinion.

THE COURT: I agree with that, but
what I'm trying to suggest to you is there may
be two balls in play. The ball that Mr. Ibrahim
is putting in play is an element of the offense
that goes to intent and mens rea state of mind.
The ball I'm putting in play for your
consideration is the motion to dismiss the
indictment on First Amendment grounds where the
objection was made was this criminalizing
potentially protected speech and does the
protection of that speech depend upon whether it
is defamatory and it being defamatory depends on *

it being true. Two separate --

MR. McANDREW: I got sidetracked.

THE COURT: I allowed him to ride in from the left there. Now that you have been outflanked, we will put the one side, the flanking maneuver to come back to your First Amendment issue.

MR. McANDREW: Let's go back to the context in which the First Amendment claim is raised, overbreathe and as applied.

THE COURT: Overbreathe is not applied. I summarily rejected that argument.

MR. McANDREW: As applied to this particular conduct. But I don't think it's for the jury to decide whether the First Amendment protects, I think that's a question of the law.

THE COURT: Well, yes, but there is a factual component to it.

MR. McANDREW: And the factual component would be whether the statements are true or not.

THE COURT: Right.

MR. McANDREW: To the extent that the Court is going to instruct on that, we're

going to ask the Court to instruct the First Amendment does not -- there is no First Amendment right to stalk. That is, if this is conduct as opposed to speech, and even if this the speech, you can make a truthful statement that is still harassing. If you were to look at the revenge pornography cases in the 2261(a) context, that's truthful, that's conduct that people have engaged in which is now a depiction that's being disseminated for a criminal purpose, for an intent to commit a violation, or an intent to act in a way that violates.

THE COURT: Can we agree that sex tapes are a materially different world for First Amendment purposes from expressions of concern about a family member in the context of abuse?

MR. McANDREW: I don't know if they are when you're saying that this person is a child rapist, this victim. That is per se defamatory under every legal standard that I know of. So as a matter of law, that statement itself is defamatory. What becomes a question, is there an affirmative defense of truth.

THE COURT: Right.

MR. McANDREW: And, you know, I'm not exactly sure what's being proposed in the way of instruction.

THE COURT: So the government doesn't get too much adjutant, it would not be my intention to put a first amendment in those terms in front of the jury, it would be with respect to overt acts that are in the nature of defamation, this is what defamation is, it would not be defamation if X.

MR. McANDREW: I think this might be more concrete if we were to actually see the instruction.

THE COURT: I'm going to rely on the defender in the first instance. I have been independently thinking about this Thursday as you may be able to tell from my questions. I don't think counsel that we ought to, you know, put a constitutional issue in front of any jury and it's not my intent to do that, but in terms of specificity of definition, in terms of overt action, in terms of the light of motion to dismiss on constitutional grounds where we did have previous colleague, I think I need to be

sensitive to that.

MR. McANDREW: I'm thinking off the top of my head here and maybe that's not a good thing, but more importantly in a defamation case, the defendant would have the burden of proving truth, for instance.

THE COURT: Right. I agree.

MR. McANDREW: How does that relate to a criminal case where you have essentially an affirmative defense?

THE COURT: Right.

MR. McANDREW: Your Honor, so if the Court will allow me, I'll table that until we have something concrete to respond to.

THE COURT: Table that.

MR. McANDREW: The only other issue I think we have with the instructions was a consciousness of guilt instruction was in here on page 33.

THE COURT: Is that in our revised or your proposed?

MR. McANDREW: My proposed, I'm sorry.

THE COURT: Page 33?

MR. McANDREW: Yes. That's taken from the third circuit model. I believe there is in evidence of Mr. Matusiewicz post shooting statement given in the courthouse with regard to him and Thomas Matusiewicz being at the courthouse, Tom coming in and walking right back out, leaving immediately, which is obviously at variance with what's seen in the videotape itself. So we would ask for a consciousness of guilt instruction on that basis.

THE COURT: Let me ask you if that's in evidence. I know it was raised on cross-examination of one of the witnesses when there was a representation that Mr. Matusiewicz had cooperated with law enforcement and then the question of the witness as -- if I remember correctly, was well, if someone had said this to law enforcement and if a video shows the opposite is true, would that be cooperation. Would -- is that the same thing as being in evidence?

MR. McANDREW: Substantive evidence. I'm going off my recollection and we can double-check the transcript.

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MR. McCALL: We can provide the transcript to the Court tomorrow. It was on my redirect of Special Agent Gordon.

THE COURT: Redirect and not cross?

MR. McCALL: Right, but my memory of the question was not a hypothetical, but isn't it you had a chance to review the transcript of David Matusiewicz's interview with the Detective Porter? Yes. And didn't Detective Porter ask him... and didn't he answer.

THE COURT: Right. So there may be in fact substantive evidence in the record.

MR. McANDREW: We can check the transcript.

THE COURT: I'm going by my memory too. We have two people rising in the back.

MR. IBRAHIM: Just so long as that type of instruction is specific to where it came from.

THE COURT: Understood. Mr. Bostic.

MR. BOSTIC: Your Honor, if I may,

I don't believe that argument can be made that the statement in its context is before this jury. There was some cross, a cross and redirect with respect to generally what was said. If the Government was to rely upon this, then I would have been happy to put in David Matusiewicz's statement, but they said it's self-serving. So they can't have it both ways, because if they want to say that -- exactly what the statement said, let's put it in front of this jury and the Court can then determine whether there's a consciousness of guilt instruction that is appropriate. But on the record that stands right now, I suggest to the Court that it's a far reach and given the type of evidence that's here, I believe it is not consistent with the notion of consciousness of guilt.

THE COURT: All right. I'm the one that raised the issue about how it came up for the jury and is it substantive evidence. So let's all focus on the transcript, all right? And then which of Special Agent Gordon's trips to the witness stand was it? Does anyone

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MR. McCALL: Judge, I think it's the second, the second trip.

THE COURT: All right. But as soon as any counsel locates the page reference, kindly circulate it to the Court and all counsel. All right. Now, back to Mr. McAndrew, do you have anything else other than the two omissions from the current draft that you wish to address?

MR. McANDREW: I do not with regard to the jury instructions. I can take up the verdict sheet when the Court is ready to do that.

THE COURT: Let's hold on the verdict sheet, so we can come back to the defense.

MR. McANDREW: I think Mr. Weede may have additions on the 404B instructions.

THE COURT: Let's stay on the main draft for the moment.

MR. McANDREW: I think that's all for us, Your Honor.

THE COURT: So Mr. Bostic, from

you we're waiting on mere presence and we're on two inferences and we're waiting on defamation. Is there anything else counsel has in play that they would like me to be waiting for?

MR. BOSTIC: No, Your Honor, that I can recall at this point.

THE COURT: Mr. Edelin.

MR. EDELIN: Your Honor, mine is contained in the Third Circuit instruction.

THE COURT: You've reviewed that and given me your input. Mr. Ibrahim.

MR. IBRAHIM: The only thing I would like an opportunity to look at is in terms of the intent instruction, whether or not there is a clearer explanation of subjective intent that the Third Circuit would not have the opportunity to address in its instruction.

THE COURT: The clock is ticking.

MR. IBRAHIM: Yes.

THE COURT: Okay. Especially if you want me to freelance.

MR. IBRAHIM: Understood.

THE COURT: All right. Let's go to supplemental instructions. The 404B, the

supplemental instruction is A, do you need it and B, I think that the preamble actually recounts the evidence in a way that the defense would certainly not welcome and indeed might in some respects undercut the purpose of a 404B instruction, so I would be more inclined, Mr. Weede, not to go into such detail about the various wrongful acts.

MR. WEEDE: Certainly, Your Honor. I took a shot at it from the model Third Circuit instruction. I think there's some detail necessary just to more what the instruction relates to but obviously if the Court wants to broaden it in a different way, that's --

THE COURT: And defense, I'm making a proposal that you may disagree with, but my premise is that you would prefer the Court to recount less of the detail of the prior wrongful conduct. Is that a correct assumption?

MR. BOSTIC: Absolutely, Your Honor.

THE COURT: Then I will proceed that way. Going back now, Mr. Weede, to the proper purposes. Do you have yours in front of

you?

MR. WEEDE: I do, Your Honor.

THE COURT: All right. Take a moment to go through. Motive is fine.

MR. BOSTIC: Your Honor, can I have one moment with the Government because I don't have my copy of that.

THE COURT: Yeah, by all means. We don't need to do this right now, counsel. All right. What I would just say is let's go through the purposes and make sure that they are not broader than A, the court previously mentioned and B, than would be warranted under the facts of the case. There's a second proposed instruction from the Government, termination of parental rights order. Actually I don't know that I have any particular amendments in this, Mr. Weede, so unless the defense has a problem with it, I think that's fine as is.

MR. WEEDE: I actually used yours to track this, the one you gave during trial.

THE COURT: All right. Thank you. No wonder I like it. All right. Now, if that

handles the substantive instructions and supplemental instructions, I think we'd be ready to go to the verdict form.

MR. McANDREW: Actually, Your Honor, two other short things on the Court's proposed instructions. With regard to the child witness instruction on page 16, I think our record now is actually we've had two child witnesses testify, Laura Matusiewicz and Tatiana Gonzalez. So we may just want to amend that to add Tatiana in that instruction. Right now it only refers to Laura.

THE COURT: That's page --

MR. McANDREW: 16 of the Court's proposed instructions.

THE COURT: I think that's appropriate and that's fair. Any problem on the defense?

MR. EDELIN: No, sir.

MR. IBRAHIM: No, sir.

THE COURT: Hold on while I make my notes here.

MR. IBRAHIM: I have a photograph also if you want it included in the

instructions.

MR. McANDREW: You want to enter it in jury instructions? At least he's not asking for it to be the cover of the jury instructions.

MR. McANDREW: Your Honor, the next thing that I have is on page 40, it's the Court's special interrogatory instruction. Based on the ordering that we have right now, I think the -- yes, all of the conspiracy instructions come after this, which we have no problem with. Maybe we'd ask the Court to consider adding a line at the bottom of the special interrogatory instruction, perhaps on page 40, that just orients to the jury the fact that you will be instructing them on conspiracy. I think this may be the first mention of conspiracy, that's all.

THE COURT: Right. And while I'm on the substance of elements of the offense is going to be very rigid in terms of reading and not ad libing, there be some ad libing to focus the jury particularly where I think I need to change the tone or change the focus in a way to

engage them and this will be one of the instances for it. But I'll make a special note anyway.

MR. McANDREW: Thank you. And with regard to the special interrogatory, Your Honor, I haven't seen a conspiracy instruction done this way. I would note the Third Circuits Instruction 13, 3.18 I think it is from the 2009 blue book, that just talks about special interrogatories. They most often come up -- they are disfavored in criminal cases generally. They most often come up in this post apprending world of sentence enhancement. *

THE COURT: Which is where we are.

MR. McANDREW: Which is where we are, but the special interrogatory that we're sort of pointing to is on the conspiracy count, count 1.

THE COURT: Right.

MR. McANDREW: How we've broken out the two objects of the conspiracy and we actually have the jury now making guilty or not guilty findings, two of them in the one count, which, you know, we wonder whether that's going *

to be confusing, particularly in light of the fact that they don't actually need to find both objectives was as having been satisfied. This goes back to this disjunctive instruction.

THE COURT: How about if we solve that with an or in between?

MR. McANDREW: Thoughts? If I could confer.

THE COURT: Why don't you confer and why doesn't the defense think about that. The Government is making what is an appropriate point in terms of what's usual. I am doing something that's unusual, that I believe is appropriate under the circumstances of the case, but to deal with the concern the Government has, then maybe we just add that or in the verdict form.

MR. IBRAHIM: And where is that?

THE COURT: Well, take for example --

MR. McANDREW: I think it's the first page of each verdict form.

THE COURT: Right.

MR. BOSTIC: Your Honor, in

hearing all this discussion about when we do the special interrogatory and when the Court gets into it, a thought has just come to mind that I need to vet a bit more, because for example, you know, ordinarily in a bifurcated case, you get the finding of guilt on the substantive charge and then where you have this added element, it goes in separately afterwards and you say to the jury, I need you to come back and do something more. And hearing all this discussion, I'm now thinking about whether that procedure -- I'm not advocating it at this point, because I haven't given too much thought to it -- might be the best all around, so I know and I hope the Court will give me this room to, as I go back and reflect, if I have a position, I'll ask the court to let me make it tomorrow morning first thing or by e-mail or document tonight. I just want to think about it.

THE COURT: The sooner the better.

MR. BOSTIC: Absolutely, Your Honor.

MR. McANDREW: Perhaps I can simplify this process. I've just been overruled

by both co-counsel and I've been instructed to withdraw the objection of the special verdict form, therefore I have nothing further on that.

MR. BOSTIC: Judge, you see why I wanted to think about it a little bit more, so --

MR. McANDREW: So with that, I don't believe I have anything else.

MR. McCALL: In his defense, we told him to object last night, Your Honor.

MR. IBRAHIM: That was a joke, right?

THE COURT: It's a complicated world, Mr. McCall.

THE COURT: All right. I believe I need to leave you to your stipulating, so --

MR. IBRAHIM: Judge, as a matter of procedure, would we be entitled or permitted to make Rule 29 arguments tomorrow morning?

THE COURT: Of course.

MR. IBRAHIM: Thank you.

THE COURT: Do we do that in advance of the jury or do we do that after we put into evidence our stipulations and do our

final housekeeping? I would be inclined, I think, to do our final evidence housekeeping and then close all the evidence and at that point we would also have the jury retire and that's why again I was suggesting to them that everybody bring their reading material.

MR. IBRAHIM: I think that's fine, Judge.

MR. McANDREW: Fine for the Government, Your Honor.

THE COURT: Okay. And then our intent would be to finish this and then have closing arguments. We may end up with an earlier lunch, then, all right, if that works Ms. Strickland. We may do lunch at noon or even 11:45 depending, but we'll assume that counsel is going to be closing tomorrow afternoon.

Returning to the issue of choreograph, has the Government given some thought to how much total time they would like for closing and rebuttal?

MR. McCALL: Judge, I think we're probably looking at about an hour and 40 minutes total.

THE COURT: All right.

MR. McCALL: Total time between the two arguments.

THE COURT: All right. To the long side, but it's a long case and it's a complex element. Defense? You won't use all that time, I'm sure of it.

MR. BOSTIC: Judge, it's a complex case and throughout this case David Matusiewicz has been made front and center, so right now, as I had written up my argument, I would suggest to the Court it might be closer to two than not and I'm going to go back and try to pair it down. But there's a lot of ground we have to cover unfortunately because. Because everything has been pointed from the Government's perspective thrown towards David Matusiewicz and I got to try to disarm some of that.

THE COURT: I understand that. And certainly I try to let counsel be advocates as you've seen. Two sounds like it will tax the jury's concentration, though.

MR. BOSTIC: And I'm not saying I'll be there, but I want the Court to know that at this point I figure it probably would end up

being at least an hour. I'll try to keep it there, try to cut it down, but --

THE COURT: An hour is not at all unreasonable. Keep in mind depending upon how long all the defense goes, the Government may come back and suggest they need a slight expansion on the back end and again, I'm just going to use my judgment.

MR. BOSTIC: I appreciate that. The Court knows we don't get to come back and say we got something, so I got to get it in up front.

THE COURT: Yes, I am well aware of that.

MR. EDELIN: Your Honor, I expect to be under an hour.

MR. IBRAHIM: About 33 minutes.

THE COURT: And then we will just call an audible as to whether we choose to charge the jury tomorrow afternoon or not, all right? Depending upon what time we finish and what we think in terms of their attentiveness. My goal will be to send out the charge with the jury, but I will not tell them I'm doing that

until after I have instructed them so that they will hopefully pay closer attention to the charge.

MR. McANDREW: Your Honor, since we have outstanding jury instruction issues, how will the Court likely take those up tomorrow, just so that we can have that cleared up before we go to the closing?

THE COURT: Oh, obviously you're not going to close without having that resolved. Again, since I like when the jury is here to get them working, I would propose we get them working as soon as possible. I've already previewed for them that there's going to be some down time when we do some lawyering. Knowing that was very likely to be the case, we sort of set the stage for that, all right. So we'll clean up our evidence, we will do our housekeeping, we will hear our arguments under Rule 29 and then we'll finish out on the jury instructions. And but I expect the heaviest lift on that to be what, if anything, was said about defamation. I suspect the other ones will be relatively, once we've done a little more

homework, I think the court will have a clearer sense of what it intends to do. Is there anything else, then, counsel, we can accomplish today?

MR. BOSTIC: No, Your Honor.

(Sidebar discussion.)

THE COURT: I'm only doing this at sidebar, because I don't want to put defense counsel in any awkward position. I know there are some judges, if a Defendant chooses not to testify that there's some kind of colloquy. I haven't made up my mind whether I'm a fan of that or not, but I wanted to raise it with defense counsel at sidebar to see if they had a preference.

MR. IBRAHIM: Judge, for whatever it's worth, as long as I've been practicing, I cannot remember the last time I've had a judge colloquy a Defendant. That you ask the attorney and you rest, that's it.

THE COURT: That's what I said. I'm not a big fan of it and I wanted to raise it only at sidebar, but I know there's some judges who are --

MR. BOSTIC: That is my position too. I never go and ask for it. I can't remember.

THE COURT: That's great.

MR. BOSTIC: Maybe once or something, but not in the very long time.

MR. EDELIN: That's fine, Your Honor. I don't need a colloquy.

THE COURT: Right. And again, I'm not here because I think you need a colloquy. I'm here just because -- and I think it varies by sections of the country too.

MR. IBRAHIM: For whatever it's worth, I've had homicide trials where folks have had that colloquy and its thrown everything for a loop because it becomes a relationship between the Judge --

THE COURT: That's why we're here at sidebar.

MR. McANDREW: But we will make a record of it, I guess, before you rest your cases tomorrow.

MR. IBRAHIM: The only record that ends up happening is 2255 we get up and explain

that's what we told them and that's it.

THE COURT: Right. It's an unusual case where there's been a lot of time and energy and resources invested, so I just thought I would raise this in the event somebody had a strong feeling. It's not what I'm inclined to do, but I just --

MR. IBRAHIM: Most judges don't even ask us, so I appreciate it.

MS. CHAVAR: I've never done it.

MR. BOSTIC: Your Honor, may we be off the record for a minute.

(Discussion off the record.)

(End at 3:55 p.m.)