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THE COURT: All right. I'm doing this not in open court because I'm concerned about any press, about polygraphs before we decide what's going to happen with polygraphs, particularly as we approach a holiday weekend.

So the first question I have for the defense counsel is do I have your agreement to have this discussion here on the record, but without your clients present?

MR. BOSTIC: Yes, Your Honor.

MS. CHAVAR: Yes.

MR. EDELIN: Yes, Your Honor.

MR. IBRAHIM: Yes, Your Honor.

THE COURT: Government, you're in agreement?

MR. McCALL: Yes, Your Honor.

THE COURT: Let me begin by getting my arms around expert disclosure and where it stands. The government has said that Mr. Ibrahim had said to him that he did not intend to call a polygraph expert although he had previously identified one and Mr. Ibrahim has said that this is not directed to a

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1 different issue. Do I understand that to be the
2 current posture?

3 MR. IBRAHIM: That's correct.

4 THE COURT: We're going to get to
5 other issues. Mr. Ibrahim, had you at any point
6 identified a polygraph expert for the
7 government?

8 MR. EDELIN: No, Your Honor. And
9 my position is similar, he's not coming in as an
10 expert, he's not coming in as an expert to talk
11 about whether or not the first one was done
12 correctly.

13 THE COURT: All right. I'm
14 somewhat surprised by that because when we had
15 -- first of all let me just clarify for purposes
16 of the record, would it be accurate to say that
17 no request from the defense for CJA support has
18 been denied? In other words, any request that
19 has been made for resources has been granted by
20 the court.

21 MR. EDELIN: Yes.

22 MR. IBRAHIM: Yes, Your Honor.

23 THE COURT: And would it be
24 accurate to say that we had had some discussions

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1 about polygraph testing dating back into the
2 spring before the discovery deadline?

3 MR. IBRAHIM: Absolutely, by the
4 nature of the filings.

5 MR. EDELIN: Yes, Your Honor.

6 THE COURT: In the more recent
7 discussions we had, the sense I had was that
8 there had been some identification, it appears
9 it was identification of an expert on behalf of
10 one defendant, but questions about whether there
11 would be testimony and so forth.

12 The other understanding I had was
13 that whatever the defense was going to do which
14 I did not know the details of went to the Texas
15 polygraphs which had become an issue in the
16 case, and the fact that not only is it an overt
17 act charged in the indictment, but there had
18 been testimony both in terms of the polygraph
19 results being sent to people as part of the
20 government's allegation of the stalking and
21 there had been the comparison by Special Agent
22 Gordon between the content of some of the
23 polygraph questions and the content of some of
24 the e-mails, at least the impression I had at

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1 the point you were going forward it is in
2 way related to the validity of those polygr
3 results. Maybe I misunderstood, but that's
4 impression that I took from our discussion.
5 I incorrect?

6 MR. IBRAHIM: Maybe if I state
7 what the reason was, and in large part becau
8 have had -- I spoke with Mr. McCall briefly
9 morning and one of the things that I advised
10 was when counsel makes ex parte requests of
11 Court, I'm very mindful not to provide too m
12 information because it's ex parte.

13 THE COURT: And I understand that
14 and I also understand you've got issues of
15 protection of your client.

16 MR. IBRAHIM: So what I would li
17 to do is state the reasons why I believe that
18 Mr. Drdak's testimony is appropriate and it is
19 not blindsiding the government.

20 THE COURT: Or the Court.

21 MR. IBRAHIM: Or the Court.

22 Initially back in March there was
23 the disclosure of the names of the experts,
24 subsequently there was a disclosure of the

1 reports of the experts that I did have reports
2 and I advised Mr. Weede, who was handling it for
3 the government that I was not going to be -- the
4 clear representation, which is the truth, is
5 that Mr. Drdak and Mr. Scholl would not be
6 offered as experts.

7 THE COURT: Let me clarify
8 something. Were actual reports of their
9 evaluation of the Texas results ever given to
10 the government?

11 MR. IBRAHIM: They weren't in
12 existence.

13 THE COURT: So it would be -- I'm
14 just trying to clarify where we standard
15 procedurally. It would be fair to say that no
16 substantive input about the polygraph Texas
17 results were provided to the government, it was
18 merely identification of possible witnesses. Is
19 that accurate?

20 MR. IBRAHIM: Correct. I believe
21 I also provided the CV of these individuals.

22 THE COURT: It goes to
23 identification, I'm talking about substance of
24 opinions.

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1 MR. IBRAHIM: There was no report
2 in existence and none was provided.

3 THE COURT: We are literally in
4 a situation where although there were individuals
5 identified, there was no substance provided as
6 a representation that you did not expect to
7 those individuals, is that an accurate summary?

8 MR. IBRAHIM: That's correct.

9 THE COURT: Now we're in a
10 position where the defense says because of the
11 way the evidence has evolved at trial, we feel
12 we should be given leave to do this.

13 MR. IBRAHIM: That's correct. One
14 of the critical differences is one, Mr. Schol
15 is not testifying. The only person being
16 offered to testify is Mr. Drdak, D-R-D-A-K, who
17 will be testifying as an examiner, and he will
18 testify concerning the test, and that was done.

19 THE COURT: Which test, the Texas
20 test?

21 MR. IBRAHIM: He is testifying about
22 the test that he performed which was done
23 yesterday.

24 THE COURT: All right. And I

1 think I had the impression that whatever he was
2 doing was going to bear upon the validity of the
3 Texas results.

4 MR. IBRAHIM: When you look -- it
5 does, because when you look at the questions he
6 asks, he is specific to relate his questions
7 back to the veracity of the answers given back
8 to Mr. Capachina of the Texas polygraph.

9 So the polygraph that was
10 administered yesterday afternoon is not a
11 polygraph where Amy Gonzalez is being provided
12 an opportunity to present indirect testimony
13 about how she feels, the questions were
14 specifically tailored so that it ask her whether
15 or not she was being truthful back when she was
16 initially asked the questions in Texas.

17 THE COURT: Let me ask,
18 Mr. Edelin, does your exam purport to be the
19 same thing?

20 MR. EDELIN: Yes, it does.

21 THE COURT: Now, I was surprised
22 and concerned to see in your E-mail,
23 Mr. Ibrahim, the idea that this is evidence of
24 actual innocence.

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1 MR. IBRAHIM: Here is why it is.
2 It's evidence of actual innocence when the --
3 the indictment has overt acts and the theory of
4 the government's case is that the reason why
5 this polygraph was done was in furtherance of
6 defamation, hence that it was untrue, and hence
7 it was not truly believed, untrue in the sense
8 of what was stated to the initial polygraph
9 examiner.

10 THE COURT: Let me ask a different
11 question. You did not purport to say that these
12 polygraphs would prove no abuse ever, that abuse
13 happened.

14 MR. IBRAHIM: Absolutely not. I
15 said evidence of innocence because polygraphs
16 are used by law enforcement and I have used them
17 in terms of presenting information to law
18 enforcement that they have evaluated in terms of
19 at least on one occasion dropping charges.

20 THE COURT: But outside of the
21 context of a trial?

22 MR. IBRAHIM: Outside the context
23 of a trial, but someone who was charged, so when
24 I say evidence of innocence, evidence of

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innocence does not mean innocence.

THE COURT: But it strikes me that at the most this would be evidence that some of the overt acts might have lacked criminal intent.

*

MR. IBRAHIM: Exactly.

THE COURT: That's the most that it could prove.

MR. IBRAHIM: Agreed.

THE COURT: If it proves that at all based upon the posture that we're in in terms of a polygraph purporting to test the veracity of a polygraph. So putting to one side the inherent problems of polygraphs, we have certain unique intellectual issues given the construct of the case.

MR. IBRAHIM: And I just ask that while I firmly agree with everything the Court has said, the only reason why it is an issue is because it was brought in the case.

THE COURT: I understand. Wait a minute. I understand that it's in the indictment and I understand that there has been testimony put in front of the jury and there is

polygraphs can be admissible for limited purposes at the discretion of the trial judge. A Daubert hearing is a hearing to determine the admissibility of scientific evidence. →

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1 no question in the Court's mind that that
2 testimony is meant to implicate your clients in
3 criminal conduct.

4 MR. IBRAHIM: And also it's going
5 to be argued to be false.

6 THE COURT: So all of those things
7 are on my radar, but there are still, you know,
8 obviously major issues with this type of
9 evidence, and at this stage.

10 So, let me hear from the
11 government.

12 MR. McCALL: What I would start
13 off by saying is the issue that we're talking
14 about is not new. It's been on the table since
15 we issued the indictment.

16 THE COURT: Too little too late?

17 MR. McCALL: I think that's
18 putting it mildly. We're three weeks in the
19 trial.

20 THE COURT: I read your E-mail and
21 I took seriously what you said in the context of
22 prior discussions that have been held by
23 counsel. And one of the reasons I wanted to
24 start out with what has been exchanged at this

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But it was
okay for the
GOVT at the
last minute to
offer testimony of
court employee
Mr. Taccarelli &
Ms. Gunther to
allege a conspiracy
because David's
demeanor was
calm.

The govt knew
about Mr. Tacconelli
since his interview
in Feb. 2013
pre indictment

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point is to get clarity on the record where we stand procedurally.

MR. McCALL: I think that you know the idea that you know we have Rule 16 in place for a reason, and it's to prevent a situation like this, where the issues are known by counsel, this isn't new, we had made disclosures in accordance with the Court's deadlines. The defense did not. They have waited and waited and waited.

We are about to close our case and they are literally springing this on us at the last second. It goes to the issue of fairness.

And I mentioned this in the E-mail, but I want to put it on the record, this is a violent crime case, this isn't like a drug case or anything else. We're entitled to a fair trial and the victims in the case are entitled to a fair trial. And this doesn't feel fair from my perspective. I don't -- I'm not getting into the motives of it, I'm just saying it doesn't feel fair the us.

What I would say about the polygraph itself is I think it's important to go

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And the defendants, the ones that are supposed to be innocent until proven guilty, deserve a fair trial as well.

1 back and really look at how the government has
2 presented the polygraph evidence in this case.

3 First of all, that was the -- one
4 of the primary tools by which the defendants
5 harassed Cristine Belford. They went and paid
6 for a polygraph and then sent it out to
7 everybody, knowing that it's a --

8 THE COURT: There is no criticism
9 implied from the Court in saying you put that
ball in play, I was making a factual statement
that it is relevant in a way that it ordinarily
would never be.

MR. McCALL: So my next point to
the Court is what we have attacked as it relates
to the document are the factual recitation that
begins the document. So if the Court recalls,
when we did a comparison, when Special Agent
Gordon testified and we compared defendant
Gonzalez's polygraph, we didn't go into what the
results were, that section, we stayed at the top
portion of the document which is basically what
Amy --

THE COURT: The question that she
was asked was different from the representation

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The govt continuously attacks + challenges the 1st polygraph mom + I took in TX, but we are not allowed to show the jury materially exculpatory

evidence when we took + passed a 2nd polygraph each. Who takes a polygraph if they think they are going to fail it?

made to third parties about the

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MR. McCALL: Well, the way I read

graph, she sits down, she says here are

s, and then she gets tested on a couple

s. Same thing with Lenore Matusiewicz.

So what we highlighted for the

that one of the statements that she

to the polygraph examiner and how that

to a statement made to David

cz's attorney. Not the results, just

sistencies in the statements made by

dant. So we were careful in your

ion of these polygraph reports.

We've subsequently decided not to

r expert and wait and see how the

handled the Texas polygraph. We fail to

rule of evidence applies that makes the

polygraph, which is a polygraph on a

, and I would note for the record that

ad the current polygraph, it doesn't

identically to the Texas polygraph.

There was nothing inconsistent about my polygraph & what I told Ed Medrano, David's attorney, when I was writing the email to the attorney I forgot to include a spot because my husband & 4 yr old daughter came into

THE COURT: One order I'm going to

that I be given a copy of the Texas

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the room +
being human,
I just got
distracted +
forgot to include
it.

1 polygraphs and the current polygraphs which I
2 haven't seen. And I want them --

3 MR. IBRAHIM: I did copy the court
4 on the --

5 THE COURT: Well, I'm working at a
6 disadvantage. Also, by the lunch break today I
7 want copies, hard copies, that I can take a look
8 at.

9 MR. EDELIN: Your Honor, I just --
10 I know Mr. Ibrahim's experts flew in and are
11 housed in a hotel. My guy is driving back and
12 forth. So I will E-mail him. And he will get
13 it to me today. I don't know if it will be by
14 lunch, but I will E-mail him and tell him the
15 Court wants it by lunch.

16 MR. IBRAHIM: Judge, can I
17 address --

18 THE COURT: I would rather let the
19 government finish.

20 MR. McCALL: So what I would
21 finish with saying is, you know, so that's my
22 position as it relates to Rule 16 which we're
23 taking very seriously in this case. And I think
24 with respect to the evidentiary issues, again,

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defense counsel has offered no case to support what they're trying to do here. They have offered no rule of evidence for which this would apply.

The Third Circuit's case law in addition to the Supreme Court case law is very clear that these polygraphs are only admissible in very limited circumstances of which this is not one.

THE COURT: I'm keenly aware of the limitations on it. And when I sent the case to counsel, it was to que up what the Third Circuit said to give you a head start, that's why my limitation, I commend these cases to your attention.

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MR. McCALL: What I responded to the Court was another string of cases around the country that go even farther than the Third Circuit. I think there's a Rule 704.

MR. WEEDE: 704(b).

MR. McCALL: Go ahead.

MR. WEEDE: You know, I note that I believe Mr. Gonzalez said they were offering this as a direct, directly relevant to criminal

But the judge also stated regarding the polygraphs being part of the overt acts - "It is relevant in a way that it ordinarily would never be."

1 intent and 704(b) says, "In a criminal case an
2 expert witness must not state an opinion about
whether the defendant did or did not have a
mental state or condition that constitutes an
element of the crime charged or of a defense.
Those matters are for the trier of fact alone."

In essence the lie detector in
this case is the jury on issues.

MR. McANDREW: Which is actually a
quote from the Supreme Court. I don't know if
we referenced the Kubini case out of the Western
District of Pennsylvania.

THE COURT: I had a cite for
Kubini that was not an accurate cite. I did not
have an accurate cite. I had a hard copy of
Kubini that I had procured.

Let me interrupt the government to
give Mr. Ibrahim a chance to response.

MR. IBRAHIM: Your Honor, there
are two separate issues. Actually three. One
is whether or not Mr. Drdak is an expert to Rule
16 does not apply. The report that I shared I
got yesterday, so if you read the literal
reading of the rule, even if he were an expert,

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So the Rule 704(b)
that the govt
quoted using to
verify that the
polygraph is
inadmissible under
this rule doesn't
specifically say
anything about a
polygraph or a case
to support the issue
of not being able to

use one.

This rule is
referring to
expert witnesses
opinions


1 which I am suggesting that he is not an expert,
2 is that it's when I have the report, but I don't
3 have the report so I have nothing to turn over,
4 number one. But the primary issue when the
5 government says that we're three weeks into
6 trial and they deserve a fair trial, I need to
7 address that.

8 This Court asked me about funding.
9 Well, the fact of the matter is is that before
10 CJ counsel pursues funding, I have an ethical
11 responsibility to the Criminal Justice Act not
12 to willy nilly spend money.

13 THE COURT: I understand that.

14 MR. IBRAHIM: What occurs in those
15 circumstances, I am determining at the time
16 whether or not money is going to be spent.

17 THE COURT: Ultimately when the
18 government pointed out when they noticed
19 Mr. Bradley is their expert, my expectation was
20 he was going to be offered in their case in
21 chief, because right now in evidence in trial is
22 that polygraph and it's subject to unilateral
23 attack.

24 The difference between this case 

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1 and all of the cases that are cited is in this
2 case a polygraph is actually -- two polygraphs
3 are actually in evidence by the government, the
4 indictment actually has polygraphs in the overt
5 acts.

6 I have already put that on the
record and I'm aware of that distinction and
when I had -- let me also say in the murky world
of ex parte communication under the Criminal
Justice Act, the Court is in that delicate
position.

I will verify when Mr. Ibrahim
came to me with a late request, he referenced
trying to be frugal and not spending money
unnecessarily, that is not a new position that
he raised. He raised that with me at the time.

17 It is obviously a very troublesome
18 issue, I take very seriously the timing issue of
19 the side of the government, I take very
20 seriously the evidentiary issue.

21 Mr. Weede, with respect to 704(b),
22 it would be too much to ask that there is a
23 polygraph case under that rule, would it?

24 MR. WEEDE: I didn't catch one by

Issue
of first
impression
& should be
admitted for
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purpose

1 the time I left last night.

2 THE COURT: We've begun our
3 process of drilling down now that this ball is
4 in play, I just ask that again, but as you point
5 out, Kubini, I have Kubini, I'm trying to share
6 the law that we have so we can make a reasoned
7 decision about what happens.

8 Let me let Mr. Ibrahim finish and
9 then we'll come back, but then I want to get on
10 with the jury.

1 MR. IBRAHIM: There is reference
2 to rules of evidence about intent, and
3 Ms. Chavar is pointing out that 704(b) talks
4 about mental intent and state.

5 MS. CHAVAR: Primarily.

6 MR. IBRAHIM: Primarily, but my
7 examiner is not going to testify that this is
8 her mental state, his purposes is to rebut the
9 suggestion by the government that when she took
10 the Texas test, she was not complying with the
11 polygraph, therefore, it can be trusted because
12 they put it at issue, they brought it out. This
13 is the only way that I could rebut that.

14 THE COURT: Let me in addition,

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1 Mr. Ibrahim, to you providing me and Mr. Edelin
2 providing me with the matched up questions, I
3 also want a specific proffer from both of you in
4 terms of are these individuals experts or not
5 and if they're not, how do they get in? And
6 second, what it is they would purport to say
7 specifically?

8 MR. IBRAHIM: Sure.

9 THE COURT: Because I'm making
10 assumptions at this point, I may have made some
11 earlier assumptions that were off base.

12 MR. IBRAHIM: It's like an
13 examiner or doctor that comes in to say I
14 examined the patient, he's not giving an
15 opinion.

16 THE COURT: It was clear from my
17 E-mail, I guess it was at 11:34 last night, that
18 no polygraph witnesses are testifying this week
19 because I wanted that to be clear in terms of
20 preparation.

21 MR. IBRAHIM: It was very clear,
22 Judge. And one of the things I do appreciate
23 the situation this government is in, I am not
24 insensitive to that. And I do believe they have

to a fair trial in this case and every
whether it's a drug case or this type of

The situation I have is I came
I found out that my client passed, had
those gentlemen, the one that did
control and the test immediately
records and once I got it I immediately
over to the government and told
k to bring his tracings and his data
I'm sensitive to that.

THE COURT: In the meantime I
k the government without waiver of its
prejudice because I'm not ruling on
you have an expert, funnel whatever you
that expert. Should the ruling go
the government, I'm not preordaining
is going to go against the government,
terms of the practicalities of the case.
me back to you're going to finish with
r.

MR. McCALL: Yes.

THE COURT: We have got that all
at. You're going to begin with an

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How many
polygraphs do
I have to take
until someone
believes me that
my intentions
were never to
harm anyone
in any way?

1 expert on cyber evidence?

2 MR. BOSTIC: No, Your Honor.

3 THE COURT: I think immediately
4 Mr. -- we're going to have the communication
5 from Texas. We better get moving on that score.

6 MR. McCALL: Mr. Edelin hasn't
7 opened. Are we --

8 THE COURT: We have to let him
9 open. What time are your witnesses scheduled
10 for, Mr. Ibrahim?

11 MR. IBRAHIM: They are scheduled
12 10:00 a.m. our time.

13 THE COURT: All right. So let's
14 get to work.

15 MR. IBRAHIM: What I'll do is I'll
16 let Mr. Herra know that he's got to get that
17 machine up here. Additionally in terms of Rule
18 29 argument, do we want to reserve that or how
19 does the Court want to handle that?

20 THE COURT: I mean, it's easy to
21 do in civil cases. In criminal cases, I wonder
22 if it needs to be more of a formality. Anybody
23 have any rules on that?

24 MR. McCALL: One issue we need to

1 make sure we're all on the same page with the
2 elements with the Court as we take up the Rule
3 29 issue, particularly as it relates to the
4 resulting in death since that's an element
5 that's going to be going before the jury. I
6 don't know if it makes sense to have that ironed
7 out.

8 THE COURT: Let me tell you where
9 we are. We spent yesterday afternoon working on
10 jury instructions. I found that largely the
11 instructions were in good shape. In a
12 conspiracy Case what I do, though, is even
13 though the counts maybe start with conspiracy
14 first, I will define the substantive offenses
15 before I define conspiracy, it will be very
16 clear to the jury what the roadmap is. I think
17 you watched me give preliminary instructions,
18 you have watched me give voir dire, I think you
19 have some degree of confidence in my ability to
20 communicate to a jury. I will do it that way,
21 but make it clear how they work on the verdict
22 sheet.

23 With respect to causation, I agree
24 with the government that there needs to be cause

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1 and fact and the Bourjaily case from the Supreme
2 Court I think ques that up very clearly. I
3 agree with the government that there needs to be
4 proximate cause.

5 The one amendment I was going to
6 make to the jury instructions was importing, if
you read the case law, some of the law is
ambiguous and says proximate cause and be
foreseeable and they're sort of combining the
two elements. I was going to say in addition to
cause and fact, mirroring the government's exact
language, there has to be a real and meaningful
between the contact charged and the defendant,
would it be foreseeable and would it result from

15 these events. I'm adding an element that says
16 real and meaningfully, to a degree that's an
17 import to tort law, but I think it's what
18 proximate cause is meant to embody. Other than
19 that, I think that's where I am. My intent was
20 to get you folks the jury instructions by the
21 end of this week so that you all can sign off.

22 MR. BOSTIC: Can I respond to that
23 piece?

24 MS. CHAVAR: As I was looking at

causation + proximate cause is one of the most confusing issues disputed amongst the circuits + this is what got us life sentences. foreseeability, etc

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1 the jury instructions and I apologize, I meant
2 to get something within a day or two, we did
3 look at the government's proposed jury
4 instructions, I agree with them as well except
5 for that one element and we have now added some
6 language.

7 THE COURT: I have now added it.

8 I'm convinced that that's the most I'm going to
9 add based upon review of substantial amount of
10 case laws.

11 MS. CHAVAR: That was what I would
12 have proposed.

13 MR. BOSTIC: Your Honor, on a
14 slightly different piece, but dealing with the
15 jury instructions, I am going to submit a couple
16 of jury instructions, one being the mere
presence.

17 THE COURT: What I am doing now is
18 just getting the essentials down without
19 prejudice to people saying Judge, don't we need
20 an instruction on this? Well, let me also say
on the verdict sheets I am going to change the
verdict sheet as to Amy Gonzalez. I'm going to
21 change it because I think it's best if we get a

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real factual determination.

I assume the government is going to argue that if she is liable in the conspiracy count that results in death would carry over by imputation as a result of finding of guilt on a conspiracy act, would that be your position that that operates as a matter of law?

MR. McANDREW: I think there is two theories there is the resulting in death under the statute, there is the also the Pinkerton liability theory, while they overlap, they are separate.

THE COURT: Government, I'm going to ask you to look at the verdict sheet because the verdict sheet is going to be different than you have proposed. It's going to have I think a cleaner factual basis for what the jury actually finds as to Amy Gonzalez and whatever the law is in terms of the legal implications of that, there is going to be a lot of room for debate at various levels. But I would prefer us to have a little more precision and you'll see how we broke it out on what the findings are.

MR. McANDREW: Your Honor, if I

1 can speak to the Rule 29 issue quickly, of
2 course, you know, in looking at the elements
3 here was really at the heart of it is not
4 whether they traveled in interstate commerce and
5 used interstate commerce, there is levels of
6 fear and intent, it comes down to intent.

7 The Court, of course, can reserve
8 a ruling at the close of the government's case,
9 it can be renewed at the end of all evidence.
10 The Court will take a snapshot of the evidence
11 from the close of the government's case and
12 apply that as a standard as it reevaluates the
13 motion. I don't know if Your Honor wants to
14 have a full-fledged argument at the end of the
15 case or reserve ruling until the end of all
16 evidence.

THE COURT: For practical
purposes, I would prefer to preserve the ruling
so we can make progress with the witnesses. If
that's the procedure, government agrees.

MR. McANDREW: Yes, Your Honor.

THE COURT: Mr. Edelin?

MR. EDELIN: Yes, Your Honor.

THE COURT: Mr. Ibrahim?

1 MR. IBRAHIM: Yes, Your Honor.

2 THE COURT: Mr. Bostic?

3 MR. BOSTIC: Yes, Your Honor.

4 MR. McCALL: Housekeeping matters
5 before the government rest. I have two
6 stipulations that are outstanding that have to
7 be signed or we cannot rest, and then I have a
8 page of exhibits that we have worked our best
9 with the clerk on that I would need to just read
10 into the record. I'm happy to do that at the
11 break and I can say rest with the understanding
12 that the government will be offering several
13 exhibits into the record.

14 THE COURT: Nunc pro tunc,
15 perhaps?

16 MR. McCALL: I don't know if we're
17 going to go back to the beginning.

18 MR. McANDREW: Hopefully not.

19 THE COURT: Now from then.

20 MR. BOSTIC: I just want to go
21 back to the jury instructions and ask the Court
22 this. The government has pled defamation in the
23 indictment.

24 THE COURT: Right.

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1 MR. BOSTIC: And I was going to
2 propose that we have to give a jury instruction
3 of what defamation is.

4 THE COURT: We'll revisit that
5 downstream.

6 MR. BOSTIC: I wanted the Court to
7 be aware of that.

8 THE COURT: I'm looking at the
9 basics of the charge without prejudice of the
10 peoples' ability to argue those other
11 substantive points that need to be covered and
12 depending on what we do with the polygraph issue
13 and some of the other things that may become
14 more or less important. Okay.

15 Before I get to you, Mr. Edelin, I
16 want to get back to today. So the government
17 rest, we have witnesses from Texas, then you
18 have a cyber expert?

19 MR. BOSTIC: No, Your Honor, the
20 cyber expert, we have a handwriting expert keyed
21 up to go. We have a couple of other witnesses,
22 depending on how things go forward.

23 THE COURT: We're going to have to
24 at some point debate Dr. Otto. You have not

- Defamation
instruction
- Dr. Otto
issue copy

1 answered the motion. You have got a very high
2 lift there, Mr. Bostic. All right? So just
3 take that into consideration, but if we were
4 going to get to Otto today, we would need to
5 argue that motion.

6 MR. BOSTIC: No, we have Otto
7 scheduled for tomorrow, and I will give --

8 THE COURT: By the end of the day
9 today we need to argue on that because I want to
10 hear what you have to say. Just for the record
11 I have reviewed in detail the direct examination
12 of Dr. Romirowsky, I have reviewed the opinions
13 he gave and when he gave them, I looked at the
14 scope of examination I give you which was
15 liberal which allowed you to go into the post
16 event relationship and allowed you to question
17 him on things on whether he shared that with
18 counsel in the court, a lot of that is in the
19 record. And then I also gave you leave in the
20 interest of justice to cross-examine Special
21 Agent Gordon on the purported inconsistency and
22 what he said to the FBI. So looking at the
23 totality of that plus my grave concerns about
24 the propriety of that kind of testimony, it's a

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1 heavy lift.

2 MR. BOSTIC: Your Honor, I will
3 say this now and I do have something that I will
4 probably put into writing because I think this
5 is an issue that needs to be well documented.
6 The bottom line for me is this is a bias issue,
7 and generally speaking extrinsic evidence is
8 allowed with respect to bias.

9 THE COURT: I accept your argument
10 and I actually read the advisory comment the way
11 you do and not the way the government does, but
12 having said that I'm not convinced and I'm also
13 persuaded by the fact that the government in a
14 sense showed the evidence of bias already with
15 the E-mail. And the other thing is, that those
16 exchanges after he had formed his opinion.

17 But you should document the record
18 any way you want, but I have given a lot of
19 thought to this.

20 MR. BOSTIC: Absolutely, Your
21 Honor. And one of the things that I will submit
22 to the Court as well as my expert opinion
23 because I think it's something that the Court
24 has to consider in making its decision and I

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1 don't think you have the expert opinion.

2 THE COURT: We have a report of
3 your expert and have looked at that, too. And
4 the other point the government makes is well
5 taken, it is not a finding of the American
6 Psychological Association, but rather this
7 witness's interpretation of the reg which also
8 bears to some degree -- well, I'll hear what you
9 have to say, but let's get -- Mr. Edelin, I cut
10 you off. Go ahead, sir.

11 MR. EDELIN: Your Honor, I'm going
12 back to the schedule for today.

13 THE COURT: Yes.

14 MR. EDELIN: Because obviously I'm
15 not able at least and would strongly prefer not
16 to open until we have the Court's ruling on the
17 polygraph, which doesn't sound like we're
18 getting to -- and I don't have any problem with
19 taking witnesses out of order. I know we have
20 the VTC, but I just wanted to cue that up and
21 make sure everybody was aware of that.

22 THE COURT: Let's revisit that
23 when the government rests, but I understand your
24 problem.

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1 MR. IBRAHIM: Judge if I may, is
2 Mr. Sulner ready to go? Is he here? I only ask
3 because of in terms of the VTC, Mr. Harara has
4 got to come and connect.

5 THE COURT: We also need to get
6 Ms. Edgar on.

7 MR. IBRAHIM: Right.

8 MR. McCALL: I have -- I'm having
9 -- if he wants to withhold his opening until --
10 I don't know what Mr. Edelin intends to do, if
11 he intends to use evidence that Mr. Bostic puts
12 on in his defense, Mr. Gonzalez puts on in his
13 defense. I mean, if we wait to do his opening,
14 I'm having a hard time understanding the
15 procedure of that.

16 THE COURT: We will revisit that
17 at the end of your case. I understand his
18 problem, but I'm going to have to make some
19 tough judgments in the next few days. At the
20 same time we have a jury and we need to move
21 this case forward.

22 MR. McCALL: Understood.

23 THE COURT: I'm trying to give due
24 consideration to the competing interests in the

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1 case. And to the point of sending e-mails at
2 11:34 at night.

3 MR. McANDREW: Impressive.

4 THE COURT: Compulsive.

5 (End of chambers discussion.)

6 THE COURT: Good morning, ladies
7 and gentlemen. Please be seated. I've been
8 conferring with counsel since before 9 and we
9 worked out other evidentiary issues. So your
10 patience is appreciated. We were making good
11 use of the time. As the case reaches more
12 stages and we look at where the case is and
13 where it might go, we have these discussion.
14 Particularly the case where there's so many
15 documents, so many issues and so much evidence
16 that you've heard and so in one sense the more
17 evidence there is, the more evidentiary issues
18 there are to resolve as we move forward. I
19 thank you for your patience and now I believe
20 we're going to hear the last witness for the
21 government. Mr. McCall.

22 MR. McCALL: Yes, Your Honor. We
23 would call Dawn Edgar.

24 THE COURT: Ladies and gentlemen