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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, . Docket No. CR 05-66 (PLF)
Plaintiff, .
v. . Washington, D.C.
WALTER ANDERSON, . March 16, 2005
Defendant. . 3:00 p.m.
.

TRANSCRIPT OF BOND REVIEW
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

1
2 THE CLERK: Criminal 05-66 United States of America
3 versus Walter Anderson. Ms. Menzer and Ms. Kelly for the
4 government. Mr. Lowell and Mr. Man for the defendant.

5 THE COURT: Good afternoon. About noon today I
6 issued an opinion on the detention question. I assume
7 everybody's got it. And it's also on the Court's website for
8 other interested persons. And after considering the evidence
9 in the transcript before the Magistrate Judge, the exhibits,
10 the proffers and the arguments made by counsel last week, I've
11 denied Mr. Anderson's motion to impose conditions of release,
12 and therefore he shall remain detained pending the trial in
13 this case.

14 In the meantime, there are some letters from Mr.
15 Lowell about some glitches in the location of confinement and
16 the things that we talked about the other day both in open
17 court and I think also at the bench. I think that's been
18 resolved. At least I have taken what steps I could to resolve
19 them, and I have been assured that it's been resolved, and that
20 Mr. Lowell's office has been advised of exactly where Mr.
21 Anderson is and will be.

22 And with respect to arrangements for an appropriate
23 meeting place to prepare for trial and to consult and to review
24 documents, I've taken steps to arrange for that as well. And
25 Mr. Lowell or his office either should have been advised by the

1 appropriate authorities or will be advised by the appropriate
2 authorities that they understand the needs and are going to try
3 to accommodate them. Obviously, if that doesn't work over the
4 long term, we'll have to try to deal with it.

5 And the only other thing that I know of that's
6 happened since last we met was that I got a letter from
7 Mr. Lowell which is essentially an agreed upon schedule in the
8 case, with a few exceptions that we need to discuss.

9 So where do you want to start today?

10 MR. LOWELL: Your Honor, the second thing you said is
11 affected by the first thing you said.

12 THE COURT: Correct.

13 MR. LOWELL: And I didn't know about the first thing
14 you said when I sent you the second thing you said. Is
15 everybody following this? Obviously, we created a scheduling
16 order with my presuming that Mr. Anderson would be available to
17 work on his defense in a different fashion than you have so
18 ordered. So I need to reconsider that with my client and with
19 the government, and including the issue of my availability.
20 Because, you see, by putting him in a position where he may
21 want a speedier trial, I have a trial in April and a trial in
22 September, I need to discuss with him the ramifications of your
23 order given his situation and my availability. So I need to do
24 that. I haven't had the chance to do that. In fact, we've had
25 five minutes based on seeing your order.

1 So I'd like you not to rule on the scheduling order,
2 at least until such time as I've had a conversation with Mr.
3 Anderson.

4 The second thing is, I'd like to be heard on the
5 first thing you said briefly.

6 THE COURT: Why don't you come up.

7 MR. LOWELL: Thank you.

8 THE COURT: We all have to keep our numbers straight,
9 the first thing and the second thing.

10 MR. LOWELL: I know. As soon as I started down that
11 sentence, I realized I had gotten myself in trouble.

12 I understand the record of this case, and I'm not
13 formally asking to you reconsider at the moment, but I am
14 inquiring of the Court something that I didn't understand.

15 I've read enough cases to understand the first part
16 of Your Honor's opinion on your assessment based on the factors
17 you've set out as to your best assessment, which is all we can
18 ask you to do on the risk of flight. I understand that.

19 Honestly, I don't understand the second part. I
20 didn't understand if I have misstepped. When Your Honor asked
21 me for a series -- to draft an order where the law says the
22 least restrictive that might assure future appearances, I
23 didn't do it on that basis. I did it on trying to figure out
24 on an amalgam of conditions that would somewhere along the
25 continuum between the least restrictive and most restrictive

1 provide the Court with assurances. So, as I said, I understand
2 the first part of your opinion. I may disagree with it, but I
3 certainly understand it.

4 I guess what I'm asking you is, will the Court
5 consider that I did not list all the things that one could do,
6 because I read your opinion as saying this is the flaw with a
7 GPS system, or this is the flaw with restricting Mr. Anderson's
8 location to the District of Columbia. And I do understand
9 those points, but I don't understand yet, and maybe I'm being
10 dense and maybe I'm just being persistent, maybe I'm trying to
11 be a decent advocate, that there's no set of conditions, for
12 example, the Court doesn't say that it pondered, because I
13 didn't ask it to ponder, what people sometimes get, which is
14 house arrest. The Court did not indicate house arrest plus
15 GPS.

16 I mean, I guess what I'm saying is, you're saying
17 that in allowing him in and about, there's a moment where he
18 could take a step to flee where normal electronic monitoring
19 would not provide enough assurances. And that's a truism. But
20 you can minimize that even further than we have attempted to,
21 and I guess I'm asking the Court would it consider, because
22 I've got familiarity with these cases in the country, perhaps
23 you do, too, the various things that people do. You can really
24 lock somebody down in their apartment, or house, or location,
25 and that they cannot get out without it triggering some thing

1 that's immediate, given the systems that we presently have.

2 I don't understand if I misstepped by not providing
3 you with all those possibilities, or the Court has actually
4 considered them such that I might reconsider submitting them.

5 The reason I ask that is, obviously, there's a great
6 premium on anybody having their freedom prior to trial. I
7 mean, the presumption of innocence, et cetera. I don't mean to
8 minimize that by saying "et cetera." I just know you know it.

9 But this is under the best of circumstances so
10 difficult to arrange for our getting together and going through
11 what I am now going to have as 100 boxes in the best of
12 locations that I am just asking once again for me to have the
13 ability to do better as an advocate than I've done in the past.
14 I just am asking the Court to consider that if the government
15 says that there's a moment of freedom which is one moment too
16 many, having him locked up in a jail in the District of
17 Columbia versus having him locked up in a jail of his house, or
18 the jail of his mother's house, is still having him locked up.
19 The difference is vast, and especially in terms of our need to
20 get together.

21 And I'm just, until you tell me there's no
22 opportunity for me to address the Court on this subject,
23 loathed to sit down without saying have we really said that
24 there is "no set of conditions." I realize you mirrored the
25 ones I put, the \$500,000 house that his mother lives in, not on

1 its value, as I tried to point out in my letter, but by the
2 significance of putting his mom in harm's way. You went
3 through the ones I put in the order, but I didn't put all the
4 possible ones in the order that I believe would satisfy the
5 conditional aspect. And if there's even the slightest hope
6 that I can submit those now that I realize you've only
7 addressed the ones I have put in, then I owe it to my client
8 not to fail to do that. Because there is house arrest. There
9 is GPS systems. There are front door trigger alarms that would
10 then make somebody call immediately. There are those things,
11 and I didn't put those in because I just didn't think they were
12 necessary.

13 And I know the government honestly believes that he
14 is going to flee. He is desirous to tell you on the record
15 again why he's not going to flee. I have assured him he can
16 have that chance, but I have also assured him that the most
17 important thing we can address to the Court is what are the
18 series of conditions.

19 And I even dare say that given the electronic
20 capabilities that exist, even the government has to say that if
21 he's locked in his own house where I can see him, and my
22 colleagues can see him, and we can get him the documents, where
23 he is on a GPS system from his house, that the window, I mean
24 there's always a theoretical window but that's why it says
25 "reasonably assure" as opposed to "100 percent assure," has

1 been so minimized that notwithstanding every other factor, it
2 alone could suffice. But, as I said, I didn't even consider
3 the option of putting him under the custody of his mother and
4 others.

5 So I think there are conditions, and I didn't address
6 them, and I'm wondering whether the Court would allow me to so
7 that I can submit it to you. Again, you may be so predisposed
8 not to hear it that you say do what you want, Mr. Lowell, but
9 I've pretty much ruled, or you can say, well, I'll give you one
10 more chance to persuade me that there are a set of conditions.

11 I didn't go, for example, to the most technologically
12 astute company that exists and say give me the best system that
13 exists GPS-wise right now, that the person has on their body
14 all the time that tells law enforcement or the Pretrial
15 Services agency to a second where he is, and give me how that
16 works when you trigger it when the door of the house he's
17 living in is opened. I didn't think to do that, and I probably
18 should have, because then I think it would be harder for the
19 Court to say under the legal standard that there are no set of
20 conditions. So I'm asking for that opportunity and for
21 reconsideration.

22 THE COURT: Well, I suppose my view of what I tried
23 to say in this opinion was that if you read the first 15 pages
24 and the last three paragraphs that the message should be that I
25 found by a preponderance of the evidence that there is no

1 condition or combination of conditions that will reasonably
2 assure his appearance for trial. That is the conclusion and
3 the finding that I reached.

4 And I can't say that I have thought up every possible
5 condition, but I don't think that this opinion can fairly be
6 read as turning only on the conditions that you proposed. I
7 think it's an opinion that says in view of the facts and
8 circumstances of the case and the allegations in the
9 indictment, which have been found by a grand jury by probable
10 cause, and based on the history and characteristics of the
11 defendant, as evidenced by the testimony before Judge Kay, the
12 exhibits submitted by the government, the proffers of the
13 government, and your counterproffers, and the materials seized
14 from his home, that I don't think there is any condition or any
15 combination of conditions that would reasonably assure his
16 presence for trial.

17 The paragraphs in which I went through the conditions
18 you proposed I suppose might best be viewed as a footnote to
19 that finding rather than the basis for that finding. And,
20 therefore, I wouldn't be hopeful. On the other hand, I don't
21 say that I thought of everything, and I also think that the
22 government, I mean, really the government did not have an
23 opportunity -- they've had plenty of opportunities in this
24 case, but they didn't have an opportunity to file a written
25 response to your specific motion. I was relying on what they

1 had filed before the Magistrate Judge and the exhibits they had
2 submitted and their oral arguments here. They responded in
3 writing to your specific conditions. And I suppose if you want
4 to move for reconsideration or propose alternative conditions,
5 the government would then have the opportunity to respond in
6 writing, and maybe to do the same level of research on the
7 technology that you think you might want to do.

8 MR. LOWELL: Of course. I just think -- well, two
9 things. I appreciate that, and I read your opinion the way you
10 have stated it. And now that you've clarified it, I certainly
11 take myself off the hook a bit as to whether or not I was as
12 creative as I could have been.

13 Having said that, I understand your ruling. It
14 exists. It only behoves me to either do one of two things, to
15 give you additional evidence that would dissuade you from the
16 first part of your opinion, which quite frankly I don't see
17 that I can do because of the reasons that you articulate in the
18 15 pages, but to address myself to the second part, which I
19 don't think I have adequately exhausted my ability to do. And
20 on that, I will do it in the proper fashion.

21 I imagine that I can come back, and of course the
22 government will respond and I pretty much will assume that
23 their response will be something like, even though Mr. Lowell
24 has now showed us that he can wear a device which gives
25 Pretrial Services his location within his house every two feet,

1 and even though that alarm in the White House will go off when
2 he opens his front door, we still believe that there's going to
3 be grounds for him to be able to flee. I understand that. Of
4 course they should respond, but I just don't think that I have
5 exhausted it, and I think I can present to Your Honor, who may
6 be more technologically capable than I am, something that I had
7 not thought of doing -- well, maybe less. I have to tell you
8 that I didn't know what GPS stood for when I read it.

9 THE COURT: I didn't either until my law clerk told
10 me, and I'm not more technologically capable than you or almost
11 anybody else I know.

12 MR. LOWELL: I just think that I owe it to him, and I
13 owe it to my ability to be an effective advocate both on this
14 issue and to have assistance for his trial to present you what
15 will now have to be a much more draconian set of conditions
16 from the perspective of somebody who seeks his liberty and see
17 that if that works for you and the government. I assume it
18 won't work for the government.

19 I can only suggest that I know, as I said to you when
20 I stood at this podium a week or so ago, that if the phrase in
21 the law is that there is "no," heavy emphasis on the word "no"
22 set of conditions which will "reasonably," heavy emphasize on
23 the word "reasonably," assure his future appearance, then I can
24 do better, and I'll move for reconsideration on that basis.

25 I can only ask you to look at it with an open mind to

1 the new conditions, and I hope that you'll change your mind.

2 THE COURT: To the extent that Mr. Anderson wants to
3 speak to this question, if you want me to hear from him today I
4 will, but it may make more sense to hear from him in
5 connection --

6 MR. LOWELL: I think that's right, Your Honor. Mr.
7 Anderson, I don't have to speak for him, he's an articulate
8 man, but what he didn't know that you knew is that you never
9 heard him speak, that you never heard him say why he would not
10 flee the area, what his reputation means to him, what his
11 connection to his mother means to him, how he has built
12 companies, and he can't do that by trying to live from palm
13 tree to palm tree or casa to casa in Spain, if that's where
14 people are thinking he's going to go.

15 He didn't have the chance to say that. And I think
16 it is not unimportant that he does so that you can assess the
17 metal of the man, but I think we'll do it in conjunction with
18 the motion to reconsider so that we can marshal both that and
19 the conditions that we would impose. And it is something, by
20 the way, for a person whose life is on the line, his liberty is
21 at stake pretrial to have that opportunity, and I don't mean to
22 deprive him. I think it actually behoves me to let him. On
23 the other hand, I think we'll marshal it at the same time. But
24 I think I've said what he'd say. Of course, he'll say it
25 differently than me.

1 So what I will do is, I will promptly speak to the
2 technical geniuses in my life, one of who is sitting at the
3 Bar, a member of my firm, and propose. The government will
4 probably oppose it, and I'm only asking you to look at it with
5 an open eye on the second half of the opinion. And that's all
6 I can do.

7 THE COURT: Ms. Menzer, Ms. Kelly, do either of you
8 want to say anything with respect to the discussion we have
9 just been having?

10 MS. MENZER: Not with respect to the detention
11 issue, Your Honor. Ms. Kelly will speak to the other issues if
12 you'd like.

13 THE COURT: All right. So I take it that what's
14 going to happen with respect to the detention issue is that Mr.
15 Lowell will file something, and you can do that whenever you
16 want to. I don't know that we have to --

17 MR. LOWELL: I understand. I'm not -- I'm sorry.

18 THE COURT: I don't know that I have to say file it
19 by such and such a date, because basically what you were
20 entitled to, to this point was a de novo review.

21 MR. LOWELL: Right.

22 THE COURT: And you have now gotten that. If you
23 want to move to reconsider, you can. The only other option is,
24 of course, to go to the Court of Appeals, and you may want to
25 do that now or you may want to come back with additional

1 suggestions and see where that goes.

2 MR. LOWELL: I understand. Obviously because he's
3 where he is, there's an urgency to getting this done. Because,
4 as I said, I'm not going to be spending a lot of time on the
5 front part of your opinions evidence. Different people could
6 come to different conclusions, I don't think it's an abuse of
7 your discretion to find what you have found for the reasons.

8 THE COURT: Does the Court of Appeals review de novo,
9 too?

10 MR. LOWELL: I think they do.

11 THE COURT: Well, you may not want to commit yourself
12 to the statement that it's not an abuse of discretion,
13 depending upon what the standard for review is in the Court of
14 Appeals.

15 MR. LOWELL: What I'm saying is, I understand why
16 somebody could take the position that a person who has a book
17 that says what a book says, provides you the basis for
18 believing that he has a propensity. I disagreed. I disagreed
19 today.

20 What I do know, though, is I have not exhausted my
21 ability -- no concessions on the legal correctness from an
22 appellate point of view, but I have not exhausted my ability to
23 prove that there are a set of conditions. And that's where
24 I'll spend some time.

25 If I think, and as I said I haven't read through it,

1 I only got it half an hour ago, if I think that there's
2 something I can tell you on the front end, I will. But I guess
3 maybe I'll put it this way. Without foregoing any opportunity
4 at the D.C. Circuit, what I guess I meant to say is that in
5 this courtroom I am best spent on the second half of your
6 opinion than on the first half. That's what I guess I want to
7 say. And that's what I will do.

8 THE COURT: Well, whenever you file it, I'll ask the
9 government to respond reasonably quickly, and we'll set a
10 hearing.

11 MR. LOWELL: What I understand from the government is
12 that while we had a disagreement -- I'm sorry, I'm going to
13 move on to scheduling and whatever else Your Honor would like.
14 Again, not knowing when the trial date should be, I guess the
15 only thing that we don't agree on, so we can pick a trial date
16 and this would still be the same dispute we have to resolve is,
17 in a case where the government tells me they're going to have
18 two months or three months of trial themselves, and however
19 many hundreds of boxes or a hundred boxes, and given the nature
20 of this case, and especially, by the way, given the order that
21 you've issued, I didn't think it was wrong to seek an earlier
22 disclosure of Jencks and reverse Jencks material than the norm.

23 So I've looked at the cases I've done in a white
24 collar setting, those that have complicated allegations of
25 financial wrongdoing, and have seen cases that Jencks has been

1 given months in advance in a case that has this complexity to
2 weeks. So I picked a mid level, I think I said five or six
3 weeks for us. Given that the government says its case is going
4 to go two months, my providing reverse Jencks at the day trial
5 begins, which is what they have asked for, is in effect giving
6 them two months of pre-Jencks material. So I said no, no, no,
7 you can't say that I get yours a week in advance and you get
8 mine two months in advance. So I tried to balance that out by
9 saying we'll do weeks in advance for you, and we'll take fewer
10 than weeks in advance to estimate when we'll begin our case.
11 So that's the one issue.

12 And I think we've come to agreement on Motions in
13 Limine, but I'm not sure if we have.

14 THE COURT: I think in your proposed order you've got
15 Motions In Limine five weeks before trial.

16 MR. LOWELL: That's right.

17 THE COURT: And all other motions, dispositive
18 motions, would be ripe under this schedule by December the 2nd.

19 MR. LOWELL: Right. And I meant to say as to all
20 this. This is great that I got to my word processor and did
21 this and sent it to the government and they responded. In the
22 end of the day, it's your schedule that I wanted to know. And
23 I know you know that, but for example even on the Motions in
24 Limine, I said five weeks because I thought how much do we want
25 to know in advance where the parameters of trial will be, and

1 how much time does the Court need to tell us that. But you may
2 decide, no, you'd rather do it in four weeks or three weeks.
3 And, of course, any of those are up to you.

4 I just thought, look, this is the kind of case where
5 I don't know, for example, we can fight out the 404(b) battles
6 prior to the last Motions in Limine, for example. I don't have
7 to wait for that. Indeed, it says they should be filed no
8 later than. And if they have earlier disclosure requirements
9 as they do for 404(b), we'll fight that battle earlier. I
10 don't know what would be left for Motions In Limine, but it
11 seems to me that that would be part of the possibility.

12 THE COURT: The really basic issue is whether you
13 still want to stick to the March 6th date --

14 MR. LOWELL: Yes.

15 THE COURT: -- for the beginning of trial if Mr.
16 Anderson is detained between now and then. That's almost a
17 year away.

18 MR. LOWELL: Correct, and that's what I have to talk
19 to him about. So all those other disputes -- the dates of
20 those will work whether we started the trial in December,
21 September, or next March, I mean the dates for when Jencks --

22 THE COURT: The amount of time would work.

23 MR. LOWELL: Correct.

24 THE COURT: But all of the dates would have to be
25 adjusted if the trial comes much earlier.

1 MR. LOWELL: So I will meet with Mr. Anderson and
2 discuss all this, and either say what we have is what we want
3 or we'll adjust it and send it to the government as we did, and
4 then try to agree and send it to you.

5 THE COURT: All right. Let me hear from Ms. Kelly.

6 MS. KELLY: Good afternoon, Your Honor. I think that
7 defense counsel set it out with regards to the scheduling
8 order. I would like to say that the government is ready for
9 trial, so whatever works for Mr. Lowell --

10 THE COURT: You've had a few years to get ready.

11 MS. KELLY: -- certainly works for us. Just so the
12 record is clear, we are ready.

13 With regards to the Jencks, Your Honor, we were
14 trying to accommodate defense counsel with regards to the one
15 week in advance of trial. As we represented, trial's going to
16 take eight to twelve weeks, so for some of those witnesses
17 they're going to have that Jencks four, five, six, seven weeks
18 by us providing it a week in advance of trial starting.

19 THE COURT: One of the things that you all ought to
20 discuss that might satisfy you both, because I have seen this
21 done in other cases, too, is you can have a rolling schedule of
22 Jencks. In other words, you will know at some point well
23 before trial who your likely early witnesses are going to be,
24 not with specificity the exact order, but generally speaking
25 the order. And it's possible that you could reach an agreement

1 or come close to reaching an agreement in some period of time
2 more than a week before trial for the first couple of weeks
3 witnesses, and then have a rolling schedule, Jencks with
4 respect to the first ten witnesses will be "X" number of weeks
5 before trial, and Jencks with respect to this next batch of
6 witnesses will be one week before trial, and Jencks with
7 respect to the next group of witnesses will be the second week
8 of trial. That might at least be a framework for you and Mr.
9 Lowell to have discussions that might lead to an agreement
10 rather than a disagreement.

11 MS. KELLY: Okay, Your Honor, we'll try to do that.

12 THE COURT: Before you sit down, what I do need to do
13 regardless of when we start this trial, is have a pretty clear
14 idea of how much time the government thinks it's going to take
15 to put on its case, and by that I mean, obviously, you don't
16 know how long he's going to cross-examine any particular
17 witness, and how much time Mr. Lowell thinks the outside he
18 needs to put on his case, because what I intend to do, this is
19 a criminal trial, Mr. Anderson is entitled to a speedy trial.
20 If he's detained, he's even, perhaps not by law but in the real
21 world, more entitled to a speedy trial. And I would like to
22 whatever date we set for the start, have a realistic assessment
23 from both of you, or together, how many months it's going to
24 take so I can simply block out that time.

25 What I probably would do is most weeks do it four

1 days a week rather than five so I can at least get a few other
2 things done on Fridays. Sometimes what I've done in lengthy
3 cases, maybe for the first couple of weeks set five days, but
4 then once we get into week three or so, start to go four days a
5 week so that I do get a few other things accomplished.

6 So that having been said, when you said eight to
7 twelve weeks, were you guesstimating the total trial, or just
8 the government's case?

9 MS. KELLY: That was for the government's
10 presentation. That does not include whatever kind of defense
11 and rebuttal.

12 THE COURT: Does that estimation change if we're
13 talking about four days a week instead of five?

14 MS. KELLY: It will certainly change if there's some
15 stipulations. And things that we might have thought were
16 issues up front may not ultimately be issues in the trial. So
17 there might be witness testimony that's stipulated to, we're
18 going to obviously try to use as many certified records as
19 possible to avoid having to drag a witness here. So we may be
20 able to tighten it up based on that sort of house cleaning
21 altogether.

22 But as I stand here today, Your Honor, I would say as
23 I look at the government's witness list and exhibit list, our
24 presentation could be eight to twelve weeks.

25 THE COURT: All right. Mr. Lowell, I know it's

1 probably too early for you to tell me what you think.

2 MR. LOWELL: It certainly is, especially because in
3 these kinds of cases a lot that can be done perhaps will be
4 done through examination of government witnesses, so I don't
5 know. I can't even say whether I think that the government's
6 estimate is wrong, although I'm always shocked when anybody
7 says they need months to put on a case, given that we have a
8 hard time as Americans sitting through two hour movies and they
9 have special effects. So I'll see what I can do about that.

10 THE COURT: It depends which movie.

11 MR. LOWELL: It's a good point.

12 THE COURT: The other thing obviously that we're
13 going to have to do in this case is we'll send out a
14 questionnaire to potential jurors with respect to hardship and
15 time. Any time you have a trial that goes more than four weeks
16 or so, we need to get that information up front.

17 I assume the government would like us to do this in
18 one of the electronic courtrooms so that you can present your
19 documentary evidence.

20 MS. KELLY: That's correct, Your Honor.

21 THE COURT: I actually think, and sometimes defense
22 lawyers don't like it, it depends, but it certainly is more
23 efficient in terms of publishing documents to the jury, and I
24 found that it makes things move faster.

25 MR. LOWELL: I actually prefer it, Your Honor. It's

1 much better to do it that way for lots of reasons. One of the
2 things I'd be coming to Your Honor with, again finding the
3 government's position on it, especially given the notoriety
4 that this case has already gotten and might get, is that such a
5 questionnaire could go into more than simply the hardship issue
6 and provide us a great deal of information that would shorten
7 the actual court voir dire process.

8 THE COURT: What I've done in other cases, Mr.
9 Lowell, and we should think about this, the jury office has
10 sort of a form questionnaire that goes out, and it's all about
11 hardship. And they come back, and I go through them, and I
12 decide who to excuse. And I've had the practice of making
13 those forms available to counsel to see whether you agree or
14 not. But I have certain kinds of rules of thumb. If
15 somebody's a school teacher and their students are going to
16 miss them for three or four months, I'm inclined to excuse that
17 person. I'm less inclined to excuse a lawyer or a businessman
18 because they just don't want to serve sometimes.

19 But go through those, make my rough cut, if you all,
20 both sides want to look at the rough cut before I send it back
21 to the jury office, fine. Then when we've got this pretty
22 large pool left, and sometimes there are people that have what
23 look like possible hardships but they may be overstated and I
24 say no at the first go-round but make them come in and see,
25 then I think in a case like this it would be real useful to

1 have the kind of questionnaire I think you're talking about
2 which would have both the standard voir dire questions and any
3 things that are unique to this kind of a case, have all these
4 couple of hundred people, whatever we think we need, come into
5 the ceremonial courtroom, give them sort of a brief overview of
6 the case which hopefully we can agree upon, and then ask them
7 to fill out the questionnaires. And we'll cover everything in
8 that questionnaire.

9 We won't have oral questions to the group. We will
10 cover everything in the questionnaire. And we'll take a day or
11 so off, maybe we need two days off. Take the questionnaires,
12 and one side or the other will have the responsibility of
13 making a sufficient number of photocopies of the
14 questionnaires, and then you'll have time to review those
15 questionnaires, and then we'll bring back each morning and each
16 afternoon a number that Ms. Montgomery tells me it seems from
17 our experience to be reasonable that we can really get through
18 them so we're not having a lot of people sit around waiting for
19 us to talk to other people. It may take a while. And then
20 talk to them one at a time, with each of you and me already
21 having right in front of us the questionnaire they have already
22 filled out, no need to go over the same ground if there are no
23 follow-up questions that suggest themselves.

24 I will do most of the questioning, but you'll have
25 the opportunity to do follow-up questioning. I think that's

1 more efficient even if it means taking a day or two off between
2 the first day of jury selection and the continuation of jury
3 selection.

4 MR. LOWELL: Your Honor, that is exactly the system I
5 was going to recommend in writing. It's been effective in the
6 cases I've done. The only variable sometimes is that there's a
7 mechanism that the courts can use, and I don't know if it's
8 done here, there's ups and downs to doing it this way, sending
9 the questionnaire out to the jurors ahead of time so that
10 you've gotten them and you have already figure out who's got
11 problems for cause and who's got issues.

12 THE COURT: I'd like to get them in. But the other
13 thing that I did in at least one case, it depends whether you
14 both think this is a good idea, sometimes when you read those
15 questionnaires, both sides will agree that they don't want this
16 juror. And it may be that we build in enough time so that you
17 can review the questionnaires and then talk to each other, and
18 then say we have jointly agreed that these people should be
19 excused for cause.

20 MR. LOWELL: That's what I was hoping.

21 THE COURT: Why spend our time talking to people that
22 neither of you want. And it has to be by agreement because one
23 could make the argument that technically some of those
24 decisions are not "for cause" in the strict sense of the term.
25 But if both sides agree, I think that works.

1 All right, what else do we need to discuss today?

2 MS. KELLY: A trial date, Your Honor.

3 THE COURT: Well, I think Mr. Lowell wants to do the
4 following. Tell me if I'm putting words in your mouth. First
5 of all, he was going to have a discussion with his client based
6 on the premise that my decision stands, and decide whether or
7 not they want to have a trial date earlier than they have now
8 proposed. And, secondly, he's going to file a motion for
9 reconsideration.

10 But the question is, if we assume that I don't grant
11 the motion for reconsideration, at least for purposes of
12 discussion, are Mr. Lowell and Mr. Anderson still in agreement
13 on the March 6th date, even though it means a long time
14 detained, because of all that needs to be done to get ready for
15 trial, or do they want to accelerate that date?

16 MR. LOWELL: I don't know if I will answer that
17 question promptly. I can almost assume that the answer to that
18 will be no. That date does not make sense in the present
19 conditions. I will talk to Mr. Anderson about what's
20 reasonable.

21 THE COURT: When are you committed to other trials?

22 MR. LOWELL: April 5th, the Southern District of
23 Mississippi.

24 THE COURT: Of this year?

25 MR. LOWELL: Yes. So I can't rush this for the next

1 60 days if I wanted to. And then sometime in September in New
2 York. And the one in Mississippi is four to six. And the one
3 in New York is a bifurcated, probably four weeks or so. So
4 that's what I know.

5 THE COURT: So what would happen is that the earliest
6 you'd be available is sometime in October. But you wouldn't
7 be --

8 MR. LOWELL: No, because even if September goes four
9 weeks, I will need some moments between the end of that and
10 this, even if I'm working both simultaneously getting ready,
11 which again is one of the reasons I have to talk to Mr.
12 Anderson about how he can get all he needs, which is a speedy
13 trial and effective assistance of counsel, and whether I can
14 provide the second. So I need to do that.

15 Your order has had a few ramifications. One is the
16 trial schedule, and the other one is who can stand up on his
17 behalf, and I need to figure that out.

18 THE COURT: For everybody's edification, I do have a
19 civil trial in October. If I need to move it to accommodate
20 this criminal trial, I will do that. November is fully open.
21 December is fully open, except that the Court is in recess
22 Christmas week, and I am in recess from around January 4th to
23 January 14th. My tradition is not to take Christmas, and to
24 work through Christmas and New Years, and then take a week or
25 ten days off when everybody else comes back, get caught up on a

1 lot of things while everybody is away and we're not in trial.

2 But I have a commitment for about the 4th to the
3 14th. So if we started in October or November, then we might
4 tell the jury that we're going to take the Christmas holiday
5 because the Court's in recess, and then another ten days after
6 that. So we might break from December 23rd until January 17th.

7 After that I'm available all the rest of January.
8 I've got a civil trial set in February. I'll move it if we
9 need to do this. And beyond that I'm available.

10 Anything else?

11 MR. LOWELL: I understand I have a few things to
12 report back to you on. I will do it promptly. I certainly
13 know that I cannot sit and give my client advice that if your
14 order stands he should wait until March of 2006 for his trial.
15 We'll have to see where we go from there.

16 THE COURT: All right. I'm going to wait to hear
17 from you, and the government is going to wait to hear from you
18 on both issues.

19 MR. LOWELL: Right.

20 THE COURT: And we can set another status if anybody
21 thinks that's useful, but I want you to take what time you need
22 to file the motion for reconsideration.

23 MR. LOWELL: I understand, and your deputy and your
24 clerk have been most generous in giving us slots and
25 accommodating us. I'm sure we can find a slot reasonably close

1 in the future that we can present two things to you. The
2 reason why, when after you've thought about it, and really
3 thought about it, and then thought about it again, and where
4 I've done everything possible to twang your pains of
5 conscience, you will provide some conditions of release, and
6 then what the schedule will be. So I will do that as soon as I
7 can.

8 THE COURT: I think the government should plan on
9 responding in about 48 hours to his motion for reconsideration.

10 MS. KELLY: We will did that, Your Honor. But since
11 there's no motion pending at this time, I'd ask that you
12 consider excluding time pursuant to 18 U.S.C. 3161 and declare
13 the case a factually and legally complex case.

14 MR. LOWELL: I don't have any objection with that
15 determination.

16 MS. KELLY: We don't want to have any problems --

17 MR. LOWELL: We have created the trial schedule --

18 THE COURT: Talk one at a time.

19 MS. KELLY: Absolutely.

20 THE COURT: Say that again.

21 MR. LOWELL: I have no problems with that
22 determination of excluding the time between now and the time
23 that we have created the trial schedule, because the trial
24 schedule itself will adopt one of the criteria under the Speedy
25 Trial Act depending on whether we are seeking a speedy trial,

1 as that is defined in the statute, or a speedy trial with all
2 the bells and whistles that need to be done.

3 THE COURT: I understand. The fact of the matter is
4 the defendant is not seeking a speedy trial, or a trial as
5 speedy as the statute entitles him to, I guess is a better way
6 to put it.

7 MS. KELLY: That's correct.

8 MR. LOWELL: But he might.

9 THE COURT: Which subsection of 3161?

10 MS. KELLY: 3161(h)(8)(B)(ii), factually and legally
11 complex case.

12 THE COURT: Okay. Mr. Lowell used to work on the
13 Hill, he probably numbered this statute or something.

14 MR. LOWELL: I've never had that many letters in a
15 statute.

16 THE COURT: 18 U.S.C. 3161(h)(8)(B)(ii) says that in
17 determining whether to grant a continuance or to stay or toll
18 the running of the speedy trial, the Court may consider whether
19 the case is so unusual or complex either due to the number of
20 defendants or the nature of the prosecution, or the existence
21 of novel questions of fact or law that it is unreasonable to
22 expect adequate preparation within the time limits established
23 by this section. I think it's fair to make that finding, and
24 with the concurrence of the defense, at this point at least,
25 stay the tolling of the statute of limitations until we have a

1 trial schedule in effect, which is going to be soon.

2 MR. LOWELL: Your Honor, I'm satisfied that we can
3 exclude the time between now and the schedule, and you can make
4 that finding with the understanding that very soon we may seek
5 the speediest of trials that's allowed under that section,
6 starting at the moment that we so state, so that this will be
7 excluded, but it won't be excluded from that point forward.

8 THE COURT: I think we all understand each other.


9 Okay, so we'll wait to hear from Mr. Lowell, after
10 which we will either have a hearing or not. Well, I guess we
11 have to have a hearing if he files a motion to reconsider
12 because in addition to waiting for your filing hearing
13 arguments, he may want me to hear from Mr. Anderson. And if he
14 doesn't file a motion to reconsider, then we'll just get a
15 trial scheduled and see where we are. Thank you.

16 (Proceedings concluded.)

17 CERTIFICATE

18 I, LINDA L. RUSSO, Official Court Reporter, certify
19 that the foregoing pages are a correct transcript from the
20 record of proceedings in the above-entitled matter.

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Linda L. Russo, RPR
Virginia CCR No: 0313102

Linda L. Russo, RPR
Official Court Reporter