

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
	)	No. 21-10270-MLW
v.	)	
	)	
ATICHA JITTAPHOL,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING
TELECONFERENCE

June 10, 2022
11:22 a.m.

John J. Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR
Official Court Reporter
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1 P R O C E E D I N G S

2 THE COURT: Good morning. Would the clerk please call
3 the case.

4 THE CLERK: Your Honor, this is criminal matter
5 21-CR-10270, *United States v. Aticha Jittaphol*. Court is now
6 in session.

7 THE COURT: And do we have an interpreter,
8 Mr. Fleming?

9 THE CLERK: Yes, we do, Your Honor.

10 THE COURT: Would you administer the oath to the
11 interpreter, please.

12 (Interpreter duly sworn.)

13 THE COURT: Thank you.

14 Would counsel and the probation officers please
15 identify themselves for the Court and for the record.

16 MS. LAWRENCE: Good morning, Your Honor. This is
17 Kelly Lawrence representing the United States. With me is
18 David Derusha.

19 MR. DERUSHA: Good morning, Your Honor.

20 MR. HALPERN: Good morning, Your Honor. Keith Halpern
21 for Ms. Jittaphol.

22 THE COURT: And Ms. Jittaphol is on by Zoom. Anybody
23 who has not just identified himself or herself should turn off
24 their video. Perhaps everybody has. Well, perhaps everybody
25 has.

1 Okay. I'd like, as always, to try to make sure we
2 have a clear and common sense understanding of certain things.
3 When I was first introduced to this case, I was presented with
4 a binding plea agreement that would have, if accepted, provided
5 for no time in custody.

6 Okay. If there's a technical difficulty, Mr. Halpern,
7 maybe we can deal with it, but we'll go ahead.

8 So initially I expressed some skepticism about whether
9 that was a plea agreement that in the circumstances of this
10 case was worthy of serious consideration. The parties did
11 further briefing, and I decided that it was worthy of serious
12 consideration, so on March 8, 2022, I accepted the defendant's
13 guilty plea and scheduled her sentencing for June 14, which is
14 next Tuesday.

15 Subsequently, I took action on the various amended
16 petitions to revoke her pretrial release and revoked that
17 release on April 18 after about three days of evidentiary
18 hearings. And she went into custody on April 21, 2022. Since
19 it would be impossible in those circumstances to accept the
20 binding plea agreement and impose a sentence of probation, I
21 gave the defendant notice that she had a right, if she wanted
22 to, to withdraw her guilty plea rather than be sentenced
23 on June 14. And if the sentencing had proceeded on June 14,
24 the parties -- because she didn't withdraw her guilty plea,
25 either the parties might have had a new plea agreement or there

1 would be no plea agreement, but they could have advocated for a
2 time-served sentence.

3 However, on May 2, 2022, the defendant filed a notice
4 of withdrawal of her guilty plea. On May 10, 2022, I entered
5 an order that the guilty plea was withdrawn and the sentencing
6 hearing on June 14 was canceled. I referred the case to the
7 magistrate judge for pretrial preparation purposes.

8 On May 26, 2022, the magistrate judge ordered the case
9 was ready for my attention again. On May 27, I scheduled a
10 pretrial conference for June 24. When I saw there was a
11 dispute about the speedy trial deadline, among other things, I
12 issued an order rescheduling the pretrial conference for today
13 and said the parties should be prepared to discuss the
14 possibility of a trial commencing on June 21, and that brings
15 us to this conference.

16 Before we get into any of the specific items, I think
17 it would be helpful for me to understand what the government
18 and the defendant view as their respective interests at this
19 point.

20 And Mr. Halpern filed -- I'm not going to address this
21 up front -- a motion yesterday for the defendant's release from
22 detention, but it's not supported in the manner required by
23 Local Rule 7.1(b) by an affidavit or memorandum, which would be
24 necessary if it's necessary to address it. But from the
25 government's perspective -- actually, why don't I start with

1 the defendant.

2 Mr. Halpern, not what are your positions on discrete
3 issues, but what are the defendant's interests at this point?
4 I think you're on mute.

5 MR. HALPERN: She has a substantial interest in
6 getting out of Wyatt. The benefits of proceeding to trial
7 involve a concern that if she were to be sentenced as a result
8 of a plea that the Court would continue to use sweat patch
9 testing, and that if you did, that we were -- we would be on a
10 merry-go-round of positives which would result in probation
11 violations. And, you know, my view is that these patch tests
12 are wrong.

13 THE COURT: Okay. Keep going. You don't have to get
14 too emphatic. But this is helpful. Here, I'm going to
15 interrupt you for a moment. Let me make one thing clear for
16 the record. I can't be involved in plea discussions, but I can
17 try to be transparent about my thinking about certain things.
18 And I understand what you're saying.

19 If the defendant was -- if it comes to sentencing one
20 way or another, if she's convicted, and you must have felt that
21 there was a good chance that she would plead guilty and there
22 was a good chance she would be convicted, and once she pled
23 guilty -- that of course wouldn't be admissible, but that might
24 be the outcome of the trial. If we get to sentencing and she's
25 still detained, whenever that is, you know, if I was sentencing

1 her next Tuesday, I would expect to hear arguments that she
2 should be sentenced to time served, maybe even from the
3 government because I've been told previously -- I don't have a
4 Presentence Report -- that the guideline range is zero to six
5 months. Now she's served almost two months.

6 And as I say, I'm not engaging in plea negotiations.
7 I can't promise you what the sentence is. But I would have a
8 question, if she served two months, as to whether I should
9 order any supervised release at all because, while you don't
10 have any faith in sweat patch testing, at the moment -- and I
11 continue to be open-minded, maybe she's learned something -- I
12 don't have any faith that she would follow any combination of
13 conditions.

14 The lengthy decision I wrote speaks for itself. I'm
15 not altering anything I said, but it wasn't just the failed
16 drug test. It was the failure to follow directions from
17 Probation about treatment, but one of the things that could be
18 argued because I have to consider what's the purpose of
19 supervised release, is she a danger to the community? And if
20 she's not a danger to the community, is it fair to impose on
21 Probation to try to supervise her? These would be things that
22 I would consider and the parties could address. Anyway. Keep
23 going, Mr. Halpern.

24 MR. HALPERN: That's important to know because a
25 significant factor in the decision of thinking a trial has a

1 purpose would be to avoid a period of supervised release in
2 which she continued to test positive for sweat patch tests, and
3 we live with this issue, you know, on and on.

4 THE COURT: And in fact, you have raised something
5 else. My duty is to resolve cases and controversies, not
6 abstract issues. So if she was on supervised release, that
7 would be a time when it would be ripe for you to renew your
8 arguments about sweat patches and whether she should have them,
9 whether there's some alternative, whether there should be a
10 short term of supervised release with some inpatient treatment
11 or some period of supervised release for some inpatient.

12 Part of what brings us here, part of the reason she's
13 detained is Probation directed her to have certain treatment
14 and she didn't go when she was supposed to go, and at some
15 point she didn't go at all. But there's a whole range of
16 things. But this is why I'm asking what your interests are,
17 not what your position is on A, B, C. Anyway, that's why I'm
18 interested. So why don't you go on.

19 MR. HALPERN: So I would say that the decision to
20 withdraw the guilty plea rested on three factors. One was a
21 fear that, if she was on supervised release, that she would
22 continue to have to deal with sweat patches. She could end up
23 incarcerated again, and she would be living with this issue of
24 sweat patch testing hanging over her head for some period of
25 time.

1 The second reason to go to trial concerns the
2 potential impact of any conviction on immigration so that, if
3 she were able to win, that issue would go away.

4 The third reason is I think I could win. There's no
5 -- I'm not saying I would win, but this is a defensible case.
6 The government's case is largely based on one witness. I think
7 I got a decent shot at winning the case.

8 So given all of those factors, I mean, I felt like
9 there was a good chance that you would release her to time
10 served if she went through with the plea. I wasn't
11 particularly concerned about the risk of her spending a lot of
12 additional time or any additional time locked up, but it was
13 more the focus on probation and immigration and the fact that I
14 had a case that I thought I could win.

15 THE COURT: And you said one witness. Nobody has ever
16 really explained the case to me the way it would ordinarily be
17 explained to me when I'm preparing for a trial. But this is
18 helpful. And, you know, I know you're a thoughtful lawyer,
19 certainly a zealous one. I must have thought about the
20 immigration consequences before she pled guilty and must have
21 regarded them as manageable or acceptable risks or whatever,
22 and it's helpful to me to know that supervised release was a
23 major consideration.

24 What are the government's interests at this point,
25 Ms. Lawrence, I suppose?

1 MS. LAWRENCE: Thank you, Your Honor. The
2 government's interest in this case, as in most, doesn't change
3 much once the charges are filed. It's to bring the case to a
4 close and a just result. And the guilty plea we believe, based
5 on the evidence that we have, a conviction is the right result
6 based on the evidence that we have. And whether it was by
7 guilty plea as we had originally agreed with the defendant or
8 whether it's by trial by jury, our position and our interests
9 are truly the same at the core.

10 And I disagree with Mr. Halpern's assessment of our
11 evidence as being limited to one witness. There are other
12 witnesses who will testify not only as to the fraudulent loan
13 application or the false statement in the loan application but
14 also as to the defendant's knowledge about the illegal activity
15 that underlies or makes that statement in the loan application
16 false.

17 THE COURT: And this is something that kind of merges
18 over into what would be necessary to prepare for trial. But
19 the essence of this case, as I understand it, the alleged
20 violations are violations of 18 United States Code, Section
21 1001, knowingly making a false statement to a government
22 official of a material fact.

23 So there were, as I understand it, two applications
24 filed for government COVID-related funding that generated
25 payments of about \$7,000, and in each of them she represented

1 that her business was not engaged in any illegal activity, but
2 there was sexual activity in violation of state law as part of
3 her massage business. Do I understand it right?

4 MS. LAWRENCE: Yes, Your Honor, that's exactly the
5 thrust of the case.

6 THE COURT: All right. Do you have witnesses that
7 will testify that there were massages of a sexual nature in
8 violation of state law?

9 MS. LAWRENCE: We do, Your Honor, more than one.

10 THE COURT: More than one. And about how many of
11 those?

12 MS. LAWRENCE: We have, I believe we would call three
13 witnesses who worked at the spa and who either did provide
14 sexual favors themselves or were asked to by clients to perform
15 the sexual favors. Some of those witnesses, two of those
16 witnesses would testify that they spoke with the defendant
17 about that topic, and that's critical testimony to prove that
18 the defendant knew that the illegal activity was occurring in
19 the business. And there's another witness who would testify as
20 to a more direct conversation with the defendant about the
21 sexual acts that were part of the massages that were delivered
22 at the spa. So those are sort of key witnesses, people who
23 worked for her at the spa and who did perform the favors or
24 were asked to.

25 THE COURT: So the witnesses worked for her?

1 MS. LAWRENCE: Yes, and -- they worked at the spa. I
2 believe the way it's set up -- and this is getting a little
3 granular, but they're not under an employment law way. They
4 may have been considered independent contractors. But they
5 performed the massages and the sexual activity in the spa owned
6 by the defendant.

7 MR. HALPERN: May I interject?

8 THE COURT: Just a moment. I'll come back to you.
9 And then do you have other witnesses in addition to those?

10 MS. LAWRENCE: We do, Your Honor. So on that vein in
11 terms of proving the defendant's knowledge of the illegal
12 activity, and I think that's something that will be strongly
13 contested at trial, so that is a very important part of the
14 government's case, I've just described there are four of those
15 witnesses I just described who worked for or performed massages
16 with sexual activity.

17 THE COURT: I'm sorry. I thought you said there were
18 three. So there were four.

19 MS. LAWRENCE: Sorry. Three at the spa and one who
20 was, I'll say, a friend. That may be too strong a word but
21 someone that the defendant knew who also separately performed
22 massages with sexual activity and discussed it with the
23 defendant.

24 THE COURT: So that's four witnesses.

25 MS. LAWRENCE: Four witnesses there. Also, Your

1 Honor, we would move to admit evidence under 404(b) as to the
2 defendant's own activity performing massages with the sexual
3 act included at her own home. And for that we have testimony
4 from a person who received those massages and a neighbor of the
5 defendant who reported people coming in and out and initiated
6 the investigation in this case. There could be other people to
7 support that, but that's the core of what we would seek to
8 admit as to 404(b) and her knowledge.

9 THE COURT: All right. So that's at least six and
10 that's Rule 404(b).

11 MS. LAWRENCE: Those two would be 404(b) in the sense
12 that the activity was undertaken by the defendant, not at the
13 spa, which is the business, although the business doesn't need
14 to be limited to a physical location.

15 THE COURT: I was going to say I'm just --

16 MS. LAWRENCE: It's just a --

17 THE COURT: -- thinking about whether that's intrinsic
18 or 404(b).

19 MS. LAWRENCE: Sorry.

20 THE COURT: I'm just thinking ahead as to what would
21 need to be done to try this case. I suspect there are going to
22 be some disputes about what's admissible evidence.

23 MS. LAWRENCE: Correct, and that's one area that I
24 think would be contested, as to whether and how it's
25 admissible. We would argue it's intrinsic. I'm just flagging

1 that it could be a 404(b) issue for briefing in advance of
2 trial.

3 THE COURT: Yes.

4 MS. LAWRENCE: And there are other witnesses we would
5 call, and we have not identified the specific person, but we
6 would call a representative from the Small Business
7 Administration to testify about how the loan process works and
8 what is material to whether the loan is granted and disbursed,
9 as well as the lending institution, Bank of America. And we
10 did not identify those individuals specifically as of Tuesday
11 when we received your order, but we are working toward that.
12 So I think our witness list is -- and a case agent. So
13 approximately ten individuals at a minimum.

14 THE COURT: Mr. Halpern, is there more you'd like to
15 say?

16 MR. HALPERN: Yes. I don't anticipate disputing the
17 testimony of workers that on occasion they provided men with
18 hand jobs. In the discovery that's been produced to me, the
19 three women who worked at the spa testified before the grand
20 jury and gave similar statements in interviews that have been
21 produced that they never told Aticha that they performed sexual
22 services.

23 One of them, in the police report and I believe in the
24 grand jury, testified that she never talked to Aticha about the
25 issue at all. The other two testified that when they were

1 hired, Aticha told them, "This is legitimate massage. If you
2 do anything else, I don't want to know about it."

3 So, you know, the government could make an argument
4 that if she didn't know, it's because she didn't want to know.
5 But the government has not produced anything to me involving a
6 statement by a woman working at the spa that they told Aticha
7 that she had performed any sexual service. That's never been
8 produced. I have no such statement.

9 I do have a statement from the fourth witness, and
10 that's the one I was referring to before who never worked at
11 the spa, who is extraordinarily vulnerable in terms of
12 credibility, who testified that she went out to lunch and had
13 conversations with Aticha and with women working at the spa and
14 that they told her at lunch how much money they were charging
15 for hand jobs and that Aticha was present for one of those
16 lunches. That's it. That is the only witness in all the
17 discovery that I've been provided who affirmatively says,
18 "Aticha knew, and I was there and I heard it."

19 The others at best testified, "She must have known.
20 She told me not to tell her what I did, if I did anything."
21 And there were witnesses who told the government that they
22 didn't do anything.

23 The other issue is that there are witnesses who would
24 establish that Aticha provided sexual services at her
25 apartment. It had nothing to do with the spa. The crime is

1 not about whether Aticha committed illegal activities anywhere
2 in her life. The crime is that the business was involved in
3 illegal activity. And what Aticha did at home, it's no
4 different than if she did drugs in her home or robbed a bank.
5 It's got nothing to do with what happened at the spa. So as
6 far as I know, in terms of the discovery that's been produced
7 to me, there's one witness.

8 THE COURT: And would you object to the admission of
9 the evidence of what she did at her home?

10 MR. HALPERN: Absolutely.

11 THE COURT: All right. Because I mean, these are
12 issues that would have to be briefed and litigated because I
13 had no idea of any of this until I asked you.

14 MS. LAWRENCE: Your Honor, if I may, Mr. Halpern's
15 statement sort of describing his position on that conduct that
16 occurred at the defendant's home and also his view of what the
17 impact of these other witnesses' statements or testimony may
18 be, I do believe there will be more than one issue that would
19 need to be worked out in terms of how this evidence is --

20 THE COURT: This is getting to something I want to
21 understand better. What are some of the other issues you would
22 anticipate?

23 MS. LAWRENCE: I think there are questions about --
24 that's a little bit hard to do in a vacuum. I think the core
25 of it will be, well, there's willful blindness, potentially,

1 because that's what the defense has started to be. There was
2 no direct communication.

3 The government would need to establish knowledge of
4 the illegal activity to establish that the statement was false
5 in the loan application. And we believe there's an
6 overwhelming amount of evidence, circumstantial evidence, that
7 sets the stage for the fact that the defendant, if she didn't
8 actually know, which we believe the evidence could support
9 that, she certainly didn't -- put her head in the sand as to it
10 and deliberately avoided it. So that's sort of a different --

11 THE COURT: All right. And I haven't instructed on
12 willful blindness in a while, so these are things you would
13 need to brief. But my understanding is that willful blindness
14 is a way of proving actual knowledge but doesn't relieve the
15 government of the obligation to prove actual knowledge. It's
16 that -- I've got my instruction here that I used years ago
17 somewhere. But is that the government's view about what is
18 willful blindness?

19 MS. LAWRENCE: Correct, but it is a way to show that
20 the defendant did have knowledge, and you produced the evidence
21 of all the ways the defendant avoided learning of the knowledge
22 that you believe the evidence proves.

23 THE COURT: And it wouldn't be sufficient for the
24 government to prove that she should have known or a reasonable
25 person would have known, but from all of the -- you would say,

1 it's as if she's telling them, "I don't want to know what
2 you're doing," you would argue shows that she actually knew
3 what they were doing.

4 MS. LAWRENCE: Yes.

5 THE COURT: Or contributes to show she actually knew
6 what they were doing.

7 MS. LAWRENCE: That is correct.

8 THE COURT: Is that the understanding of willful
9 blindness in your view, Mr. Halpern?

10 MR. HALPERN: Let me address two issues. One is I
11 initially understood Ms. Lawrence to say that the government
12 had statements from women who worked at the spa that they told
13 Aticha they'd performed sexual activity. If that's the case, I
14 don't have those statements, and I'm entitled to them.

15 MS. LAWRENCE: No, that's not what I meant to say.
16 Sorry, Your Honor.

17 THE COURT: Go ahead.

18 MS. LAWRENCE: I meant to say we have statements from
19 individuals who would testify that they did provide sexual
20 activities at the spa in addition to the massage and that they
21 also spoke with the defendant not about doing that but that the
22 defendant had said, "Whatever you do, that's on you." So I
23 don't think -- if those were conflated, I didn't mean to
24 conflate them. They were two separate points.

25 THE COURT: Yes, but see, this raises another issue

1 because, although the case has been pending for a while, we
2 haven't been in a pretrial mode. And I'm always concerned --
3 and this is no reflection on Ms. Lawrence or anybody else, but
4 for at least the last dozen years, in every single case, I ask
5 the prosecutor, "Do you understand you have a duty to provide
6 all material exculpatory evidence? Do you understand you have
7 the duty to go to every agency that was involved in the
8 investigation to look for it? Do you understand that it can be
9 oral as well as written evidence? Do you understand that
10 relates" -- you know, "Material exculpatory evidence can be
11 evidence that would tend to negate guilt or to undermine the
12 credibility of a witness? Do you understand it's a continuing
13 obligation?"

14 I think there needs to be some time, Mr. Halpern, if
15 this case is going to go to trial, to assure that you get
16 everything you're entitled to and that the pace of matters
17 doesn't result in any errors in this area.

18 MR. HALPERN: If I can address the second question
19 about willful blindness?

20 THE COURT: Sure.

21 MR. HALPERN: I think that what I would seek to
22 establish is that the economic realities of this business,
23 Ms. Jittaphol received a cut, a flat cut of \$40 out of the \$80
24 for the room. Whatever the worker made once the door closed,
25 the worker kept. All right.

1 And, I mean, the reality is that, particularly as
2 COVID damaged the business and there were fewer and fewer
3 customers, if men offered money, a lot of money, there was an
4 obvious risk that this was going to happen, and it's a risk
5 that's inherent in any massage place, and it's a risk that is
6 ignored by everybody.

7 It's ignored by the police, who allow these places to
8 run. It's ignored by the landlords. That's where her COVID
9 money went. The week that she got her COVID money, she wrote
10 checks to her landlord. I mean, in terms of who profited from
11 this money? It wasn't Aticha. It was the landlord. That's
12 where the money went. Did he not suspect that maybe these
13 people are not just giving -- I mean, everybody suspects it,
14 and so if that's enough, it would be enough not to just condemn
15 her. It would be enough to condemn the police and the
16 landlord, everybody else.

17 THE COURT: All right. But, look, what you have, I
18 don't know that that would be -- I don't know that the jury
19 would hear evidence about the police or the landlord, and that
20 relates to another matter that I'll discuss with you ex parte
21 at the end, Mr. Halpern, remind me.

22 But let me just make sure, I had the clerk yesterday
23 send you the standard pretrial order, all the things that need
24 to be done to prepare a case for trial. So I take it there's
25 no motion to dismiss or suppress. Is that right, Mr. Halpern?

1 MR. HALPERN: I didn't see the email, but there is no
2 motion --

3 THE COURT: Okay.

4 MR. HALPERN: -- to dismiss or suppress.

5 THE COURT: I hope it was sent yesterday. Then in the
6 pretrial order, I would direct the government to provide all
7 exculpatory information identified in Local Rule 116.2, and
8 that's actually material exculpatory evidence. I have to
9 revise the order. Liberally construed, Judge Paul Friedman
10 construed it in *Safavian*, not the post-trial view of what's
11 material exculpatory evidence.

12 And in general, Ms. Lawrence, this is all -- the
13 nature of the case has changed very quickly. Have you yet done
14 a thorough search of all agencies involved in the investigation
15 to make sure you have all the material exculpatory information,
16 or do you need some time to do that or update?

17 MS. LAWRENCE: Your Honor, I have undertaken to obtain
18 that material and produced as much of it as I have obtained. I
19 cannot say for certain that I have exhausted every avenue of
20 making sure that all of that covered material under Rule 116.2
21 that I have and have produced. It is a concern on this
22 timeline that we can do that, but I'm prepared to do it --

23 THE COURT: Well, we don't have a timeline yet. I
24 said I was going to discuss starting trial a week from Tuesday,
25 but that's part of the reason all of this information is

1 important to me. And then you have to provide -- did you get
2 the pretrial order, blank pretrial order?

3 MS. LAWRENCE: I did, Your Honor, yes.

4 THE COURT: It's probably somewhere on your computer,
5 Mr. Halpern. The government, I would order the government to
6 provide you a general description, including the approximate
7 date, time and place of any crime, wrong or act that the
8 government proposes to offer pursuant to Federal Rule of
9 Evidence 404(b).

10 So based on what I've heard from Ms. Lawrence, if
11 there were men, I assume, coming to Ms. Jittaphol's apartment
12 and getting sexual massages, she would have to give you
13 specifics about that evidence, and then there would be a
14 question as to whether that's evidence that's intrinsic to the
15 offense, it doesn't have to be analyzed under Rule 404(b), or
16 whether it is evidence of other wrongs or bad acts that have
17 probative value for some permissible purpose, knowledge --
18 well, I'd have to see what they argued the permissible purpose
19 is.

20 MR. HALPERN: Your Honor, I want to point out that at
21 the relevant time period Ms. Jittaphol wasn't working in the
22 spa.

23 THE COURT: Okay. You're going to get a chance to
24 file a trial brief. If you want to tell me all of this, you
25 will. And then I'm going to need proposed voir dire questions,

1 jury instructions, motions in limine -- there's going to be at
2 least one, because you want to exclude that evidence and the
3 government wants to admit it -- supporting memoranda and a
4 trial brief, at least from the government. I don't know that I
5 can order the defendant to say anything, but the more you're
6 comfortable sharing with me -- and you're giving me a much
7 fuller flavor of the complexity of this case than I had when we
8 started.

9 And then there have to be replies to the motions in
10 limine. Then the government has to provide the defendant with
11 the names, and if the government is agreeable, if the parties
12 are agreeable, are you willing to exchange *Jencks* statements in
13 advance of trial, whenever trial is, Ms. Lawrence?

14 MS. LAWRENCE: Your Honor, under the circumstance,
15 yes, and because of the way the procedural posture has played
16 out over the last six weeks, the government, we have actually
17 produced some *Jencks*, at least potentially *Jencks*, not knowing
18 exactly what our witness list looks like. But yes, we have
19 already produced some and would be willing to do it as soon as
20 is practicable and not to stand on formality.

21 THE COURT: Right. And Mr. Halpern, if you have any
22 witness statements, are you willing to provide them in
23 exchange? Because the government, as you know, under the
24 *Jencks* Act --

25 MR. HALPERN: Yes.

1 THE COURT: -- provide them in advance of trial.

2 MR. HALPERN: Yes.

3 THE COURT: Okay. Do you expect to have any?

4 MR. HALPERN: No.

5 THE COURT: Then there has to be a schedule for
6 exchanging witness lists, and first the government would have
7 to provide its exhibits, proposed exhibits to the defendant.
8 Do you have any idea, Ms. Lawrence, about roughly how many
9 exhibits there might be?

10 MS. LAWRENCE: Your Honor, I can't give you a good
11 estimate because I was focused on witnesses first, thinking
12 about securing their presence. But the bulk of the documentary
13 exhibits will be focused on the loan application and bank
14 records proving disbursement and receipt. I don't expect a
15 voluminous set of paper exhibits, but I can't really estimate
16 with much specificity.

17 THE COURT: Sure. Have you checked with -- I think
18 you told me there were going to be about ten witnesses. Have
19 you checked for their availability for June 21, which is very
20 soon?

21 MS. LAWRENCE: Yes. We undertook as of your order on
22 Tuesday to find -- we haven't spoken to many of these witnesses
23 in over a year. So we've identified last known addresses and
24 hopefully phone numbers and are prepared to go out this weekend
25 to try to find them and talk to them. They may be out of state

1 in terms of the SBA and Bank of America witnesses. So there
2 are some challenges, but we are working toward it.

3 THE COURT: All right. Because I said I was going to
4 discuss the possibility of that.

5 MS. LAWRENCE: Right.

6 THE COURT: And do you anticipate presenting
7 witnesses, Mr. Halpern?

8 MR. HALPERN: Yes.

9 THE COURT: How many?

10 MR. HALPERN: Maybe four or five.

11 THE COURT: All right. So now we're up to about 14
12 witnesses. And have you located all of your witnesses so far?

13 MR. HALPERN: Well, not all but most, yes.

14 THE COURT: Okay.

15 MR. HALPERN: I mean, I should mention now, I mean,
16 the government did mention calling the case agent which, if
17 they didn't, I would want to. And also they want to call
18 Ms. Huyen who was the prosecutor on this case before she left.

19 THE COURT: What would she be a witness on?

20 MR. HALPERN: There were problems in the grand jury
21 testimony. There were inconsistent statements. There were
22 statements made to Ms. Huynh in advance of the grand jury, and
23 witnesses testified in conflict with those statements, and
24 Ms. Huynh let it happen.

25 THE COURT: Without correcting it or noting it?

1 MR. HALPERN: She did more than not correct it. She
2 encouraged it.

3 MS. LAWRENCE: Your Honor, I would object to this. I
4 have no knowledge of this, and from what I've seen, that
5 absolutely did not occur, and that should not be an allegation
6 Mr. Halpern makes against --

7 THE COURT: Okay. Let me do the following. And
8 Ms. Lawrence, it was appropriate to make that response. And
9 obviously I have no knowledge of the merits. I don't know what
10 he's talking about. But how to say this -- what Mr. Halpern is
11 alleging echoes of something that fortunately I haven't felt
12 the need, discerned the need to deal with since about 2010,
13 when I spent a lot of time dealing with the *United States v.*
14 *Darwin Jones* where a police officer provided an affidavit that
15 was evidently prepared by the Assistant U.S. Attorney that
16 differed in material respects from what he actually saw, what
17 he actually did, so we don't have any of these problems again.
18 Everything has got to be disclosed because that's the -- that
19 would relate to this if we are trying the case or are preparing
20 to try the case. Then does the defendant expect to have any
21 exhibits? Sounds like you would.

22 MR. HALPERN: Well, there are documents that I would
23 use for impeachment. It would depend --

24 THE COURT: I'm asking about any exhibits in your case
25 in chief.

1 MR. HALPERN: I don't really think so. I think it
2 would be the case that would be largely pursued through
3 impeachment.

4 THE COURT: And then stipulations. Look, here is --
5 let me get one more piece of information that may be of some
6 practical significance. We've got Ms. Wertz and Mr. Pace on
7 the Zoom. If and when it came to it, what is the minimum
8 reasonable period of time it would take to complete an
9 expedited Presentence Report in this case, do you think?

10 MR. PACE: Your Honor, I believe there were some
11 emails being sent back and forth regarding the Presentence
12 Report. I'm just going to check my phone because I have a
13 time. I think an expedited Presentence Report could be
14 provided within seven weeks.

15 THE COURT: How many?

16 MR. PACE: Within seven weeks, Your Honor.

17 THE COURT: Seven weeks?

18 MR. PACE: Yes. But I believe if it needs to be
19 earlier, we can make accommodations to be earlier.

20 THE COURT: Was the defendant interviewed after she
21 pled guilty previously?

22 MR. HALPERN: No.

23 THE COURT: She wasn't?

24 MS. WERTZ: To my knowledge she was interviewed via
25 Maria D'Addeico, one of the U.S. probation officers in the

1 presentence unit, and that was during the guilty plea while the
2 guilty plea was entered.

3 MR. HALPERN: She did a PSR interview?

4 THE COURT: I think you would probably know,
5 Mr. Halpern.

6 MR. PACE: I think Mr. Halpern will know, but I don't
7 have a recollection of the interview. Mr. Halpern would have
8 been notified if there was, but I don't see one on file.

9 MR. HALPERN: I forget things, but I don't think I've
10 forgotten that.

11 MR. PACE: I can double-check.

12 THE COURT: It's okay. Ms. Lawrence, if I schedule
13 the trial to begin on June 21, would you move for a continuance
14 so you would have adequate time to prepare, find the witnesses
15 and brief the issues, et cetera?

16 MS. LAWRENCE: Your Honor, I would likely expect to
17 file a continuance next week. Right now I think I can get it
18 all done in the amount of time, but I do have -- there are
19 challenges.

20 THE COURT: Yeah.

21 MS. LAWRENCE: I'm particularly concerned about the
22 discovery coming onto the case midstream and also with the sort
23 of trying to be accommodating of the pace of things that are
24 happening. We have produced a lot of discovery, but I am not
25 as confident as I'd like to be that everything has been

1 presented.

2 THE COURT: Yes. Well, the defendant thinks the
3 speedy trial deadline, if I understand it right, is July 20.
4 The government thinks it's July 28. The speedy trial clock
5 started running again pursuant to section 3161(i) on May 10
6 when I ordered the guilty plea withdrawn. I believe the
7 statute applies. The speedy trial deadline would be July 28.

8 If this case -- there can be a continuance of a
9 trial -- well, time may be excluded from the Speedy Trial Act
10 calculation resulting from a continuance granted by any judge
11 on his own motion or at the request of the defendant or his
12 counsel or at the request of an attorney for the government if
13 the judge granted such continuance on the basis of his findings
14 that the ends of justice served by taking such action outweigh
15 the best interests of the public and the defendant in the
16 speedy trial. The First Circuit wrote that in *Barnes*, 159 F.3d
17 4, 9, quoting 18 United States Code, Section 3161(h)(7)(A).

18 And in deciding whether to grant such a continuance,
19 the Court must consider whether the failure to grant such a
20 continuance would deny counsel for the defendant or the
21 attorney for the government the reasonable time necessary for
22 effective preparation, taking into account the exercise of due
23 diligence, which is 18 United States Code, Section
24 3161(h)(7)(B)(iv).

25 I would grant such a continuance at least until early

1 August. If this case is going to be tried, it needs all of the
2 usual preparation. There would have to be, first, the
3 government has to give high priority, looking for all of the
4 information that has to be disclosed.

5 When Mr. Halpern starts talking about inconsistent
6 statements, and you will confer about this, but you need to
7 know, Mr. Halpern, you mentioned that you don't mind telling
8 her, Ms. Lawrence, more about what you have in mind. It might
9 focus their inquiry, but maybe everything has been produced.
10 But whatever it is, I assume you want all material exculpatory
11 evidence. Is that right?

12 I don't want to have problems after. And I'm sorry,
13 and there are issues that need to be briefed, motions in limine
14 on whether what Ms. Jittaphol did --

15 MR. HALPERN: There is --

16 THE COURT: -- going to be admissible or not.

17 MR. HALPERN: There's only one category of exculpatory
18 evidence that I suspect exists that could have been -- which is
19 that law enforcement did surveillance of the spa and talked to
20 men. There were reports written when they interviewed men who
21 provided information that helped their case. I suspect that
22 they talked to men who did help their case and said that they
23 did get hand jobs and they decided we don't really need to
24 write up those reports.

25 Other than that, I don't think there is any other

1 exculpatory evidence.

2 THE COURT: Well, that would be -- but that's going to
3 impose on Ms. Lawrence an obligation to talk to whatever agents
4 participated and may not have written reports.

5 MR. HALPERN: I don't feel like some urgent need for
6 that because I'm not disputing, I'm not going to be arguing
7 that the women who acknowledged performing hand jobs are lying,
8 all right. I'm not going to argue that issue. So whether
9 there were some men who did get them, I mean, it's kind of
10 beside the point. I'm prepared because I really do view this
11 case as a one-witness case in terms of establishing knowledge.

12 THE COURT: Well, I've heard that this is a 14- or
13 15-witness case without consideration of whether the defendant
14 is likely to testify.

15 MR. HALPERN: That does bring me to a legal question
16 I'd like to ask you.

17 THE COURT: Go ahead.

18 MR. HALPERN: All right. So I'm aware of a law that
19 would preclude the government from introducing substantively
20 anything that she said during the course of a plea colloquy.
21 I'm not sure about what the law is with respect to impeachment
22 of her statements made in court.

23 THE COURT: I'm not sure either of --

24 INTERPRETER: Your Honor, this is the interpreter.
25 While you are on to this legal question, may I take a quick

1 break? I'll be right back.

2 THE COURT: Go take a quick break, and when you come
3 back -- that's fine.

4 (Recess, 12:19 p.m. - 12:22 p.m.)

5 THE COURT: All right. During the break I believe one
6 of the deputy clerks said something about the availability of
7 the interpreter. What was that?

8 INTERPRETER: Yes, Your Honor.

9 THE COURT: No. They can repeat it. What were you
10 told? Was that Mr. Lovett who reported it?

11 THE CLERK: That was me. She gave me information that
12 she's not available until after July 4 and then not available
13 July 12 through August 4.

14 THE COURT: Here is what I will do. All right. I
15 haven't given you an order. I'm orally scheduling the trial to
16 start on June 21. Ms. Lawrence, do you want to move for a
17 continuance?

18 MS. LAWRENCE: Yes, Your Honor, I'd like to move to
19 continue the trial date.

20 THE COURT: So you can do all the things you can to
21 prepare what we've been discussing.

22 MS. LAWRENCE: Yes, under the Speedy Trial Act, I
23 believe in addition to the subsection there's also a provision
24 that excludes time in order to secure essential witnesses. I
25 don't have a specific witness that I can say is unavailable,

1 but right now there are several witnesses that need to be
2 contacted, and their presence has not yet been secured. So in
3 the next ten days, that is something we need to tackle.

4 THE COURT: Well, there's also a lot of briefing that
5 needs to be done.

6 MS. LAWRENCE: There needs to be briefing on several
7 issues of law as well as discovery obligations met because we
8 are already within the 21-day time period of Local Rule 116.2,
9 and there are quite a few categories of information that need
10 to be uncovered if they exist and produced to the defendant.

11 THE COURT: And we impanel juries now on Tuesdays.
12 The interpreter is not available until August 6. I have a
13 civil trial scheduled to start on August 9. I could give you a
14 schedule that would provide time to do everything that's
15 usually required and certainly necessary in this case to start
16 the trial on August 9 in place of that case. Do you want to be
17 heard before I decide whether to grant the continuance,
18 Mr. Halpern?

19 MR. HALPERN: No.

20 THE COURT: Okay. Well, would you like to go to
21 trial -- does anybody have a problem with starting trial that
22 date?

23 MR. HALPERN: I'm not going to agree to waive speedy
24 trial time, but I don't want to be heard on it.

25 THE COURT: Okay. Well, I'd have to look at the

1 provision for finding essential witnesses, but I'm allowing the
2 motion to continue. Let me put it this way. Are the lawyers
3 available on August 9?

4 MS. LAWRENCE: Yes, Your Honor.

5 THE COURT: Mr. Halpern?

6 MR. HALPERN: Yes.

7 THE COURT: All right. I'm allowing the motion for
8 continuance and excluding the time until August 9 because
9 before I understood the complexity of this, I said I wanted to
10 discuss the possibility of starting trial on June 21, and I'll
11 note that I've acted promptly on this. I got the magistrate
12 judge's report on May 26. I scheduled a pretrial conference
13 the next day for June 24.

14 When I was informed that there were speedy trial
15 issues, I promptly rescheduled for today the pretrial
16 conference for June 10, and I know far more about this case
17 than I did earlier before this hearing. It wouldn't be fair or
18 feasible to start the trial on June 21. And because an
19 interpreter, I'm told, is essential, it wouldn't be feasible to
20 start it before August 9.

21 So I'm excluding all time until August 9 at the
22 request of the government because I find the ends of justice
23 served by taking such action outweigh the best interests of the
24 public and the defendant in a faster trial, applying the
25 standard in *Barnes*, 159, F.3d, 4, 9.

1 And I have considered whether the failure to grant
2 such a continuance would deny counsel for the defendant or the
3 attorney for the government the reasonable time necessary for
4 effective preparation, taking into account the exercise of due
5 diligence as required by section 3161(H)(7)(B)(iv).

6 Witnesses have to be found. Only relatively recently
7 did the government learn that the case would not be a guilty
8 plea but a trial. It's important that a more thorough search
9 for material exculpatory information be made and that it be
10 disclosed to the defendant if there is more in time for it to
11 be effectively used. It's important that the parties file
12 trial briefs, at least the government, and motions in limine.

13 There's one significant piece of disputed evidence, at
14 least. That is whether the defendant's alleged activities in
15 her home are intrinsic to the charges in this case, whether, if
16 they're not intrinsic, they're admissible under Rule 404(b).
17 And if they're admissible under 404(b), it would be the
18 question of whether they nevertheless should be excluded under
19 Rule 403.

20 There's also the issue that Mr. Halpern raised. And
21 I'll add another level to it. And that is whether statements
22 the defendant made when she pled guilty can be used not in the
23 case in chief. I haven't looked at the rule or researched it,
24 but I believe it probably cannot. But the issue is whether
25 they can be used for impeachment purposes to test her

1 credibility if she chooses to testify. And I note that
2 Mr. Halpern would reasonably want a ruling on that before she
3 took the stand. So this is going to have to be resolved in
4 limine.

5 I'm going to give you a schedule that will prepare
6 this for briefing, and we'll have a pretrial conference the
7 week before the 9th, if we can get the court reporter -- get
8 the interpreter, or maybe on the 9th.

9 But I'm going to build in this schedule an opportunity
10 for you to talk again about a possible plea. It's entirely up
11 to you. But unless there's another binding plea agreement, you
12 know, I can't promise you what I would do, but you've educated
13 me to understand that this would be an intriguing case to try.
14 But the trial will take -- you haven't told me how many days
15 you think it will take, but I think you're talking about a
16 trial, if it's 9:00 to 1:00, it's going to be like two weeks.
17 And even if it's whole days, it's going to be a long trial.

18 Then if the defendant is found not guilty, she'll be
19 released. But then if she's convicted, there will be typically
20 12 weeks until the sentencing. And if you're correct in your
21 guideline calculation -- here, I'm going to give you a
22 schedule. Actually -- I'm going to give you a schedule.

23 THE CLERK: Your Honor, I'm told by the interpreter
24 that she possibly may be unavailable from August 6 to the end
25 of August.

1 THE COURT: What's that?

2 THE CLERK: I'm told by the interpreter she possibly
3 may be unavailable from August 6 to the end of August, but
4 she'd have to explain.

5 THE COURT: Well, we'll also find another interpreter.
6 There's got to be more than one interpreter in the United
7 States who can do this.

8 THE CLERK: Okay.

9 THE COURT: But I would appreciate -- all right. I'll
10 ask the interpreter to tell me what the problem is, what the
11 issue is, what her availability is.

12 INTERPRETER: Sorry, Your Honor. I am with the State
13 Department next week. And this is the first set of it, the
14 first set will be next week for two weeks. Then the one in
15 September -- I'm sorry -- in July would be, I have a trip to
16 Thailand, also a DOD assignment. I come back on the 4th. I am
17 tentatively booked, but it's not concrete. I can possibly find
18 out as well. And the last time my partner, who is also a
19 federal court interpreter and we both professionally -- not
20 certified but level with the State Department. I can also ask
21 him as well. We're in the other case together.

22 THE COURT: Okay. I was going to ask you. You have a
23 partner and maybe you know of other Thai interpreters, ideally
24 in Massachusetts --

25 INTERPRETER: There's plenty. It depends on what you

1 want, because I know with federal court you have different
2 levels you allow them to work. It really depends on what you
3 want.

4 THE COURT: You'll talk to the clerks. I have to get
5 ready for another hearing at 1:30 and eat. But we've got other
6 things to go through here.

7 MR. HALPERN: Your Honor, can I ask one question
8 before you do scheduling?

9 THE COURT: Yes.

10 MR. HALPERN: And I appreciate your earlier comments
11 that supervised release wouldn't be necessarily happening to
12 begin with, but here is the question that I think would have a
13 significant impact on the decision here. If she were to be
14 sentenced to a term of supervised release, would you be willing
15 in advance to tell us that you would agree not to do patch
16 testing and instead do urine testing?

17 THE COURT: I'm not going to say yes now. But I mean,
18 I'll tell you, the motion you filed, which I saw at about 5:00
19 yesterday, filed yesterday afternoon talked about, she should
20 go inpatient, she shouldn't have gone to Wyatt. I don't want
21 to qualify anything I said before in detail, but part of the
22 problem was Probation was directing her to do certain things
23 and she didn't do them, and I had extensive litigation on that.

24 If you want, you can talk to the government about
25 another binding plea agreement. Then I'd have to study it,

1 hear it, accept or not accept it, listen to you. You could
2 take your chances.

3 But the government brought this case. They decided to
4 bring the case, so now I need to resolve it. You know, they
5 used to say, sometimes people would say, "Don't make a federal
6 case out of it." And this, it's too bad this case isn't about
7 \$700,000 and not \$7,000. Because it's like all my cases. When
8 you delve into them, it's complex. And I'm not reluctant to
9 deal with complexity, but I can't tell you, Mr. Halpern, I
10 know -- I don't know, but I do know that I don't issue orders
11 that I don't intend to enforce, and conditions of supervised
12 release or probation are court orders.

13 On the other hand, Probation has got limited
14 resources, and, you know, I'm concerned about that. So I've
15 got to give you the schedule. Here are the blanks. So if you
16 have the blank scheduling order, the government has it. One,
17 I'm ordering that you confer and report by June 16 because I
18 want to save you from doing a lot of work if you don't have to.

19 Today is the 10th. Can you confer and tell me by next
20 Thursday whether the defendant wants to go to trial, plead
21 guilty, and if you need a couple more days, you can ask me for
22 a couple more days, a little more time. Is that reasonable,
23 Mr. Halpern?

24 MR. HALPERN: Yes.

25 THE COURT: All right. So do that. Because

1 otherwise, I'm ordering that trial commence on August 9. And
2 it's important, if there's not going to be a trial, that I know
3 as far in advance as possible. I have a very contentious case,
4 civil case with experts coming from Europe that's supposed to
5 start then, and I really would like to try that case, but I'm
6 going to give priority to this case if necessary.

7 So that's 9:00 a.m., August 9, you shall disclose --
8 this is number three -- to the defendant all material
9 exculpatory evidence as defined in Local Rule 116.2 and provide
10 the required -- evidence that might be 404(b) July 8. That
11 gives you basically a month to hunt around.

12 Do you think you can get this done by the end of --
13 actually, I'm looking at the -- do you think you can get this
14 done by the end of the month, June 30, Ms. Lawrence?

15 MS. LAWRENCE: I will do my best to make that happen,
16 Your Honor, with the understanding that I have an obligation to
17 supplement anything found thereafter, yes.

18 THE COURT: Exactly, you heard me.

19 MS. LAWRENCE: Got it.

20 THE COURT: Then I'm ordering that by July 12 -- I'm
21 trying to time the Fourth of July. I don't want to disrupt
22 that. By that same date in June, June 30, exchange *Jencks*
23 statements, this is number 4, by July 12 I'm ordering that you
24 file proposed voir dire questions, proposed jury instructions,
25 motions in limine with supporting memoranda. The government at

1 least must file a trial brief and the defendant is invited but
2 not ordered to. And responses to any motions in limine shall
3 be filed by July 22.

4 By July 22, the defendant shall also provide the
5 defendant with names and addresses of witnesses it intends to
6 call in its case in chief and then supplement that if you
7 decide to call other witnesses and provide the defendant with
8 copies of the exhibits, a pre-marked list of exhibits you
9 intend to offer in your case in chief and then supplement that.

10 The defendant shall file its witness list and exhibits
11 by July 27. The parties shall by July 27 file any written
12 stipulations of fact. We'll have a pretrial conference to
13 decide the motions in limine to talk about the jury
14 instructions. The jury instructions are going to require your
15 advising me of what the state law is Ms. Jittaphol allegedly
16 violated, and then I'll have to instruct the jury on that. So
17 be sure that's included in your jury instructions.

18 But we will have a hearing on the motions in limine
19 and final pretrial conference on August 8 at 9:30 a.m. because
20 hopefully we'll have an interpreter by that time, and we'll
21 start trial at 9:00 on August 9. As I said, all time until
22 August 9 is excluded for pretrial purposes, for Speedy Trial
23 Act purposes because it's crucial that you have time to
24 adequately prepare. This is an increasingly complex and of
25 course a consequential case.

1 Mr. Halpern, you filed a motion yesterday afternoon
2 for the defendant's release, but Rule 7.1(b)(1) requires that
3 every motion be supported by a memorandum and affidavit. It's
4 not. I'm not denying that motion on that basis, as it would be
5 within my discretion to do, but if you want it to be
6 considered, it needs to be supported by an affidavit and a
7 memorandum. And essentially it would have to be the
8 defendant's affidavit, I think. I gave very careful
9 consideration to whether to detain her. I described my reasons
10 in detail for detaining her, and it wasn't appealed. I would
11 wonder whether there's any material change in facts regarding
12 detention.

13 But to the extent she's detained, if she pleads guilty
14 or is convicted, she'll get credit for the time that she's
15 serving, which I think would still be less than the upper end
16 of the guideline range. Well, I don't know. I don't know when
17 she'll be sentenced if she's sentenced.

18 But if the government -- if Mr. Halpern files those
19 supporting documents, the government shall respond, or I'll
20 decide when the government should respond, whether it should be
21 within 14 days or less. And I would like, I'm ordering
22 Probation to do everything possible, short of interviewing the
23 defendant, to start preparing an expedited Presentence Report.

24 And Mr. Halpern, maybe you want to cooperate in this,
25 because if I'm told next week she wants to plead guilty again,

1 I'll take the guilty plea soon and we can get on with this.
2 But it's entirely up to her and you -- well, her, with your
3 advice. I'm not trying to influence the decision. I'm just
4 explaining the situation. Okay?

5 All right. There's one other matter that I need to
6 discuss with Mr. Halpern ex parte. But is there anything else?

7 MS. LAWRENCE: Not from the government, Your Honor.

8 MR. HALPERN: Nothing else.

9 THE COURT: All right. Well, let me ask you this.
10 Here, I'd like the government to go, everybody go off this
11 except Mr. Halpern and Ms. Jittaphol. He has an ex-parte
12 motion I need to discuss with him briefly.

13 MS. LAWRENCE: Thank you, Your Honor.

14 (Ex-parte discussion removed.)

15 (Adjourned, 12:52 p.m.)
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1 CERTIFICATE OF OFFICIAL REPORTER

2

3 I, Kelly Mortellite, Registered Merit Reporter

4 and Certified Realtime Reporter, in and for the United States

5 District Court for the District of Massachusetts, do hereby

6 certify that the foregoing transcript is a true and correct

7 transcript of the stenographically reported proceedings held in

8 the above-entitled matter to the best of my skill and ability.

9 Dated this 23rd day of June, 2022.

10

11 /s/ Kelly Mortellite

12 _____

13 Kelly Mortellite, RMR, CRR

14 Official Court Reporter

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