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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
-VS-	)	DOCKET NO. 1:20-CR-00296
	)	
TELDRIN FOSTER,	)	
	)	
DEFENDANT.	)	

TRANSCRIPT OF *JACKSON-DENNO* PROCEEDINGS
BEFORE THE HONORABLE J.P. BOULEE
UNITED STATES DISTRICT JUDGE
JANUARY 24, 2024

APPEARANCES:

ON BEHALF OF THE GOVERNMENT:
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UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

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(PROCEEDINGS HELD IN OPEN COURT AT 10:18 AM, ATLANTA, GEORGIA)

THE COURT: The Court has set aside time for a *Jackson-Denno* hearing in United States of America v. Teldrin Foster, Case 1:20-CR-296.

Counsel, will you please state your appearances for the record.

MR. KAUSHAL: Good morning. Samir Kaushal for the United States. Seated with me is Tal Chaiken and Siji Moore, attorneys for the United States as well. I will be handling the hearing today, your Honor.

MS. DURRETT: Good morning, your Honor, Saraliene Durrett on behalf of Mr. Foster. And seated at counsel table with me is Leigh Ann Webster.

THE COURT: Good to see both of you as well.

We have a lot going on in this greater case today. I know we've got the pretrial conference set for 1:00 with -- I lost count of how many motions we have on our plate. I don't know if anyone in the room even has kept count. But even before we get to that, we've got this separate motion. I think -- is it number 494? Are my notes correct on that?

MR. KAUSHAL: Yes, your Honor. That's correct.

THE COURT: So, Mr. Kaushal, do you want to put forward any evidence about this statement?

MR. KAUSHAL: Yes, your Honor. Before I do so, I wanted to set the stage a little bit. This was a recorded

interview that is the subject of the motion. The interview occurred in December of 2020. There's no dispute from the motion that it was a non-custodial interview. And the only thing it appears that the motion alleges is that the government has the burden to prove that the statement was voluntary. It doesn't state that the statement was, in fact, involuntary, so there's no specific facts here alleging involuntariness.

Just as a general matter, your Honor, the government believes this is a deficient motion because it fails to give specific grounds for suppression of the statement because there's no reason provided here for a lack of voluntariness. And without specific grounds, there isn't -- there's not really a way that the defendant can at this point prove up -- prove up a suppression -- prove up that suppression is a proper remedy at this time.

That said, the government has one witness here today. It's Special Agent Joe Stites. I would be happy to discuss a little bit more on the law if your Honor is interested in hearing the standard for motion to suppress, but we're also prepared to put the witness up and just handle this as swiftly as possible because I don't believe there's any doubt that this was a voluntary statement, your Honor.

THE COURT: Okay. I had some pause about whether or not we even needed to have a hearing based on what was in the

motion myself. I was inclined just in an abundance of caution to perhaps do it. But since you're raising the issue at the outset, let me hear from the defense as to why I should even have this hearing based on what's a very thin motion. And what's the suspected issue, if any?

MS. DURRETT: Well, your Honor, I think the government always has the burden to show that the statement was not involuntary if it's going to try to offer the statement in trial. So I think the circumstances, as I guess we'll hear from the agent who testifies, is that they called him and told him that he needed to come down and talk to them. And he came down and gave a statement to them. He was not Mirandized. He was not told it was a voluntary statement. He was not even told it was about him, that he was being investigated.

So I think there are some questions here about whether this was a voluntary statement, your Honor.

MR. KAUSHAL: Your Honor, none of that's in the motion to start, which, again, under case law of this district the defendant needs to in every critical respect be sufficiently definite, specific, detailed and non-conjectural to enable the Court to conclude that a substantial claim has been presented. And what she's talking about now isn't -- it's not in her motion at all. And none of it seems to go towards overall voluntariness at all. It just seems to

indicate that he agreed to show up for an interview and spoke to the agent.

That said -- and, your Honor, just as an aside, the way the Eleventh Circuit, I believe, would look at this is, yes, the government has the burden to -- the government has a burden to show voluntariness; however, even in the scenario where your Honor -- let's say your Honor did not have this hearing and the defense comes back on appeal and says the district court should have held this hearing, the test for that, whether the district court committed an error and whether there's a remedy there, is whether the appellant's version of the events, if true -- here, the defendant's version of the events -- if true, would require the conclusion that his confession was involuntary.

So their version of events doesn't require that conclusion. So if we were even looking at it from way down the road, there's no way that what has been alleged can actually result in a required hearing.

That said, your Honor, I understand your Honor's abundance of caution. I just wanted to preface the government's presentation with that comment because we could sit here and I could put the agent up -- and the interview is 2 hours and 15 minutes, and we can play the interview for your Honor. And we can all listen to the defendant talk to the agent. You can hear them laugh. You can hear them discuss

the questions. You can hear them discuss the criminal conduct for 2 hours and 15 minutes. I don't intend on doing that. I do intend on admitting the recording. But I was hoping that the defense could provide a more concrete reason for this motion so that we could address it rather than have a -- have a very fulsome hearing about something where there doesn't appear to be an issue.

That's why I brought it up, your Honor. But I understand your Honor's view on having this hearing in an abundance of caution. And we are prepared to go forward.

THE COURT: All right. Yeah, I do have some pause. But, you know, given what Ms. Durrett has now stated, you know, I'm happy to just hear from the officer some testimony, if you want to put him or her up. And then we'll see, you know, what Ms. Durrett has, you know, on cross or what argument there is, you know.

I obviously don't want anything coming in that violates the defendant's constitutional rights. And so since we're all already here, let's see what there is and we'll go from there.

MR. KAUSHAL: Thank you, your Honor.

THE COURT: But I agree that this doesn't seem at this point, unless there's some particular issue or statement within the tape, that we need to all sit here and watch -- listen to the tape or watch the tape together.

MR. KAUSHAL: Thank you, your Honor.

The government will call Special Agent Joe Stites to the stand.

THE COURT: Good morning, sir.

THE WITNESS: Good morning.

JOSEPH STITES

a witness herein, being first duly sworn,

was examined and testified as follows:

COURTROOM DEPUTY CLERK: Can you spell your last name for me.

THE WITNESS: S-T-I-T-E-S.

DIRECT EXAMINATION

BY MR. KAUSHAL:

Q. Good morning, Special Agent Stites. Can you tell us where you're employment?

A. Federal Bureau of Investigation.

Q. How long have you been employed there?

A. Nineteen years and six months.

Q. And what do you do with the Federal Bureau of Investigation?

A. For the first 16-and-a-half years I was a case agent in the Atlanta Field Office on the complex financial crimes squad. And then for the last three years I've been a

supervisory special agent in a headquarters unit that is located here in Atlanta.

Q. During your time as a special agent, have you conducted custodial interviews of defendants?

A. Yes.

Q. And have you conducted non-custodial interviews of defendants?

A. Yes.

Q. Did you conduct an interview of an individual named Teldrin Foster?

A. Yes.

Q. And was that interview voluntary?

A. Yes.

Q. Was Mr. Foster under arrest at the time of that interview?

A. No.

Q. Was there a warrant for Mr. Foster's arrest at the time of the interview?

A. No.

Q. Were there any charges against the -- against Mr. Foster at the time of the interview?

A. No.

Q. How did you set up the interview with Mr. Foster?

A. On December 9th of 2020, we had a phone number for Mr. Foster, and we reached out to Mr. Foster asking him if he

would be willing to come in and talk to us about our investigation.

Q. And how did he respond?

A. He said he would be willing to do that and we would -- we were looking to schedule it for the following day, which would have been December 10th, 2020.

Q. Did you ultimately meet with Mr. Foster on December 10th, 2020?

A. Yes.

Q. I'm going to show you what's been marked as Government Exhibit Number 6. It should show up on the screen in front of you, Agent Stites. Do you recognize this document, sir?

A. Yes.

Q. Is this the text messages that you exchanged with Mr. Foster?

A. Yes.

Q. Pointing to the top row of this document there's a December 10 entry. Is that your message to Mr. Foster?

A. Yes.

Q. And what is that message about? Excuse me, I'm sorry.

MR. KAUSHAL: The government moves to admit Government Exhibit Number 6. My apologies.

MS. DURRETT: Your Honor, for the purposes of this hearing, we have no objection to this.

THE COURT: It's admitted.

MR. KAUSHAL: My apologies, your Honor.

THE WITNESS: Can you repeat the question? I'm sorry.

BY MR. KAUSHAL:

Q. What's that first message about?

A. When we made the call on the previous day, I had told Mr. Foster we would text him with an address or a location and a time once we figured out where we would meet him at. And this is -- this first message at 9:52 AM is just a message to him, a text message telling him the time and location we would like to meet him.

Q. And how does he respond to your message?

A. He said, okay.

Q. And how long after your message does he respond?

A. It looks like about ten minutes.

Q. And did you later meet with Mr. Foster at the address that you listed in your text message?

A. Yes.

Q. And did you meet with him at the time of -- around 1:00 p.m.?

A. Yeah. Actually he was early.

Q. And then that next message, the third row of this document, is a message from you to Mr. Foster?

A. Yes.

Q. And that was when he was arriving at the building?

A. Right.

Q. When he arrived at the building, did you meet him somewhere outside the building or inside the building?

A. Yes. We had directed him to the side entrance of the building because there was really nobody in the building because of the pandemic, there was no workers in the building, so we directed him to the side entrance.

And we had seen a car pull up, which we thought was him, and that's when we sent the text message and we met him at the -- at that door.

Q. When you met him at that door, did you -- what did -- let me withdraw that.

What did you do when you met him at the door?

A. Introduced ourselves. My practice would have been showing him my creds, introducing who I was. And then the other agent, the IRS agent, Jeff Hale, would have shown his creds and introduced him.

Q. Did you search him at that time?

A. No.

Q. Did you take any items from him at that time?

A. No.

Q. Did you handcuff him at that time?

A. No.

Q. Did you tell him he was under arrest?

A. No.

Q. Did you tell him he had to come inside the building with you?

A. We told him we would like to talk to him in a conference room. So he came in the door and we directed him down to the conference room that we were going to talk to him at.

Q. Okay. So he followed you into the building?

A. Yes.

Q. All right. When you entered the building, I think you mentioned that -- well, let me withdraw that. This was during COVID, correct?

A. Yes.

Q. How many people were in the building if you know?

A. I think besides the three of us, including Mr. Foster there, there was maybe one other person in the building.

Q. Was there any security gate at the building?

A. The front entrance to the building was closed off. So that side entrance there was no security or, you know, nothing to scan anybody or do anything like that, no security guard.

Q. So there was no security guard searching y'all when you came in?

A. No.

Q. So nobody searched the defendant when he came in?

A. No.

Q. When you entered the building, where did you go?

A. Just straight down the hall to a conference room/meeting

room that was in that facility.

MR. KAUSHAL: Your Honor, if I may approach the witness?

THE COURT: Sure.

MR. KAUSHAL: Thank you.

BY MR. KAUSHAL:

Q. Agent Stites, can you look at these photographs. Do you recognize these?

A. Yes.

Q. Are these photos of that conference room that you just mentioned?

A. Yes.

MR. KAUSHAL: The government moves to admit Government Exhibits 2 through 5 into evidence.

MS. DURRETT: Your Honor, I don't object for the purposes of this hearing. I don't know what the relevance is. They weren't taken at the time that Mr. Foster was there for the interview. But for the purposes of this hearing, I don't object.

THE COURT: They're admitted.

MR. KAUSHAL: Thank you, your Honor.

BY MR. KAUSHAL:

Q. Agent Stites, I'm going to show you Government Exhibit 2 on the screen. Is this the front entrance to that conference room?

A. Yes, it is.

Q. And now I'm going to show you Government Exhibit 3. Is this the door to the conference room?

A. Yes.

Q. I'm going to show you Government Exhibit Number 4. Can you tell me what this is, sir?

A. That's inside the conference room. That's the table setup that was in the room.

Q. And is this substantially similar to how it was set up at the time you were there?

A. Yes.

Q. When was this -- these pictures taken, Government Exhibits 2 through 5?

A. They were just taken maybe a couple weeks ago.

Q. And the interview occurred in December of 2020?

A. Yes.

Q. Now, looking at this picture, Government Exhibit Number 4, when you entered the room, did y'all sit down?

A. Yes.

Q. And where were you seated?

A. I would have been -- Mr. Foster would have been seated against the wall there where the two chairs are located. And then I would have been seated directly across from Mr. Foster. And then Agent Hale would have been kind of on the end of the table, so there would have been two of us on my side.

Q. So along -- so it was you and another agent, you said Agent Hale?

A. Yes.

Q. And where is Agent Hale employed?

A. IRS.

Q. How were you dressed on that day?

A. I believe we were just business casual. So I don't know if we were in -- it was probably cooler out, so maybe longer sleeves.

Q. Would you wearing what you would wear to a normal workday?

A. Yes.

Q. So you weren't wearing, for example --

MS. DURRETT: Objection, your Honor, leading.

BY MR. KAUSHAL:

Q. Tell me whether you were wearing Kevlar armor?

A. No.

Q. Did you have SWAT gear on?

A. No.

Q. Did you have your firearm with you?

A. Yes.

Q. And where was that?

A. On my hip.

Q. Would it have been visible to somebody if you were standing?

A. Yes.
Q. What about if you were sitting down?
A. Would my weapon be visible if I was sitting down?
Q. Yes, at a table like this table in the photograph.
A. I guess if you looked over the table you could potentially, but I probably would have been seated below the table.
Q. Did you ever pull your firearm out during this interview?
A. No.
Q. And for Agent Hale, what was he wearing at the time?
A. Similar clothing. And he would have had a firearm on his hip as well.
Q. Did he ever pull out his firearm during the interview?
A. No.
Q. I'm going to show you Government Exhibit Number 5. Is this the other side of that same room that we were looking at in Government Exhibit Number 4?
A. Yes, it is.
Q. I'm pointing to something in the back of -- kind of behind those chairs. Do you see what I'm pointing to on the screen, Agent Stites?
A. Yes.
Q. Can you tell me what that is?
A. That was a shield that they had actually on top of the table to kind of separate the two sides of the table and --

due to COVID and the pandemic. That was how they had the room set up so that if you were talking to individuals in the room, you would have that shield in between you. And that was -- during the interview with Mr. Foster that shield was up, we did not take it down.

Q. What was the temperature like in the room?

A. Comfortable.

Q. And what was the lighting like?

A. Lighting was good.

Q. When you started the interview, did you record it?

A. Yes.

Q. I'm going to show you what's been marked as Government Exhibit Number 1. Is this a recording of the interview?

A. Yes, this is the recording.

MR. KAUSHAL: The government moves to admit Government Exhibit 1 into evidence.

MS. DURRETT: No objection, your Honor.

THE COURT: It's admitted.

BY MR. KAUSHAL:

Q. When you started the -- well, let me withdraw that.

This was recorded with an electronic device, correct, sir?

A. Yes.

Q. Where was that recording device placed?

A. On top of the table.

Q. So it was visible to the defendant on the table?
A. Yes.
Q. How long approximately did the interview last?
A. I believe it was like 2 hours and 15 minutes or 18 minutes, something like that.
Q. During that time did the defendant ask for a break?
A. No.
Q. Did you take any breaks?
A. No.
Q. If the defendant had asked for a break, would you have taken a break?
A. Absolutely.
Q. Can you tell us about the defendant's demeanor during the interview? Did he appear to be under the influence of drugs or alcohol?
A. No.
Q. Did he appear to have a mental or physical disability?
A. No.
Q. Did he -- well, let me withdraw that.

More generally, can you tell us what the tone and tenor of the interview was like?
A. I would say Mr. Foster was pretty relaxed. We had a lot of conversation back and forth. I think it was a pretty interactive-type setting.
Q. During that interview were any threats or promises made

to the defendant?

A. No.

Q. Did the defendant ask for any food, water, coffee or cigarettes, anything else?

A. No.

Q. Did the defendant have free access to a telephone?

A. Yes. I mean, we did not take his phone from him, so he would -- if he had a phone on him, he would have access to it.

Q. What about access to a bathroom, would he have been able to go to the bathroom if he asked to?

A. Yes.

Q. Did you make any promises about what the prosecutors would do?

A. No.

Q. Did you make any promises about what the courts would do?

A. No.

Q. Were you ever untruthful with the defendant during the interview?

A. No.

Q. Did you try and play any tricks to get him to confess during the interview?

A. No.

MR. KAUSHAL: Your Honor, if I can have one moment, please.

THE COURT: Sure.

(Pause in proceedings.)

BY MR. KAUSHAL:

Q. Did the defendant ever ask for an attorney during the interview?

A. No.

Q. Did the defendant ask if he was under arrest during the interview?

A. No.

MR. KAUSHAL: Nothing further. Thank you.

THE COURT: Any cross?

MR. KAUSHAL: If I can have a moment, your Honor, I apologize.

THE COURT: Yes.

MR. KAUSHAL: Your Honor, if I can ask two more questions.

BY MR. KAUSHAL:

Q. After the interview was concluded, where did the defendant go?

A. We let him back out to the door that he came in, and he went to his car and left.

Q. So you didn't arrest him after the interview?

A. No.

MR. KAUSHAL: Thank you. Thank you, your Honor.

CROSS-EXAMINATION

BY MS. DURRETT:

Q. Good morning. I'm Saraliene Durrett. I represent Mr. Foster in this case.

So the government admitted an exhibit, I think it was Exhibit Number 5, that showed your text messages. Do you remember that exhibit?

A. Yes.

Q. But this isn't the entire phone communication that you had with Mr. Foster, right?

A. Right. There was a telephone call the day before, so on the 9th.

Q. And there was actually a telephone call later, right? So you had a telephone call to set up the interview, you had the interview, and then at a later time, probably sometime in 2021, you had another telephone call, correct?

A. Yes.

MR. KAUSHAL: Objection. Irrelevant. The second phone call is past the interview.

MS. DURRETT: Okay. Your Honor, if I can ask a few questions about that.

THE COURT: Go ahead.

BY MS. DURRETT:

Q. That second phone call you did in 2021, you recorded that phone call, correct?

A. Yeah. Well, I can explain.

Q. Well, did you, sir?

A. Yes, we did record that.

Q. So you recorded the phone call after this interview and after Mr. Foster received the target letter, correct?

A. Correct.

Q. But the phone call to tell him, hey, come down to the IRS building tomorrow, you didn't record that phone call, right?

A. No.

Q. And so you -- I understand you said that you had talked with Mr. Foster on December 9th I think, the day before the interview, but you had also spoken with his wife, correct?

A. Yes.

Q. And did you see her in person or did you see her on the phone?

A. We saw her in person.

Q. So you had gone down and talked to his wife at their house, is that correct?

A. Yes.

Q. And during Mr. Foster's interview you make sure to say, you know, we've already talked to your wife about this, right?

A. Yes.

Q. Because she was going to pass a message about the need to come and talk with you, right?

A. Say that again.

Q. Because she was supposed to pass the message to him about the need to come and talk with you, right?

A. Yes. I think in that interview we had asked her if he would be willing to talk to us. And if she saw him, tell him we would like to talk to him.

Q. And during that phone call that you had on December 9th, you made it clear that you were with the FBI, correct?

A. Yes.

Q. And you made it clear that you were going to meet at the IRS building, right?

A. I wasn't sure on the 9th if we knew exactly what location we would be meeting at. I don't think we knew that until the 10th.

Q. Just as far as the timing of this call goes, there are a bunch of other defendants in this case, but Darrell Thomas had been indicted about maybe four months before this interview?

A. That's about -- that's accurate.

Q. And, like I said, you had already talked to his wife the day before, and then you call him and tell him he needs to come down and speak to you, correct?

A. We told him we would like to talk to him.

Q. Well, the expectation is if he didn't come down and speak with you, there would be a warrant for his arrest, just like Mr. Thomas, right?

A. I wouldn't say that would be the expectation. There was never an expectation from my part about that.

Q. But we just don't have the ability to check that phone

call because you didn't record it, right?
A. Correct.
Q. Okay. And you picked the location of the interview, correct?
A. It was somewhere close to where we believed he lived and close to where his wife's house was at.
Q. Now, you said that -- and we've seen -- the government has admitted an exhibit here that's the recording of the interview portion of your meeting that day, right?
A. Yes.
Q. But the recorder wasn't turned on from the moment he walked to the building, right?
A. No.
Q. It started later when you got into this room, right?
A. Correct.
Q. So there was some conversation leading up to the room, correct?
A. Very limited introduction is about it. The recording -- I think the text message was at 12:51, and that's when we would have got him from the door. We made the introductions. And I believe the preamble on the recording was at 12:53. So we're talking two minutes, two minutes from the time that he had probably entered into the parking space to when we got to the interview room.
Q. And there's no video of the interview or anything like

that?
A. No video.
Q. So if we were to listen to the recording of the interview, that would be the entirety of what you guys said to him that day as far as the interview goes?
A. As far as the interview goes.
Q. And we know that you're in the room with him, the door's closed, right?
A. I think at times it was open. There was nobody else in the building, so I'm not -- at times the door might have been opened, closed. It was not much of an issue because there was nobody else in the building, so it wasn't needing privacy or creating any noise for anybody else.
Q. And let me ask you, I can't remember -- or I couldn't really tell clearly from your discussion about Exhibit 4 as to where Mr. Foster was sitting. Was it your testimony that he was the one sitting back against the wall?
A. Yes.
Q. And the two of you were on the outside?
A. I would have been directly across from him. And then Agent Hale would have been kind of to the left of me.
Q. So you were across from him and he -- I'm sorry?
A. Agent Hale would have been kind of on the end of the table.
Q. But he was on the inside toward the wall, toward the

corner, is that what you're saying?
A. Mr. Foster?
Q. Yes.
A. No. He would have been right in the middle of the table, not in the corner.
Q. So the photographs you've provided have four chairs in them, so it's a little confusing to me. I'll hold them up for you, Exhibits 4 and 5. So it's hard for me to tell where Mr. Foster was. Can you just explain that to us.
A. In Exhibit 4, if you're looking at -- the chair to the left would be more accurate of where Mr. Foster was sitting. This chair right there (indicating).
Q. And was anyone else on that side with him?
A. On that side, no.
Q. On his side?
A. No.
Q. So the two of you were on the other side, across from him?
A. Yes.
Q. Okay. And you both had firearms on your hip that day?
A. Yes.
Q. Now, you're saying that the recorded interview was everything that happened in the interview. Nowhere in that interview do you tell him this is a voluntary interview, right?

A. No, I don't think that was explicitly stated.

Q. And nowhere in the interview do you say, you're free to leave any time you want?

A. No.

Q. I'm sorry?

A. No.

Q. And I think we've established you didn't read him Miranda rights, right?

A. Correct.

Q. So the government got up and said, well, did he ever ask you for a lawyer, but you never told him he could get a lawyer, right?

A. Correct.

MS. DURRETT: Just one moment.

BY MS. DURRETT:

Q. Oh, and I think you testified that he responded -- when you were talking about your text messages, he responded very quickly to you, right? You texted with him and he responded quickly?

A. On the first message?

Q. Uh-huh (affirmative).

A. I think I said it was ten minutes later, so I would say that's pretty quick.

Q. Uh-huh (affirmative).

And he came to see you a little bit early, he got to your

office a little bit early, right?

A. He was early.

Q. Because he understood if he didn't come and meet with you, that the answer to that would be a warrant for his arrest?

MR. KAUSHAL: Objection. The agent doesn't know what Mr. Foster understood.

MS. DURRETT: Well, the agent knows what he talked with him about the day before the interview.

MR. KAUSHAL: It's asking for speculation about the defendant.

THE COURT: Sustained.

MS. DURRETT: One moment, your Honor.

BY MS. DURRETT:

Q. Again, on the interview, if we listen to that recording, it's very clear when you introduce yourselves that you tell him you're going to be asking him questions about Darrell Thomas, correct?

A. Correct.

Q. And there's never a point in time where you say, you know what, we're changing this interview from an interview about Darrell Thomas to an interview about you, Mr. Foster, right?

A. There was not a -- the interview was from the beginning about him and Darrell Foster (sic).

Q. But when you told him during the recording, you say,

We're going to be asking you some questions about Darrell Thomas today.

Right?

A. Darrell Thomas and the PPP loan process.

Q. Right. So there was never a time where you explicitly said, guess what, this interview is actually about you and your criminal activity, right?

A. That was never specifically stated, but that's where the conversation went very quickly.

Q. Right. Because that was your intent the entire time?

A. The intent was to talk about the investigation into Darrell Thomas and the PPP loan fraud that was -- that Mr. Foster was involved in.

Q. Right. But when you introduced yourself to him, you told him, we're going to be asking you questions about Darrell Thomas today, you did not say, we're here to ask you questions about your own involvement in this case --

A. Correct.

Q. -- correct?

A. Right at the beginning, correct.

Q. At the beginning of the interview, that's what you said?

A. Yes.

Q. And you never made any different statement about that?

A. The conversation went quickly to the involvement with Mr. Foster and Darrell Thomas.

Q. I know you've testified a couple of times before the grand jury, I think three times. Have you testified in any other hearings in this case?

A. I don't believe so.

Q. Just the three grand juries?

A. I believe that's correct.

MS. DURRETT: One moment.

No further questions, your Honor. Thank you.

THE COURT: Any additional evidence from the government?

MR. KAUSHAL: Nothing further, your Honor.

THE COURT: All right. Any evidence from the defense?

MS. DURRETT: Your Honor, just to be clear, if there is other testimony by Agent Stites in this case, we think we're entitled to that as *Jencks*, and we would make that request.

MS. CHAIKEN: We're not aware of any.

THE COURT: All right.

Your motion, so go ahead.

MS. DURRETT: Thank you, your Honor.

THE COURT: Sir, you can step down. Thank you.

Any redirect?

MR. KAUSHAL: No, your Honor, no, no. But we need to -- we need to talk about the *Jencks* issue because there are

more documents unrelated to this interview.

(Witness excused.)

THE COURT: Let's do this. I'm happy that now we have in addition to our motion to suppress the *Jencks* issue, but let's deal with the motion to suppress and then you can have an additional pow-wow about the *Jencks* after we at least deal with this first motion. Okay?

MR. KAUSHAL: Yes, your Honor.

MS. DURRETT: Thank you, your Honor.

Your Honor, I think the Court understands the argument here is that this was an involuntary statement. When the FBI calls you, identifies themselves, tells you to come down to their office the next day to be interviewed, I think there is an element of coercion there.

On top of that, the FBI had met with Mr. Foster's wife the day before and told her to pass the message that he needed to come down and meet with the FBI.

He responded as quickly as he could. He immediately went down there, was early on his arrival because he was under the impression that if he did not meet with them, that there would be a warrant for his arrest. Mr. Thomas had already been arrested, other people had been charged in the case, and he felt that he needed to go meet with them, that was his only choice.

It's clear from the agent's testimony -- I know the

agent testified he thought it was a voluntary interview, but I know the Court knows that the agent's subjective belief about what the defendant felt is not relevant here. What's relevant is the objective perception that's given when you have an FBI agent and an IRS agent telling you to meet them at their office with guns on their hips, come into our office and we have some questions to ask you. I think none of us would feel completely free to leave in that moment or completely free to leave the interview or in the interview. And I think that's the standard the Court has to look at here.

But I think the interesting part about the interview is that it was the agent's intent the entire time to question Mr. Foster in a way that would elicit incriminating information. That's their intent, is to interview him, get incriminating information from him. There's no doubt about that.

But when they meet Mr. Foster, they don't read him his Miranda rights, they don't tell him it's a voluntary interview, and they tell him we're here to ask you questions about Darrell Thomas. So I think there's a misleading nature in the way that they treated him.

And he said, oh, we quickly moved from that to asking about Mr. Foster. I understand but nowhere in time in the interview does the agent say, hey, we're going to move now to talk about your criminal activity, or, we're investigating you

in this case. They presented as an investigation of Darrell Thomas and we have some questions for you about Darrell Thomas, and then they start asking him questions that they think will elicit incriminating information. And I think that under the circumstances the Court should find that the statement was not voluntary because it was not a knowing interview, he did not have enough information to understand they were investigating him. They easily could have read him his Miranda rights. They chose not to do that. They easily could have told him it was voluntary --

(Clarification by the court reporter.)

MS. DURRETT: And they easily could have told him it was voluntary, but they chose not to do that.

I think it's telling that when they wanted to have a recording of something, like the interview or the later phone call, they did record it. But when they called him to tell him to come meet with them, they chose not to record that phone call. So we don't have that for the Court's review, and I think the Court should consider that in Mr. Foster's favor when it's considered in this motion.

THE COURT: Thank you.

Mr. Kaushal.

MR. KAUSHAL: Your Honor, I think it's pretty clear that this was a voluntary interview. The attempt to flip the burden here is a little bizarre, that the defense is

suggesting that their witness, their defendant who is here -- there are no allegations that this agent said anything improper in terms of setting up the interview. There is no allegation of that in the motion. There's no evidence of that here today.

The government simply can't, you know -- we can't disprove something that they have not presented any evidence on. And the agent has explained that he did not coerce the defendant, he didn't trick him, he didn't lie to him, he didn't threaten him.

And under the standard of voluntariness, the defendant showed up -- he got a phone call, he showed up the next day, he entered the building, he answered questions for 2 hours and 15 minutes.

And if your Honor chooses to listen to the recording, you will hear that very swiftly after the first couple sentences the agent starts to ask questions -- or starts to ask about the actions of this very defendant. And when he says almost immediately -- the agent says something along the lines of, this is about -- he says, it's about Darrell Thomas, it's about these Paycheck Protection Plan or Program loans, the defendant says, Yeah, I know what it's about.

And then the agent says, Okay, you know what your involvement was, correct?

And then the defendant says, No.

And then there's a long conversation, 2 hours and 15 minutes of background about the defendant and the defendant's relationship with co-defendant Darrell Thomas.

Then it starts to transition into more explicit discussion about this defendant's role in the scheme and this defendant's actions in the scheme. And it is clear that the questions are about the defendant.

There's no requirement that the government tell somebody, I'm now going to ask you a question about you, here's the question. The questions were obviously about him the entire time.

The suggestion that this was not knowing I think -- first of all, that's not in their motion. They only challenged voluntariness, not whether it was knowing. But we do know, your Honor, that the defendant's demeanor was normal and that he did not appear to be under the influence of drugs or alcohol and he doesn't appear to have a mental or physical disability. And if your Honor chooses to listen to the recording, you will hear that there is a coherent, knowledgeable back-and-forth between the defendant and the agent about the facts of the investigation.

I think this is squarely a voluntary interview, your Honor. The defendant was never arrested. He was never charged with anything immediately after -- excuse me, he wasn't charged immediately after that interview. He wasn't

arrested immediately after that interview. And the defense hasn't identified any specific facts showing coercion or any other improper tactic by the agent, your Honor.

THE COURT: All right. Thank you.

I'm going to deny the motion. I don't think the motion really went to whether Miranda was triggered, but to the extent that was even touched on or argued, I don't think Miranda was triggered based on what I've heard and what's been presented.

And as far as voluntariness, you know, there's 100, maybe a thousand cases out there about the various standards. I think the *US v. Jones*, 32 F.3d, 1512 at 1516, Eleventh Circuit from 1994, gives a fairly succinct list of some of the things to consider. Sufficiently coercive conduct normally involves:

One, subjecting the accused to an exhaustingly long interrogation;

Two, the application of physical force or the threat to do so;

Or, three, making him a promise that induces a confession, isolated incidents of police deception, discussion of realistic penalties for cooperative and non-cooperative defendants are normally insufficient to preclude free choice.

The defense cites *Colorado v. Connelly*, 479 US 157 at 170, and writes in the motion, The focus of voluntariness is

on whether the defendant was coerced by the government in making this statement, quote, the relinquishment of the right must have been voluntary in the sense that it was a product of free and deliberate choice rather than intimidation, coercion or deception.

You know, based on the evidence that's been presented to me and the arguments made, I -- you know, first, it doesn't look like this was an exhaustingly long interrogation. There was no application of physical force or the threat to do so. There was no promise to induce a confession. I don't think there was any intimidation, coercion or deception. I just see absolutely nothing, and the defense has pointed me to nothing; therefore, the motion is denied. All right.

I will see you at 1:00 for our pretrial conference. Thanks, everyone.

Sorry. We were going to have a discussion about any *Jencks* issue.

MR. KAUSHAL: Yes, your Honor. I didn't want to make it sound like there was a major dispute about this.

We have provided the grand jury transcripts for Special Agent Stites. We've provided the 302 that describes the interview that was recorded --

(Clarification by the court reporter.)

MR. KAUSHAL: The interview that was recorded, there's a 302 memorializing the fact that there was a recorded

interview.

The thing that I wanted to just clarify for the defense is that there is additional *Jencks* about the substance of this investigation from this agent that we will provide but we have not yet provided, but it is not about this particular interview, the subject of his testimony here today.

And under *Jencks* the requirement is that the witness' statements about the subject matter of the testimony at that time is what's going to be disclosed, and that's what we've provided, your Honor.

We intend on providing *Jencks* hopefully a week in advance of trial, which is before what is required under the law. And we've already provided some form of *Jencks*. We're in the process of producing *Jencks* on a rolling basis. And we intend to be as completely finished with that production process a week before trial.

That's -- I just wanted to clarify that because I think defense counsel's question first was, Have you testified in any other hearing?

And the answer to that, your Honor, I believe, was no. And then, you know, that kind of triggered in my head that there is something else that we will be producing to the defendant but it is not pertinent to this particular hearing, your Honor.

THE COURT: All right.

MS. DURRETT: Your Honor, I'll just say if it's related to our -- if it's related to our client or the investigation into our client, the things that they discussed, we do think it's relevant and we do think it should be produced early because it goes to the credibility of the agent. If we're going to be questioning him about something, I think it goes to that.

THE COURT: Okay. Well, you know, I don't know that I can parse out all of that right now, but when you get it, if you think we need to revisit this motion, please move to renew and we'll go back and relook at it.

MS. DURRETT: Thank you, your Honor.

THE COURT: Thanks, everyone.

(PROCEEDINGS REPORTED WERE CONCLUDED AT 11:31 AM.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 30th Day of January, 2024.

PENNY PRITTY COUDRIET, RMR, CRR
OFFICIAL COURT REPORTER