

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA, :
 : Case No. 5:02-CR-27-CAR
VS. :
 : DECEMBER 16, 2003
 : Macon, Georgia
DWIGHT D. YORK, DEFENDANT. : 9:30 a.m.

PRE-TRIAL HEARING

BEFORE THE HONORABLE C. ASHLEY ROYAL
UNITED STATES DISTRICT JUDGE, PRESIDING

APPEARANCES:

FOR THE GOVERNMENT: MS. RICHARD MOULTRIE, AUSA
MS. STEPHANIE THACKER, AUSA
P.O. BOX 1702
MACON, GA 31202-1702

FOR THE DEFENDANT: MR. BEN GARLAND, ESQ.
MR. MANNY AURORA
MR. ADRIAN L. PATRICK, ESQ.
MR. BENJAMIN A. DAVIS, ESQ.

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P R O C E E D I N G S

1
2 DECEMBER 16, 2003

3 THE COURT: Good morning.

4 COUNSEL: Good morning, Your Honor.

5 THE COURT: Let me tell you how I want to proceed today.
6 We're going to start out by taking up some of the motions that
7 were filed by the parties in the case. I've read all the motions,
8 and I have read the responses, if there are responses. It appears
9 the defendant has not filed a response to most of these. Some of
10 them I understand, and some of them I have some questions about,
11 so we will address certain of these motions.

12 After that, we'll talk about how this case is going to
13 be tried, and I will give you the opportunity to ask me any
14 questions about the way I expect the court to run, and I want to
15 make sure that by the time you leave today, you're going to a real
16 good idea about my expectations of what we're going to do in the
17 case.

18 Now, I understand there are two new attorneys in the
19 case. Mr. Davis.

20 MR. DAVIS: I'm Ben Davis, yes.

21 THE COURT: And Mr. Patrick.

22 MR. PATRICK: Yes, Your Honor. Adrian Patrick.

23 THE COURT: Thank you. Is Mr. Rubino here?

24 MR. GARLAND: He is not, Your Honor.

25 THE COURT: Is he involved in the case or?

1 MR. GARLAND: He is still counsel of record in the case.
2 And his status is unclear, and we will report to the Court shortly
3 when we have clear directions about that.

4 THE COURT: Okay, well, Mr. Garland, are you lead
5 counsel?

6 MR GARLAND: Your Honor, I would say today in this
7 hearing I can act as lead counsel, but there will be a discussion
8 immediately following this hearing on those subjects, and I will
9 report to the Court.

10 THE COURT: Okay. Well, you will be the lead counsel for
11 today, and a lead counsel is going to have to be identified for
12 purposes of the trial of the case.

13 MR GARLAND: Yes, Your Honor. And I will act as lead
14 counsel today, and if there is a change in that, we will report to
15 the court a lead counsel.

16 THE COURT: All right, very good. Thank you very much.
17 All right, let's start out with the motions filed by the defense
18 in the case. And the first question that I have is about the
19 consolidated pretrial motions that I believe Mr. Patrick and
20 Mr. Davis filed in the case. Those look like standard discovery
21 motions to me; is that correct?

22 MR. DAVIS: Yes, Your Honor.

23 THE COURT: I would assume that those have already been
24 filed. I haven't gone back to check the record, but I would
25 assume that those been filed in past. Is that right Mr. Garland?

1 MR. GARLAND: Yes, Your Honor.

2 THE COURT: So is there anything specifically we need to
3 take up? I mean, I assume that you're just trying to perfect the
4 record because you've come into the case and this is your standard
5 practice in doing that. I have also assumed you're not expecting
6 the government to give you all the information that they've
7 already given counsel that's been in the case from beginning; is
8 that correct?

9 MR. DAVIS: That is correct, Your Honor. I would also
10 like to point out to the court we have a supplemental motion that
11 we filed today needs to heard, a motion to dismiss the indictment
12 for failure to allege a violation of federal law. That we think
13 is a very significant motion that needs to be heard. And I have
14 -- there's a curtesy copy on your desk.

15 THE COURT: I see.

16 MR. DAVIS: I can outline that briefly if the court who
17 would like. Just let me know the Court's procedure.

18 THE COURT: Well, probably what I prefer to do would be
19 to read it at the break.

20 MR. DAVIS: Very well, Your Honor.

21 THE COURT: All right. The next is the motion to
22 separate and sever counts pursuant to Rule 8A and Rule 14. Now,
23 that was filed by Mr. Rubino. Who's going to handle that? All
24 right, Mr. Aurora.

25 Now, I have read the motion, and I have read the

1 response of the government to the motion, and my question about
2 this to you, Mr. Aurora, is the RICO count sufficient -- does it
3 offer sufficient nexus for joining the two other types of counts
4 in this case, the Man Act count and what I'll call the money
5 laundering count?

6 MR. AURORA: Your Honor, I would agree that under RICO
7 pretty much you can throw a lot of things in there, but there's a
8 Rule 18 and a Rule 14 requirement with regards to the precedent
9 and some type of nexus between the separate counts.

10 Simply put, generally, you don't take a client that's
11 been charged with something on one day and then charge them with
12 something two months later, and so on and so forth. It's not sort
13 of a garbage pail where you can dump everything in there.

14 What we're trying to say is simply under the Rule 8, the
15 offenses, even though they're now couched under RICO, and they
16 weren't in the prior indictment, they're basically just going
17 around the end to get around the requirement under Rule 8A, that
18 you have to have the same or similar characteristics in your
19 charges, they have to either be based on the same act or
20 transaction, or the third issue listed in Rule 8, is that they
21 need to be connected with or constitute parts of a common scheme
22 or plan.

23 Arguably, prong three may be met when you just put it in
24 a oral RICO, but the idea that you're trying to take three
25 instances of structuring with regards to what this case boils down

1 to -- it's a child molestation type case -- we find it a little
2 bit prejudicial because once all the evidence comes out, I don't
3 think we'll be able to see clearly and correctly whether it
4 relates to the financial issues as regards to the child
5 molestation issues, and we just don't see any connection, and
6 while I understand under RICO it could all -- it could be thrown
7 in there, the court has the ultimate discretion either under Rule
8 8A or under Rule 14, that there's prejudice out there that we've
9 pointed out in the brief.

10 THE COURT: All right, so it sounds to me like you agree
11 that there is a difference when you just have these two types of
12 cases joined without a RICO count, compared to this situation
13 where there is a RICO count.

14 MR. AURORA: Judge, I agree that there is basis for what
15 they've done, however, I disagree with that happening, and I'm
16 asking the court to exercise its discretion. A couple of cases
17 that weren't cited -- if I could just enlighten the Court -- in
18 Mr. Rubino's motion, if I could just put those on the record.

19 THE COURT: Are they not in the briefs?

20 MR. AURORA: No, Your Honor. They're just two cases that
21 I found subsequent to that. They're in Mr. Samuel, our partner's
22 law book. I don't know if you have a copy of that. It's U.S.
23 versus Walser, W-A-L-S-E-R, 3 F.3d 380, an Eleventh Circuit 1993
24 case.

25 Again, it deals with charges that have to be of similar

1 character, and they define it specifically what similar character
2 means as nearly corresponding, resembling in many respects, and
3 someone like and having a general likeness.

4 The Walser case goes on to cite U.S. versus Wilson and
5 U.S. v Moralis, also Eleventh Circuit cases. Again, Judge, the
6 overall precedent that we have says that the charges that they're
7 going to go for against the defendant need to be similar.

8 RICO, to some extent, allows an exception, but if you
9 look at the RICO cases that the government will cite or the other
10 RICO cases that I've found, they generally deal with this drug
11 trafficking thing, as far as a felon having a gun while he was
12 conducting a drug traffic, or somebody stealing from a bank, and
13 then hiding the notes.

14 There's never -- I can't say there's never, but I
15 haven't found anything that, says we'll charge you with child
16 molestation, and at the same time, we'll charge you with bank
17 fraud or obstruction. It's just too great a leap.

18 And while RICO allows it, I don't find any case law that
19 says two completely distinct and separate, different times,
20 different places. For example, the child molestation issues are
21 between Sullivan County, New York to Putnam County, Georgia or
22 Bibb County, Georgia. The second part of the child molestation is
23 Putnam County, Georgia to Orange County, Florida.

24 The issues with regards to the three structuring counts
25 all deal with Athens-Clarke County, don't even fall in the same --

1 I mean, obviously it's the Middle District, but in the same
2 geographical area. There's nothing related between those two
3 counts.

4 And so I ask that -- if we do a thorough search, that
5 you're not going to find anything RICO-wise that is so distinct,
6 separate, and apart; different dates, different times, different
7 locations.

8 And that's why, while I agree with the fact that RICO
9 can allow multiple crimes to come in, they're almost always
10 related or similar to one another, i.e., the drug transaction or
11 bank type crime.

12 THE COURT: I understand. Now, let me ask you another
13 question. Let's assume that I was to agree with you.

14 MR. AURORA: Yes, sir.

15 THE COURT: What would be the next step? How would we
16 try the case; what would have to be done with the indictment?

17 MR. AURORA: I think the indictment, Your Honor, by
18 itself is fine. It's 9, 10, and 11 of the substantive structuring
19 counts that could be either whited out or just re-numbered, or I
20 think, they're there was three counts cited in the forfeiture, we
21 could obviously re-number those issues.

22 With regards to the interplay between counts one and
23 two, where the Man Act and the structuring is, they're separate
24 subparagraphs. We could very easily just take those out, white
25 them out, or just get on the computer and cut and paste out. I

1 think it's a very low, you know, inconvenience to the court or to
2 the prosecution to change it and just get a different redacted,
3 change the lettering, and that would be the end of it.

4 THE COURT: So are you saying that there would have to be
5 two separate trials, one on the money laundering and one on the
6 child molestation charges? Is that what you --

7 MR. AURORA: There could be two different trials, Your
8 Honor, but if there's a conviction on the child molestation case
9 based on the guidelines, I mean, there's not going to be a second
10 trial at all, you know, in sincerity, I think just is not.
11 Arguably, there could be state equivalent to this case that's sort
12 of parallel and pending out there. If there's a conviction,
13 that's not going to happen.

14 So I don't think there's going to be any real
15 inconvenience. I mean, the case boils down to the child
16 molestation. If they can prove it, I think they'll -- that pretty
17 that's pretty much going to end the case.

18 THE COURT: And so in terms of the RICO violation, you're
19 not saying that would have to be severed from the Man Act
20 violations.

21 MR. AURORA: There's a separate count that I've put in
22 for the RICO with regards to what the requirements of the RICO
23 are.

24 THE COURT: I understand that, but I'm talking about in
25 terms of this, this proposition.

1 MR. AURORA: I'm not saying they have to be severed
2 because I think they could prove the enterprise issue if you're
3 claiming the case law allows that to be defined as an enterprise.
4 I have to go into the second brief to some extent in challenging
5 the deficiencies in the RICO allegation that we've done.

6 So while I can say you could have basically anything as
7 enterprise and charge anything under today's law for RICO, the
8 second question becomes is RICO the appropriate way, or was the
9 first indictment the proper way to go.

10 THE COURT: Well, I understand your argument on the RICO.

11 MR. AURORA: Yes, sir.

12 THE COURT: Now, from the government, let me ask you this
13 how is the evidence going to change in this case if I rule in
14 favor of the defendant, the defendant on this motion that we're
15 dealing with now?

16 MR. MOULTRIE: Your Honor, the counts that are charged in
17 counts 9, 10, and 11 provide the necessary counts that -- well,
18 how should I state this. The statute of limitation for purposes
19 of RICO is five years. Counts 9, 10, and 11 which are the
20 substantiative structuring counts, provide the basis for the RICO
21 counts in the terms of the statute of limitations that apply.

22 The allegations of transporting children in interstate
23 commerce for unlawful sexual acts, all occurred outside the
24 five-year window for purposes of the RICO count.

25 So if we were to -- if the court were to grant the

1 defendant's motion and sever out counts 9, 10, and 11, it would
2 have to also sever out the RICO count as well.

3 THE COURT: Well, if I'm going to not grant the motion,
4 am I going to have to instruct the jury that they can only
5 consider the evidence related to the enterprise theory as to the
6 money laundering?

7 MR. MOULTRIE: No, Your Honor, the only purpose of -- you
8 only need ~~one~~ substantive count that falls within the requisite
9 statute of limitations in order to charge a RICO count that
10 involves other counts that do not fall within the five year
11 statute of limitations. The structuring count gives us that.

12 THE COURT: All right.

13 MR. MOULTRIE: And I would like to point out, Your Honor,
14 that the defense, as I expected, suggests that the government's
15 decision to charge this RICO count may be punitive. That is not
16 the case. I'd like to provide just a brief context.

17 We indicted the case on May 8th, 2002, at the time that
18 Mr. York was arrested. We then continued our investigation,
19 however, Mr. York made a decision to enter pleas of guilty, both
20 on the state level and on the federal level. We suspended all
21 investigation of this case at that point.

22 He entered his pleas of guilty in January of 2003. It
23 was not until May 9th of 2003 that Judge Lawson decided to reject
24 the federal plea agreement, and since that time we have had the
25 re-arm and re-activate our investigative machine, we've had to do

1 it in a limited period of time, and we've done that, and we
2 re-indicted this case based on those charges that are readily
3 provable on November 20th of 1993.

4 So this is not an effort by the government to sanction
5 Mr. York for having withdrawn his plea of guilty.

6 THE COURT: All right, I understand that. Wait a minute.
7 How long is it going to take you to put up your evidence?

8 MR. MOULTRIE: Your Honor, I'm guessing it will take a
9 solid two weeks to present the government's case in chief. What
10 is a mystery at this point is how long the jury selection process
11 will take. That will have some bearing on how long our case
12 takes.

13 Of course, Your Honor, part of the equation as well is
14 the extent of the defense's cross examination of the witnesses.
15 If the detention hearing is any indication, Your Honor, the
16 detention hearing that was held in May of 2002, took two days with
17 just a few very witnesses.

18 The government only presented one witness, Jalaine Ward,
19 I believe, and the defense presented a few witnesses, but that
20 took two days. So that might give the court some sort of idea of
21 how it might progress in terms of time.

22 THE COURT: All right, and how long would it take you to
23 present simply the Man Act charges?

24 MR. MOULTRIE: The Man Act charges, Your Honor, the Man
25 Act charges are going to take about the same amount of time, and

1 let me explain, Your Honor.

2 The Man Act charges don't just involve the transport of
3 the children from New York to Georgia and from Georgia to Florida.
4 The elements of that offense are that we have to prove that when
5 the defendant either transported those children or caused those
6 children to be transported in interstate that he did so with the
7 primary purpose or major purpose of continuing to molest them
8 sexually.

9 Therefore, his conduct in New York and his conduct, both
10 with the federal victims and with the other children and young
11 adults that are listed in the indictment whose conduct involves
12 solely Georgia is all relevant on the issue of what Mr. York's
13 intent was when he caused those federal victims to be transported
14 from New York to Georgia and from Georgia to Florida.

15 All of those witnesses are going to be testifying, Your
16 Honor. Even if the court elects to sever out the structuring
17 count, the same witnesses who will be testifying on the Man Act
18 offenses are the same witnesses who are going to be testifying as
19 to the structuring counts.

20 The structuring counts, Your Honor, are not causing this
21 trial to run two weeks. The evidence in that is fairly limited
22 just in terms of number of witnesses that we have to call.
23 They're the same witnesses that we'll be calling on the Man Act.
24 And, that is, Your Honor, if I may say, why the government insists
25 that these predicate acts are not just related to the overall

1 enterprise as the government asserts.

2 These predicate acts relate to one another because the
3 primary people, the members of the enterprise, as we allege, the
4 primary people who carry out a lot of the recruitment for the Man
5 Act charges against Mr. York are the same people that carry out
6 the structuring counts.

7 So they're related to one another, and they're related
8 to the overall enterprise as well. They will not extend the trial
9 more than the Man Act charges will.

10 THE COURT: All right, now, I want to move to -- well, do
11 you want to respond to that?

12 MR. AURORA: Yes, please, Your Honor, if I may briefly.
13 Your Honor, I guess I'm a little confused as to what the statute
14 of limitations issue as far as the structuring counts has to do
15 with anything because if you look at the structuring counts, they
16 range from 1998 through 2000.

17 And if we simply look at United States versus Italliano,
18 I-T-A-L-I-A-N-O, 894 F.2d 1280 from the Eleventh Circuit, 1990, as
19 soon as this indictment comes down everything is tolled. So
20 typically with RICO it's the last predicate act, plus five years.
21 We're still within the first five years all together at this
22 point, assuming the trial goes forward on January 5th, but if
23 nothing else, at this point it's tolled when this second
24 indictment was filed.

25 So even if you sever it, it doesn't prejudice the state

1 in any way -- or the government in any way, shape, or form. So
2 I'm a little confused as to what the point of that argument was.
3 So I don't think that's a valid consideration for the court.

4 I simply ask, if we just look at the RICO issues,
5 regardless of what the child molestation parts are, if you look at
6 RICO cases, it's got to have some nexus between the different
7 types of counts, and I just don't think it's simply a dumpster
8 where you can charge everything in there, and I don't think
9 there's cases that necessarily say that.

10 And that is why we're asking that those three counts
11 plus parts of counts one and two just be edited out. I think that
12 will be easier, clearer, less issues to deal with on appeal if
13 there is a conviction, and I think that's just the proper way to
14 go because this case pretty much is a child molestation case.

15 THE COURT: All right, thank you very much.

16 MR. MOULTRIE: Your Honor, may I make just one addition
17 to that, please.

18 THE COURT: Sure.

19 MR. MOULTRIE: Or excuse me, two. One is, with all due
20 respect, Mr. Aurora is just wrong on the law when it comes to
21 RICO. The RICO law, as it stands both in the United States
22 Supreme Court and before the Eleventh Circuit, is clearly that the
23 government may prove RICO counts by showing that the predicate
24 acts relate to the overall purpose of the conspiracy even when
25 they do not relate to one another.

1 In this case we meet both those standards, the RICO --
2 the predicate acts, excuse me, relate both to the enterprise and
3 they also relate to one another. So on both those fronts the
4 defense loses if that is its argument for suppressing the
5 indictment.

6 Second, Your Honor, Mr. Aurora, made the proposition
7 that if the court were to sever these counts, that most likely it
8 would not be necessary to try the structuring counts. We
9 absolutely plan to try the structuring counts, first.

10 Second, it is not correct that we know that Mr. York
11 will be found guilty of the Man Act violations. So for either of
12 those reasons there is no certainty based on the court's decision
13 to sever the counts as to whether or not Mr. York will actually
14 stand trial on the structuring counts. We plan to try those
15 counts one way or the other, Your Honor.

16 THE COURT: All right. Let's go to the defendant's
17 motion to suppress. My understanding is that what's at issue here
18 is a journal, a quilt, a video tape, and some adult pornography.
19 Are those the four items; is that correct?

20 MR. AURORA: Yes, Your Honor, and I would put an "s"
21 after the video tapes. There's several video tapes in question
22 that were seized. I haven't looked at all of those, but I've
23 pretty much contained everything to the main structure that was
24 known as Dr. York's house, or however it was referred to in the
25 search warrant.

1 We haven't gone into the financial issues because
2 counsel has been able to show me the subpoenas where they got the
3 independent financial records. So the items that were seized
4 financial wise from the house we haven't extended it to because
5 they got it through an independent basis.

6 So we're just going to limit it to those sexual items.
7 There's a pillow, quilts, videotapes, and magazines, and things
8 like that we listed.

9 THE COURT: As a very practical matter, do you plan to
10 introduce any or all of these?

11 MR. MOULTRIE: Yes, Your Honor, we do plan to -- and I
12 think there's also -- excuse me, Your Honor -- I believe there's
13 also Pink Panther doll, is that right?

14 MR. AURORA: Yes.

15 MR. MOULTRIE: -- with a dildo attached or something like
16 that. One of the witnesses, Your Honor -- well, most of the
17 witnesses testify that Mr. York used as part of his grooming
18 process the display of adult pornography. So we will be moving to
19 enter the adult pornographic videotapes that we've located, into
20 evidence to corroborate the witnesses' testimony in that respect.

21 Additionally, Your Honor, one of the witnesses discusses
22 in a statement that Mr. York showed the witness a cartoon
23 pornographic videotape which the witness has identified. We do
24 plan to play the segment in that videotape that the witness
25 recognizes.

1 THE COURT: All right.

2 MR. MOULTRIE: The quilt and the pillows were part of the
3 area of Mr. York's bedroom that the witnesses who will testify say
4 that -- and specifically, Your Honor, in particular, the
5 pillows -- that Mr. York used those pillows in New York, he used
6 them in Georgia, and that very often he would commit the unlawful
7 sexual acts with the children on those very pillows.

8 THE COURT: All right, what about the journal.

9 MR. MOULTRIE: And, Your Honor, the Pink Panther doll,
10 excuse me, is one of the items, it's a very explicit doll, it's a
11 very large doll, with a very large attachment, and several of the
12 witnesses identified that Pink Panther doll, and we plan to use
13 that in evidence, again, as corroborative evidence. And then
14 there's a journal?

15 THE COURT: Right, the journal.

16 MR. MOULTRIE: Excuse me, Your Honor.

17 MR. AURORA: Could I just list the items, Your Honor.

18 THE COURT: Yes, I tried to --

19 MR. MOULTRIE: Your Honor, I don't recall the journal.

20 MR. AURORA: There's a journal "slash" letters. I had a
21 pretty lengthy argument. I'm sure you've already taken that.

22 THE COURT: Yes.

23 MR. AURORA: -- so I won't go over that. There were
24 journals and letters listed in Paragraph 25, 57, and some other
25 paragraphs that I cited. There's a quilt and a pillow. There's

1 some furniture. It was specifically listed as the black table,
2 figurines, things like that.

3 There were several videos I referenced to many
4 paragraphs in there. There was some clothing to include grass
5 skirts, amongst other things that I mentioned. There's
6 photographs, and then sexual items, like a fake penis, and some
7 other things are mentioned in some of the paragraphs that I listed
8 in my argument.

9 And, Judge, I understand what they're trying to say.
10 I'm not getting into the relevance of any of these items. The
11 whole argument was based on the staleness issue as to the last
12 time any of the people had last seen these items were as late as
13 ten years prior.

14 So, I mean, I understand the felony part they're trying
15 to make, but I'm making sure, you know, on the record that we stay
16 focused on the ball as far as the dates, the times, and the
17 reliability of the people actually giving this information. That
18 was our basis.

19 THE COURT: I understand that, and I also wanted to make
20 sure I knew -- I think I was a little bit confused because it
21 talks about on page two, talks about the search warrant based on
22 interviews, and there are only four items that are mentioned in
23 the -- apparently in the search warrant. So I was thinking there
24 were only four items at issue here, but obviously there's a good
25 many more than that.

1 MR. AURORA: I think there were six total, and I cited
2 there were specific paragraphs that may not have been mentioned in
3 the preamble of the search warrant, just to be clear as far as
4 what.

5 THE COURT: And if -- the circumstances of these items
6 are different.

7 MR. AURORA: Yes, sir.

8 THE COURT: Where they were found and so forth, and if
9 they're not to use one of them, I'm not going to rule on that, so
10 that was the purpose of going through it. I wasn't trying to
11 decide on the relevancy of it, I was just trying to decide whether
12 I needed to rule on it or not, and it sounds like I'm going to
13 need to rule on all of this.

14 Now, I'll tell you, and you can respond to this, my
15 thought about these items, so many of them is that these are items
16 that, you know, once you bring these into your home, you don't
17 generally get rid of them. I mean, they are many features in
18 somebody's home that come in there and stay there. I have
19 videotapes. I don't have any pornographic videotapes, but I have
20 videotapes, they've been in my house for years, they stay in the
21 same place they've been in the whole time. I have blankets and
22 pillows and they stay on the bed, and these are the kind of items
23 that once they come into a house, unlike food, for example, they
24 stay there. And so what is your response to that.

25 MR. AURORA: Judge, I mean, I understand what you're

1 saying when we're looking at it as a nuclear family type of
2 situation and not the facts with regards to this case,
3 specifically. Plus, you're also looking at over a period of about
4 12 plus years of at least three different residences. You've also
5 got testimony directly in the search warrant that I cited in
6 excruciating detail where people are saying they saw evidence
7 being destroyed, they didn't see some of these things in the last
8 four or five years.

9 The standard under the law that I cited is simply, are
10 those items fungible, moveable, is there a likelihood that they'll
11 stay there. We gave some examples of some things that would stay
12 there. For example, a computer. Your hard drive stays there,
13 even if you delete it, you can expect reasonably to find those
14 things.

15 Dolls, videos, over a 12 year period of time, nobody
16 giving any specificity as to when they last saw it. There've been
17 multiple moves throughout across state lines. Witnesses have said
18 that we've seen these things being destroyed. Witnesses have said
19 our client said, you know, if there's something coming, I mean,
20 I'm going to go ahead and destroy everything. Witnesses have said
21 that they knew he'd done this regularly.

22 Those are the kinds of things that I'm going to put out
23 there to show that it's not an absolute that those items would be
24 there. Certainly the law doesn't require an absolute, but there's
25 got to be a reasonable probability that you would find something

1 from 12 years ago. He had three or four different houses where
2 this person is going across state lines.

3 And while your argument is correct, Your Honor, as far
4 as saying that I would keep these or you and I may keep these,
5 this isn't -- it's not that objective necessarily. It's more, if
6 you look at the situation here, when the warrant was issued based
7 on the background of the client and the history, is it based on
8 their history a reasonable probability to find these things that
9 much down the line.

10 And that's what I'm saying, whereas you and I may
11 arguably keep a videotape of our kid from 20 years ago or a movie
12 I bought from Block Buster or something, I don't think it falls in
13 the same category when you look at all the facts and circumstances
14 here.

15 So is it a reasonable probability that these items would
16 be found with regards to this client based on all that has been
17 said, and I don't think it is, and there's the statements.

18 THE COURT: All right, I understand your argument. Thank
19 you. Mr. Moultrie, have you had the opportunity to see this new
20 motion?

21 MR. MOULTRIE: I have, Your Honor.

22 THE COURT: Okay. Are there any other motions that I
23 haven't -- well, are there any other new motions. There's some
24 that I haven't covered, because I don't have any questions about
25 those. I didn't cover the motion to suppress the superseding

1 indictment. I didn't cover the motion to dismiss counts one and
2 two of the superseding indictment. I think I understand all of
3 that.

4 MR. AURORA: Judge, with regards to the count one and two
5 motion, again, since Mr. Rubino isn't here, there's a couple of
6 facts I just wanted to perfect the record with.

7 THE COURT: Go right ahead.

8 MR. AURORA: And the only other thing is, I've talked to
9 Mr. Moultrie about looking for a bill of particulars. I haven't
10 filed that, again, with some of the issues we're having, but I've
11 gone over in detail as to what I want, and I'll put it in writing
12 and get it to the court before the end of the week. I think as
13 grownups we can resolve those issues. A lot of it, from the
14 discovery, I can figure who's where, but I just want to get it
15 pinned down as to who the known conspirators are on some of the
16 counts that are listed out there.

17 THE COURT: All right.

18 MR. AURORA: So there's no confusion. Judge, with
19 regards to the dismissal of counts one and two of the superseding
20 indictment, I think Mr. Rubino clearly goes over defining the
21 enterprise. What I wanted to emphasize, and I don't know if it's
22 clear necessarily to the court from the brief itself, is whether
23 the purpose of the enterprise -- the only issue of the RICO is the
24 purpose of the enterprise when you're looking at the two prongs
25 set forth by U.S. versus Starrett, S-T-A-R-R-E-T-T, 55 F.3d 1525,

1 Eleventh Circuit case from 1995. Followed also by the Supreme
2 Court case Sedima, S-E-D-I-M-A, versus Imrex, I-M-R-E-X,
3 Corporation, 473 U.S. 479. It's an '85 case.

4 It basically says -- defines through a pattern of
5 racketeering activity as the defendants' predicate acts as to
6 their relationship to the enterprise charge, which is sort of the
7 relationship prong, and the second prong being the pattern prong;
8 that the predicate acts formed a pattern of some kind.

9 What I'm trying to establish or make sure that I'm clear
10 on the record, regardless of the brief notwithstanding, is simply
11 the government on paragraph A of page three of the new indictment
12 sort of goes over the purpose of the enterprise. It's a
13 "religious organization" quote, unquote, is what they've called
14 it. And clearly the purpose of the religious organizations of the
15 members isn't to commit child molestation acts or commit
16 structuring acts and things like that.

17 These are clearly, if we read the indictment, based on
18 the conduct of one person, which would be the defendant as accused
19 of it. They've listed in a lot of those counts, there's
20 conspirators known and unknown, but at the same time, it also says
21 that a lot of people did things under the fear of violence of some
22 sort.

23 So the issue with regards to count one, which is the
24 conspiracy, is is there truly an agreement to commit some of these
25 acts if we look closely at the way the indictment is structured,

1 and perhaps I may need to revisit it once I find out specifically
2 who the co-conspirators were. I think I have a pretty good idea,
3 and one of them has got immunity, and the other folks, arguably,
4 if you read throughout the brief and some of the discovery, are
5 claiming that they were threatened with physical force or things
6 like to do what they did in order to bring the children and things
7 of that nature.

8 So that was sort of the factual part I wanted to make
9 sure that the court got clear, which I wasn't clear from the brief
10 as to the conspiracy agreement.

11 The second part is the actual RICO count itself which
12 can be done arguably just by one person. If, under U.S. v.
13 Camble, C-A-M-B-L-E, 706 F.2d 1322, it's a Fifth Circuit opinion,
14 Your Honor. It talks about whether the defendant is charged with
15 committing the racketeering activity as alleged in the indictment,
16 the defendant's position in the enterprise that therefore allowed
17 him to do it, and, third, the predicate acts, whether they had
18 some effect on the lawful enterprise.

19 So the issue I'm trying to raise here is this is a
20 religious organization based on the prosecution's own position.
21 The purpose of the enterprise isn't to commit some illegal act,
22 such as the child molestation or not. That isn't necessarily
23 required. But there's got to be some connection with the purpose
24 of the enterprise and some of the acts that have taken place, and
25 I don't know if that was clear, and those are the types of the

1 things that they're trying to establish, and what we -- yes, sir.

2 THE COURT: Go ahead, I'm going to wait to ask my
3 questions until you finish, go ahead.

4 MR. AURORA: Okay. So the conspiracy issue, as I said,
5 is the issue about force, and I think the indictment can answer
6 that question, and I'm asking the court to look at that.

7 But second is, there's got to be some effect as far as
8 the enterprise goes, or the lawful enterprise. And our position
9 was simply, as Mr. Rubino put in there, based on the case law, is
10 what is the effect of the lawful enterprise as far as the
11 Nuwabians themselves go because the whole organization isn't there
12 for this purpose. One person can do illegal acts, but there's got
13 to be some nexus in furtherance, some relevance, I guess, as far
14 as helping it.

15 For example, when we look at the cases that are out
16 there and they talked about, you know, people selling drugs or
17 providing drugs to an agency, thereby furthering the profit
18 motive, or people having folks killed, therefore to keep witnesses
19 silent, and things like that to actually further the conspiracy or
20 the goals of the enterprise.

21 Occasionally there have been cases that deal with where
22 a police department has been listed as the enterprise where
23 different officers were taking bribes or corruption to further
24 their separate agreement within the enterprise, and we're trying to
25 say that based on this indictment and the way it's written is

1 there's nothing listed out there where these predicate crimes that
2 are charged are actually furthering the Nuwabian cause or their
3 beliefs or anything like that, and that's what I'm trying to be
4 specific.

5 THE COURT: I thought there was evidence in this case
6 that the defendant used religious metaphors and religious
7 arguments to support his actions related to these children. Is
8 that not correct?

9 MR. MOULTRIE: Yes, Your Honor.

10 THE COURT: That's not enough?

11 MR. AURORA: The religious teachings and the books and
12 things like that are done and the people followed based on those
13 religious teachings. They provided certain things, if we got into
14 a Bible scholarship as to what, you know, people used to do
15 hundreds of years ago as far as scheduling and things like that
16 go.

17 I don't think that's necessary until it comes -- I don't
18 see how that is furthering the purpose of the Nuwabians as a
19 religious organization because if we talk -- we're sort of getting
20 into evidence to some extent, I mean, the folks that are going to
21 come and testify will say he either made us do this, that we
22 didn't voluntarily do this, as far as I can tell, and the
23 witnesses that we have with regards to some of the children's own
24 family members will say this didn't happen or we would have never
25 allowed these things to happen.

1 So I guess there's a little bit of an assumption that
2 his belief system or what he may have published in a book,
3 therefore made that one of the purposes of the Nuwabian nation. I
4 don't think that's correct.

5 I don't think there's anything illegal about what the
6 charter of the Nuwabian nation is to be. One person acting within
7 the enterprise itself, but outside the scope of what the
8 enterprise is, I don't think should be allowed. This should be as
9 straight forward as far as the first indictment was, a child
10 molestation type case, and that's what I'm trying to get back to.

11 I think we're putting smoke and mirrors and clouds and
12 all these fancy terms, and, you know, where it sounds much more
13 sexy than it is. It's simply just a child molestation type case
14 the way it was charged, and I don't think doing these types of --

15 THE COURT: Now, isn't there going to be significant
16 evidence in the case that he used this religious organization in
17 order to satisfy his sexual desires, and isn't there going to be
18 evidence that there were people in the organization that thought
19 they might be somehow blessed or somehow benefited or profited or
20 rewarded, and isn't there evidence in the case that the defendant
21 did reward and did punish his followers if they didn't cooperate
22 with him. Isn't all that in this case?

23 MR. AURORA: Judge, I agree that those are all issues out
24 there, but I'm asking the court to look at what the purpose of the
25 Nuwabian -- we're basically saying he's the sole basis of that

1 thing. There are hundreds or thousands of followers that go with
2 regards to this, and there are several leaders within the group
3 itself.

4 It's sort of like the business issues that we have, you
5 know, you see in New York people getting arrested. You can be
6 president of a company or CEO, and you can do things for your own
7 personal benefit that doesn't necessarily further the enterprise
8 of, you know, Tyco Toys or anything else, just like here.

9 So while there may be evidence that he manipulated
10 things this way or that way to get what he wanted, that still
11 doesn't further the enterprise, the legitimate goals of the
12 enterprise, or it doesn't relate to the legitimate goals of the
13 enterprise.

14 And I know it's kind of hard for me to explain that, but
15 I'm trying to sort of show that his individual action be charged
16 as individual without wrapping it up into something more dramatic
17 like the RICO issue. What he does doesn't necessarily further the
18 enterprise or connect with the lawful means of the enterprise.

19 So what you're saying is absolutely correct, and I
20 anticipate that evidence will come with regards to some of the
21 people that did it for benefit whether they, quote, were able to
22 agree to it based on either the pressure he put on them or the
23 false belief that he gave him that, you know, you're going to be
24 rewarded, or something like that, in the afterlife. You know,
25 those are part of the arguments for count one.

1 Now with count two, how is this furthering the
2 legitimate goals of a lawful enterprise, which everyone agrees
3 that this was a lawful enterprise, one man acting alone, to
4 satisfy whatever alleged actions that they're claiming he's done.

5 And so I think that's where the difference is. This
6 should be a sole charge against him for what he's done, versus
7 wrapping it up into something a little sexier.

8 THE COURT: All right, do you want to respond to that?

9 MR. MOULTRIE: Yes, Your Honor, and I won't take long.
10 Your Honor, Mr. Aurora's legal position is hard to explain because
11 it's not the appropriate legal position to take based on the facts
12 in this case.

13 What I would like to make clear, Your Honor, is that
14 this is not an indictment of the entire Nuwabian nation or its
15 group. There are lots of fine people who believe in Mr. York now,
16 there are lots of fine people who believe in him when he was
17 arrested. This indictment is not an indictment of those people or
18 what they believed then or what they believe now.

19 The RICO count charges Mr. York with conspiring with
20 certain individuals among the Nuwabian nation to commit a criminal
21 enterprise.

22 So this does not have to do -- that is, this indictment
23 -- doesn't have anything to do with a lot of the legitimate
24 purposes and beliefs and foundations that Mr. York put in place
25 and that a lot of his believers continue to believe.

1 Mr. Aurora also makes the point, Your Honor, that Mr.
2 York acted alone. Well, that certainly is not born out by the
3 facts, given that two of co-conspirators have already pled guilty
4 to molesting children in state court and one of the
5 co-conspirators has pled guilty in federal court to knowing about
6 the molestation and not reporting it.

7 So clearly we have individuals who acted, at least they
8 stated in open court and under oath, that they acted of their own
9 volition in certain instances.

10 And, finally, Your Honor, the idea that the RICO count
11 is somehow only germane to the Man Act charges is a position that
12 the defense will continue to take because it produces a result
13 that they want, and, that is, not to have to face a RICO count at
14 all. And, again, Your Honor, I would state that the law is very
15 clear that if the government can prove that the predicate acts
16 relate to the overall enterprise, then the RICO count should
17 stand.

18 Additionally, if the government can prove that the
19 predicate acts relate to one another, then the RICO count should
20 stand. And in this case we have predicate acts that relate to the
21 overall purpose of the enterprise, that is, to enrich Mr. York, to
22 provide him a basis, both financially and sexually, with the
23 ability to molest children and that we have these structuring
24 count and the Man Act count in many instances committed by the
25 same individual.

1 And for all these reasons the court should dismiss the
2 Defendant's motion to dismiss the indictment because the RICO
3 count is based on the necessary predicate acts that form a pattern
4 of racketeering activity. They have nothing to do, again, Your
5 Honor, with the legitimate purposes of the Nuwabian nation. They
6 have everything to do with the illegal intent of Mr. York and some
7 of his co-conspirators to commit illegal acts.

8 And the whole point, Your Honor, was to do it in secret
9 so that many of his followers who believe in him and still believe
10 in him wouldn't know about it. And so, again, for all those
11 reasons, Your Honor, we ask that the court dismiss that motion.

12 THE COURT: All right, Mr. Aurora, do you have something
13 else to offer?

14 MR. AURORA: Yes, Your Honor. Judge, if you look at page
15 three of the indictment, under the enterprise section, it clearly
16 defines what they're claiming. They're saying -- they define the
17 enterprise: That is, a group of individuals associated in fact,
18 the enterprise constituted an ongoing organization whose members
19 functioned as a continuing unit for the common purpose of
20 achieving the objectives of the enterprise. The enterprise was
21 engaged in and affected in interstate commerce.

22 And it goes on to the next page under paragraph B, Part
23 4: A further purpose of the enterprise was that Dwight York kept
24 minor victims and their parents and other followers in fear of the
25 enterprise.

1 And it goes on to talk about the specific sexual things.
2 They're clearly indicting the Nuwabians as a group, as a whole,
3 saying the purpose of that organization was to do these types of
4 things, and it's not the case, and Mr. Moultrie admitted as much.
5 This is simply one man acting out. This is not the purpose of the
6 enterprise, as listed -- as he just argued. In their indictment,
7 they do say that's the purpose of the enterprise as far as the
8 Nuwabians go.

9 And I guess I'm a little confused, and I think the court
10 is a little confused at this point as to -- I just don't see how
11 this could be a RICO violation with simply his actions outside the
12 scope of what the enterprise was set out to do.

13 They're claiming that we're not trying to indict the
14 entire Nuwabian nation, but they put in their indictment
15 repeatedly that the Nuwabian's purpose was to do those types of
16 things, and that's not the case.

17 So I just don't see how that happens. And the fact that
18 a co-defendant pled guilty to a misdemeanor in federal court
19 saying I knew about something, but I didn't report it, doesn't
20 make them a co-conspirator.

21 The people in state court that took a plea, if I recall
22 correctly, did altered pleas, where they didn't admit any guilt;
23 they just said we didn't want to fact a 10 year or a 30 year
24 mandatory minimum on some of those charges.

25 So I don't think that's relevant for the court's

1 consideration. I'm simply saying if the purpose of the
2 enterprise, being the Nuwabians, is to conduct lawful religious or
3 Native American activity, one person acting outside the scope of
4 that charter doesn't allow you to then go into a RICO and drum up
5 the case and go into a lot of the other things.

6 It's appropriate to do it simply, as a straightforward
7 molestation count, which they've done in counts four, five, six,
8 seven, and eight.

9 THE COURT: All right, Mr. Moultrie.

10 MR. MOULTRIE: Your Honor, I just want to add one thing.
11 It might clear up Mr. Aurora's confusion to look at one of most
12 important sentences where the enterprise is defined, and that is
13 on page 3, the last sentence of paragraph subsection A, which
14 reads, where the enterprise is defined:

15 The Nuwabians were a religious organization that
16 consisted of approximately five thousand members, including, but
17 not limited to, Dwight York and unindicted co-conspirators and
18 others, both known and unknown to the grand jury.

19 That sentence makes it very clear, Your Honor, that we
20 are talking about very specific people only.

21 THE COURT: Okay. Thank you, very much. Now, in the
22 interest of time, let's take up this matter of the motion to
23 dismiss the indictment, count six and count two, racketeering act,
24 three, transporting minors in interstate commerce for unlawful
25 sexual activity, and failure to allege violation of federal law.

1 MR. DAVIS: May I, Your Honor?

2 THE COURT: Certainly, go right ahead.

3 MR. DAVIS: Your Honor, for the record I'm Benjamin
4 Davis. I'm representing Mr. Dwight York in this case.

5 Count six and count two of RICO act three, purports to
6 set forth a violation of U.S.C. 2423, Subsection A, and identical
7 language as follows:

8 In or about April of 1993 in the Middle District of
9 Georgia and elsewhere within this jurisdiction of this court, the
10 Defendant Dwight York knowingly transported and caused to be
11 transported P-23, an individual who had not attained the age of 18
12 years, in interstate commerce from Kings County, New York to Bibb
13 County, Georgia and Putnam County, Georgia with the intent that
14 such minor engage in unlawful sexual activity for which a person
15 can be charged with a criminal offense, including, but not limited
16 to violations of Georgia Code, Section 1664 and 1665, the
17 individuals not having reached the age of 25, in accordance with
18 Title 18, United States Code, Section 3283, all in violation of
19 Title 18, United States Code, Section 2423(a) and (2).

20 Title 18, United States Code, Section 2422(a) --
21 2423(a), subsection A, states in pertinent part as follows: A
22 person knowingly -- a person who knowingly transports an
23 individual who has not attained the age of 18 years in interstate
24 commerce with the intent that the individual engage in sexual
25 activity for which any person can be charged with a criminal

1 offense shall be found under this Title and imprisoned for not
2 more than 15 years. Therefore, pursuant to the terms of 2423(a)
3 it is a violation of federal law to transport a person under 18
4 with the intent to engage in sexual activity for which any person
5 can be charged with a criminal offense.

6 The criminal offense that the government purports to
7 have been committed by this defendant is a violation of Georgia
8 state law, namely, child molestation pursuant to O.C.G.A. Section
9 1664, and enticing a child for indecent purposes, pursuant to
10 O.C.G.A. 16-6-5.

11 Therefore, applying the government's legal theory of the
12 case as set forth in counts six and two, RICO act three, to the
13 statutory language of Title 18, United States Code, Section
14 2423(a), before this defendant can be accused of violating the
15 terms of the federal statute, he must have also violated the 1993
16 versions of O.C.G.A. 1664 and 1665.

17 In accordance with the factual allegation set forth on
18 page 17 of the indictment, paragraph 37 and paragraph 38, in April
19 of the year 1993, P-23 was 14 years of age.

20 This is significant as O.C.G.A. 1664 did not make it a
21 violation of Georgia law in 1993 to do any immoral or indecent act
22 to, or in the presence of, or with a child who was age 14, but
23 rather, the child had to be under the age of 14. Nor did 1665
24 make it a violation of the law to solicit, entice, or take any
25 child age 14 to any place whatsoever for the purpose of child

1 molestation or indecent acts, but rather, the child had to be
2 under the age of 14.

3 O.C.G.A. 16-6-4 and 16-6-5 were not amended to include a
4 child of the age of 14 until 1995. The effective date was July 1,
5 1995.

6 The dicta of the Georgia Supreme Court case of Feagin v.
7 The State, 268 Georgia 272, 1997, lends credence to this argument,
8 to wit: Effective July 1, 1995 it was illegal to have sex with a
9 person under the age of 16 to whom the accused was not married.

10 However, prior to July 1, 1995, the conduct was illegal
11 if one of the parties was under the age of 14.

12 Thus, the government has not adequately set forth a
13 violation of federal law in counts six and count two, RICO Act
14 III, accordingly, these counts should be dismissed.

15 THE COURT: Do you have any federal cases on this?

16 MR. DAVIS: I'm sorry, Your Honor?

17 THE COURT: Do you have any federal cases supporting your
18 position?

19 MR. DAVIS: Any federal cases, Your Honor? Your Honor, I
20 don't think that any federal case would speak to the Georgia law.
21 I think it's relevant that the Georgia Supreme Court spoke to it.
22 So I think that this it would be a gap in federal law which should
23 be addressed in state law.

24 The elements of these violations is that in 1993, the
25 defendant committed a violation of Georgia law, 16-6-4 and 16-6-5,

1 but in 1993, it was not a violation to do these acts with a person
2 that was 14. That happened after 1995.

3 Now, as the law stands, if you engage in these acts with
4 someone under 16, it's a violation of the law, however, in 1993,
5 it was not.

6 THE COURT: All right, I understand.

7 MR. DAVIS: Thank you, Your Honor.

8 THE COURT: Mr. Moultrie, let me just tell you, I'm going
9 to give you the opportunity to do a written response to this.

10 MR. MOULTRIE: Your Honor, it may not be necessary.

11 THE COURT: Okay.

12 MR. MOULTRIE: But let me address the court, and I can
13 maybe clear it up. Mr. Davis is right, Your Honor, that if the
14 government cannot show that the victims in 1993 were under the age
15 of 14, that the counts that relates to those particular elements
16 would have to be dismissed.

17 However, the victim that Mr. Davis speaks of was under
18 14 at the time that she was caused to travel in interstate
19 commerce from New York to Georgia. That was in 1993. The person
20 that he is talking about, again, was under 14. She was actually
21 13 at that time.

22 Second, with respect to the offenses that occurred in
23 1996, the other set of charges in which the government accuses Mr.
24 York of having caused children to be transported from Georgia to
25 Florida, in 1996, in those charges, Your Honor, the age of consent

1 would have had to be 16 and under. In those counts, all of the
2 victims were under 16 when they were caused to be transported from
3 Georgia to Florida.

4 So in both sets of crimes, both the crimes in 1993, when
5 the law was the age 14 or under, and in 1996, when the law was age
6 16 and under, all of the government's victims meet those tests in
7 O.C.G.A. 16-6-4 and 16-6-5

8 THE COURT: So you agree with the legal theory, you just
9 say the facts don't support that.

10 MR. MOULTRIE: Yes.

11 MR. DAVIS: May I go very briefly, Your Honor.

12 THE COURT: Sure, go right ahead.

13 MR. DAVIS: Your Honor, on page 17, I'm relying on the
14 facts that the government sets out in the indictment, and I'll
15 just very quickly cite to the -- or recite to the court paragraph
16 37:

17 On or about November 20, 1993, Dwight York, at his
18 private residence in Putnam County forced P-25 and -- P-23 and
19 P-25, both approximately age 14, to engage together with him in
20 oral and -- I'll leave out the other part -- but sex.

21 But the point is the indictment sets forth that this
22 alleged victim is 14.

23 THE COURT: Well, it says approximately 14.

24 MR. MOULTRIE: Well, Your Honor, it says approximately
25 14, but Mr. Davis is also citing to a place in the indictment that

1 deals with conduct in Georgia after that victim had already been
2 transported, which is a federal crime.

3 THE COURT: All right. Well, I would assume that if the
4 evidence doesn't establish what Mr. Moultrie expects it to
5 establish, I will have to dismiss that count against him; is that
6 correct, Mr. Moultrie?

7 MR. MOULTRIE: Yes, Your Honor, but the facts don't bear
8 his argument out.

9 THE COURT: Well, I understand that, but I'm saying, my
10 point is, I'm not sure I need to rule on this right now, if I'm
11 clear, if it's --

12 MR. MOULTRIE: Your Honor --

13 THE COURT: -- or I can deny it right now and find out
14 what the evidence is going to be, and we can take it up at that
15 time.

16 MR. MOULTRIE: Certainly. Well, Your Honor, if you
17 like -- excuse me, Mr. Davis -- if you'd like, Your Honor, I'd be
18 happy to provide the court with a very quick response that
19 identifies the individual involved, the birth date of that
20 individual, and the date in which she traveled in order to
21 establish her age at the time of the act.

22 THE COURT: Please do that.

23 MR. DAVIS: Your Honor, with all due respect, I'm moving
24 to dismiss the indictment per the allegations as they are set
25 forth in the indictment. I think Mr. Moultrie is referring to

1 something that's outside the indictment.

2 THE COURT: Well, Mr. Moultrie just explained that what
3 you're quoting from the indictment doesn't apply under your theory
4 of the law.

5 MR. MOULTRIE: Your Honor, I think maybe what Mr. -- I
6 think what Mr. Davis is focusing on, Your Honor, or not focusing
7 on, is with the law with respect to the Man Act and these charges
8 concerns the intent of the defendant when he causes a child to be
9 transported.

10 THE COURT: Right.

11 MR. MOULTRIE: The act doesn't have to be consummated at
12 the point that the individual travels. It's just the intent has
13 to be to engage in unlawful sexual activity.

14 When this child traveled, she was age 13, and we will be
15 able to prove that at that time Mr. York had already committed
16 acts that prove his intent to transport her for the purpose of
17 unlawful sexual activity.

18 MR. DAVIS: He's basically agreeing with me. He's
19 talking about the Man Act; I'm talking about the way it's alleged.
20 For the Man Act to apply, it has to be a violation of a criminal
21 offense.

22 They allege the violation of the criminal offense was in
23 1993, and it was a violation of 16-64 and 16-6-5. Per their own
24 indictment, P-23 was 14, therefore, he couldn't have violated a
25 criminal offense as set forth in the indictment, and I'll just

1 stand on those arguments, Your Honor.

2 THE COURT: Okay.

3 MR. DAVIS: All right, thank you.

4 THE COURT: I want you to submit something to me. Can
5 you get it to me by the end of the week?

6 MR. MOULTRIE: I'll get it to you by the end of the day.

7 THE COURT: Okay, very good.

8 MR. MOULTRIE: Your Honor, let me be clear, is it
9 sufficient as I spelled it out what I plan to do, and that is, to
10 provide the factual basis for the charge as it relates to this
11 particular victim?

12 THE COURT: Well, I think so, but, you know, the issue
13 is, according to the defense in this case, relates specifically to
14 the indictment and not outside that. So you might address that
15 too, if you would, please.

16 MR. MOULTRIE: Okay.

17 THE COURT: All right, now, those are all the motions
18 from the defense that I know about.

19 MR. PATRICK: Your Honor --

20 THE COURT: Sir?

21 MR. PATRICK: I do have two other motions. I filed a
22 motion to dismiss the superseding indictment based upon the grand
23 jury being selected from the same pool.

24 THE COURT: Right, and I told you we weren't going to
25 take that up.

1 MR. PATRICK: Okay, we're not going to hear it at all?

2 THE COURT: Well, 90 percent of the motions that are
3 disposed in this case or ruled on in this case are ruled on
4 without oral argument. And when I go through, and I read these
5 motions, and I feel like that based on what I've read and the
6 response from the other side, then that's -- I don't feel I have
7 to -- I'm not like maybe the judges you're used to who have oral
8 arguments on every motion. That's just not the way I do it.

9 MR. PATRICK: Oh, I see what you're saying. You're
10 saying you're saying you're not going to have oral argument on the
11 motion.

12 THE COURT: Right.

13 MR. PATRICK: All right, that's fine. Well, I had two I
14 filed this morning, I have two bases for my motion to dismiss the
15 superseding indictment. I filed one this morning, and I provided
16 the court a copy. Are you basically saying you'll rule on both?

17 There's two motions to dismiss the indictment, Your
18 Honor, just two different bases. One is based on the tainted
19 grand jury pool, and the other is based on the fact of the
20 publicity around the guilty pleas.

21 THE COURT: Okay, now, I have the motion to dismiss --

22 MR. PATRICK: -- the superseding indictment, and I've
23 provided a copy of the motion to dismiss the indictment and the
24 alternative motion --

25 THE COURT: Well, just bring me what you have, and let me

1 make sure I have everything, because --

2 MR. PATRICK: Thank you, Your Honor.

3 THE COURT: Okay, motion to dismiss the indictment and
4 the alternative motion to change venue. All right, I have not
5 seen that one.

6 MR. PATRICK: Right.

7 THE COURT: Why don't you, if you would, just outline
8 that for me.

9 MR. PATRICK: Okay. Your Honor, on the motion to dismiss
10 the indictment and the alternative motion to change venue,
11 basically, Your Honor, what I'm setting out in this motion is that
12 on -- obviously the court is aware on January 23rd, the defendant
13 entered a guilty plea. That plea was publicized in most every
14 media, definitely in the immediate media and the media throughout
15 the country.

16 Your Honor, I have a supporting exhibit I can submit to
17 the court, articles I pulled off the internet and other articles
18 that we have, I'll submit as an exhibit to support my argument.

19 But, Your Honor, the case that I'm using to support my
20 argument is United States versus Lynn, 212 F. Supplement Second
21 541, a 2002 case. This is the case of Mr. Lynn and him being
22 involved with the Taliban organization and Ali Quida.

23 Basically, Your Honor, the motion I have is based upon
24 the amount of pretrial publicity that this case has had. In the
25 cases that I've cited, U.S. v Abbott and Redu versus Louisiana and

1 Channel v Florida, all of these cases involve, although they did
2 not grant a dismissal of the indictment, Your Honor, they involve
3 cases with substantial pretrial publicity, and the issue came up
4 as to whether or not the indictment should be dismissed because of
5 the prejudicial impact of the pretrial publicity, and basically
6 the court outlined some rules.

7 Basically -- and all of the courts agreed in all the
8 cases -- that the Sixth Amendment guarantees that in all criminal
9 prosecutions the defendant shall enjoy the right to a trial by an
10 impartial jury. However, that may be compromised by the presence
11 of pervasive and inflammatory pretrial publicity.

12 The purpose of me submitting my exhibit is to show the
13 pervasiveness of the pretrial publicity and that it's
14 inflammatory, and I think the court noted in a previous order that
15 dealt with the Middle District that the publicity was prejudicial
16 and inflammatory.

17 Your Honor, in these cases it was stated that it would
18 be the burden of the movant to show the prejudicial pretrial
19 publicity. I think the court has taken, as I stated, some notice
20 of that.

21 Your Honor, the difference in those cases and this case
22 is that not only was there pretrial publicity prior to an entry of
23 guilty plea, there was substantial pretrial publicity related in
24 that it's continuing pretrial publicity related to the guilty
25 plea, and it is our position that because of that, that the

1 defendant cannot receive a fair trial because the information is
2 out everywhere.

3 I have, Your Honor if I may submit my exhibit, I have a
4 letter from an individual in England that saw this. I have
5 downloaded information from the internet. There are over 15,000
6 hits related to Dr. Malachi York.

7 Your Honor, it is our position that because of the
8 impact of the publicity related to the guilty plea that the
9 defendant is denied his Sixth Amendment right to a fair trial.

10 And it is our position, Your Honor, that thus the
11 indictment should be dismissed based upon that aggravating factor,
12 not only on just simple pretrial publicity, but the pretrial
13 publicity related to a guilty plea that's evident across all
14 media, radio, print, and on the internet, Your Honor.

15 Additionally, Your Honor, we ask that -- the additional
16 ground for this motion to dismiss the indictment is the fact that
17 the defense was informed that if Dr. York testifies that the
18 admissions that he gave will be used against him for impeachment
19 purposes.

20 Additionally, that if the attorneys allow him to testify
21 contrary to the admissions, that also they would be held to be
22 assisting in perjury basically. Your Honor, that would be a
23 denial of his Fifth and Sixth Amendment rights as additional
24 ground.

25 So, Your Honor, I will submit my exhibit if the court

1 So I'm not saying that the individuals did it -- whoever
2 did this, Your Honor, it was independent media report, just as I'm
3 sure we have media here today, Your Honor, and because there's a
4 guilty plea involved, that distinguishes that from other cases of
5 this sort, the high publicity in other cases, because what was
6 advertised is that he pled guilty, and the opportunity -- the
7 chances of at least one juror knowing that he pled guilty is
8 great. So it would be our contention that the indictment should
9 be dismissed, Your Honor.

10 THE COURT: All right, thank you very much. Now, are
11 there any other motions that have been filed today that I haven't
12 heard about? I understand that the defense is talking about
13 essentially filing a Daubert motion. Is that correct, Mr. Aurora?

14 MR. AURORA: Yes, Your Honor. I've gone through that,
15 and I haven't done it yet. This is what I'm getting done, if you
16 can just give me 24 or 48 hours after the hearing, and the reason
17 for the hearing is based on the proffer by the government that
18 simply says that they're going to talk about pervasive nature of
19 the quote-unquote, "child molestation atmosphere."

20 There's going to be issues as to the ultimate issue type
21 argument and things like that. So I'd like to be able to
22 formulate what it is specifically and pin-point it for the court,
23 as well as the science behind the psychiatry of saying that the
24 climate was there, versus our argument is, let each person come up
25 and say whether it happened or not happened, and let the jury

1 decide.

2 And the third point being is -- one of the other Daubert
3 problems that obviously just struck me off the top of my head this
4 morning, and I'm reading it again, is simply I don't see how
5 that's going to be beyond the kin of the average lay person to say
6 if people are coming in here saying that.

7 So, while I don't have argument, and I've been giving
8 them fair notice of it, I have informed them that I would file
9 something as soon as I can.

10 THE COURT: Well, let me tell how to focus your argument.

11 MR. AURORA: Yes, sir.

12 THE COURT: What I'm interested in, because I've read the
13 affidavit in the case. On the surface of it appears that this man
14 has expert credentials, that's on the surface of it. In terms of
15 Daubert I'm suppose to examine his methodology and the way he
16 arrived at his conclusion. I don't really focus on the
17 conclusions and the opinions that he's actually going to give in
18 the case.

19 It would appear to me that one of the primary reasons
20 he's going to testify, and I may wrong about this, but one of the
21 primary reasons he's going to testify his opinions are going to be
22 directed towards more or less the modus operandi used by child
23 molesters. Is that correct?

24 MS. THACKER: That's correct, Your Honor. Mr. Lanning
25 would testify as to the characteristics of child molesters as well

1 as the victimization and characteristics of the victims, compliant
2 victims, as he terms it.

3 And Mr. Lanning actually is here today and has flown
4 down from D.C. and is available for voir dire by the defense since
5 we filed our motion three weeks ago in anticipation of this
6 hearing. I recognize the defense hasn't filed a response, but he
7 is here and available to go forward today.

8 THE COURT: All right, well, the circumstances of this
9 case in my mind involve allegations and evidence of a consistent
10 pattern of child molestation. Based on the evidence as I
11 understand it, there's going to be evidence of a consistent
12 pattern of the way the defendant did this in a number of these
13 cases, a number of these instances, and I do not think that the
14 average juror understands this.

15 And so I am not ruling on your motion, but I am telling
16 you where I want you focus, and you can bring up anything else you
17 want to. I mean, you can challenge his credentials or whatever
18 you want to do, but I'm just telling you that based on my review
19 of this -- and actually I reviewed it three weeks ago, so it's not
20 a current review -- that was what came to my mind.

21 MR. AURORA: Yes, sir.

22 MR. GARLAND: Your Honor, there is pending a separate
23 document filed by Mr. Rubino, that is a motion, it was touched on
24 by Mr. Patrick, and it's a motion to dismiss the indictment based
25 upon outrageous government conduct relating to a pleading filed by

1 the government.

2 THE COURT: I reviewed that, and that was one I'm not
3 planning to take up.

4 MS. THACKER: Your Honor, with respect to Ken Lanning's
5 testimony and his admissibility, the United States would submit
6 that the defense go forward with any questions it would have for
7 Mr. Lanning today, and they could file their motion, or their
8 basis for his testimony being not heard later. He is here and
9 he's available.

10 THE COURT: What do you say about that, Mr. Aurora?

11 MR GARLAND: May I respond?

12 THE COURT: Sure, Mr. Garland.

13 MR. GARLAND: We would ask for the opportunity to file
14 our objection to focus what we're going to focus our objection on
15 and to have such a hearing, but not today.

16 THE COURT: Okay. Well, I suppose I'm a little bit
17 concerned about having to bring this man back. This is a very
18 awkward situation. When did you file the notice?

19 MS. THACKER: November 24th, we filed our motion to admit
20 Mr. Lanning's testimony. That it was three weeks ago, Your Honor.

21 THE COURT: Okay.

22 MR. MOULTRIE: Excuse me, and, Your Honor, I'd also like
23 to point out that we're on the eve of trial.

24 THE COURT: Well, I understand that, I understand that.
25 And it's not only are we on the eve of trial, it's during the

1 Christmas holidays.

2 MR. MOULTRIE: Yes, Your Honor, and New Year's.

3 MR. GARLAND: Our objection will be fully made. We have
4 not made our full objection yet, Your Honor, and the issue is
5 obviously an extremely important issue that has many facets to it.

6 The question of the scientific underpinnings, the
7 factual underpinnings of studies that would make that science, are
8 not a simple question for us just to start examining on. As I
9 understand the issue, we will contend this is not based on science
10 in any respect, and I understand the modus operandi theory, but as
11 I understand Daubert, it has to be based upon science.

12 THE COURT: All right, well, let me --

13 MR. GARLAND: And I wish to address that and contest it.

14 THE COURT: All right, well, let me explain to you that
15 Daubert and those cases that follow after Daubert, including Kumo
16 Tire, basically talk about two categories of witnesses, at least
17 two. One category is scientific type witnesses, and the other
18 category is witnesses based on their experience.

19 Now, this strikes me as a witness based on experience,
20 and I would refer you, I think it's the case of U.S. versus
21 Frazier, and in U.S. versus Frazier --

22 MR. GARLAND: Is that Frazier or Grazier?

23 THE COURT: Frizzer. I believe I'm getting this right.
24 In U.S. versus Frazier, it was a rape case, and the defense had an
25 expert who had investigated many rape cases in the past, and the

1 district court wouldn't let him testify about what he would have
2 expected to find in a rape investigation based on all of his
3 experience, and the Court of Appeals said that the district court
4 committed error under those circumstances because based on his
5 experience, he was authorized to give his opinions about his
6 expectations about what he would have found. So I think that's
7 the case, I --

8 MR GARLAND: I think I need to focus directly on that,
9 and address that issue with the court.

10 THE COURT: Okay.

11 MR GARLAND: Since the court is narrowing it down, and
12 perhaps taking science out of the issue of admissibility, I am --
13 by your comments, assuming that, it becomes easier for us to focus
14 on this and easier to deal with this issue.

15 This man is going to have to come to trial, and we could
16 take this up immediately beforehand. It's a very important part
17 of the case and admitting it in extends the case, eliminating it
18 shortens the case. It's an important ruling in this case.

19 THE COURT: All right, well, we're going to take a break
20 right now, and I'm taking a break right now because I assume
21 that's everything from the defense on motion; is that correct?

22 MR GARLAND: That's correct, Your Honor.

23 THE COURT: Okay, and we'll take about a 15 minute break,
24 and I'll give some consideration to that.

25 MR. MOULTRIE: Your Honor, I'd just like to point out, if

1 I may, as you consider the point, Your Honor, we filed the motion,
2 the motion was suppose to be heard today, and that's why
3 Mr. Lanning is here.

4 And it just seems to me that in all fairness to Mr.
5 Lanning, if the defense has questions for him, the defense's
6 questions are going to be based in part on the motion that we've
7 already filed to admit him as an expert. He's been previously
8 admitted as expert in federal court on the very same issue twice
9 before.

10 And it seems to me, Your Honor, that in all fairness to
11 both the government and to Mr. Lanning that the defense ought to
12 be pressed to move forward because the purpose of today was to
13 address the motions that have been filed.

14 THE COURT: All right, well, my understanding is that the
15 response on that motion was due yesterday. So, all right, we're
16 going to take a 15 minute break, and when we come back, we're
17 going to take up the motions by the government.

18 *(RECONVENED; ALL PARTIES PRESENT)*

19 THE COURT: Did you get the Frazier case?

20 MR GARLAND: I did, Your Honor. Part of the dissent was
21 left off my copy.

22 THE COURT: Part of the what?

23 MR. GARLAND: The dissent was left off my copy. I got up
24 through page five.

25 THE COURT: Well, that's because I don't read the

1 dissent. This is what I want to do about the Daubert motion. I
2 want to you to file -- how long will it take you to get it filed?

3 MR GARLAND: I think we can have it day after tomorrow.

4 THE COURT: Okay. And then I'm going to take a look at
5 it. Daubert motions and hearings in my court tend to be very
6 informal, and I basically let the attorneys do whatever they want
7 to do within reason.

8 Sometimes I just resolve those on the briefs. Sometimes
9 it's necessary to put the expert. Sometimes it's necessary to
10 have countervailing experts.

11 So it can go from being very simple to very complicated.
12 Do you have any idea what your intention is in that regard?

13 MR. GARLAND: Your Honor, if I can discuss it with you a
14 little bit. Reflecting on this case, it would seem to me that the
15 government should put up what they purport they want this man to
16 testify to.

17 They have referred to it in the brief as a continuum of
18 characteristics, on page two of the brief, paragraph two of their
19 motion to admit the expert testimony of Mr. Lanning. They have
20 referred to the testimony they intend to submit as, quote, "the
21 continuum of characteristics of situational and preferential sex
22 offenders who offend against children and the very stages and
23 methods used to attract and abuse children." And that he would
24 testify to characteristics of compliant victims of sexual abuse.

25 In order to apply the Daubert test and the provisions of

1 Rule 702, I think the court probably needs to know specifically
2 what they purport or at least some outline of the actual substance
3 of it.

4 Now, I could put him up there and ask him about it, or
5 the government could, but -- in accordance with your approach of
6 some degree of informality -- I think we need to know in order to
7 focus it.

8 Our objection will be, and we will object, under Rule
9 702, and we will contend under 702 that the essential element that
10 this testimony is not the product of reliable principles and
11 methods, and element three, that the application by the witness of
12 those principles and methods was not reliability done as to the
13 facts of this case.

14 So it seems to me, your ruling becomes very fact
15 specific as to whether, you know, there's going to be generality
16 testimony, or, as we see the requirements of 702 and by the ruling
17 done in the Frazier case.

18 The thing that I see in Frazier is that you had a very
19 discrete, able to be analyzed, fact. You go through a crime
20 scene, and you get these things that you can specifically
21 reference.

22 Here we appear to be going to psychological
23 characteristics which by their very nature are individually
24 different and come in not necessarily any recognized format.
25 So I think there's factual differentials that we'd want to make.

1 Now, I do accept the opportunity to file our motion and
2 make it more focused and to reference in detail his prior work,
3 which we have not done. There have been a number of lawyers
4 entering and exiting this case, and the motion responses were
5 being done by Mr. Rubino, and we should have filed and wish to
6 filed some focused response.

7 THE COURT: All right, well, I'm certainly not going to
8 prohibit you from filing. You can file whatever you want to file.
9 I've asked you to focus it based on my thoughts about this when I
10 read the affidavit, and my understanding about Daubert. But it
11 sounds like what you're saying, though, is -- well, let me -- was
12 there a report done by this expert, and was the report made
13 available to defendants in this case?

14 MS. THACKER: Your Honor, there's not a report that
15 Mr. Lanning has done specifically with regard to this case because
16 he will be submitted as an educational witness with specialized
17 knowledge to assist the trier of fact rather to opine on any
18 ultimate conclusion in this case or the mental state of the
19 defendant; what Mr. Lanning's expertise is with regards to
20 behavioral characteristics of sex offenders and victims of sex
21 offenders, not the psychology of this particular defendant.

22 By way of delineating what it is that Mr. Lanning would
23 testify to, it's detailed both in our motion and as well in the
24 exhaustive attachments thereto.

25 Mr. Lanning's testimony regarding the continuum of

1 characteristics of sex offenders as well as the characteristics of
2 compliant victims has been developed over the course of his 30
3 years of experience in this area and has been set forth in
4 publications well before this case, including as set forth in
5 paragraph two of our motion, Child Molesters, A Behavioral
6 Analysis for Law Enforcement, which was first published in 1996,
7 and, A Law Enforcement Perspective on the Compliant Child Victim,
8 which was published in 2002.

9 The behavioral analysis that was first published in 1986
10 has been updated as recently as 2001. So those, all of those
11 documents set forth in detail what his testimony would be about
12 with regard to the characteristic of offenders and victims, and
13 the defense has that in the motion.

14 THE COURT: Well, are you proposing, Mr. Garland, that we
15 have a little hearing today, and let him testify about what
16 underlies his methodology and what is the basis for his opinion
17 and expertise?

18 MR GARLAND: I think what -- I would want that at some
19 point. What -- I do differ a little bit that the motion itself
20 does not really say what he's going to testify to. It makes
21 reference to law enforcement manuals.

22 So I was trying to get a clearer focus on what it is
23 they are offering the expert to testify to. I'm generally
24 acquainted with having that laid out as a basis of what is
25 expected to be offered.

1 So what I would like is for the government to make a
2 proffer of what it is they will have this man say. As I
3 understood it from the response just now, that he's going to talk
4 about generalized characteristics, not fact specific in this case.

5 THE COURT: Well, do have you a problem with doing that?

6 MR. GARLAND: But I'm not --

7 THE COURT: Do you have a problem with putting him on the
8 stand, and -- I just want to make sure we're on the same track.
9 What his ultimate opinions aren't an issue for a Daubert hearing.
10 It's his methodology and his credentials. So are we in agreement
11 about that?

12 MR GARLAND: Well, I'm not sure we are because I heard
13 her say that's -- no, Your Honor, we're not. I don't think under
14 the Frazier case that is the way the court focused it. As I read
15 the Frazier case, the court focused it, it says you have to look
16 at this in the context of the facts in the Frazier case.

17 THE COURT: Well, let me stop you because I was just
18 notified by my law clerk that Frazier was vacated back in
19 September and has been set for in banc rehearing. So we obviously
20 better not put too much credence in that.

21 MR GARLAND: Then, Your Honor, I do think I need to look
22 into it a little deeper.

23 THE COURT: Okay.

24 MR GARLAND: But just to follow up, however Frazier comes
25 out, as I read it, it seems that you take the rules of 702 and do

1 look at the -- whether the requirements of 702 are met in the
2 factual context. I think that's what it said. At least I read
3 that here.

4 So I'm not sure that I do agree with you that you only
5 -- if you look at methodology, I think it brings in the facts of
6 this case, because if he has methodologies, those methodologies
7 have to relate to the facts of the case. I think --

8 THE COURT: Well, let me stop you. Do you have a problem
9 with putting Mr. Lanning on the stand today and let him go over
10 some of this information?

11 MS. THACKER: No, Your Honor.

12 THE COURT: And I'm not talking about right now. I'm
13 talking about 3 o'clock this afternoon, or something like that.

14 MS. THACKER: Well, Your Honor, I believe Mr. Lanning's
15 flight is at 5:30 this evening out of Macon, however, he is here
16 and available now, but the position of the United States also,
17 with respect to what is required of us, is that our motion and our
18 brief should stand alone, as well as exhaustive attachments
19 thereto.

20 We filed notice, timely notice on November 24th, as well
21 as our motion to admit Ken Lanning's testimony on November 24th,
22 and set forth both case law as well as all the attachments with
23 regard to his credentials and a summary of what his opinion would
24 be with respect to those publications that the defense could have
25 read.

1 We have him here today so that they can cross examine
2 him or voir dire him on his credentials, and if we are prepared to
3 go -- we are prepared to go ahead forward with the hearing, but
4 they, having had three weeks, should also be prepared to cross
5 examine him.

6 THE COURT: Well, all I'm trying to do is to decide if
7 we're going to get anything done about this today or if we're
8 going to have to do it some other time. Now, there's very little
9 time left between now and the time of trial. I'm very reluctant
10 to stop the trial and have a Daubert hearing. I'm also very
11 reluctant to have a Daubert hearing at the end of the day, but we
12 can do that.

13 I'm trying to find out what the two sides can agree to
14 do today to get this resolved, and if we can't have some
15 resolution of it, then we're going to have to figure some way to
16 do it. So what can we do.

17 MS. THACKER: Your Honor, he is here and available. His
18 flight is at 5:30. We can put him on with regard to his
19 background and credentials and what he bases his behavioral
20 analysis with regard to sex offenders and victims. We can do
21 that.

22 THE COURT: All right, is that agreeable with you, Mr.
23 Garland?

24 MR GARLAND: Yes, Your Honor.

25 THE COURT: Okay, and then I'll let you file whatever you

1 want to file, and I'll let you add to the record whatever you want
2 to add to the record, and -- you know, I'm trying accommodate both
3 sides here.

4 MR GARLAND: Thank you.

5 THE COURT: And I'm certainly not holding it against you
6 at all that you may be a day or two late trying to get some
7 response in to this.

8 MR GARLAND: I think this will begin to help focus the
9 issue, Your Honor.

10 THE COURT: All right. Okay, well, we're not going to
11 take that up right now. We'll figure out a time when we can do
12 it, because I want to deal with these other motions. So now, we
13 anything else from the defendant?

14 MR GARLAND: Nothing further, Your Honor.

15 THE COURT: All right, let me just ask a question of both
16 sides here. There is a forfeiture count that is somewhere out
17 there in the ether. I'm not sure what the status of that really
18 is now that there has been a reindictment.

19 That case was actually assigned to Judge Fitzpatrick, if
20 I understand correctly. And my question is does the fact that
21 there has been a reindictment in this situation make any
22 difference about that?

23 MR. MOULTRIE: No, Your Honor. That's a civil forfeiture
24 matter that's been stayed, I believe, pending the outcome of the
25 criminal case in which there are two forfeiture allegations.

1 THE COURT: All right, do you agree with that, Mr.
2 Garland?

3 MR GARLAND: Yes, Your Honor, yes, sir.

4 THE COURT: All right. Okay, now, we're going to deal
5 with the government's motion, and I want to first find out which
6 motions the defense has objected to. There is the motion to
7 restrict dissemination of juror information.

8 MR. GARLAND: No objection. Wait, let me -- Your Honor,
9 let look at the prayer in the motion.

10 THE COURT: Well, you don't need to do that now, because
11 I have my own observations about that, and I'm going to make my
12 own motions, so to speak, related to the motion to restructure
13 dissemination of juror information and the motion to partially
14 close the courtroom.

15 MR. GARLAND: Yes, Your Honor.

16 THE COURT: So I'm going to save those for the end of the
17 discussion of the defendant's motions, and tell you what I'm
18 proposing in this case, and tell you why I'm proposing it, and
19 then give you all the opportunity you need within reason to
20 respond to what I'm proposing in this case.

21 Now, there's the motion in limine related to evidence
22 about government witnesses, and I think basically this is sort of
23 covered in the Rape Shield law. Do you have any objection to
24 that?

25 MR. AURORA: Judge, I mean, the motion is fine, and

1 that's the rule, we're not suppose to go into it unless they go
2 into one of the physical issues or something like that opens the
3 door, so we'll respect that.

4 THE COURT: Okay, well, I just was not clear about if you
5 thought you had some theory under which you might be able to bring
6 this in. I mean, I understand that there are theories under which
7 evidence of this type can bring be brought in.

8 MR. AURORA: Yes, sir.

9 MR GARLAND: May I join, Your Honor, on that?

10 THE COURT: Sure.

11 MR GARLAND: I think our position is that we will comply
12 with the law. If the evidence develops a theory where we believe
13 that to go beyond the Rape Shield, an exception to it arises, we
14 would commit to first address that with the court before any
15 mention either in opening or in cross of those issues so that we
16 don't -- and follow such a procedure.

17 THE COURT: Okay, all right, we don't have to deal with
18 that. Then there's the motion to release the redacted copy of the
19 indictment.

20 MR GARLAND: No objection, Your Honor.

21 THE COURT: And then we're going to deal with the motion
22 on the expert testimony. Now, there are a number of orders that
23 the government has requested that I sign to seal their responses.
24 I assume you don't have any problem with that. I haven't signed
25 any of those yet because I wanted to make sure you didn't have

1 objection to that.

2 MR GARLAND: No objection, Your Honor.

3 THE COURT: Okay, well, I'll sign those today then and
4 that will take care of that. All right, now, other than the
5 motion to restrict dissemination of juror information and the
6 motion to partially close the courtroom, is there anything else
7 the government has that we haven't taken up?

8 MR. MOULTRIE: Yes, Your Honor, if I could quickly ask
9 the court. Our computer tech person is here, I believe you know
10 him, Milton Hooper, and what we're proposing to use at the
11 courthouse is the sanction program, the computer program that
12 allows us to display trial exhibits using various flat screens.

13 And Mr. Hooper is here, Your Honor. We wanted him to
14 have him available to talk very briefly about what we're proposing
15 to do in order to expedite the presentation of our evidence.

16 We're also going to make the sanction program available
17 to the defense, if the defense has any exhibits they'd like to
18 display in that manner. And I think, Your Honor, that that
19 equipment has been used in your courtroom previously.

20 THE COURT: Well, let me simply say this, and we'll
21 talking about the way I conduct a trial in just a minute, that
22 this would be more appropriately brought up under those
23 circumstances. The way I handle demonstrative evidence is very
24 simple, if you want to present something, and you have the
25 capability to present something, and it's not going to delay the

1 trial, then all you have to do is submit it to the other side, and
2 if they agree with it, then it comes in. It's not coming into the
3 evidence obviously; it's coming in for use at trial.

4 If they object to it, then it needs to be brought to my
5 attention, and I will decide. Do y'all understand that? It's
6 really fairly simple.

7 The same works for you, if you have any kind of
8 demonstrative evidence, anything that you want to use with the
9 jury, then just exchange it, and if there's no problem with it,
10 then it's going to be used as far as I'm concerned.

11 MR. MOULTRIE: Yes, Your Honor. But the point I was
12 actually making is not the evidence that we intend to present, but
13 rather the method by which we intend to present it. What we're
14 asking the court is for permission to use the computer sanctioned
15 program to display the evidence.

16 What it will require is for Mr. Hooper to go down in
17 advance and set up the computer equipment in the courtroom, and I
18 think previously the court has used that equipment before, but I
19 wanted to bring it to the court's attention in case the court
20 didn't want us to use that equipment in the courtroom.

21 THE COURT: Well, do you have an objection to him using
22 that equipment?

23 MR. GARLAND: No, we look forward to using the equipment.
24 As I understand it, and my experience has been, that the
25 government technician who operates that equipment will make

1 himself equally available to the defense for the purpose of us
2 being able to get our stuff into the computer.

3 THE COURT: Is that correct?

4 MR. MOULTRIE: That's correct, Your Honor.

5 MR GARLAND: So the experience I've had was that -- the
6 gentleman, unfortunately, in the Southern District was killed
7 recently, he was a technician, said to us, and the government
8 said, if you give me exhibits here and things you want to put in,
9 I will put them in. I won't go running over and say something
10 about it until you're ready to use it, and then you have to bring
11 it up to the prosecutor.

12 THE COURT: All right, that's fine. I will tell you as
13 people this courthouse know I don't like technological problems.
14 I don't like it holding up the trial of my case, and so if you're
15 going to use technology, it better be working.

16 MR. MOULTRIE: Judge, it will speed up the trial.

17 THE COURT: Okay, that's fine.

18 MR. MOULTRIE: And we'll go down in advance to set it up
19 and makes sure it works properly.

20 THE COURT: All right.

21 MR. MOULTRIE: The other thing I wanted to add, Your
22 Honor, just in as in abundance of caution, I didn't make this
23 point in any written motion, and that is, when the trial
24 transcript is produced, I'm not sure which court reporter will be
25 assigned to the courtroom, but the Child Victim and Witness Act

1 requires that the initials of the children be used in all
2 correspondence that may be made public. Now, that probably should
3 have been added as part of my motion to partially closed the
4 courtroom, and I didn't add it.

5 THE COURT: Do you have an objection to that? Does the
6 defense have an objection?

7 MR GARLAND: No, Your Honor.

8 MR. MOULTRIE: Thank you.

9 THE COURT: Now, let just mention while we're talking
10 about this, that any of these little technicalities such as that
11 and it's a technicality in the sense of how it's going to be
12 handled, not the substance of it, I'm not trying to -- but I would
13 appreciate it if you would get together with defense lawyers and
14 try to work these things out.

15 I want this trial to move along very smoothly, and I'm
16 going to do what I can to ensure that that happens, and anything
17 that you can do beforehand that would assist in that would be
18 greatly appreciated by the court. Is that understood?

19 MR. MOULTRIE: Yes, Your Honor.

20 MR GARLAND: Yes, Your Honor.

21 THE COURT: Anything further before we get into the
22 motions, the last two motions?

23 MR. MOULTRIE: Yes, Your Honor. I've not received any
24 response from the defense pursuant to a request for reciprocal
25 discovery that I filed very early in this investigation, and I've

1 also not received any notice of any experts that the defense plans
2 to use, and I believe that there may be a 14 day rule on that from
3 the date of trial. So we are fastly approaching that deadline if
4 we haven't approached it already.

5 THE COURT: Do you want to respond?

6 MR. MOULTRIE: Excuse me, Your Honor, if I could just
7 add, my motion was filed for reciprocal discovery on July 11th,
8 2002.

9 THE COURT: What about the reciprocal discovery, Mr.
10 Garland?

11 MR. AURORA: I'll attach that with the Daubert issue with
12 our experts as well. So I'll have it all by Thursday afternoon
13 here.

14 THE COURT: Okay.

15 MR. MOULTRIE: Your Honor, I just want to add that the
16 deadline is December 22nd for the notice of experts.

17 THE COURT: Are you going to have an expert in the case?

18 MR. AURORA: Perhaps.

19 THE COURT: Well --

20 MR. AURORA: Well, I mean, I anticipate it. We've got a
21 few folks. I just need to iron out the details. So I'll give
22 notice of it. We may or may not need it, and if we do, I'll let
23 the court know if we're going to call them or not.

24 THE COURT: Well, you need to let me know very quickly.

25 MR. AURORA: Yes, sir.

1 THE COURT: All right, because experts have particular
2 problems or legal issues, I guess is a better way to state that,
3 and I want to deal with those issues in a timely fashion. All
4 right?

5 MR. AURORA: A lot of those experts, Judge, arguably, are
6 just to rebut some of the medical experts that the state has given
7 us notice of. So whether they use that information or not, may or
8 may not make them relevant.

9 So I'll give notice of those folks and -- then we may or
10 may not call them. I mean, that's why I say perhaps we may use
11 them, we may not. There were a lot of physical examinations done,
12 and we've got pediatric folks that have reviewed all those
13 documents. If they don't go into it, which just goes into the
14 Rape Shield and all that stuff, then all of it become moot. If
15 they do, then they're --

16 THE COURT: Okay, on the remaining two motions by the
17 defense, I want you to understand my position on this. A motion
18 was filed by the defense in this case to change the venue, and I
19 spent a long time and gave a lot of consideration and put a good
20 bit of work into deciding where this case was going to be tried.

21 And after doing all that work, after doing some
22 investigation and talking to the people down in the Brunswick
23 area, I concluded that Brunswick was the best place to try the
24 case.

25 And I was extraordinarily unhappy when I found out that

1 the Nuwabians had gone down -- the followers of Malachi York had
2 gone down to Brunswick and joined in the parade and had
3 disseminated material, and as far as I'm concerned, have tampered
4 with the jury or attempted in this case to tamper with the jury.

5 Now, I suspect that if we tried this case starting
6 January 5th, and this hadn't happened, there would have been only
7 one newspaper article about this case. That was the newspaper
8 article that came out in the Brunswick paper after I entered the
9 order transferring it.

10 I have someone down there, several people actually,
11 reading the newspaper and checking the media to find out what has
12 actually happened down there. And so there was this one lone
13 article which is all I know about until what happened recently.

14 And I found out this weekend, this week when I actually
15 went down to the courthouse to become acquainted with it, about a
16 number of people who actually received information, and this
17 information obviously was designed to exculpate Mr. York.

18 Now, whether Mr. York directed this or not makes no
19 difference to me. It's obviously done by his followers in this
20 case, and it's obviously a situation where I think that it is
21 going to make it more difficult to pick a jury in this case.

22 I don't how much more difficult it's going to make it,
23 but I think it's going to be somewhat more difficult. I suspected
24 that it would have been very easy to pick a jury in this case. I
25 still believe that the majority of people who are going to be

1 called to the trial of this case are not going to have heard about
2 any of this.

3 I am concerned about the jurors, and I'm concerned about
4 the witnesses in the case. And as far as I'm concerned, I'm not
5 at all convinced that the government has gone far enough in their
6 notions related to witnesses and jurors, and I am inclined to
7 believe that more stringent action needs to be taken in this case.

8 What we have is a case where we have a defendant who is
9 charged with very serious crimes, crimes that involve bodily harm,
10 crimes that involve minors. There's evidence in the case that
11 witnesses have been threatened. There is evidence in the case,
12 based on what I know at this time, that there's been an effort to
13 interfere with the judicial process here by affecting the jury in
14 the case, and I think that it's clear that threats to witnesses
15 could easily become to threats to jurors. And so I am very
16 concerned about what might happen to these jurors.

17 I think that the evidence submitted by the government in
18 this case, most of which I didn't even know about until I read the
19 information just recently, was not even known to me. Most of the
20 conclusions that I reached about this were based on what I've
21 learned in the last few days.

22 And so it's very clear in this case that assuming that
23 he's convicted that there's a substantial likelihood of a lengthy
24 sentence. There's also a possibility of a very high monetary
25 award or penalty. There's a forfeiture.

1 Certainly it has come to my attention on the bench that
2 cases are filed, some of which are simply harassment cases against
3 various people who've had some kind of connection somehow in the
4 judicial process related to either Mr. York or the Nuwabians.

5 And so I'm very concerned about how witnesses and jurors
6 might be affected in the case. And in anticipation of that, I
7 have thought about the possibility of sequestering the jury, and I
8 still may do that, although I think that the case where the
9 government is going to spend two weeks, and I assume there'll be
10 some significant evidence from the defense in this case, that to
11 sequester this jury would be quite onerous. I may do that yet.
12 I'm really not sure.

13 Another consideration that I have is an anonymous jury.
14 An anonymous jury would be one in which the only people who would
15 know the names and addresses and informed of the jurors in this
16 case would be the court and the court staff and those people who
17 need to know that information.

18 I've also considered closing this trial. The
19 possibility of closing the trial to anybody but the media.
20 Certainly the media is invited to attend this trial. I hope the
21 media will come to this trial. The Supreme Court has made it very
22 clear that media nowadays is surrogate of the public in so many
23 ways in terms of what happens.

24 I understand that there's a First Amendment right that
25 the public has to come to the trial. I understand that there's a

1 Sixth Amendment right that the defendant has to have a public
2 trial. I also understand that there are circumstances under which
3 both of these rights can be significantly limited, and those
4 circumstances are generally circumstances that involve organized
5 crime one way or another.

6 We have a RICO enterprise theory in this case. There's
7 certainly a concert of action in this case in my mind related to
8 the organization of efforts to come down to Brunswick. There is a
9 web site. You filed your motion on this change of venue issue and
10 dismissing the indictment as a result of that.

11 The reality of the situation is so much of what's out
12 there has been put out there on the web site. So I've looked at
13 the material from the web site. I'm familiar with all of that.

14 And so the circumstances in this case in my mind make it
15 very unusual. If the lawyers had gone down and passed out this
16 material, you know how much trouble you would be in, and you know
17 how wrong that is and how improper that is.

18 And so the circumstances of this case in my mind require
19 some very unusual action to protect the jurors because I'm afraid
20 that they're going to be intimidated. I'm afraid that they might
21 be offered some kind of reward. I'm not sure exactly what might
22 happen.

23 But it all comes down to the obstruction of the judicial
24 process. The judicial process is paramount in this case. It has
25 to work according to the way that it normally works, and so as a

1 consequence of that, I'm thinking about taking some action beyond
2 what is requested by the government in this case.

3 Now, I'm not going to enter a ruling today. I'm going
4 to give you or anybody else the opportunity to respond with any
5 motions, any evidence, or anything else that you'd like to add in
6 this case.

7 That needs to be submitted -- let's see -- we have a
8 telephone conference or -- it's a telephone conference on the
9 30th, and let me see this a minute. I'd like for you to submit
10 whatever you want to submit by December 24th. Is that adequate,
11 Mr. Garland? Is that adequate?

12 MR. GARLAND: That's adequate.

13 MR. MOULTRIE: Yes, sir.

14 MR. PATRICK: That's to submit the briefs, Your Honor?

15 THE COURT: That's to submit anything that you or anybody
16 else wants to submit on this matter, and then I'll rule about
17 that. But I want you understand my concerns about this case, and
18 what I think is just outrageous conduct, inappropriate, and
19 designed to impact this jury pool. Do you have any questions, Mr.
20 Garland?

21 MR. GARLAND: No, Your Honor. I would agree with your
22 comments that if I had had anything or the defense counsel had
23 anything to do with it, it would be totally improper.

24 THE COURT: Right.

25 MR. GARLAND: And I want the court to know that we had no

1 knowledge of it and learned of it this past weekend.

2 THE COURT: Right.

3 MR GARLAND: And we will file an appropriate response
4 concerning the issue of closure. I think our position will be
5 that it has to be a public trial and that exclusion of the public
6 would be too drastic a remedy, so the court knows where we'll be
7 on that.

8 As it relates to anonymous jury, we would want counsel
9 to know the background of the jurors adequately, but a
10 dissemination of their names in any way, I think is not necessary.

11 THE COURT: Well, what is your -- what do you mean by
12 background?

13 MR GARLAND: Well, I do want to know where they live. I
14 want to know, but I would operate under a restriction of not
15 communicating that beyond myself. But I think residences and
16 environment and neighborhood has a way of informing counsel in
17 some respects in making judgments in jury selection. So we would
18 seek that.

19 THE COURT: Well, based on my review of the cases, it's
20 common to restrict the information related to name, address, and
21 employment, but I'll certainly consider that, and that's something
22 you can bring to the court's attention.

23 MR GARLAND: Right.

24 THE COURT: Now, let me mention --

25 MR. GARLAND: Can you give me just a minute, I'm not sure

1 I addressed the rest of the --

2 THE COURT: Okay, well, you don't have to address
3 anything right now. I'm giving you the opportunity to have time
4 to deal with it.

5 Do you have any questions, Mr. Moultrie, about that?
6 You may not like that either, Mr. Moultrie.

7 MR. MOULTRIE: I don't.

8 THE COURT: But --

9 MR. MOULTRIE: I actually join in the defense with their
10 concern, Your Honor, but what I wanted to -- the point I wanted to
11 make was concerning the motion as it stands for the partial
12 closure of the courtroom.

13 Mr. Garland in his remarks raised the concern about
14 public not having the opportunity to view the trial, however, I
15 believe the United States Supreme Court has made it clear that the
16 media is the surrogate of the public, and the court has said that
17 if it imposes closure of the courtroom, the media will be present.

18 That would suffice for the government, and I think it
19 would also meet the concerns of the court, and I would think,
20 frankly, the concerns of the defense team themselves.

21 It's important that the judicial process be protected in
22 this case, and they apparently are not able to do that with
23 respect to their own efforts, and we certainly cannot do it
24 either, Your Honor, and it may require as the court has just said,
25 go above and beyond what the government has previously asked for

1 in that respect.

2 THE COURT: All right.

3 MR. GARLAND: Your Honor, addressing whether the jury
4 would be sequestered and the length of trial. I'm really unclear
5 about the scope and length of cross examination in this case. I
6 could see that it would very important for rather detailed
7 examinations, Your Honor, not just on the act, but on all the
8 surrounding circumstances leading up to it and other things.

9 So it does have the potential for the need for
10 examination of a lot of factual details, as well as relationships
11 between the respective parties and their motives. So it is not my
12 intent to say it's going to be extraordinary long, but I think if
13 we have jury selection care, and they're saying two weeks, you
14 would add, I would say, another week to that, in all probability.

15 THE COURT: All right, so you're predicting it will be a
16 three week trial, is that what I understand?

17 MR GARLAND: If I'm hearing the government right, they
18 need two weeks to put up the substantiative evidence, and then --
19 is that correct, Richard? And then you have the issues of
20 argument and jury selection and defense case and perhaps rather
21 detailed examinations of the witnesses, that the two weeks, it
22 might be a little longer.

23 I have always been wrong on my predictions on the length
24 of trial, so I'd ask the court to put no weight on those
25 predictions. I just see factors here that could bear on it, and I

1 tend to not favor the sequestration of jurors because of the
2 catharsis it puts them through, however, I recognize in this case
3 there are some special circumstances.

4 THE COURT: All right, I understand.

5 MR. MOULTRIE: Your Honor, the government would just like
6 to go on record as saying that it would like a sequestered jury,
7 that it would like the opportunity for individual voir dire
8 questions to be put to the jury panel in a closed courtroom, and
9 that for the other reasons that the government has already stated
10 and stated in written form in its request for the partial closure
11 of the courtroom, that we would also ask that, again, the trial be
12 closed except for the media.

13 THE COURT: All right.

14 MR GARLAND: Just to respond to that, we join in the
15 wanting individual sequestered examination of each juror.

16 THE COURT: Well, I'm not inclined to do that, so you
17 better have a good reason for doing that, and you better submit
18 something to me on it if that's what you want because I'm not
19 inclined to do that.

20 MR GARLAND: Would Your Honor share what you are inclined
21 to do where we do have these issues of publicity?

22 THE COURT: Yes, we're going to talk about that just in a
23 minute. I'm going to tell you how I'm going to proceed in just a
24 minute. I want to make sure that we deal with the motions,
25 and then we'll move forward with that. Anything else related to

1 government motions?

2 MR. MOULTRIE: No, Your Honor.

3 THE COURT: All the motions have now been covered.

4 MR. MOULTRIE: Yes, sir.

5 THE COURT: Okay. I want to explain a number of things
6 to you about the way I expect this trial to be conducted, and then
7 I'm going to give you the opportunity to ask me as many questions
8 as you would like to ask.

9 The first thing that you need to understand is that I am
10 very jealous of the jury's time, and as a consequence of that, I
11 expect you to be prepared on your direct examination and cross
12 examination and arguments and so forth, and any motions that you
13 might want to make during the course of the trial.

14 This case has been around for a long time, and you've
15 had ample opportunity to know what your case is about and get
16 prepared for it. And so I am expecting you to come out of the
17 starting gate and move to the finish line. And I don't abide a
18 lot of fumbling papers around and asking for extra time and so
19 forth and so on during the trial of the case. Do you understand
20 that? Okay.

21 MR GARLAND: Yes, Your Honor.

22 THE COURT: So I'm not going to be unrealistic or
23 unreasonable about that, but I am going to push you, and I'm going
24 to tell the jury that I'm going to push you, which is my standard
25 practice. I am not doing anything differently in this case than I

1 would in any other case, with the exception of what we talked
2 about just a minute ago.

3 So this is the standard approach that I use to the trial
4 of a case, and I don't think it makes any difference whether it's
5 a big case or a little case, these same rules apply.

6 I will tell you, and I note specifically for this case,
7 is we've just had two new attorneys come into the case, and that's
8 fine. I don't have a problem with that. But you told me, Mr.
9 Garland, that you're going to have a meeting this afternoon and
10 decide who is going to be lead counsel.

11 And what I will tell you is simply this, I'm not going
12 to continue this case because there are two new lawyers in the
13 case, and I'm not going to let anybody out of case, including
14 Mr. Rubino, if it's going to cause this case to be delayed or
15 cause problems in the trial of this case.

16 So we're moving forward with this case on January the
17 5th. That's the plan. It's set up for that. An enormous amount
18 of work from my office has gone into that, and that's the way
19 we're going to go unless there's some very, very strong reason for
20 doing it in a different way. So I want you to understand that.

21 Now, as far as the conduct of the case, I expect there
22 to be lead counsel, and that certainly does not mean that lead
23 counsel has to try the entire case. I don't have any problem
24 with, you know, one attorney taking a witness or one attorney
25 taking a motion, the way we did it today.

1 Mr. Aurora, you handled a lot of the technical matters,
2 and I don't have any problem with that at all. But we're not
3 going to deal with motions by committee. Only one person can
4 respond or make the motion. And I'm not going to let you consult
5 three or four different lawyers about each time a motion is made
6 you. You understand that. And if you make the motion, then you
7 make it.

8 Unlike some of my brothers on the bench in the Southern
9 District, I'm not necessarily opposed to side bar conferences, but
10 you can definitely over do that. What I do not like is to take
11 the jury out. I do not like to take the jury out. If you make an
12 objection that I think is a jury argument, I'm going to very
13 firmly cut you off and rebuke you for that.

14 There are certainly occasions when it's important to
15 approach the bench. Most objections don't require that. So I'm
16 going to expect the objection to be made by one person. I'm not
17 going to say that you can't get a note from somebody else related
18 to that objection, but I'm clearly saying you can't go around get
19 a head count about what the objection ought to constitute.

20 We're going to move forward with the trial of the case.
21 If we have a bench conference, one person from the defense and one
22 person from the government can come to the bench. We're not going
23 to have everybody coming up. It's very difficult for the court
24 reporter to deal with a situation like that.

25 There may be occasions when we have to take the jury

1 out, but I need to understand very clearly why it is that the jury
2 needs to be taken out, and it has been has to be a very good
3 reason. It just takes up too much time.

4 As far as objections, let me just tell you that I have
5 two rules that may be peculiar to me. One is, as far as leading
6 questions are concerned, those matters that I consider to be
7 preliminary or threshold or foundational, you can lead the
8 witness, and any objection that you make at that point is going to
9 simply be denied. So don't waste my time on those kind of
10 objections.

11 There are a lot of issues that are really collateral or
12 foundational that really help to move the -- that leading
13 questions help to move the case along. So I tend to be much more
14 lenient with leading questions. However, don't put testimony in
15 your client's mouth or your witness's mouth when you know that
16 it's something that shouldn't be done.

17 Okay, now, we have very experienced lawyers here. I'm
18 not troubled about that at all. I know you're competent, I feel
19 very comfortable with you. So I have high expectations about the
20 way you're going to conduct yourselves in the trial of this case.

21 I suspect that you're going to find that I'm fairly easy
22 to deal with as long as I think you are playing by the rules. But
23 when I conclude that you are not, then it's going to be much
24 harder for you to conduct the trial of this case.

25 So as long as you conduct yourself as ladies and

1 gentlemen, then I don't think we're going to have any trouble
2 getting along, but I will tell you that there are judges that
3 cross the spectrum of judges who like an uncontrolled courtroom,
4 they like cheap shots and dirty tricks, and then there are other
5 judges who do not like that and don't tolerate that, and I'm one
6 of those.

7 So you need to keep that in mind. I think
8 professionalism is very important, and I expect you to conduct
9 yourselves in a professional way throughout the trial of this
10 case.

11 As far as the picking the jury in this case, I haven't
12 -- I've thought about a number of ideas related to how we're going
13 to pick the jury in this case. I will tell you that I'm going to
14 do the voir dire, and I will tell you that the way I typically do
15 the voir dire is that I may have some of my own questions, and I
16 probably will have more than the normal questions in this case.

17 And what I'd like for you to do is come up with your
18 questions for the jurors and exchange those, and if you have any
19 objection to the other side's questions, then you need to bring
20 those to my attention, and then I'll rule on that, if necessary.
21 Otherwise, I will ask the questions that you've submitted unless I
22 find for some reason that I think they're inappropriate.

23 So you understand that, and what I want you to do is to
24 exchange those in time enough so when we have our telephone
25 conference on December 30th that you'll have the opportunity to

1 bring those objections to my attention.

2 Now, let me point out to you that the reason we're doing
3 this by telephone is because I assume that you're going to be busy
4 preparing for trial of the case, and so I'm not going to require
5 the defense lawyers to come down here.

6 If you'd like to do this in chambers, we can do that,
7 but it's primarily in deference to the defense attorneys so you
8 don't have to spend three or four hours trying to get down here
9 and back.

10 I am concerned about the pretrial publicity in this
11 case. I suspect, as I said earlier, it may not be as -- there may
12 not be as much impact as there possibly could be, primarily
13 because there will be a number of jurors who come from outside of
14 Glynn County.

15 So anyway, we'll find out what the circumstances are
16 when we start to examine these jurors, and I'll be asking them
17 questions, and I have certain questions that I ask that relate to
18 their ability to serve as fair and impartial jurors in this case
19 which are fairly standard.

20 So if we a situation which there might be a question
21 about it, then we'll take it up. Sometimes there are matters that
22 come up during voir dire that are personal matters, and I'll let
23 the jurors come up to the bench and tell me about if they might be
24 embarrassed to stand up to something that they might not want the
25 rest of the jurors to hear.

1 So in that sense, there would be some individual voir
2 dire in those circumstances. If you want to strike a juror for
3 cause, that motion needs to be made at the time we're dealing with
4 the juror and the issue comes up. Do you understand that. All
5 right.

6 If you have a Batson complaint, that needs to be made
7 before the jury is put in the box. I want you to bring that to my
8 attention before the jury. I am going to do the best I can to
9 ensure that that the jury that tries this case will be fair and
10 impartial and that they can enter the jury box with a clear mind
11 and decide this case based on the evidence and the law that I
12 charge.

13 So I'm going to do what I need to in order to accomplish
14 that. If it is required to do individual voir dire, then I will
15 do that, but I'm not at all convinced that's required, and I don't
16 know that we'll know that until we ask some preliminary questions
17 of the jurors, but I haven't decided what I'm going to do about
18 that yet. That's on my to-do list.

19 And so if you have any recommendations or suggestions
20 about that, I'll be glad to hear from you about that.

21 As far as the opening statements are concerned, the
22 opening statement is an opportunity for you to present an overview
23 of the case. It is not an opportunity for you to argue the case.
24 It is not an opportunity for the defense to go into some lengthy
25 explanation of the principles of burden of proof and reasonable

1 doubt and innocence and so forth and so on.

2 So I want you to outline the case, I will give you
3 reasonable amount of time to do that, and I would like for you to
4 tell me at the beginning of the trial how much time you think
5 you're going to need, and then once you tell me that, I'm going to
6 keep you to it.

7 Basically the same with the closing arguments. As far
8 as the closing argument is concerned, I tend to be very lenient
9 with closing argument. If you want to use your documentary
10 evidence, whatever, your displays, flip chart, whatever you want
11 use, then that's fine, you can use that as long as -- it's taking
12 up your time, though, and, if you have an hour to do closing
13 argument, and it takes you 15 minutes to fiddle with your
14 equipment, then you're down to 45 minutes. So that's another
15 consideration that is important in my mind.

16 Now, we will have a charge conference in the case, and I
17 don't think it will last very long in a criminal case, so I don't
18 see that will be a particular problem. You certainly need to
19 submit to me whatever you think will be appropriate under the
20 circumstances, and I'll consider all of that.

21 And as far as your conduct in the courtroom, or your --
22 let's see your movement around the courtroom, I am not a stickler
23 for formality. I have a very simple rule. You have to be close
24 enough to a microphone that the court reporter can hear you, and
25 the court reporter is going to call you down, if you aren't. It's

1 not even going to take me; he's going to tell you that he can't
2 hear you.

3 And so that's going to be the requirement. If you want
4 to stand outside of the podium, I don't have any problems with
5 that. I think it's going to be a little bit difficult for you to
6 pace back and forth because you won't be heard. And so as far as
7 I'm concerned, the conduct or your moving around the courtroom, is
8 controlled by the needs of the court reporter. It's not the
9 formality that I might impose.

10 If you want to approach the witness, just say, may I
11 approach. You don't have wait for me to say, yes, just move on
12 up. I'm not going to let you do an extensive cross examination of
13 a witness at the witness -- you know, right there in front of the
14 witness. You're going to have to move back away from the witness.

15 Certainly if there are documents that you have that you
16 want to show the witness to refresh the witness's memory or
17 whatever, then I don't have any problem with you standing there
18 and doing it that way.

19 I do want you to make sure that there is a witness
20 exhibit notebook. I need an exhibit notebook, the witness needs
21 an exhibit notebook, and you need an exhibit notebook. Do y'all
22 understand that? Because I don't want time to be taken with
23 somebody fumbling around trying to find an exhibit to show the
24 witness. So I want you to get together and agree. There may not
25 be any. I don't know what you are going to have, but I think it's

1 important in this case for you to be prepared with these
2 witnesses.

3 I'm going to give you the opportunity to do a thorough
4 and sifting cross examination of the witnesses in this case, but
5 I'm not going to let you be a battering ram. I just don't -- if
6 you don't like the answer you get the first time, I don't let you
7 continue asking the question until you intimidate the witness into
8 answering the way you want it answered. So I want you to be on
9 guard against that.

10 I will tell you that I have what I call the modified
11 cumulative evidence rule. Modified from Judge Owens's rule. And,
12 that is, my rule is that I'm not going to let you put up a lot of
13 witnesses to testify about the same thing over and over again.
14 I'm not going to restrict you to just one witness, but when the
15 testimony becomes cumulative, that is an appropriate objection for
16 either side to make, and depending on the circumstances, I might
17 restrict the testimony.

18 So, again, this goes back to what I said at the very
19 beginning about jealously guarding the time of the jurors in this
20 case. Now, is anything I haven't covered or you would like to ask
21 me?

22 MR GARLAND: What do you think our hours will be and what
23 about break time and that sort of thing.

24 THE COURT: Well, okay, the trial should start at 9
25 o'clock. That's generally what I do, and I generally conclude at

1 5 o'clock, and that's my general practice. Now there are certain
2 circumstances where, for example, if we have a witness on the
3 stand, and that witness is going to take 15 or 20 minutes or 30 or
4 even 45 more minutes, I may ask the jury if they'd like to stay a
5 little bit later. So I am flexible to that. I rarely start
6 before 9 o'clock because a lot of these jurors in federal court
7 have to come from 50 miles away, but I do go beyond the 5 o'clock
8 hour.

9 MR. GARLAND: Will you have a practice about hearing the
10 counsel before the court cranks up in the morning?

11 THE COURT: Yes, I'm glad you brought that up. It is my
12 practice to be at courthouse before the trial starts. I will try
13 to be there by 8:30 or so, and I will tell you that if you have a
14 matter that is going to come up in the trial of the case during
15 the course of that day, you need to bring it to my attention that
16 morning before the trial starts.

17 Or, if you learn about it during the course of the
18 trial, at the break or during the lunch break. And if you bring
19 up something during the trial that requires me to have to take the
20 jury out, and I think you should have brought up before trial, I'm
21 going to be very unhappy about that.

22 So it is very important to me for you to you bring
23 matters to my attention when the jury is not there, okay, when
24 we're not doing something with the jury. Obviously, there are
25 many objections that come up during the course of a trial that

1 cannot be anticipated, and I'm not talking about that.

2 I'm talking about matters that are going to take some
3 discussion. It may be some testimony, it may be some legal
4 research. Something like that that's significant, and you're all
5 good enough attorneys to know what that is. So that is definitely
6 an important point, and I'm glad that you brought that up.

7 MR. PATRICK: Your Honor, what time is the telephone
8 conference on the 30th?

9 DEPUTY CLERK: 10 o'clock.

10 MR. PATRICK: And we'll just provide your assistant with
11 all our --

12 THE COURT: Right, yes, that would be great if you would
13 do that, we'd appreciate very much.

14 MR. GARLAND: Your Honor, just on the issue of the
15 individual examination of jurors, and assuming we're going to have
16 some jurors that have heard about this case, assuming that, I urge
17 you to take those in chambers and question them.

18 I also urge you to consider that type of examination if
19 anyone in their family or friends or someone they're personally
20 connected with has had experiences with allegations of child
21 molestation, either personally as a victim or in the family those.
22 Are so sensitive -- excuse me, yes, Your Honor.

23 THE COURT: I agree with you about the child molestation
24 questions, and that's exactly what I had in mind when I said
25 earlier that there are questions related to matters that might

1 really be embarrassing, and they can come up to the bench, and I
2 think that that would certainly be justified in those situations.

3 If we have a number of jurors in this case who say
4 they've never heard of Malachi York or the Nuwabians or don't know
5 anything about this case, and that's a significant number from
6 which to pick this jury, I don't know why I need to take them
7 individually, and, say, are you sure you really don't know
8 anything. Do you understand what I mean by that?

9 MR. GARLAND: I do, Your Honor. I think what you're
10 saying is that can we agree that if they've heard about it, cut
11 them out.

12 THE COURT: Well, that's one idea I have. At least
13 initially, not -- you know, it may be how many jurors have we got
14 coming, Lee Ann -- we're expecting to have 130 jurors.

15 MR. GARLAND: I have had the privilege of being in a
16 highly publicized case in that courthouse, and there are very
17 commotive -- seem to be a very adequate place where the judge in
18 our case, Judge Bowen, because of the publicity, did bring jurors
19 in individually, and it was a pretty comfortable and quick
20 process, after he had done his general voir dire.

21 So I just want to suggest that it is a rather workable
22 procedure and better than the bench and attempt to explore what
23 may be very sensitive matters. And what he did was, we did some
24 weeding, and it would be -- it was a local case where there was
25 massive publicity, and, there was not a change of venue in that

1 case, but we addressed the issue of the general exclusion. Both
2 sides, I think, in that case agreed, if they had read or heard, or
3 -- well, we were able to exclude some general portion.

4 THE COURT: Right.

5 MR GARLAND: But there were others that had heard, but
6 who felt like they could be fair jurors, and though they said they
7 could be fair jurors, they were taken in individually, and in that
8 particular instance, we were given individual follow-ups to
9 explore it.

10 So I urge that approach as a very workable, not a non
11 workable approach, and one that, given the sensitivities of this
12 case, which there are emotional sensitivities here about child
13 molestation, I think would, in fact, be helpful.

14 I would also ask the court to consider working out a
15 process where after you -- or when you do your general questions,
16 we can submit to the court follow-up questions on those areas, and
17 then finally, I would ask that you consider after that has been
18 done, allowing us to request the right of individual voir dire on
19 a sensitive point or something where the court could interplay
20 with us after you ask questions that you might say, all right, Mr.
21 Garland, do you have any follow up on that point. I would suggest
22 that approach.

23 THE COURT: Well, I think we can be flexible about that.
24 I mean, if we have a hundred jurors who say that they've never
25 heard of Malachi York or the Nuwabians or the trial of this case,

1 you know, I'm not sure what the question necessarily would need to
2 be, some of them are obvious, then I think that makes a
3 difference. If we only have ten, then that's going to make a big
4 difference too about how we conduct this.

5 And so what I'm telling you is I haven't got finally
6 decided the approach I intend to use, and I'm also telling you
7 that depending on what I find out when we get there, then there
8 are certainly different arrangements that can be made.

9 I understand your concerns, and I think we're just going
10 to have to see what this jury pool looks like after we get them in
11 there and what they have to say.

12 Now, let me make this very clear, if anybody attempts to
13 contact or tamper with or intimidate, or do anything with one of
14 these jurors, and I find out who they are, then they're going to
15 be extraordinary serious consequences to that. So I just want
16 everybody to know that.

17 MR. GARLAND: Well, Your Honor, I want to be clear on
18 that, and I appreciate the court bringing that up. It is my
19 understanding that no one can contact any of these jurors if their
20 names become known under any circumstance or any neighbor or any
21 friend of these jurors, and it is my understanding that that's the
22 rule of this court.

23 And it's the intent of counsel to abide that and to have
24 anyone connected with counsel in this case or anyone associated
25 with the defendant abide with that rule.

1 And I just want the court to know that we will do our
2 best to let anyone who has contact with this case understand that
3 a failure to do that might result in being jailed or being
4 prosecuted criminally.

5 THE COURT: All right. Anything further other than the
6 matter of the witness?

7 MR. MOULTRIE: Your Honor, the only point, the final
8 point I wanted to make is, unfortunately one of the factors that
9 may result in the trial being more lengthy that maybe it
10 necessarily has to be is there are a number of chain of custody
11 witnesses, there a number of documents, there a number of
12 non-fungible items, for example, that were seized during the
13 search that absent the court's ruling to suppress them will
14 require a number of FBI witnesses in order to admit each of those
15 documents because of the number of FBI witnesses, for example,
16 that participated in the search.

17 I am hopeful that we might be able to work out some
18 agreement with the defense to stipulate to some of those chain
19 custody witnesses, I'm trying to do that, and perhaps I'll be
20 successful, perhaps I won't. But I did want the court to know
21 that that is something that the government is trying to work out
22 with the defense.

23 THE COURT: Well, that needs to be worked out. I mean,
24 it's just that simple. I mean, to have somebody come in here and
25 simply testify that I got it on such and such date from so and so,

1 and I gave it to such person on another date. I mean, those are
2 the kind of things that you should be able to reach an agreement
3 about, so I want you to work very hard.

4 I'm not certainly prohibiting you from requiring
5 something where there's really some kind of dispute, but just to
6 make life difficult on the prosecutor is not a good enough reason
7 to do that, and if there's going to be some kind of issue about
8 that, I'm want to know what it is beforehand.

9 MR. GARLAND: Certainly, Your Honor.

10 THE COURT: All right, okay. It is now 12:35, I have a
11 telephone conference at 2 o'clock. How long do you think it's
12 going to take to hear from Mr. Lanning?

13 MS. THACKER: Your Honor, we can do a streamline version
14 of his credentials and what his testimony would be probably in an
15 hour.

16 THE COURT: Okay. Well, if we come back at 2:30, would
17 that be enough time for him to get to the airport?

18 COUNSEL STAFF: I'll get him there.

19 MS. THACKER: Yes, and perhaps I can speak more quickly
20 and do it under an hour at that point.

21 THE COURT: Well, let's just talk about that a minute.

22 MS. THACKER: It's the Macon airport.

23 THE COURT: The Macon airport?

24 MS. THACKER: Yes, it's just the Macon airport.

25 THE COURT: Okay. Well, let me just say this. There

1 appears to be a fairly extensive statement here of his background,
2 that's Exhibit A to the motion, and it talks about his education,
3 it talks about the specialized training he's had, it talks about
4 the other training he's had over the years.

5 I don't want you covering anything that's in here, okay.
6 So that's going to save a little time right there. You don't need
7 to tell me about the obvious now. I'm not clear about what you're
8 particularly interested in, Mr. Garland.

9 MR. GARLAND: Certainly, Your Honor, we agree that they
10 can put in for your consideration the written resume from the
11 standpoint of that. I may have cross examination about some
12 aspect of it, or some examination, but I would think that that can
13 go in.

14 THE COURT: Okay, all right. Mr. Moultrie.

15 MR. MOULTRIE: Your Honor, I was just talking to
16 co-counsel, as I understand it, I think what we're proposing is to
17 just allow the defense an opportunity to cross examine Mr. Lanning
18 about any concerns they have, any questions they have. We're
19 happy to stand on our motion for purposes of our evidentiary.

20 THE COURT: Is that okay with you, Mr. Garland?

21 MR GARLAND: Well, I think the government should be
22 required to proffer some substance to put this in a context what
23 they intend to ask. Summarize it, put in writing, or something,
24 on direct.

25 THE COURT: Okay.

1 MR. GARLAND: So that we can make decisions about, do we
2 cross or what do we cross.

3 THE COURT: Well, sometimes I do the examinations of
4 these witnesses in these Daubert hearings. So I am not sure we
5 have an agreement yet about what we're going to do.

6 MR. GARLAND: Well, I would ask that the government make
7 a proffer of what they intend to put in front of the jury from
8 this man. Not I've written a zillion articles or I work for the
9 FBI and I work for the government, but what they're going to put
10 him up to say, okay, now, here is what I propose to testify as
11 quote "expert."

12 THE COURT: Okay, well, I think that the issue in my mind
13 is how his expertise and methodology fits into this case. That's
14 what I think the issue is.

15 MR. MOULTRIE: And, Your Honor, there are some cases that
16 deal with Mr. Lanning as a witness that are directly on point on
17 that issue. I've got copies. I'll give them to defense counsel.

18 What defense counsel seems to be suggesting is that they
19 want us to do is exactly what the court said Mr. Lanning cannot
20 do, and that is make specific findings in terms of the specific
21 facts of a particular case as to the ultimate issue of whether,
22 for example, Mr. York is a pedophile or is a preferential sex
23 offender. That is not what we plan to do with him, and the cases
24 say that we can't.

25 THE COURT: Well, I don't think I would let you do that

1 anyway.

2 MR. MOULTRIE: And that's --

3 THE COURT: Is that what you're worried about?

4 MR. GARLAND: I'm trying to find out what they are going
5 to do.

6 MR. MOULTRIE: Well, Your Honor, that's why we filed the
7 motion three weeks ago, but I'll give them cases that we have.

8 MR. GARLAND: Your Honor, actually in all deference to
9 the government counsel, the language in the motion, it doesn't
10 clearly tell me.

11 THE COURT: Okay, well, we're beyond that. I'm not
12 worried about that. I want to find out -- I don't anticipate that
13 this is going to take a long time as far as the proffer is
14 concerned. I think you understand what I want to hear.

15 MS. THACKER: Yes, Your Honor.

16 THE COURT: And then I'll give you the opportunity to ask
17 whatever you want to ask as long as it's within reason. Now, I
18 don't, again, my understanding is that the ultimate opinions are
19 not really the issue I have to deal with.

20 And obviously, it's also very clear from the Daubert
21 line of cases that in most situations the way to deal with this is
22 by cross examination of the witness, rather than just throwing in
23 stuff, you know, you not letting him testify on --

24 MR. GARLAND: The courts have come down many different
25 ways on this and on these type of issues, and some of this

1 testimony I notice was done pre-Daubert, I think, and perhaps some
2 afterwards, so I want to see exactly what it is.

3 But I think it does address itself to the court's
4 discretion of how you'll handle it, and its value versus it
5 prejudice is always there, even in this.

6 THE COURT: Well, that's a separate matter, I think, but
7 maybe that's -- if you need to point that to me, that's fine. I'm
8 the gatekeeper. I decide whether the gate comes open or not,
9 so --

10 MR. GARLAND: Right.

11 THE COURT: It's based on the methodology and expertise.
12 I'll be glad for you to educate me further on Daubert. Anything
13 further before we come back at 2:30?

14 MR. GARLAND: No, Your Honor.

15 THE COURT: All right.

16 *(RECONVENED; ALL PARTIES PRESENT)*

17 THE COURT: All right, let me just mention one thing
18 before we get into this expert issue that I meant to tell you this
19 morning. My current plan is not to start the evidence in this
20 case until Tuesday.

21 So you don't have to worry about having witnesses there.
22 But I will tell you, however, that if we have time, I do want you
23 to do the opening statements. So, come prepared to do that, and
24 then if it works out that we can't pick this jury in a day, we'll
25 just go from there. All right. Okay, now, Mr. Lanning, do you

1 want to come on up.

2 DEPUTY CLERK: Raise your right hand, please. Do you
3 solemnly swear that your testimony in this case will be the truth,
4 the whole truth, and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 DEPUTY CLERK: State your name for the record, please.

7 THE WITNESS: My name is Kenneth Lanning, L-A-N-N-I-N-G.

8 THE COURT: Now, Mr. Lanning, this is a Daubert hearing,
9 and I'm pretty sure you were in here the entire time that we
10 talked about this in the courtroom; is that correct?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: All right, well, what I'd like for you to do
13 is to tell us how it is that the opinions that you're going to
14 offer in the trial of this case will assist the jury to understand
15 the evidence or to determine a fact at issue. Can you do that?

16 THE WITNESS: Yes. It is my understanding that I'm not
17 going to offer any opinions. What I'm going to do is to educate
18 the jury concerning certain patterns of behavior that I have
19 become aware of as a result of my training, education, and
20 experience.

21 THE COURT: All right, and tell us about those patterns.

22 THE WITNESS: Basically I have been asked to talk about
23 two primary patterns. One is patterns of -- offender patterns of
24 behavior. The different kinds of sex offenders against children
25 behave in different kinds of ways, and it's important for people

1 to understand what those different patterns are, and then to also
2 understand, depending on how the child was victimized, who
3 victimized them, what the relationship is, that children will also
4 respond in different kinds of ways and have different kinds of
5 patterns.

6 THE COURT: All right, well, give us some examples of
7 that.

8 THE WITNESS: Okay. Most people, I would say the average
9 person, when you talk about a child molester, predominantly thinks
10 about a stranger who comes from outside, who kidnaps children, and
11 forces them against their will to engage in sexual activity, and
12 that certainly happens and gets a lot of publicity, but that's not
13 the most common type of child molester.

14 And many people take that model or their understanding
15 of that and try to apply it to all kinds of different cases that
16 come along. So you may have a case of a female child who has been
17 sexually molested by her father from the age of two or three on up
18 into her teenage years, you may have an adolescent boy who has
19 been befriended and seduced by his Boy Scout leader or Little
20 League coach in a different kind of a way. That offender is an
21 acquaintance. He's not a family member. He's not a stranger.

22 So we have different kinds of offenders behaving in
23 different ways with different kinds of victims depending on the
24 dynamics and the type of case.

25 THE COURT: And what is it about this case that enables

1 you to be able to assist the jury in understanding the issues of
2 the case, the facts of the case?

3 THE WITNESS: Well, I actually know very little about
4 this case. I'm not really going to talk about this case. I'm
5 going to talk about different patterns of behavior that I've seen
6 with different kinds of sex offenders against children and
7 different patterns that I've seen in children who have been
8 victimized.

9 THE COURT: Okay, well, I'm trying to understand what
10 kind of pattern there is that fits into this case. You certainly
11 haven't indicated one yet that does.

12 THE WITNESS: I don't know if the pattern is going to fit
13 in this case. When I've testified in this way as an education
14 witness, what the courts have said is I provide the educational
15 material. Then it is up to the jury to decide, am I a credible
16 witness, is the dynamics that I describe, do they seem to fit the
17 evidence in this case. That decision is left for the jury.

18 THE COURT: Well, I understand all that. That's not what
19 I'm asking you about. I'm still a little bit vague about what
20 you're planning to say in the trial of this case.

21 THE WITNESS: Okay. Well, basically what I would do is
22 first start to talk about a typology of sex offenders that I've
23 developed, and essentially this is a continuum that ranges from
24 what I call situational or opportunistic type sex offenders, down
25 to the other end of the continuum, which is preferential sex

1 offenders who have true sexual preferences and are driven
2 predominantly by sexual needs. And I can describe what those
3 patterns are and what this continuum indicates and what behavior
4 patterns and which type of offenders are more likely to engage in.

5 THE COURT: All right, do you want to ask him some
6 questions? I'm not convinced he's telling me what I need to know,
7 and I had in mind what he was going to say, but I'm not at all
8 convinced that he's going to testify about, so I'm going to give
9 you an opportunity to clarify that.

10 MS. THACKER: Yes, Your Honor.

11 EXAMINATION

12 BY MS. THACKER:

13 Q. Mr. Lanning, you mentioned patterns of behavior with respect
14 to child sexual offenders that you would plan to testify about.
15 Could you tell us some of the characteristics that you focus on or
16 would testify about in connection with, for example, a
17 preferential sex offender?

18 A. Preferential sex offenders usually -- and, again, down at that
19 end of the continuum, are individuals who operate as part of
20 long-term and persistent patterns of behavior. So we tend to see
21 longer patterns of behavior that go back further into their
22 background.

23 A lot of their behavior tends to be what I would call
24 need driven, and, that is, they engage in behaviors primarily
25 because of a need that they have, a sexual need or other kind of

1 need that they have.

2 They behave in certain kinds of ways that I've
3 identified, or more likely to behave in those kinds of ways, and
4 those offenders would be more of what I would call the
5 preferential type of offender.

6 They may have a true sexual preference for children, or
7 they may have other sex preferences that they carry out with
8 children because the children are available, but they're motivated
9 primarily by sexual needs.

10 Q. And are there other characteristics with respect to
11 preferential sex offenders, in addition to long-term and
12 persistent pattern of behavior?

13 A. Yes. There's a whole list that I have in my publications that
14 I've published, and I've used in my training of characteristics --
15 of behavior patterns, I should say, is the correct term --
16 behavior patterns that they tend to engage in.

17 Q. Would you testify about the seduction or grooming process with
18 respect to the child sexual offenders?

19 A. Yes. Although either offender can engage in grooming or
20 seduction, we see it a little bit more often with preferential
21 offenders, but a lot depends on what is the relationship between
22 the offender and the victim.

23 If the offender and the victim are acquaintances -- in
24 other words, they know each other -- the more likely to see this
25 kind of grooming or seduction process, where the offender

1 gradually seduces the victim over time with attention, affection,
2 kindness, whatever needs they identify, they fill those needs in
3 the child and manipulate the child into cooperating in the sexual
4 activity.

5 Q. Are there particular -- is pornography used in terms of the
6 sex offender?

7 A. Yes, depending on who the victim is. Now, if you're going to
8 try to seduce a three-year old girl, pornography may play no
9 significant role in that, or a very minor role, but if you're
10 going to try to seduce somebody who is a little bit older, then
11 pornography can be a very important part of that seduction
12 process.

13 Q. And would you testify, as well, with regard to well-developed
14 techniques and what that may entail in preferential sex offenders
15 or sex offenders along the continuum?

16 A. Yes. When you have an offender who's been doing this as part
17 of a long term persistent pattern of behavior, they tend to
18 develop good techniques of doing this. In order to get away with
19 this for an extended period of time, they have to refine and
20 develop their techniques, which they do through the process of
21 doing this over an extended period of time. So they get good at
22 what they're doing, which enables them to get away with it for a
23 longer period of time.

24 Q. You mentioned the long and persistent pattern of behavior, are
25 there characteristics that you see within that that you would

1 testify about that are indicators of a long-term and persistent
2 pattern of behavior?

3 A. Yes. Because I deal with patterns of behavior, what I've
4 tried to develop is observable patterns that people --
5 investigators, prosecutors, other people -- can see that would
6 tend to indicate that someone was engaging in those kinds of
7 patterns.

8 So I have various kinds of indicators that I see, that
9 I've developed in my experience and my training that tell us that
10 an individual may be operating as a part of a long-term,
11 persistent pattern of behavior.

12 Q. And what sorts of indicators are those?

13 A. One of them obviously might be multiple victims, that if
14 someone has been doing this for a long period of time,
15 particularly against children, they're more likely to have
16 multiple victims to -- as I said earlier -- to develop techniques
17 in grooming these individuals, and so on, and things like that.

18 Q. With respect to specific sexual interests, are there patterns
19 of behavior that you've seen during the course of your experience
20 that you would testify in that regard?

21 A. Yes. In other words, if someone has a particular sexual
22 interest, and we can identify it as part of their sexual need,
23 something that's important for them to be aroused and gratified,
24 then we would look for indicators that those needs were there, and
25 they might involve material that the individual has collected,

1 material that he has in his possession.

2 Q. What sorts of material that the individual would collect?

3 A. Generally, any offender can collect sexually explicit
4 material, but the more preferential offenders tend to collect
5 obviously one type of material, which is pornography, which they
6 find sexually arousing, stuff that they look at and get sexually
7 aroused.

8 But they also may collect a lot of material that they
9 use to rationalize and justify and validate their behavior to
10 convince them that they're really caring, loving people in what
11 they're doing with children. They have souvenirs and mementoes of
12 their relationship with the children. They may save things that
13 are part of their sexual relationship with the children.

14 Q. And are there also rationalization behaviors involved in the
15 characteristics with regard to child sexual offenders?

16 A. Yes. And that's a very important thing for some offenders
17 more than others, which is what my typology is all about, to
18 understand that not all offenders are the same.

19 Some of them have a tremendous need to validate their
20 behavior, and so they might collect letters from the victims,
21 notes from the victims talking about how much they care about them
22 and how wonderful they are in their lives and things like that.
23 Any number of things. Or read articles and collect other material
24 that tries to analyze or look at child victimization in a way
25 different than how society generally or the law looks at it.

1 Q. Are there some rationalizations that would use culture or
2 religious methodologies?

3 A. Obviously what I have found is the effective offender is going
4 to look at the child, see what the needs of that child are, and
5 then fill those needs. In other words, you find out what are the
6 things that are more likely to work with that particular child.

7 And so the way you would groom and seduce a five-year
8 old girl may be different than the way you would groom and seduce
9 a 15 year-old boy. But part of it is identifying needs and
10 vulnerabilities that they have, and the vulnerabilities could be
11 cultural, religious, any number of things that you would plug into
12 to manipulate that child for your purposes.

13 Q. Is the role that an offender plays in the child's life
14 significant in terms of the characteristics that you've studied?

15 A. Yes. It's extremely important to at least look at the basic
16 relationship between the offender and the child. Are we talking
17 about a stranger, are we talking about an acquaintance, are we
18 talking about a family member, and how you operate and what you do
19 is going to depend a lot, if you want to get away with this crime,
20 on your relationship with the child.

21 Q. And have you also developed in the course of your experience
22 characteristics or patterns of behavior with regard to the victims
23 or the children?

24 A. Yes. And this grows out of my work with offenders in that we
25 understand how the different offenders operate, we then have to

1 understand and have insight into the victims.

2 And so if a child is grabbed by a stranger and forced
3 into sexual activity, and then released, there's a good chance
4 that that child is going to come home and immediately disclose.

5 If a child has been befriended and groomed and seduced
6 by an acquaintance and gradually lured into this, their
7 inhibitions lowered, showered with attention and affection and
8 kindness, a bond develops between the victim.

9 The victim does many things that they are ashamed and
10 embarrassed about. These victims very rarely then disclose and
11 sometimes vehemently deny that they were victims, and very often,
12 the word that I like to use, cooperate, or are compliant in their
13 victimization.

14 They cannot consent in the legal sense of the word,
15 because they're children, but they comply. And this is something
16 that most people don't understand. We think that all children are
17 suppose to say, no, yell, and tell.

18 Many children, depending on who the offender is, do not
19 say no, they say, yes. They don't yell, they don't utter a sound,
20 they don't tell anybody about it, and sometimes vehemently deny
21 that it happened.

22 Q. And what factors would go into this not telling or vehemently
23 denying that it happened?

24 A. A lot would depend on their relationship with the offender,
25 whether they even consider themselves to be victims or not, the

1 amount of shame and embarrassment and guilt that they feel for
2 having gone along with this. Many different factors enter into
3 whether these children disclose this.

4 Q. You mentioned that you've developed this typology of patterns
5 of behavior of both sex offenders and compliant victims over the
6 course of time. When did you develop these behavioral patterns
7 with respect to offenders?

8 A. My typology of offenders, I first published in 1986, '85, '86,
9 or thereabouts, and began to incorporate it into my training and
10 lecturing that I was doing all around the country and all around
11 the world.

12 I then revised it four times. The current edition is my
13 fourth edition. I published it through the National Center for
14 Missing and Exploited Children. Many other individuals have
15 duplicated it, and it's been published in many other publications
16 as well.

17 So the typology, I basically first developed in the
18 early to mid-80s, and continued to refine it as I go along. The
19 concept of compliant victims is something that came a little bit
20 later.

21 I recognized these dynamics, but understanding more
22 specifically what was involved is something that came later in my
23 career, and I first published that material, specific material
24 about that in the early -- about 2002-2001.

25 But I had talked about certain aspects of it prior to

1 that and had published material about it. I just didn't use the
2 term "compliant child victim."

3 Q. And what are these behavioral characteristics in your
4 typologies that you developed in 1986, forward, what are they
5 based upon?

6 A. They're based on my training, education, and experience. I
7 was assigned for the last 20 years of my FBI career and what most
8 people know of as the FBI Behavioral Science Unit in Quantico.

9 And in that unit we did training, we did research, we
10 looked at the research of others, and we were involved in case
11 consultation.

12 So during that 20 years, I consulted on thousands of
13 cases from all over the United States, all over the world. I did
14 research at the unit with other members of the unit.

15 I interacted with other professionals in this field,
16 looked at their research, and then got involved in training where
17 I interacted with investigators, prosecutors, all kinds of
18 professionals who deal with this and would get feedback from them.

19 Q. So it's not based on anything with regard to the particular
20 case, but something that you developed prior to this case?

21 A. Yes. As I said, I have very little knowledge of this case.
22 All these patterns that I'm talking about are based on the
23 thousands of cases that I've been involved in, the training and
24 the research that I've done and received.

25 Q. And have you testified as an expert witness in this area

1 before?

2 A. Yes, I have.

3 Q. How many times?

4 A. It's in my resume, but I would say approximately somewhere in
5 the neighborhood of 35 to 45 times.

6 Q. Is that in both state and federal court?

7 A. Yes.

8 Q. And what did you testify as an expert about in particular?

9 A. A variety of different things, but other than maybe in two or
10 three cases they all related in some way to the sexual
11 victimization of children, some aspect, either understanding
12 offender or victim patterns of behavior or certain roles that
13 material played and so on.

14 But it was all focused on some aspect of the sexual
15 victimization of children other than, as I said, maybe two or
16 three cases where it was other areas.

17 Q. You mentioned earlier, I think, a continuum of sex offender
18 behavior. What do you mean by that?

19 A. Well, one of the things I learned early on, I kind of talked
20 about the idea that there were two patterns of behavior, and what
21 I realized as I continue to learn and modify this over time was
22 that it was better to look at human behavior along a continuum
23 rather than deciding everybody was either this or that, that we're
24 looking at patterns of behavior, and it means that somebody is
25 more preferential or more situational, but you can have mixed

1 patterns of behavior.

2 Q. You're talking about patterns of behavior with regard to the
3 sex offenders; is that correct?

4 A. Yes, the patterns of behavior of the offenders.

5 Q. You mentioned on one end of the continuum is the situational
6 sex offender, on the other end of the continuum is the
7 preferential sex offender. Can you tell us a little bit about
8 what is meant by or the factors that you look at with regard to a
9 situational sex offender?

10 A. Yes. The main thing that we look at in deciding is behavior.
11 In other words, that's what I look at, is behavior, to try to say
12 where someone fits along this continuum and what purpose that
13 really serves. A lot of times it helps you to decide where they
14 might be and what type of corroborative evidence.

15 But at the situational end of the continuum, these are
16 offenders who tend to be more opportunistic, take advantage of
17 certain situations and dynamics, tend to be more spontaneous, and
18 so on, and opportunistic in their crimes, and we see certain
19 patterns that we're more likely to see with this type of offender.

20 At the other end is the preferential offender, for whom
21 it is part, as I said, of a long-term and persistent pattern of
22 behavior, and there we see more kind of predictable patterns.

23 Q. With regard to -- in comparison to the situational offender at
24 one end and the preferential sex offender at the other end, what
25 has your experience told you with regard to their plan or in terms

1 of the process of using children?

2 A. Either individual, if they're going to get away from some
3 period -- going to get away with their crime for any period of
4 time, they put some planning into it. What we see with
5 situational offenders, they engage in more what people in law
6 enforcement, investigators, are more familiar with, what's
7 commonly referred to as MO; their modus operandi.

8 They develop things which work for them and facilitate
9 them getting away with the crime. Preferential offenders
10 certainly do that, and sometimes have those kinds of patterns, but
11 they also have patterns that I call ritual, meaning these are need
12 driven patterns -- need driven behaviors.

13 They do these things because of needs that they have,
14 and the most common one with sex offenders is the need to get
15 aroused and gratified. They may need to have a certain type of
16 victim or certain types of sexual behavior.

17 Q. With regard to the patterns that sexual offenders engage in
18 focusing on particular victims, could you tell us a little bit
19 more about what the grooming process means?

20 A. Well, what -- the grooming process has to obviously be
21 adjusted depending on what it is that you're trying to do and who
22 you're trying to victimize, and so if you're talking about adults,
23 then the grooming process usually results in non-criminal
24 behavior.

25 If you seduce an adult, and they cooperate or consent,

1 then we usually don't have a crime. But if we're talking about
2 children, the situational offender might not put as much time and
3 effort into it, may be more opportunistic, he may take advantage
4 of a certain situation that you're in.

5 Whereas the more preferential offender is more likely to
6 commit a lot of time, energy, and resources to this, spend a lot
7 of time doing this, developing children or victims over an
8 extended period of time, including in some cases, starting to
9 seduce them long before you plan to have sex with them.

10 Q. Do you have a particular term for the development of children
11 for a long period of time, one right after the other?

12 A. Well, basically what I have found is that preferential
13 offenders are more likely to be simultaneously involved with
14 multiple children. They're not, in essence -- and maybe
15 monogamous may be a poor term, but they -- frequently they don't
16 take their victims one at a time; they're involved with multiple
17 children, but depending on who the child is and how much access
18 they have to the child.

19 Obviously if you're an acquaintance molester, one of the
20 important things that you have is you have to find a method of
21 access to the children, and so you have to develop that and then
22 begin to develop your techniques based on that.

23 Q. With regard to the techniques in gaining access to the
24 children, are there with respect to preferential sex offenders
25 repeated methodologies with the victims?

1 A. You mean in gaining access to them?

2 Q. Yes.

3 A. Yes. What we've seen is the -- the three most common methods
4 of access is sometimes a relationship with a woman who already has
5 children. You can marry her, you can move in with her, you can be
6 a boarder, but basically you take a woman who has children and
7 then you befriend her, and then gain access to the children
8 through her, through a relationship with this adult woman.

9 Sometimes is what we call neighborhood. You're just the
10 nice guy in the neighborhood who has the kids come down to your
11 house, you watch them, you babysit for them. So you just live in
12 a neighborhood where there are a lot of children.

13 And the third method -- and none of these are mutually
14 exclusive -- is some kind of a hobby, a vocation, or an occupation
15 that gives you access to children. And so you may be a dentist,
16 but you may specialize in treating children.

17 You could become a Boy Scout leader, a Little League
18 coach, a minister that does youth work, and so on, any number of
19 possibilities that you're trying to put yourself with access to
20 children.

21 Q. With respect to the individual children, are there specific
22 methodologies, for example, in the seduction process, that the
23 individual may use over and over with each victim as they come
24 along?

25 A. Yes. In other words, obviously these offenders are not super

1 human. They develop techniques, and they have their own
2 personalities and skills. So they have to be what they are.

3 So depending on what abilities and skills that you have,
4 if there are things that are working for you, and you're targeting
5 certain types of victims, you may repeatedly use those things.

6 You may have to make some adjustments for each
7 individual child, but there may be certain patterns that we see
8 repeated from child to child, certain techniques that generally
9 work, and the most common ones that work is showering these
10 children with attention, affection, and kindness.

11 Q. What about threats with regard to victims?

12 A. There always can be threats, but particularly with the
13 offender who grooms children, the so-called nice-guy molester, the
14 most common time that they use threats is when the child wants to
15 terminate this relationship, wants to leave before the offender is
16 finished with the child, then they may threaten the child.

17 And the other time that threats become more common with
18 this type of offender is when the relationship is ending. Now,
19 you're going to terminate the relationship, you're pushing the
20 child out the other end, and now you don't want this child to
21 disclose. You've lost your close relationship with the child, so
22 you may have to resort to threats at that point to keep the child
23 quiet.

24 MS. THACKER: Your Honor, may I have a moment?

25 THE COURT: Sure.

1 BY MS. THACKER:

2 Q. Mr. Lanning, you've testified that you don't know the facts --
3 much about the underlying facts of this case; is that correct?

4 A. That is correct.

5 Q. Is that typical in your experience in terms of testifying as
6 an expert witness?

7 A. I've done it both ways. I've been involved in many, many
8 cases where I've been provided a great deal of material, records,
9 discussions, all kinds of things, and asked to review it and
10 analyze it and render some analysis or opinion about it.

11 And I've also been involved, particularly more recently,
12 in cases where I've been what the courts seem to refer as an
13 education witness, where I essentially know very little, if
14 anything, about the case and just educate the court, the jury
15 concerning certain patterns of behavior which most people are not
16 otherwise aware of.

17 MS. THACKER: Your Honor, those are all the questions I
18 have for Mr. Lanning.

19 THE COURT: All right, Mr. Garland.

20 EXAMINATION

21 BY MR. GARLAND:

22 Q. Mr. Lanning, I'm Ed Garland. I'm examining you for the
23 defense. First, I'd like to touch on your educational background.
24 You are not a psychologist, are you?

25 A. No, I am not.

1 Q. Never had any training in psychology?

2 A. I had a lot of training in psychology, but I'm not a
3 psychologist.

4 Q. Did you go to school and take any courses in a college?

5 A. Yes, I did.

6 Q. And what college?

7 A. Sam Houston State University in Huntsville, I was in extension
8 at San Antonio at the time, and California Lutheran College in
9 Thousand Oaks, California, and then obviously my undergraduate
10 work many years ago, I had some classes on psychology.

11 Q. Did you get a degree in psychology?

12 A. I did not get a degree in psychology, no.

13 Q. And have you gotten any degree in psychiatry?

14 A. No, obviously not.

15 Q. Have you ever worked in any clinical setting in the
16 psychiatric setting?

17 A. No, I have not done clinical work.

18 Q. Have you ever provided any counseling to an alleged offender,
19 sex offender?

20 A. No, I'm not qualified to do that.

21 Q. And have you ever participated with a psychiatrist in the
22 analysis, diagnosis, and treatment of someone who has a sexual
23 deviancy problem?

24 A. Yes.

25 Q. And when have you done that?

1 A. Many, many times over the years, although it was not my
2 primary responsibility in the FBI, I primarily was servicing
3 criminal justice professionals, but quite often I was contacted
4 either during training or at work by therapists, mental health
5 clinicians, who were looking for some advice and guidance to
6 better understand some patient that they were treating,
7 evaluating, or whatever.

8 Q. You have talked to a clinician working with a person who had a
9 problem?

10 A. Yes.

11 Q. But you one on one have never done that?

12 A. No. I'm not qualified.

13 Q. You never had the one on one with a sexual offender.

14 A. No, I --

15 Q. -- insofar as providing them treatment?

16 A. Providing them treatment. Yes, I've had one on one with them,
17 but not providing the treatment.

18 Q. Now, your typology that you developed, when was that
19 developed?

20 A. As I indicated earlier, it evolved over time. I first began
21 to put it together and published it around 1985, 1986.

22 Q. And if I understand it, this is -- is the term typology one
23 that you applied to sexual characteristics? Is that something
24 that kind of you came up with, sir?

25 A. No. I saw certain patterns of behavior in sex offenders, and

1 then I tried to find a way to make that practical and apply it to
2 different areas. People suggested to me that the most common term
3 for that kind of a classification system was a typology, so I
4 called it a typology.

5 Q. You called it a typology. And is that -- a typology is your
6 way of referring to what you consider to be common
7 characteristics?

8 A. Yes. It was a way to group together certain patterns of
9 behavior -- and that was my focus, behavior -- in some way that
10 could make sense.

11 Q. All right, so would the word "characteristics" be an
12 equivalent? You said patterns of behavior, but when you say a
13 pattern of behavior, this would be patterns of characteristics; is
14 that correct?

15 A. I don't think -- correct. I prefer and try whenever
16 possible -- I sometimes will lapse, and I will sometimes use the
17 word characteristic, but a better word is patterns of behavior
18 because what I focused on was behavior, not whether someone was,
19 you know, immature or some other character -- a personality
20 characteristic. What I was looking at is behaviors. Now,
21 sometimes they overlap.

22 Q. Well, let's see. Sometimes you use the word characteristics
23 to refer to what you refer to as the typology; is that right?

24 A. I may have, and probably sometimes I have. Whenever possible,
25 whenever I can remind myself, I try to keep calling it the

1 patterns of behavior, but there may have been times I've used the
2 word characteristics.

3 Q. So we have behavior, and you have taken behavior and said that
4 you -- you see a pattern?

5 A. Yes.

6 Q. And then based on the pattern that you say you saw, you then
7 wrote about and developed a descriptive criteria for these
8 patterns of behavior, correct?

9 A. I think that that is a correct statement.

10 Q. Okay. Now, and if I heard you correctly, you have continued
11 based on your observation to modify your definitions or your work
12 in several different periods of time?

13 A. Yes. I continued to learn as I saw these cases, yes.

14 Q. Okay. Right. And your source of developing your patterns was
15 looking at other prosecutions; is that correct?

16 A. A small part of it, yes.

17 Q. Okay. Now, your typologies or your patterns, have they ever
18 been tested by any form of test or statistical study?

19 A. That is about to happen very shortly, but up til now, the only
20 way it has been tested is by the fact that it is used by thousands
21 of investigators all over this country on an almost daily basis,
22 but I have not done that type of empirical testing that you're
23 talking about.

24 Q. I understand. It's about to be done. Now, how is going to be
25 done when it is done?

1 A. I was contacted by a man who treats sex offenders who is part
2 of the American Association for Treatment -- ATSA -- Association
3 for Treatment Sex Abusers as a professional clinician who believed
4 that my typology may be the most effective way to diagnose and
5 treat sex offenders, and so he has submitted a grant to have --
6 establish a design to basically use my typology in a way that I
7 didn't intend it, to use it for diagnostic and treatment purposes,
8 and to see how these individuals fit and whether a treatment
9 program can be developed based on this type typology.

10 Q. But up until this time, no statistical studies, to your
11 knowledge, have been done to test your theory of patterning;
12 that's correct, isn't it?

13 A. Testing in what way?

14 Q. Well, in the way you just said is being proposed, that the
15 legitimacy -- the reliability of your conclusions have not been
16 statistically tested in any fashion, have they?

17 A. In a formal academic way, not to my knowledge, no.

18 Q. Okay. Now, do you have a field that you say you are an expert
19 in?

20 A. I would say -- when people have asked me that question, I
21 would say that my major area of expertise is in the area of what I
22 prefer to call the sexual victimization of children, the
23 behavioral dynamics of the sexual victimization of children.

24 Q. Now, are there any societies in which people purport to be
25 simply situated as you, such as the Society for the purpose of

1 this?

2 A. I am a member of the American Professional Society on the
3 Abuse of Children. I'm a founding member and a former member of
4 their board, an advisory board, which is a multi-disciplinary
5 group of individuals who deal with many of these issues. And I'm
6 on the advisory board of the Association for Treatment of Sex
7 Abusers.

8 Q. All right, now, have your theories, your typologies been
9 subjected to written peer review?

10 A. I believe, yes. It depends on what your definition of peer
11 review is.

12 Q. Okay, well, if you would illuminate us on where there has been
13 any writing about the accuracy or inaccuracy of your theories?

14 A. My publication was first published by an organization called
15 the National Center for Missing and Exploited Children. They
16 published it, put their logo on it, printed it. Before they did
17 that, they subjected it to more peer review than most professional
18 journals get.

19 I peer review articles for professional journals all the
20 time. Usually they get three people. They sent my manuscript to
21 a lot more people than that who looked at it, evaluated it,
22 decided whether it was professional and so on, and then they made
23 the decision to publish it, and then made the decision to publish
24 three revisions or new additions after that.

25 Q. Do you know who they sent it to?

1 A. I don't have their names, no.

2 Q. Did you ever see any writings of this --

3 A. Yeah, they would come back to me quite often after they sent
4 it out to different kinds of people. And you have to understand
5 that my material was peer reviewed on many different levels, not
6 just mental health or clinical, but from prosecutors, lawyers,
7 investigators, various other professional disciplines, and they
8 would look at it.

9 And then when they would get these responses back, they
10 would come back to me, and say, this is what the people who are
11 peer reviewing your publication have mentioned, what do you think
12 about this, can we make changes, and so on, and so forth.

13 Q. So you've had observations from a lot of prosecutors?

14 A. Yes.

15 Q. Okay. And policemen?

16 A. Yes.

17 Q. Now, have you ever submitted it to any association of
18 psychiatrists for review?

19 A. I have not submitted it in a formal way to be published
20 because it kind of already was published in the way that I wanted
21 it to, but I have presented it many times, and in my vitae I list
22 all the universities and scholarly groups and organizations that
23 I've presented my typology to.

24 Q. All right, but you've never presented it for a peer review to
25 any group of psychiatrists, have you?

1 A. Not to be published by them, no.

2 Q. Okay, and you've never submitted it to any group of
3 psychologists to be published by them, right?

4 A. No, I have not.

5 Q. And you're familiar from your study of psychology that it's
6 very common in professional psychology and in the testing of
7 theories to do lots of statistical analysis; are you not? You're
8 familiar with that?

9 A. I'm familiar with that, yeah, right.

10 Q. And those type of tests have not been done on your theories of
11 the patterning of facts, have they?

12 A. That specific type of testing to the best of my knowledge has
13 not been done.

14 Q. All right. Now, as I understand it, you developed an idea of
15 patterning of facts that facts are on a continuum. Is that -- as
16 I hear you say that, I kind of envision a line, and at one end,
17 it's one thing, and at one end, there's another, right?

18 A. Well, basically when I try to explain a continuum, I simply
19 mean that it is not a choice between just two things; that you can
20 be along this continuum in a variety of places. You can be more
21 towards one end, more towards the other end.

22 Q. If we are more toward the end, would it be correct to say that
23 this idea is something that is along a line, and that there are
24 different types, depending on where you are along this line?

25 A. The way you are along this line determines whether you're more

1 one thing or more the other, yes.

2 Q. And as I understand it, the line is composed of different
3 forms of, shall I just say, perverted sexual gratification; is
4 that right?

5 A. That's wrong.

6 Q. That's wrong. Some of it is not perverted?

7 A. Well, sometimes we're looking at perverted sexual activity,
8 sometimes we're looking at lots of different things. We're just
9 looking at behavior patterns that we can identify that hopefully
10 tell us about criminal activity, which is my main focus from a law
11 enforcement background, what I'm looking at is criminal activity.
12 Whether something is perverted or not, I will leave for others to
13 decide. My main focus was on criminal sex activity.

14 Q. Well, as I heard you say that patterns of behavior relates to
15 sexual arousal, that's one of the things you look at.

16 A. That's one of the things I look at; if you can determine what
17 somebody seems to be getting aroused by, what their sexual
18 preferences might be.

19 Q. So, if someone has sex with a child --

20 A. Yes.

21 Q. -- then you would say that they are aroused by having sex with
22 a child; is that right?

23 A. Generally speaking, but it's not quite that simple.

24 Q. They can have sex without being aroused?

25 A. Yes, sometimes they can. It depends on what your definition

1 of arousal is, but some people have a sex with children because
2 they have a sexual preference for children, and some people have
3 sex with children because they're weak, vulnerable, and available,
4 and may have to fantasize that this is someone else, but only the
5 child is available. These are all the variables that I look at in
6 studying a case.

7 Q. And yet, as I take it, you're saying that sometimes it would
8 be without sexual arousal that they would have sex?

9 A. Well, depending on what your definition of sexual arousal is.
10 If you're talking about a man having an erection, that's one
11 indicator, but sometimes you have individuals who may not have an
12 erection, they may be doing things obviously in order to -- the
13 issue here is that from a criminal justice point of view in
14 evaluating these cases, you have to look at both the behavior and
15 the motivation for that behavior.

16 Q. Well, I'm just asking to understand how you developed patterns
17 about sexual arousal, and if I understood you correctly, you said
18 that there could be patterns in which people had sex, but did not
19 get sexually aroused. Now, you said that, didn't you, a moment
20 ago?

21 A. I said that that's one pattern that I could look at.
22 Obviously in many of these cases the patterns are that they were
23 getting sexually aroused but it's not just sexual behavior that
24 you're looking at.

25 Q. Is there any form of sexual behavior that you wouldn't put in

1 a pattern involving a child?

2 A. That you -- well, I guess when you engage in behavior, the
3 question is, are there patterns that seem to have some
4 consistency, or are they a more random. That's part of the
5 evaluation of what you're doing.

6 Q. Well, give us an example of some random patterns.

7 A. Well, basically maybe an indiv -- okay, I was involved in a
8 case one time when a man was over at a house watching a football
9 game with a friend who was living with this woman who had
10 children, and during the half time of the game her 12 year-old
11 daughter walked in, and the friend asked this man if he'd like to
12 have sex with the daughter.

13 He first indicated he didn't want to, and he said, why
14 not, she'd like to have it, and so he did, and during the half
15 time he went in the back room and had sex with her. That's child
16 molesting, that's a crime, but that's not a preferential pattern
17 of behavior. As best we can figure out it was an isolated
18 incident to that time.

19 Q. So you're saying there's child molestation that's isolated,
20 and there's child molestation that's not isolated; is that
21 correct?

22 A. That could be. And, again, it's a continuum.

23 Q. So a continuum really encompasses all of it --

24 A. We're looking --

25 Q. -- all forms of molestation?

1 A. Well, this is sex offenders. We're looking at sex offenders
2 along a variety of ways with --

3 Q. But I'm talking about sexual molestation. If I used the word
4 -- here it's talking about sexual molestation. I'm not talking
5 about physical abuse of some sort.

6 A. But when you say the word molestation, are you referring to
7 the victimization of only children, or adults, or what are you
8 referring to?

9 Q. Well, let's say children.

10 A. Okay.

11 Q. Okay, so as it relates to children when you use the word
12 continuum, you're talking about all forms of sexual molestation of
13 children?

14 A. That's one thing that we look at on this continuum, yes.

15 Q. That's one thing. I'm talking about the continuum itself,
16 what it consists of.

17 A. The continuum consists of a way to analyze the patterns of
18 behavior of an offender. Some of those patterns of behavior are
19 sexual in nature, and some of them are not.

20 Q. So you have created -- this is personally created by you,
21 correct?

22 A. Well, I developed it in conjunction with many other
23 professionals.

24 Q. Okay. Now, the name "situational offender", did you -- at one
25 end of the continuum, did you create that name?

1 A. No, I did not.

2 Q. Okay. And, "preferential" at the other end, did you create
3 that name?

4 A. No, I did not.

5 Q. Okay. Now, is there published definitions of preferential
6 sexual offender?

7 A. I have published what I mean by the terms, and I have
8 referenced where other people have used similar terms, other
9 mental health professionals, and I've made reference to those
10 places.

11 Q. So the definition of it, is it one that you created?

12 A. The definition that I use, I defined it, I created it based on
13 the work of myself and other professionals in the field.

14 Q. And the term you use as "situational" is that a term that you
15 created?

16 A. I didn't create the term. I had a pattern that I identified.
17 I discussed it with psychiatrists, mental health people. I was
18 referred to material where there was a word -- I was looking for
19 descriptive term. I didn't want to use any diagnostic terms, and
20 somebody suggested that as a good descriptive term, so I used it,
21 and then defined it in my writings.

22 Q. All right, now, have you ever participated in work with
23 children?

24 A. What do you mean by work with children?

25 Q. Have you ever worked with children?

1 A. In a paying job, is that what you're talking about or --

2 Q. Yes, in any paying job ever worked with children?

3 A. Other than doing some presentations and teaching where there
4 were children in the audience. I don't know whether that's what
5 you're referring to.

6 Q. Well, I mean, have you ever participated in any kind of
7 studies of the reaction of children to different stimuli?

8 A. No, I have not done that, no.

9 Q. So you have no one-on-one experience about how children react
10 to different suggestions, do you? One-on-one from conducting any
11 kind of clinical experiment or otherwise as to how they will
12 react?

13 A. I'm not sure what you mean when you say one-on-one. I have
14 experience, much experience dealing with these dynamics from an
15 investigator point of view because I was an FBI agent. I was not
16 a clinician. So I've dealt with many, many cases where we're
17 looking at how an individual child reacted and issues of leading
18 and suggestion and all these kinds of things.

19 Q. You have studied cases that have been presented, but what I'm
20 asking you about is, have you ever done any educational analysis
21 where you were in any kind of clinical or classroom settings where
22 different techniques of persuasion or seduction were used or
23 attempted to be used on any children?

24 A. Well, first of all, I do not know how you could ever possibly
25 do that. That would be one of the most unethical things you could

1 ever do in a classroom setting to seduce children. I don't know
2 anybody would be allowed to do that.

3 Q. All right, then, have you participated in any studies where
4 suggestibility has been studied and techniques of suggestibility,
5 to suggest to children conduct?

6 A. I have not participated in those studies directly, but I've
7 worked with people who do those studies.

8 Q. And there are studies to that effect; are there not?

9 A. Yes, there are.

10 Q. Now, seductions of children, based on your studies, have
11 occurred in literally hundreds of different techniques; isn't that
12 correct?

13 A. Well, I don't know what you mean when you say in hundreds of
14 different techniques.

15 Q. Well, let me be clearer then. You have studied seduction that
16 has taken place by people using hundreds of different techniques
17 to seduce; have you not?

18 A. I don't know what -- well, that would be a difficult question.
19 I've never counted how many different techniques because I'm not
20 sure what constitutes a different technique.

21 Q. Well, are there different techniques -- if you're not sure,
22 are there different techniques of seductions of children?

23 A. I would say the best answer to that is, do men seduce women
24 using different techniques. And the answer is they have different
25 techniques. There may be common patterns to those techniques, but

1 there can be variations. You just have to decide whether a
2 different variation constitutes a different technique. There are
3 certain basic commonalities in all the techniques, but they can
4 have variations.

5 Q. So your answer is that the way men seduce women or induce
6 women into sex are as varied as there are men and women.

7 A. I think that the patterns -- there's some commonalities to the
8 patterns, but there can be variations based on individual traits.

9 Q. Well, I mean, obviously one of the patterns is it involves
10 sex. That would be a common pattern, wouldn't it?

11 A. But we're talking about something that primarily precedes the
12 sex. We're not talking about the sex itself. Now, we're talking
13 about what leads up to getting the person to go along with the
14 sex.

15 Q. So whatever men do to seduce women, you would compare that to
16 what adults do to seduce children.

17 A. I would only compare it insofar as to help people to
18 understand it, but there is no comparison because men and woman
19 seducing each other who are adults is called dating, and it's not
20 criminal. Adults doing this to children is called child
21 molestation. It's not the same.

22 MR. GARLAND: Just a moment, please, Your Honor.

23 THE COURT: All right.

24 BY MR. GARLAND:

25 Q. In determining whether there has been molestation, you focus

1 on the fact of what the conduct was, correct?

2 A. From my criminal justice background, what I have learned in
3 determining whether molestation took place, I prefer to focus on
4 every bit of information I can get my hands on.

5 Q. Well, I believe you said that your topology, or your
6 patterning, was done by focusing on facts. You testified to that,
7 did you not, sir?

8 A. I develop my typology based on allegations and information
9 that I had, that I had to assess and evaluate the accuracy of it,
10 and then build my typology on that information, yes, right.

11 Q. That information being facts?

12 A. Hopefully, yes.

13 Q. And so the facts determine whether there was molestation,
14 correct?

15 A. Well, the problem that's confusing here is that my typology is
16 not just simply based on the sexual behavior. That seems to be
17 what you're focusing on, only on the sexual acts. I'm talking
18 about a whole range of behavior, before, during, and after the
19 sexual activity.

20 Q. All right, and the molestation is based on what you find from
21 the facts, both before, during, and after, whether or not there
22 was molestation?

23 A. Whether or not there was molestation is something that the
24 courts decide. I don't decide. I try to develop a typology that
25 would assist investigators and prosecutors and other fact-finders

1 to evaluate that information and attempt to determine whether or
2 not a child was or was not molested.

3 Q. Well, you have talked about -- you have said facts give rise
4 to patterns, right?

5 A. I didn't say that.

6 Q. Okay. They don't give rise to patterns.

7 A. I said the facts can be analyzed to see if there are patterns.

8 Q. Okay, so whether they fit a certain profile, correct?

9 A. I don't know what you're talking about profile. There's no
10 profile here. What I do is look at certain behaviors and decide
11 whether there are any patterns in that behavior.

12 Q. All right, and so the patterns, if we had a pattern, and it
13 had several characteristics to it, that would be the profile of
14 that pattern; would it not?

15 A. I wouldn't call it a profile, no.

16 Q. Why not?

17 A. Because that's not how I use the word profile.

18 Q. What does profile mean to you?

19 A. Profile means to me a personality description of an unknown
20 subject who has committed a crime. That's what I call a profile.

21 Q. Okay, they'd be unknown. And if they became known, would they
22 still have the same profile in your definition?

23 A. A profile is a description of an unknown subject. Once they
24 become known, then they're not unknown anymore, and there is no
25 more profile.

1 Q. And so you couldn't produce a profile for a known subject,
2 could you?

3 A. Not the way I define a profile, no. I could tell you his name
4 and address and everything. It's not a profile anymore.

5 Q. Okay, so it is something that you say has certain
6 characteristics then, but you won't designate it as a term
7 "profile?"

8 A. It's not a profile. What I'm saying is that I take certain
9 behavior patterns, information that you learn from the case, you
10 assess them and evaluate them and decide how accurate they are,
11 and then you try to see where they fit and what purpose that
12 serves in analyzing the case in trying to become a fact-finder.

13 Q. And you haven't done that in this case by analyzing the
14 specific facts of this case, have you?

15 A. No, I have not, no.

16 MR. GARLAND: I have nothing further, Your Honor.

17 MS. THACKER: Nothing else, Your Honor, aside from
18 argument.

19 THE COURT: Well, I think I'm going to give the defense
20 the opportunity to submit something to me, so we don't have to
21 have any argument about it right now. That's my plan, I mean, Mr.
22 Garland, you certainly --

23 MR. GARLAND: No, I would prefer to do a submission, Your
24 Honor.

25 THE COURT: Well, let me give you a few thoughts about

1 this, again, to point out what I think is important so you can
2 address these matters along with what I said earlier about the
3 case, and the fact the Frazier case may be withdrawn, doesn't
4 change my opinions that I've stated earlier about the focus of my
5 inquiry in this particular situation.

6 And I would just refer you to the Kumo Tire case which
7 is one of the big three cases that came out of the Supreme Court,
8 and it says in talking about the Daubert gate-keeping requirement;
9 that the objective of that requirement is to insure the
10 reliability and relevancy of expert testimony; it is to make
11 certain that an expert, whether basing testimony upon professional
12 studies or personal experience or is in the courtroom, the same
13 level of intellectual rigor that characterizes the practice of an
14 expert in the relevant field (*reading*).

15 Now, this man has testified about considerable personal
16 experience in dealing with this area. He's also testified about
17 considerable training in this area. He's also testified that he's
18 published in this area, and that, in fact, it was extensively peer
19 reviewed.

20 I also understand from what he's testified to that he
21 has developed this typology, and the whole proposition in my mind
22 turns on the validity of this typology and how he developed it.
23 That's why I say I'm not -- the conclusions, I don't think I'm
24 suppose to deal with that.

25 But my understanding is that he developed this typology

1 in conjunction with others in his field and people in related
2 fields that have impact in this area, that over the course of the
3 years since 1988 -- or when was it?

4 THE WITNESS: 1985, '86.

5 THE COURT: -- 1985, that he has presented this typology
6 to various groups, some of which I understand to be scholarly
7 groups and some which I understand to be clinical groups and
8 obviously law enforcement groups, too, and that you've made
9 adjustments to your typology over the years, and apparently also
10 someone either at the academic level or the clinical level has
11 taken this typology seriously enough to -- do I understand to get
12 a grant in order to --

13 THE WITNESS: From the National Institute of Mental
14 Health, he has applied for a grant to apply this for diagnostic
15 and treatment purposes.

16 THE COURT: All right. And it's also clear to me that
17 the methodology that applies in this situation is the methodology
18 of behavioral sciences, which is certainly different from the
19 methodologies that would be used by a physicist or a chemist, and
20 certainly would be a situation where these kind of things can't be
21 reproduced in the laboratory.

22 So those are what I have gleaned from what the witnesses
23 have to say, and you can address those for me in the motion, and
24 then I'll give you the opportunity to respond to that. Thank you.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Okay, does anybody have any other questions
2 related to any of the matters that we've dealt with today?

3 MR. PATRICK: Your Honor, I have one issue, not related
4 to the matter, just a practical issue related to the defendant's
5 placement in terms of preparation for trial. But in terms of the
6 motions, Your Honor, no. I just have a request to make in terms
7 of where he will be housed.

8 He's in Jones County now. I was just trying to see if
9 he can remain there until we're close to the trial, because I
10 think it's terribly inconvenient to drive back and forth, you
11 know, down from -- I'm not sure where --

12 THE COURT: Yes, I don't think he'll be moved until
13 shortly before the trial, and that's --

14 MR. PATRICK: I was just wondering could the court like
15 maybe we could have the marshals because it'd just be too
16 difficult. -

17 THE COURT: I certainly understand that concern.

18 MR. PATRICK: All right, thank you very much.

19 THE COURT: And I don't think that he's -- there's any
20 plan to move him until shortly before the trial of the case. All
21 right.

22 MR. PATRICK: Your Honor, if that happens, I can just
23 inform you, and we can make some arrangements for him to
24 stay there if there's any attempt shown for that to happen?

25 THE COURT: Well, the marshal is sitting right behind

1 you, and he understands; he's been nodding his head the whole time
2 so he understands.

3 MR. PATRICK: I didn't see him, Your Honor, but --

4 THE COURT: I understand, I know, but -- okay, anything
5 else?

6 MR. PATRICK: No, Your Honor.

7 THE COURT: Mr. Garland.

8 MR. GARLAND: No, Your Honor.

9 THE COURT: All right.

10 (PRETRIAL HEARING CONCLUDED)

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CERTIFICATE OF REPORTER

I, SALLY L. GRAY, Official Court Reporter of the United States District Court, in and for the Middle District of the State of Georgia, do hereby CERTIFY that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Sally L. Gray USCR
SALLY L. GRAY, USCR
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
3-11-04
DATE