

1 A: Yes, sir.

2 Q: Before the grand jury was done, was there a submission
3 that you guys eventually -- and when I say you guys, I'm talking
4 about Metro -- that you eventually make to the DA's Office to
5 determine whether or not prosecution will take place and what
6 charges might occur?

7 A: Yes, sir.

8 Q: And ultimately you know that the decisions on -- on what
9 to charge and how to charge and if to charge are the DA's decision,
10 correct?

11 A: Yes, sir.

12 Q: You made a recommendation?

13 A: Yes, sir.

14 Q: And that recommendation was based on your investigation
15 to not charge ACS because there was evidence of them having done
16 work at the hospital?

17 A: Yes, sir.

18 Q: Okay. Ultimately, did you have a discussion with Scott
19 Mitchell at any time about documents which might show that they
20 didn't do work at the hospital?

21 A: I don't recall any -- repeat that again, sir.

22 Q: Yeah. It's maybe a bad question, a negative one. I know
23 -- well, let's talk about what you actually did then.

24 You submit the -- the materials to the DA's Office for --
25 for prosecution or request for prosecution.

1 A: Yes, sir.

2 Q: After that is done, do you have further discussions with
3 Mr. Mitchell and/or Eric Jorgenson about what to charge and if to
4 charge and who to charge?

5 A: No. Once -- once -- once we decided to submit the case,
6 from what I recall and I -- it -- again, this was a long time ago,
7 there was a long pause between the time that we -- we gave the
8 information over to the time that we went to the grand jury and
9 then we were just subpoenaed to testify in the grand jury.

10 Q: Okay. And of the materials that -- I mean, I assume that
11 there were a lot of materials in your overall investigation; is
12 that correct?

13 A: Yes, sir, there's quite a bit.

14 Q: How many books, binders or -- or the like were there?

15 A: I want to say 15, 20.

16 Q: And were in addition to that, were there other
17 productions like custodian of records production of actual bank
18 records and the like that were produced?

19 A: Yes, sir.

20 Q: Okay. And so those were collected by Metro. Was all of
21 that material provided in the submission or a portion of it based
22 on what charges you thought were going to be brought or should be
23 brought?

24 A: I couldn't tell you. I thought it was a portion based on
25 what we thought we were going to submit, but I couldn't tell you

1 exactly what I was a part of exactly putting all that stuff
2 together.

3 Q: So if I understand you correctly, you say, hey look,
4 we've done our investigation, we focused on this person or persons,
5 here are the charges that we think apply to them and here's the
6 supporting evidence --

7 A: Right.

8 Q: -- for the charges --

9 A: Yes, sir.

10 Q: -- is that fair?

11 A: Yes, sir.

12 Q: Then that material goes to the DA's Office for
13 determination?

14 A: Right.

15 Q: And so you don't recall ever having discussions with any
16 District Attorney about whether you should after that charged
17 things or not charged things; is that correct?

18 A: Right.

19 Q: Okay. And just so we're clear, in the actual police
20 report, the submitting police report, do you make recommendations
21 on charges and why you don't want to have certain other charges?

22 A: You know, I'd have to look at the police report and see
23 what it exactly says, but yes, usually that's our method. And I do
24 remember we did recommend that we don't charge ACS. Now whether or
25 not I gave a list or we gave a list of what was the reasons why

1 not, I don't remember if that's in there. But we did recommend
2 that we shouldn't go after ACS, but there would be supporting
3 information in the body of the report that would talk about what we
4 found during the investigation.

5 Q: Okay. So at least from your perspective on the original
6 submission, there was never anything represented to the DA's Office
7 or -- or in the materials that ACS had done no work at UMC; is that
8 fair?

9 A: I --

10 Q: Was not?

11 MR. ALBREGTS: Again, Judge, object on relevance grounds.
12 This gets back to the same issue.

13 MR. STAUDAHER: It's what was turned over or not turned over,
14 Your Honor.

15 THE COURT: I'm going to allow the question.

16 THE WITNESS: Are you saying if I know what's in the report if
17 it says --

18 BY MR. STAUDAHER:

19 Q: Let me ask it again --

20 A: Okay.

21 Q: -- since we're -- we're clear on this. Is -- in turning
22 over the materials supporting the charges that you were
23 recommending?

24 A: Yes, sir.

25 Q: Okay. Was there any material that indicated that ACS, in

1 fact, did no work at the hospital?

2 A: Not that I'm aware of. No, sir.

3 Q: Okay. So, the only information that you recall turning
4 over would have shown that ACS did some work?

5 A: Yes, sir.

6 Q: And that was also contained at least discussed that you
7 believe in your officers -- in the officer's report?

8 A: Yes, sir.

9 Q: And you said that it was your recommendation to the DA's
10 Office to not charge ACS because they had, in fact -- you at least
11 had evidence that they had, in fact, done some work at the
12 hospital?

13 A: Right.

14 Q: Now all of that is part of the original case materials
15 that are submitted, fair?

16 A: Yes, sir.

17 Q: So, then you said a number of months pass by and then the
18 case goes to the District Attorney or the case goes to the grand
19 jury. Did you testify at the grand jury?

20 A: Yes, sir.

21 Q: Okay. Before you testified at the grand jury, did you
22 know, in fact, what charges the DA was actually pursuing at that
23 point?

24 A: No, sir.

25 Q: When did you, if you ever did, learn what -- what charges

1 the DA was pursuing?

2 A: Probably way down the road right before trial.

3 Q: Okay. And you've -- you've seen actually the charging
4 document itself, the indictment?

5 A: Yeah, after the fact. A long ways after the fact. Yes,
6 sir.

7 Q: Five different entities that are being charged in that
8 charging document, correct?

9 A: Yes.

10 Q: Four of which are not ACS --

11 A: Correct.

12 Q: -- correct?

13 MR. ALBREGTS: Objection, relevance.

14 THE WITNESS: And let me clarify when I say that we didn't
15 know what was charged, you know, there's a difference between
16 knowing that there was charges that were made. There was actual a
17 list of charges --

18 MR. STAUDAHER: Uh-huh.

19 THE WITNESS: -- and what was the evidence behind the charge.
20 What was the reasoning behind the charge of the affidavit or the --
21 I forget what you call it, the sentencing whatever.

22 BY MR. STAUDAHER:

23 Q: Okay. So you never actually had -- did you have
24 discussions --

25 A: Charging documents is I guess was what we never saw.

1 Q: -- did you have discussions after the fact with regard to
2 the charges and what supported or didn't support them?

3 A: No.

4 Q: Okay.

5 A: No, sir.

6 Q: So again, you come in, you give your testimony before the
7 grand jury, there's an indictment; what did you -- what interaction
8 do you have afterward with providing additional materials, if any,
9 to the DA's Office to the best of your recollection?

10 A: It was kind of again a long lull before we went to trial
11 and --

12 Q: Was it --

13 A: -- so it wasn't until --

14 Q: -- at some point --

15 A: -- it wasn't until we --

16 Q: I'm sorry.

17 A: -- started ramping up for trial that we started kicking
18 into gear as far as what needs to be turned over.

19 Q: Was there discussion about getting defense access to
20 things like the vault and computer files and things like that?

21 A: Yeah, we've always had that policy all along that if any
22 time the defense wanted to look at our -- our office or what we
23 have at the evidence vault, it's an open book.

24 Q: Was there ever a time that you or anybody that you worked
25 with at Metro ever specifically decided hey, we're not turning this

1 over because this looks bad or anything like that?

2 THE WITNESS: No, we would --

3 MR. ALBREGTS: Your Honor, object on relevance. We're not
4 contesting that. That's not an issue here.

5 THE COURT: I'm going to allow the question. He's answered.
6 I heard the answer. Go ahead.

7 MR. STAUDAHER: Okay.

8 THE COURT: Next question.

9 THE WITNESS: We would never do something like that.

10 BY MR. STAUDAHER:

11 Q: Okay. Was there ever a time when he -- when you talk
12 with Mr. Mitchell or Mr. Jorgenson at least during the production
13 of that case where you said, you know what, let's not turn
14 something over to the defense?

15 A: That never happened.

16 Q: As a matter of fact, if you were -- if you had a request
17 to let's say come down and look at all your books or anything like
18 that, would you have honored that?

19 A: Absolutely.

20 Q: In fact, did you do that at a subsequent time at a vault
21 review?

22 A: Yes, sir.

23 Q: And this was after the trial, fair?

24 A: Yes.

25 Q: So you go down to the vault with Mr. Albregts?

1 A: Yes, sir.

2 Q: He reviews all the vault materials?

3 A: Yes, sir.

4 Q: Is there anything that you would have not provided or
5 allowed him access of had he requested looking at the vault
6 materials before trial?

7 MR. ALBREGTS: Again, relevance, Judge. This -- this isn't
8 the issue. I'm not -- I'm not alleging he hid something or didn't
9 give me access. That's not the issue.

10 MR. STAUDAHER: Well, he's talking about turning over
11 documents or not turning over documents.

12 THE COURT: Well, it's turning over after the trial.

13 MR. ALBREGTS: And that's after the trial.

14 MR. STAUDAHER: No, I'm just --

15 MR. ALBREGTS: It's also not relevant.

16 MR. STAUDAHER: I'll talk about them before.

17 THE COURT: So, I have question.

18 MR. STAUDAHER: Okay.

19 THE COURT: So -- and then follow-up, Mr. Staudaher.
20 Sir, you had said you received some discs from Mr.
21 Campbell or there's a meeting with Mr. Campbell, correct?

22 THE WITNESS: Yes, sir.

23 THE COURT: Do you remember how many discs you received?

24 THE WITNESS: It's either one or two. I can't remember.

25 THE COURT: And then there was a question what did you do with

1 them and you said you did not give the discs to the DA; is that
2 correct?

3 THE WITNESS: I did not give the discs to the DA. No, sir.

4 THE COURT: Where -- where did those discs go? Where were
5 they kept?

6 THE WITNESS: They --

7 THE COURT: You received them? What did you do with them?

8 THE WITNESS: The disc would have been put into a binder like
9 the ones that they have and, you know, they would have been
10 downloaded into a binder and that's what Nancy did. She actually
11 printed them out, put them into the binder for them and then we
12 have a shelf where we keep our -- we keep copies of all the stuff
13 that we use for our case in chief and we put that on the shelf
14 right there --

15 THE COURT: And that binder --

16 THE WITNESS: -- in the office.

17 THE COURT: -- what happened -- was that binder given to the
18 DA or defense attorney?

19 THE WITNESS: The binder, as far as I know, was not given to
20 the DA or the defense attorney.

21 THE COURT: All right. Mr. Staudaher, go ahead.

22 BY MR. STAUDAHER:

23 Q: Okay. And my point is is there any -- even though
24 something's given or not given over to the DA or to the defense, do
25 you maintain those records at least in an accessible form for

1 either side if they wish to look at them?

2 A: Yes, sir.

3 Q: Have you ever precluded or said we're not going to let
4 anybody look at these materials in this case?

5 A: No, I'd never do that.

6 Q: Okay. So, if at any time there was a request to look at
7 certain information, your case file, anything like that, would you
8 have honored that request?

9 MR. ALBREGTS: Asked and answered, Judge.

10 THE COURT: Sustained. He said he would have -- he would have
11 honored the request from either side.

12 MR. STAUDAHER: Okay.

13 In fact, during the preparation up to -- to trial, there
14 were specific requests made for materials that Metro had that were
15 not provided to the DA, correct? Like computer files and the like.

16 THE WITNESS: Computer file is right 'cause the voluminous of
17 it, yes. And there is stuff in the evidence vault that wasn't
18 turned over that, you know, was part of the search warrant, but it
19 wasn't what we found relevant to the investigation.

20 BY MR. STAUDAHER:

21 Q: So -- so you got a search warrant, it delineates the
22 things that are collected, that information's turned over clearly,
23 right?

24 A: Yes.

25 Q: But the actual items themselves are housed at the vault?

1 A: Yes. And because the nature of being a telephonic search
2 warrant, we're only allowed to search a certain portion of -- of
3 the computers itself. So, therefore, there's a whole vast area of
4 stuff on those computers that we wouldn't be able to allow the
5 search due to the limitations of the search warrant, so that stuff
6 we couldn't even turn over or look at ourself.

7 Q: So pretrial there was a specific request to get that
8 information, correct?

9 A: Yes.

10 Q: And you gave it over?

11 A: Yes, sir.

12 Q: Plus --

13 MR. ALBREGTS: Your Honor, so the records clear, who made that
14 request and who was it given to? I'm not --

15 THE COURT: Just clarify that. Thank you.

16 BY MR. STAUDAHER:

17 Q: Sure. The defense made the request, correct?

18 A: Yes, sir.

19 Q: As a matter of fact, when the defense made a specific
20 request for computer files, it wasn't defense counsel who went and
21 tried to obtain those; is that correct?

22 A: I believe it was Mr. Thomas that obtained them.

23 Q: He came down?

24 A: Yes, sir.

25 Q: And initially when you do a sort of request like that, is

1 there something called like a mirror image of the hard drive or
2 something that you have?

3 A: Yes, sir. And I'm not a computer guru, but what I
4 understand the process is is they create an exact mirror image of
5 what the hard drive contains and that information becomes the best
6 evidence in the case, not the computers itself.

7 Q: Was that information at least from Mr. Thomas'
8 perspective at that time when it was produced accessible? Meaning
9 searchable or look -- someone can look into it.

10 A: I'm assuming they could 'cause there was no complaints,
11 but you know, I couldn't tell you on the back side. I mean, yes,
12 it was provided, but I don't know if it was searchable or lookable
13 or whatever.

14 Q: You know that there were -- there were emails and things
15 that were produced at the trial from those documents?

16 A: Yes, sir.

17 Q: Okay. So obviously there was access that was obtained
18 from those materials, correct?

19 MR. ALBREGTS: I'm going to object on relevance grounds as to
20 -- the issue is what they did with the book and whether they ever
21 gave it to us. I mean, the access --

22 THE COURT: I'm going to sustain the objection. That this
23 Court's focus.

24 BY MR. STAUDAHNER:

25 Q: Correct. But in general, the book is part of the entire

1 amount of material that was in the investigation, correct?

2 A: Yes, it was. Yes, sir.

3 Q: So there were materials that were turned -- that were
4 presented to the DA's office for the support of the prosecution
5 which was not the entirety of that record; is that fair?

6 A: Yes, sir.

7 Q: And just so we're clear whether its computer or file book
8 or anything else, did you ever limit access of any of that to the
9 defense?

10 MR. ALBREGTS: Asked and answered.

11 THE COURT: Sustained. You said if anyone would have asked
12 either side, he would have allowed it.

13 MR. STAUDAHER: For all of those materials? This -- okay. I
14 want to make sure that's part of the record.

15 THE COURT: For the entire case, correct, sir?

16 THE WITNESS: I would not withhold anything that we ever
17 obtained from anybody.

18 BY MR. STAUDAHER:

19 Q: Was an -- as a follow-up to that. I know that there were
20 specific requests for computers, those were provided. Was there
21 ever a specific request for review of anything in this case that
22 you did not honor?

23 MR. ALBREGTS: Asked and answered.

24 THE WITNESS: Every request was --

25 THE COURT: I'm going to --

1 THE WITNESS: -- honored.

2 THE COURT: -- last time. Go ahead.

3 THE WITNESS: Yes, Your Honor. I'm sorry. Every request is
4 honored.

5 MR. STAUDAHER: Okay. Nothing further, Your Honor.

6 THE COURT: Anything?

7 REDIRECT EXAMINATION

8 BY MR. ALBREGTS:

9 Q: The information in the notebook that Nancy Sampson
10 compiled, that came from ACS directly didn't it?

11 A: It came from Don Campbell's office from ACS. Yes, sir.

12 Q: So that wouldn't have been anything that would have been
13 on Lacy Thomas' computer if he would have gone down to the evidence
14 vault and looked at it, would it?

15 A: I would say no, but I couldn't answer that one hundred
16 percent.

17 Q: And prior to trial, a lot of the information that you --
18 or if not all of the information and documents that you seized and
19 had as a result of this investigation, they were at the evidence
20 vault for Metro, correct?

21 A: Yes, sir.

22 Q: And you indicated this notebook would have been -- would
23 that have been in your detective offices; is that where that would
24 have been stored?

25 A: Yes, sir. We have an office. We've got notebooks that

1 are compiled that look just like that --

2 Q: On all your cases?

3 A: -- of all the cases that we do.

4 Q: Did Mr. Mitchell or any representative from the DA's
5 Office go down to the evidence vault -- pretrial to go over the
6 evidence or meet with you to discuss the evidence and what was
7 there?

8 A: Not that I recall. No, sir.

9 Q: Did Mr. Mitchell ever go to your office to look over your
10 notebooks and the information that was there prior to trial to see
11 what you had?

12 A: Not that I recall. No, sir.

13 MR. ALBREGTS: No further questions.

14 THE COURT: Anything further, Mr. Staudaher?

15 MR. STAUDAHER: No, Your Honor.

16 THE COURT: Okay. Thank you, Sergeant --

17 THE WITNESS: Thanks, Your Honor.

18 THE COURT: -- for your testimony. You are excused.

19 Any other witnesses?

20 MR. ALBREGTS: Ford real quickly, Judge.

21 THE COURT: All right.

22 Excuse me, Mr. Staudaher, Mr. Albregt, how long do you
23 envision this witness to be?

24 MR. ALBREGTS: I've got five minutes with him.

25 THE COURT: Okay, 'cause I have a trial starting in one

1 minute. I mean, I'll finish up with the witness. We'll have to
2 come back another -- any other witnesses besides this gentleman?

3 MR. STAUDAHER: I don't anticipate him being long, Your Honor.

4 MR. ALBREGTS: No. And I don't have any other witnesses.

5 THE COURT: Okay. Good. Counsel, if you can just tell
6 everyone else because we're just getting -- you know, running late
7 here, we will start at 11:15.

8 UNIDENTIFIED SPEAKER: Yes, Your Honor.

9 THE COURT: Thank you.

10 **MICHAEL FORD**

11 having been called as a witness and being first duly sworn,
12 testified as follows:

13 THE CLERK: Please be seated and then state and spell your
14 name for the record.

15 THE WITNESS: My name is Michael Ford, F-O-R-D.

16 **DIRECT EXAMINATION**

17 BY MR. ALBREGTS:

18 Q: Mr. Ford, you're a sergeant with the Las Vegas
19 Metropolitan Police Department?

20 A: I am.

21 Q: You used to be a detective?

22 A: Yes, sir.

23 Q: In your capacity as a detective, were you involved in the
24 investigation -- the criminal investigation of UMC and Lacy Thomas?

25 A: I was.

1 Q: And was that one all-encompassing investigation about Mr.
2 Thomas, UMC and various vendors and entities that did business with
3 UMC?

4 A: That's correct.

5 Q: And was one of those entities business' ACS?

6 A: It was.

7 Q: And ACS was affirmed it was hired or contracted to help
8 collect receivables and other bills for UMC that was a general
9 overview of what they were to do?

10 A: Increase their baseline to yeah find other revenue funds
11 to increase profit for UMC.

12 Q: In connection with this case, were you working with
13 Detective Whiteley?

14 A: I was.

15 Q: And did you conduct -- in your investigation of the ACS
16 aspect of the case which we want to focus on today, did you conduct
17 interviews of two ACS' principals?

18 A: I did.

19 Q: And that would have been Ross Fidler and Bob Mills?

20 A: Yes, sir.

21 Q: And that was at Don Campbell's office?

22 A: Yes, it was.

23 Q: During the course of the interview did the issue arise as
24 to documents, information, records that ACS might have that you
25 would want to look at as an investigator?

1 A: Yes, sir.

2 Q: And did you or -- and/or Detective Whiteley make a
3 request of Mr. Campbell and ACS to provide that information to you?

4 A: Yes, sir.

5 Q: And did they ultimately do that?

6 A: They did.

7 Q: And do you remember how that was provided to you?

8 A: It was by a letter by -- from Mr. Campbell at his office
9 and on a disc.

10 Q: And do you know where there multiple discs provided by
11 Mr. Campbell over time or was there just one?

12 A: I can't -- I think there was just one disc that came with
13 it and then we created a folder out of that with his letter that
14 was provided -- that he provided the information we requested.

15 Q: And you're familiar with the notebook which is at issue
16 in this case --

17 A: I am.

18 Q: -- the ACS action items?

19 A: Yes, sir.

20 Q: And that notebook contains documents that were received
21 by you from Mr. Campbell on behalf of ACS which was ultimately
22 Exhibit G in the trial; is that correct?

23 A: Yes.

24 Q: Now, what did you do with those discs when you got them?

25 A: We took them back to the office. We made a copy of each

1 disc. And then we observed or looked at what -- what the data
2 contained on the disc.

3 Q: Okay. And ultimately at least somebody created the --

4 A: We created a folder. Correct. Yeah.

5 Q: Did -- did you provide those discs to the District
6 Attorney's Office?

7 A: When we submitted the case with the officer's report, all
8 the -- all the evidence -- all the data that we had referenced
9 every subject in that officer's report. There's many sections. We
10 submitted them what we had gathered with that to support charging
11 or not charging.

12 Q: And in that officer's report which I think was close to
13 60, 65 pages, there were a few pages directly addressing the ACS
14 aspect of the investigation, correct?

15 A: Yes, sir.

16 Q: Who were you working at -- working with at the District
17 Attorney's Office? Who was the DA assigned to the case?

18 A: Mr. Mitchell.

19 Q: And how many times did you meet with Mr. Mitchell during
20 the course of the investigation?

21 A: Oh, dozens.

22 Q: And during the course of the investigation, did you
23 discuss what you were finding in terms of documents and entities
24 and evidence?

25 A: Yes, sir.

1 Q: Did that include the ACS aspect of it?

2 A: It did.

3 Q: And so the disc that Mr. Campbell provided to you with
4 the ACS information, do you recall specifically that being part of
5 what you gave to Mr. Mitchell when you gave your officer's report?

6 A: I would have turned the disc in. Yes, sir.

7 Q: And in the officer's report you go through the evidence
8 as it relates to ACS and whether or not they should be charged,
9 correct?

10 A: Correct.

11 Q: And it was your recommendation in that report that ACS
12 should not be charged?

13 A: Correct.

14 Q: And the reason for that was in part the interviews that
15 you conducted with the -- with the two individuals?

16 A: It was a combination of everything that we were looking
17 at.

18 Q: Right. The interviews and also the information that Mr.
19 Campbell had provided about the work that ACS had done at UMC.

20 A: Yeah. We had looked at it and decided that it was
21 totally different than what we had seen with the other things that
22 we had recommended charging. That we actually had seen product of
23 work that ACS had delivered and whether or not it was fair or good
24 deal, I didn't believe it was. We didn't think it was. But we
25 didn't feel that we had what we had on the other -- other deals.

1 Q: You didn't feel it was criminal?

2 A: I didn't feel it was as criminal as the other one. So I
3 wasn't as confident that we can get it on compared to the other --
4 other charges that we had.

5 Q: And Mr. Mitchell was a part of that conversation?

6 A: Yes, sir.

7 MR. ALBREGTS: I have nothing further.

8 THE COURT: Any cross examination?

9 MR. STAUDAHER: Couple of things.

10 CROSS EXAMINATION

11 BY MR. STAUDAHER:

12 Q: You were actually author of the officer's report,
13 correct?

14 A: Yes, sir.

15 Q: So you have a discussion with -- with Mr. Mitchell. You
16 provided the officer's report. And you provide discovery,
17 supporting documents to Mr. Mitchell.

18 A: Yes, sir.

19 Q: Your investigation though was -- was quite more
20 expansive, was it not?

21 A: Quite a bit.

22 Q: Okay. Fair to say there were -- it ended up being many,
23 many binders of stuff that --

24 A: Twenty-six or thirty-two of them I think total.

25 Q: Okay. And search warrants stuff and computer things, and

1 all of that stuff, right?

2 A: Yup.

3 Q: So the -- the materials that you provide as part of the
4 submission, was it all of that stuff?

5 A: It was all of it, yeah.

6 Q: You provided all the computer materials, all -- all the
7 discovery that was at the vault, everything?

8 A: Oh no, no, no, no. Oh no.

9 Q: Okay. So let's -- let's make sure we're clear on this.

10 A: Yes, sir.

11 Q: When you make a submission --

12 A: Uh-huh.

13 Q: -- even though your -- your essential investigation maybe
14 26 binders of -- of stuff and computer things and whatever, do you
15 submit all of that typically with your submission?

16 A: No.

17 Q: Okay. So at least the materials you submit, do they
18 typically support whatever charges you think are valid?

19 A: Correct.

20 Q: Okay. Is that what you did in this case?

21 A: That's what we did. Yes, sir.

22 Q: So you had a discussion with Mr. Mitchell and I think
23 even in your officer's report you indicate that there at least was
24 evidence of ACS doing work at UMC?

25 A: Correct.

1 Q: So you don't recommend charges related to UM -- when I
2 said UMC, I meant ACS.

3 A: Correct.

4 Q: That you don't recommend charges related to ACS?

5 A: Correct.

6 Q: The theft stuff like you had done with the other ones.

7 A: The others it was -- it wasn't as apparent. Correct.

8 Q: Okay. So in the other ones that you were recommending,
9 those were indications that they had done a little or no work or
10 something to that affect?

11 A: Absolutely.

12 Q: But ACS was different and that's why you didn't recommend
13 charges related to ACS?

14 A: Correct.

15 Q: Okay. So, this is before any -- any grand jury takes
16 place or trial or anything like that?

17 A: Yes, sir.

18 Q: In fact, you never testified at the trials, is that
19 right?

20 A: Never did. Yes, sir.

21 Q: Were you even in town? Was there something going on at
22 the time? Do you remember?

23 MR. ALBREGTS: Objection, relevance.

24 THE COURT: Sustained. He didn't testify.

25 MR. STAUDAHER: Fair enough. You didn't testify at the trial.

1 Was there any discussion with Mr. Mitchell or further
2 providing of -- of records or evidence from this larger
3 investigation after you submitted it to the DA's Office, before the
4 grand jury was -- was done?

5 THE WITNESS: No.

6 BY MR. STAUDAHER:

7 Q: Okay. So did a number of months pass after your
8 submission before there was an indictment?

9 A: Yes, sir.

10 Q: Did you know what charges were actually going to be
11 levied at the time of the indictment?

12 A: No, we did not.

13 Q: Did you learn that later on?

14 A: We learned it after the fact.

15 Q: Okay. Did you after the fact provide additional
16 materials to Mr. Mitchell?

17 A: We did.

18 Q: And what did those contain, if anything?

19 A: It was I believe another binder for ACS is what it was.
20 We had created another folder for him because the way -- when we
21 found out that he had actually charged ACS in the indictment, we
22 had a conversation with him in regards to what the materials or
23 whatever. And I can't remember if he remembered if he had it at
24 his office or he didn't have it.

25 Q: Okay. Let me -- let me go back. I've got to ask about

1 this.

2 So after the fact -- after the indictment, after the
3 charges had been brought, you learned that ACS is -- is charged in
4 the case?

5 A: Yes, sir.

6 Q: When was that?

7 A: I don't know -- I don't know what the year was. I don't
8 know what the day was. But it was -- it was after the grand jury.

9 Q: How long, a month, a year, two years? What?

10 A: Probably pretty -- pretty immediately right after when we
11 found out what the charges were.

12 Q: So when did you find out when the charges were or what
13 the charges were?

14 A: When we had a discussion with -- with Scott Mitchell at
15 the DA's Office.

16 Q: Okay. And -- and you know that the charges related to
17 ACS at least in the indictment did not have an allegation that ACS
18 did no work, correct?

19 A: Correct.

20 Q: Okay. So, again that --

21 A: I see what you're saying.

22 Q: -- that specific charge is different than the other
23 charge?

24 A: Yes, sir. Yeah.

25 Q: So the information that you say that you -- you would

1 have provided to Mr. Mitchell, do you recall what that was?

2 A: No, I don't. No.

3 Q: Okay. You were -- had done an investigation involving
4 tail numbers and the like, things like that, right?

5 A: Yes, sir.

6 Q: That was part -- part of an -- of investigation that you
7 had done; is that right?

8 A: That's correct.

9 Q: Do you remember what it was that you were talking about
10 with Mr. Mitchell related to ACS at that point?

11 A: We were talking about -- it was a little more convoluted.
12 We were looking at the actually when ACS was Superior Consultants
13 prior to turning into ACS. And they had -- the contract that they
14 had established with UMC was a pretty large contract.

15 So looking at them gathering that contract, we felt that
16 maybe it helped this ACS purchased Superior for a lot more money
17 than it was worth.

18 Q: Okay.

19 A: It was --

20 Q: So that --

21 A: -- so --

22 Q: -- so that what we're talking about is not related to the
23 nuts and bolts of ACS at UMC --

24 A: Not at all.

25 Q: -- but how Superior Consultants essentially and ACS came

1 together and what was going on with the Superior Consultants?

2 A: Correct. Yes.

3 Q: Okay. So it predated any action by ACS at UMC?

4 A: UMC, yeah. That was not of our discussions about UMC.

5 Q: Okay. That's what I was concerned about.

6 A: Oh, I'm sorry about that.

7 Q: Okay.

8 A: I didn't know what you were talking about.

9 Q: All right.

10 A: I'm sorry. I apologize.

11 MR. STAUDAHER: I have nothing further, Your Honor.

12 THE COURT: Anything further, Mr. Albregts?

13 REDIRECT EXAMINATION

14 BY MR. ALBREGTS:

15 Q: So, you had --

16 THE COURT: Actually, Mr. Albregts, let me -- I have a
17 question. This way it'll allow the two of you --

18 MR. ALBREGTS: Absolutely.

19 THE COURT: -- to follow-up.

20 MR. ALBREGTS: Absolutely.

21 THE COURT: Sir, you had stated that you had received at least
22 one disc --

23 THE WITNESS: Uh-huh.

24 THE COURT: -- from Mr. Campbell.

25 THE WITNESS: Yes, sir.

1 THE COURT: And then later it says I gave the disc, but I
2 heard with an S plural to Mr. Mitchell. Do you recall now was it
3 one disc from Mr. Campbell or more than one disc?

4 THE WITNESS: I can't recall the number of discs, Your Honor.
5 But when I said disc, what I was referring to when we -- when we
6 provided the initial submittal to the office, we would have
7 provided the disc of all the interviews that we had done, so it
8 would have been 20 or 30 discs in there. They would have that.
9 Everything in the officer's report with the interview that we
10 recorded interviews on would have been submitted with that on disc.

11 So the -- I think the number of discs we received from
12 Mr. Campbell was just one disc with a letterhead attached to it and
13 that's what we turned over.

14 THE COURT: And I think you said you gave the disc to Mr.
15 Mitchell. Were you referring to the disc relating to the Campbell
16 meeting?

17 THE WITNESS: Yes, sir.

18 THE COURT: Okay. And did you actually give him a disc or was
19 it something that was printed out from the disc?

20 THE WITNESS: I can't -- I can't -- I really can't recall
21 that. Like I said, I -- I can't recall that.

22 THE COURT: All right.

23 THE WITNESS: It's been so long. I apologize.

24 THE COURT: Fair enough, sir. Mr. Albregts?

25 BY MR. ALBREGTS:

1 Q: So in the charging meeting that you had with Mr. Mitchell
2 before the case went to the grand jury, the recommendation not to
3 criminally charge ACS was discussed, correct?

4 A: No.

5 Q: That was just in your report?

6 A: Yes.

7 Q: Okay. So you don't recall actually having that
8 discussion with Mr. Mitchell?

9 A: Not in the charging meeting, no. We -- we talked with
10 Mr. Mitchell on several occasions prior to the grand jury.

11 Q: Okay. So it wasn't necessarily a quote, charging
12 meeting, end quote, but during the meeting you had a discussion at
13 some stage with Mr. Mitchell about not pursuing ACS criminally?

14 A: Correct.

15 Q: And the reason for that was because of the interviews
16 with the two principals and the documents that they had provided to
17 Mr. Campbell?

18 A: Yes.

19 Q: And -- and you discussed that and told that to Mr.
20 Mitchell --

21 A: Yes.

22 Q: -- about the interview and the documents, correct?

23 A: Yes, sir.

24 Q: And you say when the indictment came out and you saw that
25 ACS had been included at least as a -- as a count against Mr.

1 Thomas, did that somewhat surprise you?

2 A: We were a little a surprised by it. Yes, sir.

3 Q: And then you provided him other information you said
4 another notebook about ACS?

5 A: I can't remember at that time what we had done because
6 when we had looked at it there was some other -- along with ACS
7 like I said this investigation was -- was still going on quite a
8 different things, so when we had talked to Mr. Mitchell about why
9 he had charged the ACS, we had seen some of the other incidents
10 that had taken place.

11 From the interviews that we had did referenced Mr. Thomas
12 going down and trying to get another addendum done to a contract to
13 change some things. So we could see that yeah, there was some
14 favoritism there, there was some misconduct and I could see why he
15 charged it. So yeah -- so we saw some of that. And we -- and I
16 believe we had interviews of the people we talked too with that
17 that we -- that Mr. Mitchell might have requested again from our
18 office to provide him to support that.

19 Q: Was that the only time then after that the indictment
20 came down that you had a discussion with Mr. Mitchell about ACS or
21 -- or that evidence?

22 A: Yes, sir.

23 MR. ALBREGTS: Nothing further.

24 THE COURT: Anything further, Mr. Staudaher?

25 MR. STAUDAHER: Yes.

1 bit of, you know, stuff as we brought it in to him.

2 Q: Okay. So, again I just want to be clear on this. The
3 large -- the whole investigation --

4 A: Uh-huh.

5 Q: -- all of the stuff that you had, not all of that goes to
6 Mr. Mitchell during this investigation, fair?

7 MR. ALBREGTS: Asked and answered.

8 MR. STAUDAHER: Well --

9 MR. ALBREGTS: And beyond the scope of cross.

10 MR. STAUDAHER: -- it doesn't actually --

11 THE COURT: Sustained. I understood his testimony in that
12 regard.

13 BY MR. STAUDAHER:

14 Q: When the Judge asked you a question about you giving the
15 -- Mr. Campbell materials to Scott Mitchell, do you actually
16 remember giving Don Campbell's materials to Scott Mitchell?

17 A: No, I don't.

18 Q: Okay.

19 A: I apologize.

20 Q: And your recommendation at that time was to not charge
21 ACS?

22 A: Correct.

23 Q: Is it -- I mean, does it seem reasonable that you would
24 have provided evidence to Mr. Mitchell about an entity that you
25 felt shouldn't even be charged during the original submission?

1 A: No, I wouldn't have.

2 Q: Okay. So you don't have a recollection of ever providing
3 that material to Mr. Mitchell during the original submission, is
4 that fair?

5 A: That's fair.

6 MR. STAUDAHER: Nothing further, Your Honor.

7 THE COURT: Mr. Albregts, anything further?

8 FURTHER REDIRECT EXAMINATION

9 BY MR. ALBREGTS:

10 Q: Well, didn't you just testify earlier that you gave the
11 information on ACS along with the -- the interview transcripts to
12 Mr. Mitchell along with the other documents? I mean -- well, you
13 don't have a specific recollection of the day --

14 A: Correct.

15 Q: -- you handed it over.

16 A: Right.

17 Q: Do you have any doubt that you would not have given the
18 DA the information that ACS provided to you when you recommended
19 not to go after ACS criminally?

20 A: They would have -- no. Especially after we have found
21 out that they had charged, the DA's office they -- they definitely
22 would have got that information.

23 Q: Nothing further.

24 THE COURT: Anything further, Mr. Staudaher, to the last
25 question?

1 MR. STAUDAHER: No, Your Honor.

2 THE COURT: All right.

3 And can the sergeant be released for today?

4 MR. ALBREGTS: Yes.

5 THE COURT: All right. Thank you, sir, for your testimony.
6 You are excused.

7 Is this our last witness?

8 MS. FORSMAN: Yes, that's the last witness, Your Honor.

9 MR. ALBREGTS: Yes, Judge.

10 THE COURT: All right.

11 Now -- now, we need to set a time to argue any motion.

12 MR. ALBREGTS: Does the Court feel it necessary for
13 supplemental briefing given the evidence or have we beat this horse
14 to a pulp?

15 THE COURT: If I will give the parties -- if you want some
16 time to do these supplemental briefing, you don't have to, we can
17 just go ahead and set a hearing date for the -- the argument. All
18 right.

19 MR. ALBREGTS: We don't think we need to supplement.

20 THE COURT: Okay. Then you don't need to. Okay.

21 Carol, like probably mid-July, Carol on a Friday.

22 MR. ALBREGTS: Your Honor, go ahead and throw out a date, but
23 I'm going to be -- I've got some out-of-state time in July, but let
24 me see if it works.

25 THE CLERK: July 17th.

1 MR. ALBREGTS: Yeah, that's right in the middle. I'm sorry.
2 THE COURT: How about the next week?
3 MR. ALBREGTS: We should be back. Yeah, we're back the 24th.
4 THE CLERK: The 24th?
5 MR. ALBREGTS: Yeah. My father turns 80.
6 THE COURT: How about the 31st?
7 MR. ALBREGTS: My father turns 80 this July, so we're --
8 THE COURT: Is the 31st good for you, Mr. Staudaher?
9 MS. FORSMAN: Thirty-first.
10 MR. ALBREGTS: Thirty-first.
11 MR. STAUDAHER: Thirty-first. One second, Your Honor. That
12 looks to be good, Your Honor.
13 THE COURT: All right. That'll be at 10:30 'cause we do have
14 some probably at 9:30 this way -- all right.
15 And, counsel, I have a question. I don't know. I think
16 this was brought up before unrelated to our hearing today. The
17 Supreme Court dismissed Count 1. Count 6, misconduct of a public
18 officer relates to Count 1.
19 MR. STAUDAHER: Correct.
20 MS. FORSMAN: Correct.
21 THE COURT: Does that need to be -- is that still good?
22 MR. STAUDAHER: Yes, it's still good.
23 THE COURT: Okay. All right.
24 MS. FORSMAN: And we'll try to explain it at the time of the
25 argument if I can.

1 THE COURT: Okay.

2 MR. STAUDAHER: Supreme Court said it was still good, so
3 that's part of the order. The only thing they dismissed was Count
4 1.

5 THE COURT: I didn't know if there was some confusion or --

6 MR. ALBREGTS: Oh, there was confusion.

7 MS. FORSMAN: Oh, there's confusion.

8 MR. ALBREGTS: But that's another issue.

9 MR. STAUDAHER: Okay.

10 THE COURT: All right. Thank you.

11 MR. STAUDAHER: Thank you, Your Honor.

12 [Proceeding concluded at 11:21 a.m.]

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21 ATTEST: I hereby certify that I have truly and correctly
22 transcribed the audio/video proceedings in the above-entitled case
to the best of my ability.

23

24

25


Michelle Ramsey
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

Defendant.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

DEPT. XVII

000368

1 LAS VEGAS, NEVADA; FRIDAY, JULY 31, 2015

2 [Proceeding commenced at 9:35 a.m.]

3
4 THE COURT: Now, Lacy Thomas.

5 THE COURT RECORDER: Appearances please.

6 MR. STAUDAHER: Michael Staudaher on behalf of the State.

7 MR. ALBREGTS: Dan Albregts and Franny Forsman on behalf of
8 Lacy Thomas. Your Honor, we'd ask that his appearance be waived
9 today. He had a --

10 THE COURT: And that is fine because of the nature of this
11 matter. I think he was here a couple of weeks ago as well.

12 MR. ALBREGTS: Yes, he was here for the evidentiary hearing.

13 THE COURT: And if I recall he was here when we set the trial
14 date, correct?

15 MR. ALBREGTS: Yes, Your Honor.

16 THE COURT: All right. All right. We have two matters this
17 morning. One is to -- three motions -- one is to compel disclosure
18 of certain documents regarding this matter. Let's deal with that
19 one first.

20 [Defense attorney conferring]

21 MS. FORSMAN: Judge, one moment please, Your Honor.

22 THE COURT: Sure.

23 [Defense attorney conferring]

24 MS. FORSMAN: Your Honor, we actually -- that motion was --
25 was pending for a while. We went through various attempts to get

1 the Prosecutor to provide us -- basically it's connected to the
2 evidentiary hearing. We believe at this point that the evidentiary
3 hearing and the evidence that came out of the evidentiary hearing
4 probably solves the problem. We were trying to find out.

5 I think the only time it would -- would come into play
6 would be if the Court were to find that there were insufficient
7 proof that Mr. Mitchell had the documents because that's what we
8 were -- that's the discovery we're attempting to conduct was -- was
9 to show that the -- that the communications between the law
10 enforcement people and Mr. Mitchell. The detectives who came in I
11 think solved the problem.

12 THE COURT: Okay. So that -- that matter is off calendar.
13 And then part and parcel we have one for it's a double jeopardy and
14 part of that is also that the failure for the indictment to state a
15 crime or unconstitutional vagueness of the statute that what they
16 have alleged is not a crime; is that correct?

17 MS. FORSMAN: Correct.

18 THE COURT: All right.

19 MR. ALBREGTS: Yes.

20 THE COURT: Who's going to handle that?

21 MR. ALBREGTS: Judge, if we could I'd like to do the motion on
22 double jeopardy first --

23 THE COURT: Sure.

24 MR. ALBREGTS: -- and I'll be handling that. I'll just argue
25 from the podium if that's all right?

1 THE COURT: That's fine.

2 MR. ALBREGTS: Your Honor, obviously the evidentiary hearing
3 shed a lot of light on -- on some of the issues that the Court
4 needs to decide factually and applying those facts to the case law.
5 I'm not going to reiterate everything that we cited in our briefs.
6 I'm sure the Court's read it and is familiar with the case law.

7 So let me just try to do a brief argument as to what we
8 think the evidentiary hearing and the evidence that's now in the
9 record on this, what that does with the legal standard the Court
10 has to use to decide whether or not the case should be dismissed.

11 First, I'd like to touch briefly on the exculpatory
12 nature of the evidence in question. And we all know that it's the
13 notebooks relating to ACS.

14 First, those show the progress of the -- the meetings and
15 the work that ACS was trying to do which is exculpatory. It's
16 exculpatory because first of all UMC employees testified prior to
17 me receiving that book about the fifth day of trial. And many of
18 them testified that ACS was not doing much work, that there were
19 not many people there and so basically its impeachment evidence on
20 these witnesses who testified to that. If I would have had the
21 notebook, it would have impeached them. Therefore, been
22 exculpatory regarding the work done and the efforts of ACS.

23 And more importantly that also shows the need to
24 renegotiate the ACS contract. State alleges that Mr. Thomas went
25 back and renegotiated that out of the goodness of his heart to

1 benefit his friends, but those notebooks show that -- that the
2 testimony that it had to be renegotiated because they were doing a
3 lot of work and were not going to be making any money out of the
4 job and would have walked off the job; that's why the contract was
5 renegotiated. So there was no nefarious reason.

6 They also demonstrate that -- like I said the witnesses
7 that the DA called from UMC were untruthful about what ACS was
8 doing that would have really hurt their credibility.

9 And then finally, the State's theme of the whole trial as
10 the other counts allege and the State alleges that Lacy Thomas was
11 hiring people that were doing no work, that were coming in and just
12 taking the money and running. And that was their theme through the
13 trial and ACS was included in that in terms of that theme. And
14 this would give me ample argument to show how that theme was not
15 correct, that ACS was doing work just like the other vendors were
16 doing work as well.

17 But I think if there's any question about whether it was
18 exculpatory or not that was answered by the detectives themselves
19 because as they testified they recommended that ACS not be charged
20 in part because of all the information that Don Campbell had
21 provided to them. And the reason they recommended that is because
22 the information Don Campbell provided to them was exculpatory. And
23 that's why they recommended to the DA after six, eight, ten months,
24 whatever it was an investigation, we don't think the ACS count
25 should go forward. And the District Attorney's Office decided

1 differently.

2 So what are the undisputed facts that we learn at the
3 evidentiary hearing, Judge? And I again suggest to the Court that
4 these are undisputed given the record in the case. Well first of
5 all it's undisputed that I did not have the materials until the
6 time of trial.

7 Now I think the Court found that at least inferentially
8 in granting the mistrial that I hadn't seen them, but Mr. Campbell
9 merely reiterated that in his testimony. He indicated that at one
10 stage me, Albregts, asked him what documents have been produced and
11 he said, me, said something to the effect I don't have what you're
12 talking about.

13 And I think Mr. Campbell talked about the holy S moment
14 of when it clicked in my mind as -- at our meetings that -- that I
15 had never seen any of this stuff. And so there's no evidence to
16 rebut whatsoever that I hadn't seen it.

17 Now it's also important to note that the standard is not
18 that I had access to it. It's not that you could have come down
19 and looked through the mountains of evidence that -- that was
20 seized during the course of this enormous investigation and you
21 could have find -- they could have found it. That's not the
22 standard and access, Judge, is not the standard and it's just the
23 State if they argue that trying to detract from the fact that they
24 know they had it and it wasn't turned over.

25 We also know that the failure to turn over the documents

1 caused a mistrial. Again, I think that's in the record. The
2 evidentiary hearing really didn't do much more to add to that, but
3 there's no question that the failure to turn it over is what caused
4 me to have to ask for the mistrial and the Court to grant the
5 mistrial.

6 Now, most importantly there's no question, no question at
7 all that ACS gave the material to the detective long before the
8 trial. All three or actually two testified about that, Mr.
9 Campbell and Sergeant Ford. Whitely testified that he could not
10 remember specifically giving the discs and the books to the State,
11 but he did say that they talked about the evidence. They went over
12 the merits of the case and that included the information contained
13 in the notebooks. So there's absolutely no question whatsoever the
14 State through the detectives had the ACS material long before the
15 trial.

16 Now there's also no question whatsoever that the
17 detectives gave it to the District Attorney's Office long before
18 the trial. Now Sergeant Whitely again indicated he couldn't recall
19 the specific date or specifically the acts of giving the material
20 to the DA, but he testified that they discussed it and the fact
21 that's the reason they suggested that the ACS charges not go
22 forward.

23 Detective Ford though was much more certain. He
24 testified that -- that they received it, that they put it on a
25 disc, that it was eventually made into binders, but most

1 importantly testified throughout that they met with Mr. Mitchell,
2 they provided the materials to him, that they discussed it in the
3 context of the charging decision and that's why they made the
4 recommendation not to go forward on the ACS counts.

5 I think what was most telling was toward the end of his
6 cross examination. He was asked, do you remember actually giving
7 Don Campbell the materials. And he indicated, no, I don't. And I
8 got up and asked him, didn't you just testify earlier that you'd
9 given it to him. And he said, that's correct. I said, you handed
10 it over. He said, right. And then I said, do you have any doubt
11 that you would not have given the DA the information that ACS
12 provided to you when you recommended them not to go after ACS
13 criminally. And he said, no, they would have. Especially after we
14 found out that they had charged the DA's Office, they definitely
15 had that information.

16 And so Detective Ford was unequivocally testified that
17 that was handed over to the District Attorney's Office. They
18 discussed it. It's exculpatory because the District -- or the
19 detectives recommended that no charges be filed. And, in fact,
20 they were surprised when the ACS counts were charged. And it was
21 never turned over to us and therefore you declared a mistrial.

22 So the question then becomes, Judge, under the case law
23 with that very fact specific record under Hilton and the types of
24 cases that -- that discuss these issues, is whether it was
25 intentional or negligent. And if it was negligent, then the

1 question is whether it was excusable or inexcusable.

2 Now, there's a couple of important things about this
3 record. Namely, Mr. Mitchell or nobody from the District
4 Attorney's Office was called to testify, so we have a record of the
5 two detectives and Mr. Campbell. We, in the motion to compel
6 asking for emails and some of the things that the Court brought up
7 a minute ago tried to see if there would be any further information
8 from the District Attorney's Office regarding the circumstances of
9 getting the information regarding the circumstances of not
10 disclosing it to me. We didn't get that. And so we don't know
11 whether it's intentional or not.

12 Now we do know that the DA's Office got a recommendation
13 from the detectives who did the extensive investigation not to
14 charge the ACS materials. So, one could certainly in further
15 perhaps it was intentional. They wouldn't turn that over because
16 they knew how exculpatory it was. But I don't know that the record
17 supports that and I -- more importantly don't think that you need
18 to find that. Because if we go to the next step, is it negligence.
19 The question becomes is it excusable or is it inexcusable. They
20 didn't offer an excuse.

21 Mr. Mitchell didn't testify. Nobody's come in here and
22 said this is the reason we didn't turn it over. And so without an
23 excuse by definition, it becomes inexcusable. There's simply no
24 reason for them not to have turned over the documents to us.

25 Now one might argue and rightly so in this case that

1 there was a mountain of evidence. There were searches of Mr.
2 Thomas' office, UMC records, bank records. Literally a mountain of
3 evidence over the course of the extensive investigation that the DA
4 had not only at the DA's Office, but at the Metropolitan Police
5 Department evidence vault.

6 Now one might argue that it could be excusable if Mr.
7 Mitchell would have come in and said, you know, it was such a huge
8 case. I just missed it. We didn't see it. We didn't mean to do
9 it. There were so many things going on and so much of an
10 investigation that might be excusable. But again, that's not the
11 record.

12 The two detectives were clear when they repeated, both of
13 them that they discussed the material that were in the notebooks.
14 Ford said that they gave the notebooks to the DA. Well in advance
15 of trial they discussed it in the context of a charging decision
16 and then they went back after the charging decision 'cause they
17 were surprised that ACS counts have been charged and discussed it
18 even further with the DA.

19 So this isn't a case where they can say, geez, it was
20 some -- so much evidence, there's no way we could have -- it was
21 just an accident or a mistake on our part it's excusable. There's
22 no evidence whatsoever. In fact, the evidence supports that it was
23 not excusable. And if it's not excusable, then, Judge, you should
24 grant the motion for dismissal based upon double jeopardy.

25 Now again, Judge, the double jeopardy, and we cited the

1 cases and I won't get into that or I won't repeat them, but I'll
2 just touch on, the fact that double jeopardy doesn't mean the ACS
3 counts then go. The double jeopardy has to do with whether Mr.
4 Thomas has to face the specter of a whole new criminal trial on all
5 these charges after we got halfway through a criminal trial and it
6 was mistried as a result of the DA's actions and no fault of his
7 own.

8 Why is that -- the case law goes through it? But I'll
9 just touch on a number of things. The effect that a retrial would
10 have on a Defendant's life. That's clear in the case law that
11 appellate courts look at that. That a person shouldn't have to go
12 through a second trial under the circumstances that we have here
13 because of what it does to his life. He's had these charges
14 hanging over him for years. It's affected his employment. He's
15 had to pay for attorney's fees. He's had to adjust schedules. And
16 basically the case law says in this sort of case, the circumstances
17 here, a Defendant shouldn't have to go through that.

18 They also talk about the State getting a second chance to
19 correct the problems from the first trial, so they now had the
20 opportunity to go a week, week and a half of trial, see what my
21 cross examinations are going to be, see what our theory of defense
22 is going to be and they can go back and clean it up and correct it.

23 And appellate courts have found repeatedly that that is
24 another reason why a Defendant shouldn't be subjected to having try
25 the case a second time after a mistrial in these circumstances and

1 then the chance for them to strengthen their case. They looked at
2 the impeachment that we had of their witnesses and the theory.
3 This gives them time on a second shot to go out strengthen case and
4 try to have a better case against Mr. Thomas the second time. And
5 that's why Court's continue to say double jeopardy means the whole
6 case goes.

7 So just because the evidence related to only Counts 1 and
8 6 doesn't mean that the rest of the counts aren't affected by the
9 double jeopardy clause. It applies to the whole case.

10 So, Judge, in closing I think your decision in this case
11 is largely based upon the specific facts of this case. And those
12 are that they had it well in advanced. They discussed it. The DA
13 had it. He knew about it. And he didn't turn it over. No excuse
14 has been offered, so it's inexcusable. Under those facts, specific
15 to this case, the law requires dismissal of the charges on double
16 jeopardy grounds and that's what we'd ask the Court to do.

17 THE COURT: So you don't -- I mean, it's clear, but just so
18 I'm clear that merely striking Counts 1 and 6, and I know there's -
19 - there's an issue on Count 6 which references Count 1 --

20 MR. ALBREGTS: Right.

21 THE COURT: -- would be insufficient here.

22 MR. ALBREGTS: Absolutely. The case says and the case law
23 says on double jeopardy it's not the counts, it's the retrial that
24 violates the Defendant. In this case, Mr. Thomas' constitutional
25 rights.

1 And so no, it wouldn't be enough to say we just take --
2 carve out the ACS counts because the other counts were part and
3 parcel of all the benefits they would get on a retrial that Courts
4 of Appeal say that they shouldn't get. And so it's the retrial of
5 the trial and the effects on a Defendant that double jeopardy
6 protects. Not just certain counts.

7 And so because of that it would protect him from a
8 retrial of all of these counts as a result of the mistrial. So a
9 mistrial may only be on a certain issue or fact or -- or something
10 that arises in the case. It doesn't mean that that gets carved out
11 because of double jeopardy. The whole case gets dismissed.

12 THE COURT: In ever -- in every situation where there's a
13 mistrial for a discovery violation, are you saying that our Supreme
14 Court would state that the entire case now has to be dismissed for
15 -- for double jeopardy purposes? I know there's been numerous
16 cases up in the Supreme Court and for every Judge in this Court has
17 I'm sure has granted mistrials for discovery issues. So you're
18 saying that -- it sounds like what you're telling me is that if
19 it's on discovery issues that -- and the State knew about it either
20 assuming not intentional, but either gross negligence or just
21 negligently, that the case should be dismissed because of double
22 jeopardy?

23 MR. ALBREGTS: Not ever case. I think the Court needs to look
24 at it on a fact -- case by case basis on the facts before the
25 Court. And so I would say that if -- if in this case if somebody

1 came in and -- and we didn't -- let's say the detective said, you
2 know, we turned it over with all the other stuff we had and all the
3 other stuff we had was extensive. And the State came in and said
4 yes it was extensive, it was a huge investigation, we were doing
5 our best with our resources, we simply didn't see it, and we're
6 sorry, but here it is. And you declare a mistrial under those
7 circumstances, I don't think under Hilton that double jeopardy
8 would necessarily apply because it's excusable.

9 So I don't think it's a blanket rule that says every time
10 this happens double jeopardy attaches and the case is dismissed.
11 That's why the -- this case is so fact specific, that they had it
12 well in advanced. There's no question that he had to know about it
13 because the evidence that the Court heard was the detectives talked
14 to him about it. Not only before the grand jury because it was in
15 their charging -- their hundred and twenty page report where they
16 said this is why we don't think you should charge ACS. And then
17 after the grand jury, well before trial where they came back and
18 said that they were surprised because in part the notebooks showed
19 that there wasn't a crime at least in the eyes of the detectives
20 which make it exculpatory.

21 So the specific facts of this case they had it, they knew
22 about it, they didn't turn it over and that's what caused the
23 mistrial because it was exculpatory. That's why double jeopardy
24 attaches in this specific case.

25 So I would say no, it's not every case. But this is not

1 every case. This is a very unusual set of facts whether detectives
2 unequivocally said they discussed the information. One detective
3 said they gave the information and the detectives themselves said
4 that's why we didn't think you should charge ACS. If that's not
5 exculpatory, then I don't know what is from the investigating
6 detectives. But that's the reason you don't charge it. That's
7 what exculpatory evidence is.

8 And so no I'm not suggesting that's a blanket rule. I'm
9 saying under the facts of this case applied to the case law. At
10 the very least, the records clear that it was negligent and there
11 was no excuse for it. And I think under Hilton jeopardy attaches.

12 THE COURT: All right. Thank you, Mr. Albregts. Mr.
13 Staudaher, let's deal with one of these legal issue at a time.

14 MR. STAUDAHER: At a time.

15 Well, first of all he's not entitled to a dismissal or
16 the case going away, but under double jeopardy grounds because, in
17 fact, not only did he have the material however it came into his
18 possession, he had the material before the close of the trial. He
19 had the material at a time when he would actually use it because he
20 was introducing it into evidence, so he clearly had it in time for
21 the witnesses that he had.

22 That being said, clearly the State based on the
23 testimony, based on the fact that it was part of a police
24 investigation was at least constructively in possession of -- of
25 the book so to speak.

1 Now, going again to why he's not entitled to under double
2 jeopardy grounds another essentially a removal of the case from the
3 Court system. He -- he actually not only had the material, but he
4 requested the mistrial. He requested the mistrial under a
5 discovery violation grounds. The fact that he claims this material
6 is exculpatory I will get into a moment, but the fact is that he
7 declared that or he actually requested the Court to grant the
8 mistrial. So he's not entitled to come back and say that he's --
9 he is somehow prejudiced under double jeopardy and cannot go
10 forward again at trial because he was the one who requested it.

11 Secondly, this Court found even though the Court wasn't
12 obligated to do so because the defense had requested a mistrial on
13 those grounds that there was no -- there was a manifest necessity
14 to declare a mistrial. Court's not obligated to do so unless
15 there's a situation where something presents itself and the Court
16 sua sponte makes a determination, but the case cannot go forward
17 and the defense is not requesting a mistrial.

18 So under both situations there's no indication that the
19 State acted in bad faith or intentionally hid something from the
20 defense. I don't even think that they made that allegation.
21 Clearly it was a surprise by both counsel at time of trial that
22 this book was even being introduced. We didn't know -- hadn't seen
23 it at least that was my -- I had never seen it. I had been
24 involved in the case. As we came up to trial I was brought into
25 the case. I went through the discovery and materials we had within

1 our office. It wasn't there. I brought Mr. Albregts over to our
2 office and had him go through the materials that were in our office
3 plus the materials that had been provided, the supporting documents
4 from the Metro's detectives. It was not there.

5 So the fact that that information was not in our office
6 whether it had ever come to the office 'cause the case had a long
7 history, had ever come to the office at some point and was lost or
8 whatever, I don't know that there was any unequivocal finding by
9 this Court that the State had it in its possession and actually
10 prevented the defense from getting it, that we did something active
11 to -- to prevent them from having it especially in light of the
12 fact that he did get it before trial.

13 So two points on that. One not entitled to double
14 jeopardy because he requested the mistrial. Secondly, the Court
15 declared that there as manifest necessity to declare the mistrial.
16 So under both -- both prongs there is no basis for a claim of
17 double jeopardy in this particular case.

18 Secondly, the normal course of things for any kind of
19 discovery violation in a case before it gets to jury verdict,
20 before there's actually a verdict in the case, that's when if there
21 is a verdict in the case and information comes to light later on
22 that shows that somehow or another the jury verdict would have been
23 different. It would have altered the defenses. It would have
24 changed what could have been presented at trial to come out with a
25 different outcome. That's an exculpatory Brady violation. Meaning

1 that there was something that would have changed the outcome of the
2 trial in favor of the defense and it happened after all was said
3 and done.

4 This did not happen in this case. We were in trial. He
5 had the book. He was going to use it. And then the Court had the
6 arguments, entertained things and declared the mistrial. So we had
7 never gotten -- we hadn't even gotten through the presentation of -
8 - of the State's case in chief. It hadn't gone to the defense case
9 yet. The State was still presenting -- hadn't even presented
10 evidence on some of the contracts I think TBL specifically. And I
11 can't remember if we finished on -- on one of the other contracts
12 or not. But there were five contracts in this case.

13 And one of the most important parts about this is that
14 the five contracts are not considered nor were they charged, nor
15 were they argued or presented evidence on equally. There are four
16 contracts, Premier Alliance, Crystal Communications, TBL
17 Construction and Frazier Systems. Those four contracts all allege
18 that little or no work was done. No work product was provided or
19 that they didn't do the work for -- for what they got the money
20 for. That is the state for those contracts.

21 The last contract and the one that is the first count in
22 the indictment is the ACS contract. I've got the charging document
23 before me. I know the Court has reviewed it. I can read through
24 the points about what we're alleging here. In no place in this
25 particular indictment does the State ever allege that no work was

1 done.

2 I went through the arguments and counsel in his -- I
3 think when he was arguing to the Court about this in the past said
4 I would like to see Mr. Mitchell's opening statement to say --
5 'cause he was convinced that Mr. Mitchell at least related to the
6 ACS contract had said that there was no evidence of work being done
7 by ACS. I've got the -- got it -- I went through it this morning
8 again just to make sure. There's not a single argument by Mr. --
9 by Mr. Mitchell that ACS did no work.

10 It all boiled down to basically a single document that a
11 contract was in place. And -- and under the charging document
12 under Count 1 it says the three main points that we charged under,
13 and this is the State making the decision on charging. The police
14 don't make the decision. One, that they were collecting money owed
15 under contract terms that were grossly unfavorable. That by itself
16 shows that they were doing something, but that they were collecting
17 the money under contract terms that were grossly unfavorable.

18 Two, that they allowed Superior Consulting and/or ACS to
19 sell valuable assets at a price that was unreasonably low. That
20 also doesn't denote anything related to no work being done.

21 And finally that the Superior Consulting and ACS
22 modifying the contract to greatly increase the amount of money UMC
23 would pay to them for services and other property that was being
24 used or excuse me, for services that were being rendered through
25 collection services. All of that denotes that ACS is doing

1 something.

2 Now whether or not what they were doing was effective,
3 ineffective, that came into what plays down the road. Clearly, the
4 minutes -- meeting minutes that were contained in the book showed
5 that ACS was meeting in an attempt to try and increase the revenue
6 stream for their own purposes. They had the -- as the Court was
7 aware there was a baseline amount of money that they could -- they
8 had to meet before they could collect a single dime.

9 And above that baseline they would get 25 percent of
10 whatever they collected. They were not meeting that -- not every
11 month. They were doing the work, but they weren't getting that
12 money. As a matter of fact, they collected less money than UMC had
13 done before ACS got involved.

14 So the problem here and the basis of Count 1, the basis
15 of all this related to the book and the book is only connected to
16 Count 1 and Count 6 tangent -- excuse me -- tangentially. Count 1
17 ACS binder that does not reflect any allegation -- any allegation
18 that they did no work and the book only shows that they were trying
19 to do something to increase the revenue stream.

20 That's why when the Court declared the mistrial and said
21 that the material in the book because the Court hadn't reviewed it
22 was potentially exculpatory. There's never been a finding that
23 that material was exculpatory because in order for it to be
24 determined to be exculpatory, you would have to find that it was
25 contrary to something that was shown in the charging document as

1 being alleged.

2 Since we never alleged that no work was done related to
3 Count 1, I would submit to the Court that it's no exculpatory.
4 Beyond that, the information came to light through whatever
5 resources the defense had. Before trial they attempted to
6 introduce it and it was -- the Court concluded the trial before the
7 case or the State's case in chief was even done.

8 There was never an issue of a jury verdict and some
9 information that comes to light later that would change or alter
10 what the jury's verdict might have been. So, therefore, no Brady
11 violation per say.

12 The fact of the matter is that this was at best a
13 discovery violation. And I would agree with counsel, the Court,
14 the state of the record that whether we possessed the book
15 physically in our possession or should have had it or it was lost
16 or some -- or people are mistaken about things, whatever the -- the
17 situation is, the State is constructively in possession of that
18 book. No question about that.

19 I think I've argued at least now that I do not believe
20 based on the charge, and that's what we're talking about and the
21 reason why the double jeopardy is so important here at least this
22 argument related to it is because it's important for the Court to
23 make sure that the Court looks at this charge and what is alleged
24 to have been done wrong or not wrong.

25 Now the Supreme Court -- when this went up to the Supreme

1 Court, they specifically say that this first count is either too
2 vague and ambiguous. It doesn't basically put the defense on
3 notice of what he's charged with doing. The terms like that they
4 were collecting money under terms grossly unfavorable to the State.
5 That the -- allowing them to sell valuable assets at a price that
6 was lower than it should have been. That modifying a contract to -
7 - to increase the amount of money they could have collected; that
8 those things didn't put the defense -- Defendant on notice.

9 The other contracts they said did because they alleged
10 that essentially they were getting paid for work that either didn't
11 get done or that was just placidly sort of window dressing for
12 something that they were supposed to do, but didn't actually do.

13 That's why the Supreme Court I would submit in the order
14 comes back and says look, all those other charges are fine because
15 they allege something that puts them on notice of what conduct is
16 criminal. Under Count 1, the theft count it did not put him on
17 notice according to the Supreme Court of what actions constituted
18 theft; that's what they said. That is -- and that is why they
19 don't dismiss or say that Count 6 the related count is somehow
20 tainted so much that it needs to go away as well because it's
21 talking about misconduct of a public officer.

22 And that count related to misconduct -- misconduct of a
23 public officer was after the contract, after ACS' attempt to do
24 things in -- under the contract and a single action with Bob Mills,
25 Lacy Thomas together trying to alter the material terms of the

1 contract to the disadvantage of the County.

2 And that whole thing, that whole part of it, that
3 administrative clarification in Lacy Thomas' involvement in it is
4 what the misconduct count is based on. And it has nothing to do
5 with theft because it never happened. What happened was he
6 attempted to do, he was called on it, he agreed not to go forward
7 with it and then he turned around and did it anyway. All of that
8 is misconduct of a public officer.

9 That's why Count 6 does not go away and why the Supreme
10 Court found that it didn't. But the Supreme Court also said that
11 you can use the factual allegations essentially from the first
12 count to support that because that's what is contained in the Count
13 6.

14 So with regard to this -- the double jeopardy coming back
15 around, and then I'll finish, Your Honor, not entitled to it
16 because he asked for the mistrial. The Court declared it a
17 manifest necessity and declared the mistrial anyway even though the
18 Court didn't wasn't obligated to do so. We hadn't gotten through
19 the State's case in chief, so there's no Brady violation because we
20 never got to a verdict and any information came to light later on.

21 And regardless of how the information comes there, if the
22 State has information and unless there's some evidence that the
23 State purposely withheld this and there is none in the case. I
24 mean, I think that is undisputed as well. When I brought Mr.
25 Albregts over to my office and he -- he looked at all the boxes

1 that were there and I showed him the materials and when I first got
2 involved in the case, I went through the police report. And in the
3 police report and we're not talking about anything that's hidden.

4 This is something that has -- has been present since the
5 inception of the case. Years before essentially I was ever
6 involved in the case. I'm looking at this and I see recorded
7 interview of this person, recorded interview of this person. I did
8 not see all those recorded interviews in the State's file that we
9 had in our office. I asked Mr. Albregts if he had those. He said
10 he didn't.

11 Now I assume that he had read the police report. So the
12 police report when it says recorded interview would denote that
13 there had been a recorded interview. I then went off and got the
14 materials. Got those to Mr. Albregts. Asked if there was anything
15 in addition. Wet get up to trial, he's aware of the computer
16 materials. Mr. Thomas comes into town in advance of trial. It was
17 only then that he asked -- Mr. Albregts asked for access to the
18 computer materials. They went through the computer materials. At
19 least Mr. Thomas did. Mr. Thomas was the one who actually went
20 down to Metro and got the discs and specifically which discs he
21 wanted of the computer materials that were accessible.

22 As far as discovery is concerned and even Mr. Albregts in
23 his -- in his first portion of this when he was talking to the
24 Court said, access is not the issue. Access is completely the
25 issue. The State is required to provide the Defendant access to

1 the discovery. We don't have to copy a single page and provide
2 that to them. We have to provide them with access to the material.

3 Now if there's something that is clearly exculpatory, we
4 have to -- we have an obligation to provide that information or
5 make sure they're aware of it. They claim to this day that that
6 book is exculpatory. I pointed out to the Court based on the
7 charging document what it shows and what we have actually alleged
8 and why the Supreme Court dismissed that charge that it is not
9 exculpatory pertaining to that charge because there's never been
10 ever an allegation that ACS did no work in the case.

11 I went through the opening statement of Mr. Mitchell at
12 the time of trial. He never alleges, ever says that ACS did no
13 work. Mr. Albregts references witnesses within the trial who said
14 ACS did no work. I failed to see any witness testimony -- we got
15 the transcripts of the entire trial that shows that a witness
16 pointing to it and saying look I'm Jerry Carol or, you know, Mr.
17 Fidler or somebody came in and said ACS didn't do anything in this
18 case. Nobody said that.

19 So because that is the state of the evidence before this
20 Court and because the allegation is that the book contains
21 information which shows they did do work, there's not a Brady
22 violation because we never got to a verdict and there's no
23 discovery violation because he had the material and there's never
24 been an allegation that shows that that somehow is favorable to
25 him.

1 Now he can get up and say use the book, use testimony of
2 witnesses to say, yes, ACS had 40 people there. ACS had, you know,
3 they had come and done their due diligence, that the mother ship
4 company was -- was maneuvering. Whatever the issues are to show
5 that they're doing things; fine.

6 Whatever they were doing was not enough. Whatever they
7 were doing was never making the nut that they had on their own --
8 they wrote that portion of the contract. They put in the
9 information about what their due diligence said that the baseline
10 should be. When they don't make that nut, it's that point after
11 the contract, after the administration that Lacy Thomas gets
12 involved and actually comes forward and materially attempts to
13 change the contract. That was the misconduct. That was the basis
14 of the State's charging the ACS count regardless of what the police
15 wanted to do or not. The Supreme Court didn't agree with that.
16 They dismissed Count 1 based on that.

17 There's now no double jeopardy issue even related to
18 Count 1 because it does not exist in the case. The count related
19 to the misconduct is not affected in any way by the book because it
20 deals with the -- and solely deals with Lacy Thomas' actions
21 regarding the administrative clarification only. It doesn't relate
22 -- well not only because it -- some of his things that he did
23 subsequent to that.

24 But that is the basis, that's the focus of why Lacy
25 Thomas' actions were improper. So there is no basis for a double

1 jeopardy argument in this case because of those points I've
2 mentioned. I will submit it to the Court.

3 THE COURT: Anything further, Mr. Albregts?

4 MR. ALBREGTS: Yes, please.

5 You know, Judge, I don't know where in Brady it says that
6 the violation cast -- either has to be a verdict or a case has to
7 go through trial to verdict for Brady to be -- come into play,
8 that's not the case at all. And, in fact, that's why access is not
9 an issue either. To say there's access to the evidence and I could
10 have found it, is just trying to mislead the Court on what the
11 issues are in the -- or divert the Court's attention in any way on
12 what the issues are because access isn't the standard.

13 The Brady standard puts an obligation on the State if
14 they are aware of exculpatory evidence to provide that to the
15 defense. So to say we have an open door and that takes care of any
16 Brady issues or our Brady obligation is just -- flies in the face
17 of the law. And there's absolutely no question on this record that
18 they knew about it because the detectives both said they talked
19 about it and the information that caused the mistrial. And one
20 detective said he was certain he gave it to the Prosecutor. So he
21 knew about the exculpatory evidence and didn't turn it over and
22 that's why it's a Brady violation.

23 And it's just interesting because not one part of the
24 State's argument talked about inexcusable or excusable neglect and
25 what the reason or the excuse was for not providing it to the

1 defense. They simply say you had access and oh by the way it's not
2 exculpatory.

3 And even if you take the State's theory on that charge,
4 let's just dismiss the no work argument and let's look at the
5 State's theory. They're exculpatory because it shows what work and
6 how much effort and time that ACS was putting into it which
7 precipitated the need to change the contract.

8 And so instead of just changing the contract to the
9 detriment of the County and helping his friends, the evidence
10 related to those notebooks show this is why we needed too because
11 they weren't making any money and they weren't going to leave and
12 that would not be good for the County. So it's clearly exculpatory
13 to that extent.

14 Now the retrial doesn't go to counts or a double jeopardy
15 doesn't go to counts. It goes to the retrial. It goes to the
16 effect on a citizen of having to go through the whole process all
17 over again. The knots in your stomach as the jury is coming in.
18 The day to day coverage where your friends have to see you in the
19 newspaper with allegations that you believe are unfounded. And now
20 if there's a second trial, the State being able to go in and clean
21 it up, even more so.

22 And you found when you declared the mistrial that this
23 was exculpatory because witnesses have already testified and left
24 and I could have asked them questions had I known about this and I
25 couldn't now which is why you found the mistrial.

1 And when I asked for the mistrial, that doesn't somehow
2 take double jeopardy and throw it away, Judge. What the case law
3 says is you then have to determine was it caused by the Prosecution
4 because I as a defense attorney had no choice but to declare a
5 mistrial.

6 And in this case the record is utterly and absolutely
7 clear and unequivocal that the mistrial was caused by the
8 Prosecution's failure to turn over that information. No questions
9 at all.

10 And I will leave you, Judge, with Hilton because Hilton's
11 the case at least in the State of Nevada. And there they said it
12 wasn't intentional. The mistake was either excusable or
13 inexcusable. And in assessing the State's negligence in that
14 situation, the Supreme Court had to decide excusable or inexcusable
15 and they considered the reasons that the State proffered in that
16 case. The trial Prosecutor didn't perceive the problem and that
17 the -- in the Sixth Amendment context and that there was a
18 communication breakdown within the District Attorney's Office. In
19 Hilton they had some justification. Here we have not.

20 And the Supreme Court found that although the Prosecutor
21 was subjectively unaware of the substantive ramifications of
22 calling a witness who could invoke an attorney client privilege on
23 cross examination, we cannot accept such an error of judgment as
24 excusable when weighed against the Defendant's constitutional right
25 to be free from repeated attempts to convict him of the alleged

1 offense.

2 Judge, we don't even have any excuses here. And the
3 Supreme Court doesn't distinguish between counts or theories on
4 counts. It's the retrial that the double jeopardy clause of the
5 constitution protects, protects the citizen against. And in this
6 case, to try to focus simply on Count 1 or Count 6 with this
7 evidence flies in the face of what the jurisprudence is and what
8 the constitutional protection is. And in this case there's no
9 excuse 'cause it's inexcusable. And double jeopardy attaches and
10 the case should be dismissed.

11 THE COURT: All right. Thank you, counsel, on this particular
12 issue.

13 If -- I seem to recall when the binder came up we had
14 already called 13 or 15 witnesses. Somehow that number sticks out
15 in my mind. I think it's probably 13 witnesses. And I also recall
16 that it was at the end of one of the weeks of trial like Thursday
17 or Friday. The reason why I recall that and I think it's important
18 here is that we had numerous witnesses -- had testified. I think
19 we were in the third -- in the third week of trial and I think --
20 again, I think it's a Thursday or Friday when this came out.

21 And I believe it was Mr. Mitchell who had stated that
22 well, Judge, we have no objection to the defense recalling these 13
23 witnesses and perhaps examine them further. I didn't find that
24 that was workable for a couple of reasons. One is the defense lost
25 part of their cross examination because now the witnesses were on

1 notice of the cross examination and perhaps of some shortcomings of
2 their testimony.

3 At the time, and also after our evidentiary hearing, I'm
4 not convinced that there was any intentional act by the District
5 Attorney to withhold the information. Clearly, there was a Brady
6 violation. There were -- I'm convinced after evidentiary hearing
7 that the detective did -- did give the binder I think he said to
8 Mr. Mitchell.

9 And the reason why I found it to be exculpatory in nature
10 was because those documents showed that ACS representatives were
11 trying to perform on the contract to working diligently to perform
12 on the contract. I think that would negate the allegations in
13 Count 1.

14 The Supreme Court has determined that Count 1 should be
15 dismissed and so because of that -- and I also I don't find this to
16 be intentional and I don't see a carryover to the other counts, I'm
17 going to deny the motion on the -- for the double jeopardy.

18 Just so we're clear, clearly I found them to be
19 exculpatory. The State had the documents. Metro had the documents
20 if I recall, almost a year before trial. The documents were not
21 produced to the defense. And again, when the binder came in and
22 Mr. Campbell was in Court, I recall doing a cursory review of the -
23 - of the binder.

24 And just with the cursory review it appeared to me that
25 you could establish that ACS was diligently working on it and is

1 trying to perform on the contract. But nevertheless I don't find
2 we rise to the level of -- of the violation of double jeopardy for
3 the -- on this particular matter.

4 Now, with the other motion here is that the charge are
5 unconstitutional because of vagueness or as applied to this
6 particular case. Who's going to handle that for the defense?

7 MS. FORSMAN: I am, Your Honor.

8 THE COURT: All right. Thank you.

9 MS. FORSMAN: I think that what -- where I'd like to start is
10 to talk about what I think the Supreme Court did. I think I'm --
11 I'm a little confused I have to tell you. I must have read the
12 opinion of the Supreme Court 20 times to try to figure out what
13 they did.

14 The one thing that is clear in the Supreme Court opinion
15 is that they did not decide the issue which we raised. They
16 decided that the opinion, the order affirming in part reversing in
17 part in remanding is based upon what the State said the issue was.
18 Not the issue that was decided by this Court which was that the --
19 that there was a failure to state a crime. They did not decide
20 that issue. They decided an issue which the -- the State kept
21 reiterating this is the issue in both their briefs before you and
22 the briefs before the Supreme Court. And that was whether there
23 was sufficient notice.

24 Now to try to explain why Count 1 why they -- why they
25 decided that Count 1 should -- should remain dismissed and not

1 Count 6 when the facts were identical is a little harder to
2 explain. But it appears that what the Supreme Court believed was
3 that in order for the theft -- theft counts I believe although they
4 -- they didn't have information with regard to the thefts counts
5 that you'd have information with regard to the -- or the evidence
6 that was going to be adduced on the theft counts. But with regard
7 to Count 1 basically what the -- what the Supreme Court said is
8 that because there was evident --

9 THE COURT: Which page are you on of their decision? Can you
10 --

11 MS. FORSMAN: I'm sorry.

12 THE COURT: -- can you reference me the page?

13 MS. FORSMAN: Yes, it's page 3 is where they -- where they
14 discuss Count 1.

15 THE COURT: All right. Thank you.

16 MS. FORSMAN: And what they -- I think the reason I'm -- I --
17 so I can figure out what they did is they -- they put in italics
18 the word unauthorized, unauthorized from the theft statute. And
19 they're looking at what is the state of the record with regard to
20 whether or not there was unauthorized transfer. And it was alleged
21 that -- that the contract called for the completion of debt
22 collection work that was already being performed by another entity.
23 And it is alleged the work was performed poorly by ACS leading to a
24 decrease in overall debt collection.

25 Well, Count 1 included the relevant dates, the parties,

1 etcetera, etcetera. They failed to allege how Thomas' conduct was
2 unlawfully authorized or how his use of payments to ACS articulate
3 the intended unlawful purpose when actual work had been performed
4 through the contract. I think what they're saying and if -- if we
5 have to go back to reach to a new trial, we will ask the Court to
6 decide as they appear to be saying it none -- that theft cannot be
7 made out under this statute in this case if there's any evidence of
8 actual work being performed.

9 And I think they'll -- so in other words if you don't say
10 that there's no work being performed and -- and the Court should
11 know and can -- and from some of the testimony does know that the
12 other counts include work being performed. It's just they don't
13 like the amount of work. They knew they didn't produce a report at
14 this point. I can remember Tom Riley's testimony about the fact
15 that he did consulting jobs, you consult and you may not have a
16 report. So there's all that sort of stuff. So we -- this is not
17 the issue before you today though.

18 The interesting thing to get to the constitutionality of
19 the statutes 'cause it -- the failure to state a crime in the
20 unconstitutional statute are inter -- interrelated. If the -- if
21 their -- if the statute is unconstitutional and you find that it's
22 unconstitutional as applied or unconstitutional on its face, we're
23 done. But if the statute is not unconstitutional on its face, then
24 you have to look at the conduct which is what you did last time; is
25 that you have to look at the conduct that's alleged and say does

1 this constitute a crime under this statute then? If -- if we can
2 salvage the statute, it's like Skilling 'cause that's what happened
3 in Skilling's. The statute is unconstitutional. Well, we can
4 salvage the statute by saying this particular conduct doesn't
5 constitute a crime.

6 In all of the briefing before the Supreme Court and all
7 of the briefing before this Court although they -- they simply --
8 the State simply attached a copy of it's brief to argue this issue,
9 all of the State statutes that they looked at, all of the -- I put
10 a chart with -- with the statute with the conduct that was alleged
11 with the holdings of the Court, no they -- the State was unable to
12 come up with one case, one case under -- under official misconduct
13 or theft statutes which involve the -- the performance of contracts
14 that -- that don't meet some standard. In other words, bad
15 workmanship or not -- not doing enough work under contract. No
16 criminal case where an official such as Lacy Thomas has been
17 charged.

18 I -- so -- all right so -- so let me -- let me start with
19 the unconstitutionality of the statute. I think the easiest way to
20 look at this is to look at it from -- from the perspective of the
21 Court having to come up with instructions -- jury instructions. I
22 challenge the State to do that in our briefing and said, come up
23 with instructions, tell us how you're going to define use -- use or
24 unauthorized in this State. How are you going to tell the jury
25 when the line is crossed; when the line is crossed where it creates

1 a crime? This is not a civil case.

2 And that was the struggle that this Court had during the
3 trial to try to get the State to articulate that theory. It was
4 the struggle that even one of the grand jurors had is how do you
5 know when the line is crossed. That's what vagueness is. That's
6 what vagueness is is that do -- can you tell from the statute what
7 conduct will constitute a crime. When do you cross that line? Is
8 it -- is it -- we can put a fair market value on the services and
9 if it's this much away from what they were paid or, you know, you
10 can't in this case tell what the line for the conduct is. And
11 that's exactly what vagueness is about. That's exactly it is.
12 Does it leave to the Prosecutor the discretion to charge Lacy
13 Thomas?

14 I have to tell you that -- that -- that in discussions in
15 this courtroom about why, you know, what -- what is up with this
16 case. Why is this case here? I was told by a member of the
17 Prosecution team because we need to send the message that this is
18 not Chicago. I think we need to send a message that this is not
19 the Mississippi of the west.

20 This is case is unusual. It is unique. There is -- the
21 -- there is not one case that the State has cited at either level
22 where this kind of conduct is charged as a crime. So what. We can
23 come up with an unusual theory. Well you can if you can't
24 articulate what jury instructions you would give to the jury
25 sitting over that in that box to say this is where you cross the

1 line. This is the conduct that crosses the line.

2 If you look at all of the other States, the statutes that
3 are salvaged with vagueness challenges are statutes to say well he
4 violated a regulation. He violated statute. He violated a policy.
5 They cannot do that here. We demonstrated that. They can't do
6 that here. In fact, all of the conduct that's in this case was
7 authorized by the District Attorney, by the County Manager, by the
8 County Commission.

9 And so when you have that, in order to salvage this -- in
10 order to salvage this statute for constitutional purposes, then you
11 go to well then can I look at the conduct just as they did in
12 Skilling, can I look at the conduct and can I say that okay I've
13 salvaged the statute, can I say that this particular conduct
14 constitutes a crime under the statute. That was not decided.

15 I know Mr. Staudaher is going to stand up and say well
16 the Supreme Court already decided; that's what they're arguing.
17 You cannot look at the Supreme Court decision and find anywhere in
18 the Supreme Court decision where they address vagueness. You
19 cannot find anywhere in the decision where they address failure to
20 state a crime. They go strictly on the theory of the State because
21 it's easier for them -- for the State to argue that there was
22 sufficient notice in the indictment. That is now what we argued.
23 That is not what you decided previously. That is not -- the
24 Supreme Court simply didn't -- didn't address the issue that you
25 decided, so that's why we brought it back.

1 THE COURT: Let me mention this and this is for -- for you,
2 Ms. Forsman, for Mr. Staudaher to address here. I've reviewed my
3 order of dismissal and this is at page 6 --

4 MS. FORSMAN: Uh-huh.

5 THE COURT: -- of the order. I said the characterization of
6 the crimes charged in the indictment, in my opinion at the time,
7 does nothing more than put Thomas on notice that -- that he slash
8 UMC may have entered into basically a bad contract. And by
9 entering such a contract his conduct is now deemed criminal. The
10 indictment is allowed to stand would be tantamount to this Court
11 sanctioning the proposition that if UMC and/or Clark County entered
12 into an ill-conceived contract that's more beneficial to a vendor,
13 but now that conduct, I'm just paraphrasing, is criminal in nature.
14 And I said this Court, my Court, me, did not accept this
15 proposition.

16 So, the State appealed the decision and the Supreme Court
17 in their first decision of September 2013 stated, and this is at
18 page 4 of their decision, and I was at first a little perplexed by
19 this because I -- I said I thought the allegations were clear, but
20 the allegations were not establishing a crime.

21 MS. FORSMAN: Correct.

22 THE COURT: So then the Supreme Court decision said we
23 conclude that Thomas was sufficiently put on notice of the criminal
24 acts charged. According we reverse the District Court's dismissal.
25 When I first read it, I said I never said the allegations were

1 unclear. I think they were crystal clear. But the allegations in
2 my opinion did not allege a crime. The Supreme Court disagreed and
3 as a District Court Judge I will respect their decision and I go
4 along with that.

5 And I know the defense filed a motion for
6 reconsideration. And I think at that time the defense said Supreme
7 Court we understand -- we would agree to a certain extent that yes
8 it's clear, but that's -- that's not our issue.

9 MS. FORSMAN: Correct.

10 THE COURT: Our issue that we brought up and what Judge
11 Villani brought up was it's not alleging a criminal or criminal
12 conduct. But then the Supreme Court, you know, just rejected the
13 motion for reconsideration on that issue. So aren't I to assume
14 that they specifically address the issue you're bringing up today
15 and -- I mean, am I now -- are you putting me now in a position to
16 overrule the Supreme Court?

17 MS. FORSMAN: I'm not. I'm not, Your Honor, because --
18 because the language on the face of the order affirming the denial
19 the motion for reconsideration doesn't tell us anything other than
20 the fact that I said wait a minute you didn't decide the right
21 issue, you know, that isn't the issue we raised.

22 The Supreme Court -- the Supreme Court is always free to
23 affirm something on a different ground than that one that was
24 raised. You've seen those opinions. They do it -- they've done it
25 repeated times. That's what happened here. That's what happened

1 here is because you -- I think the Court has articulated the same
2 ruling that I heard and that I saw on your decision which was you
3 said this -- this conduct which is alleged which we know what the
4 conduct is that's alleged it simply doesn't constitute a crime.

5 The Supreme Court didn't address that at all. Didn't
6 cite to Castaneda. Didn't -- didn't cite to any case which talks
7 about the failure to state a crime. Didn't cite to anything. They
8 simply decided we're going to affirm it on -- on the fact that he
9 had sufficient notice of what the conduct was.

10 So no, you are not reversing the Supreme Court. You're
11 simply -- they left that issue out. So it's still there to be
12 decided.

13 THE COURT: But wasn't that brought up in your motion for
14 reconsideration, the specific issue?

15 MS. FORSMAN: It was, but they -- it was, but they didn't --
16 they didn't say where all -- they didn't say anything that helped
17 us to determine whether or not -- whether or not they were going to
18 decide it on a different ground which is what they did. I think
19 you have to look at the face of the opinion itself.

20 THE COURT: And actually their decision was motion for
21 rehearing denied.

22 MS. FORSMAN: Right. That's -- exactly. I [indecipherable]
23 got a number of those. So -- but yeah -- so it doesn't -- it
24 doesn't tell us anything. It just says we already made our
25 decision and we're just not going to back off of it.

1 But I don't think you can -- you can point to any place
2 in their original order that addresses the vagueness, addresses
3 failure to state a crime. It's not in there. So I -- so it's not
4 decided. It has not been decided. And the only way you would be
5 bound by this and not be able to do something different is if they
6 actually decided the issue.

7 THE COURT: Okay. Thank you.

8 MS. FORSMAN: Thank you.

9 THE COURT: Mr. Staudaher.

10 MR. STAUDAHER: With all due respect to counsel and the Court,
11 I would -- I would argue just the opposite. I think the Supreme
12 Court did address the issue. Maybe not in -- in the direct words
13 that counsel would have liked them to use. However, I believe the
14 Supreme Court in my reading of their -- of their opinion
15 essentially equate vague -- vagueness with notice that although
16 they don't use the word vagueness, they put the -- they talked
17 about notice.

18 Putting someone on notice of -- of conduct which is
19 considered criminal and what they did to actually breach that or to
20 cause that conduct which was, in fact, criminal means that it must
21 be sufficiently defined so that the person of ordinary intelligence
22 would be able to understand what -- what they did was wrong and
23 why. That's what the Supreme Court says essentially. And that's
24 why that's the vagueness and the notice I think go hand in hand.
25 They're one in the same essentially.

1 This is the law of the case as it stands right now. And
2 even though counsel says they never addressed the issue. She
3 raises the issue saying look you missed the point. This is what we
4 were really bringing to the Court. This is what the Court was
5 bringing up. This is what we're bringing up. And their response
6 was motion denied. Motion denied on their previous ruling. And so
7 I think the Court is bound by that ruling from the Supreme Court at
8 this point.

9 With regard to a comment that counsel made about they
10 just attached -- the State just attached a copy of their brief to
11 the briefing before this Court. And I'm talking about the brief up
12 at the Supreme Court.

13 THE COURT: Okay.

14 MR. STAUDAHER: The reason the State did that was the almost
15 verbatim argument that was made to the Supreme Court and which was
16 essentially denied by the Supreme Court as having validity that
17 would have given them the redress that they were seeking. They put
18 that argument in total and put a caption on it before this Court
19 and resubmitted it to this Court. That is why the State submitted
20 and put in our briefing. I said look this argument is identical to
21 the one made before the Supreme Court. This is the State's
22 response to that. And we know what the Supreme Court ruled and
23 didn't rule. But that is why there was essentially an attachment
24 of the documents that were presented to the Supreme Court in this
25 case.

1 So essentially what the defense is doing is -- is they
2 didn't get what they wanted in front of the Supreme Court so they
3 rebranded the same argument presented to this Court hoping that
4 this Court will do something different than the Supreme Court did
5 on the exact same argument.

6 With regard to the issue about -- gosh, I don't know who
7 counsel was talking too, but I don't believe I've ever spoken to
8 her and said that we needed to send a message that this wasn't
9 Chicago. And I'm the Prosecution team right now. And she came on
10 board after Mr. Mitchell was off the team. So I don't know who
11 she's specifically referring to.

12 But related to conduct that was alleged in the charging
13 document that somehow denotes that conduct that the Defendant, Mr.
14 Thomas, was engaged in was somehow different than simply doing --
15 entering into a contract the person who entering the contract does
16 a bad job and you're charged criminally. That has never been the
17 State's position. It is not in the charging document. It is not
18 in the arguments before the -- before the jury when we did do it.
19 It's not been in any argument that we've made before this Court.

20 So I'm going to reiterate what I'm talking about here and
21 I will give two crystal clear examples. TBL Construction is one of
22 the contracts. Frazier Systems is another one of the contracts.
23 TBL Construction, the actual company that was going to forward to
24 do the work that was Mr. Thomas' doing in getting TBL involved --
25 first of all, they didn't need to be involved because the County

1 was already paying for that exact supervisory work that would have
2 been done under the change order that was already contemplated
3 under the contract.

4 In fact, the County paid more because they had to
5 supervise the supervisor to do the work which they were obligated
6 to do and being paid for. The issue with TBL was they never did
7 any work. TBL is an entity ceased to exist at the time that the
8 supervisory work that they would have been doing was taking place.
9 It's one of the few places that Mr. Thomas flat out lied to the
10 police when he was being interviewed them. He said, oh yeah, I
11 went down to the site and I shook hands with the TBL people and
12 they were doing a good job. None of that's true. TBL did not
13 exist when the electrical connect was being supervised to the North
14 Tower project. They disbanded it. It happened after the fact.

15 So, TBL not only could not have done any supervising
16 work, they did no supervising work. And yet \$35,000 was carved out
17 to pay them for this work that never got done. Clear example.
18 That's not somebody doing a bad job. That's somebody doing no job
19 for payment of money under a contract that was orchestrated by Mr.
20 Thomas.

21 If we moved to Frazier Systems, another very clear cut
22 example. There were actually multiple contracts. I think three
23 separate contracts totaling hundreds of thousands of dollars in
24 payments to Greg Boone the person who was involved with Frazier
25 Systems. He was brought in to do things to essentially produce and

1 put together a project management office under the IT Department.
2 He was brought in to supervise and run the IT Department to do
3 these projects and to this work. He didn't do any of it. He
4 produced basically a couple of PowerPoints. He never did the
5 project manager office. He never did anything specifically related
6 to that.

7 And, in fact, the testimony that came out before Your
8 Honor, before the jury when it was impaneled before related to why
9 Mr. Frazier -- excuse me -- why Greg Boone was even in the hospital
10 was not to do anything for the IT Department. It -- it was to be
11 the eyes and ears of Lacy Thomas within the -- within the hospital.

12 Now the contract was for him to provide services under
13 the IT Department to do specific things. He did not do those
14 things. He was essentially a spy for Lacy Thomas. Whether that's
15 appropriate or not appropriate is not the issue. The issue was
16 Lacy Thomas entered into a contract with him to do certain things
17 that were not done. Clear examples. So those are two of the five
18 contracts total that we're talking about in the case.

19 The actual allegations and the reason that the Supreme
20 Court said look, he's on notice of what the criminal conduct is
21 because if you get -- if you enter into a contract with the lawn
22 mower, I think the Court used that -- that example a couple of
23 times, that Lacy Thomas hires a person to mow the lawns at UMC
24 Hospital. And the person does a terrible job. But they actually
25 show up with the lawn mower and they attempt to mow the lawn even

1 if they do a bad job. How would that be criminal? I think the
2 Court -- we've already said that.

3 The State has always been in the position of saying that
4 is not what is alleged. The allegation is that Lacy Thomas hired
5 essentially the lawn mower to come mow the lawn and Lacy -- and the
6 lawn mower doesn't even do it. The lawn mower either doesn't come
7 and do the work at all or they come and do something else and say
8 they mowed the lawn. That's what we're talking about here.
9 There's a material complete difference in what we're -- what we're
10 referring to and what is actually in the charging document that the
11 Supreme Court said is sufficiently clear to go forward on to put
12 him on notice of their criminal conduct.

13 And we're not saying the person did a bad job. We're
14 saying the person either did no job or they did something to make
15 it look like they were doing the work when, in fact, they weren't
16 doing it at all. Yet, they're getting for that work at the behest
17 of Mr. Thomas by the County. And the misconduct part of that is
18 that that is absolutely, diametrically opposed to his mission and
19 what he was charged with and employed with by the County to do.

20 As far as the -- I think there was -- one of the
21 arguments that counsel made was all of the conduct was authorized.
22 I defy counsel to come with any testimony or evidence in this case
23 that said that Mr. Con -- Mr. -- Mr. Thomas' conduct in this case
24 in the manner that he's charged by the State was in any way
25 authorized.

1 Now there's a difference between saying that a contract
2 that Mr. Thomas floats meets the structural requirements that are
3 there to have a contract. And if that contract goes up to the
4 Board of County Commissioners, this is actually approved. When, in
5 fact, Mr. Thomas knows. And, in fact, the actual production of
6 whatever occurs never happens related to the contract and he fully
7 well knows that.

8 There's a big difference there between saying that a
9 contract has an offer and acceptance consideration, the things that
10 are all -- that are all necessary and required by the State or by
11 the County to have a contract entered into. When the purpose of
12 the contract itself is to do something other than what is in the
13 contract and Mr. Thomas knows it, that's misconduct. And no one is
14 going to come and nobody did come in and say that that conduct was
15 authorized.

16 So to get up here and say that all of the conduct that
17 Mr. Thomas did was authorized is flat out wrong and completely
18 opposite of what the evidence that actually did come into trial
19 showed.

20 THE COURT: Well, didn't they -- Civil Deputy District
21 Attorney come in and testify? Although I -- if I recall, her
22 testimony was that her job is not to determine that a contract
23 perhaps is in the best interest of the County, but to make sure all
24 the appropriate -- it's in the appropriate form, appropriate
25 bidding --

1 MR. STAUDAHER: That the parts are there.

2 THE COURT: -- I's dotted, T's crossed.

3 MR. STAUDAHER: Right.

4 THE COURT: And then after that -- I think I didn't know -- I
5 don't recall if it went to another level, but then it's my
6 understanding there's testimony that it went to the County
7 Commissioners --

8 MR. STAUDAHER: Correct.

9 THE COURT: -- and the County Commissioners would review it
10 and then when it's on the agenda they would vote in an open forum.
11 It's just I think at the time and I don't know if it's germane to
12 this issue, it seems to me that the County Commissioner staff
13 reviews the contracts and then County Commissioner decide to vote
14 on it. And I would hope they don't blindly vote on contracts, that
15 they would evaluate the contract and make the determination whether
16 it's in the best interest of the County.

17 MR. STAUDAHER: Well part of that, and I think it did come out
18 at trial, I think it will come out if we go to another trial is
19 that the County Commission in their role with UMC as well as the
20 civil DA who looks at the contract that might -- a contract that
21 might come up to see if it has all the right parts and then says
22 yeah, it has all the right parts, pass. Doesn't look at content.
23 Doesn't look at whether it's a good deal, bad deal, whatever.
24 'Cause frankly those people, the Commission and that person don't
25 really know what the issues are specifically to the County. That

1 is why having a person like Lacy Thomas who is responsible for the
2 initiation of the contract itself, why that person as a public
3 officer is essentially supposed to act and is authorized only to
4 act in the best interest of the County for things that actually
5 need to be done and not to put forth a bogus contract to help out
6 some friend or colleague or somebody that he's associated with. If
7 that is the purpose, that's contrary to what their mission is.

8 Once that person does that, whether it's Lacy Thomas or
9 someone else in his capacity, they're the ones that actually know
10 what is needed and why the contract is being brought forth in the
11 first place.

12 The County Commission -- I will defy you to find anybody
13 in the County Commission will say we went back and parsed out
14 everything and then double checked it and count, made phone calls
15 and investigate it to see if it's contract was actually something
16 that was one, real. Two, was really needed, was appropriate. They
17 take the recommendations of their counsel, of their staff. They
18 take the recommendations from the civil DA to say that it's all
19 proper and whatever. And then they rely upon the public officer
20 who is submitting it in the first place. They have to do that.
21 They cannot go through and look at every contract and vet every
22 single contract that comes before them for approval to that degree.
23 They have to be able to rely upon those people.

24 And that's why it's a crime for a public officer to
25 breach that trust. To act in essentially opposition to what their

1 mandate is a public officer for the County. When that happens,
2 there's a breakdown. And if they do it knowingly, it's criminal.
3 It's -- that's what is charged here.

4 So there's -- there's not really an issue of notice.
5 There's not really an issue of vagueness because the actual conduct
6 that's alleged absent Count 1 which is no longer in the case that
7 there's no issue of what conduct constitutes one misconduct by --
8 by Mr. Thomas. And two, the actual losses to the County because of
9 the bogus contracts that he did enter into constitute theft because
10 he's using County resources that he's responsible for for a purpose
11 other than what they were designated for.

12 Even if what Mr. -- using Frazier -- Frazier Systems as
13 an example. Even if it would have been a completely okay for Lacy
14 Thomas, and maybe just for argument sake, and to say that he was
15 completely authorized to have a spy within the department and to
16 actually -- and within UMC and to actually pay that person this
17 exorbitant amounts of money to spy for him. Even if that had been
18 authorized, the fact that he enters into a contract that
19 essentially makes it look like this person is being paid for work
20 that is going to be done, but never gets done or is basically just
21 window-dressing and never does what he is supposed to do, that is
22 an act which is unauthorized. You can't do that.

23 There's got to -- that's why when it goes to the County
24 Commission, County Commission looks at it and says, gosh, it looks
25 like you validly have a person in the IT, they're trying to put

1 together this -- or this, you know, sort of program or thing that's
2 within the IT Department, sounds valid, sounds reasonable, we'll
3 sign off on it.

4 Do you really think that if the County Commission had had
5 a proposal for Mr. Thomas to say, look, I want to pay Greg Boone
6 six -- nine hundred thousand dollars to be my spy in the hospital,
7 that they would have approved that? Absolutely not. It's because
8 the only way he could get that money dispersed to his buddy was to
9 make fraudulent representations to the County Commission in order
10 for them to approve that expenditure. And that -- that expenditure
11 was never for the purpose for which it was intended. That's what
12 we're talking about here with relation to all of these contracts.
13 That we're talking about his misconduct and in some instances the
14 Premier Alliance, Crystal Communications, Frazier Systems, TBL
15 Construction now, not ACS at this point, that all of that resulted
16 in a monetary loss that is actually definable to the County because
17 of the misconduct constituting theft. That's what we're talking
18 about. That's why the indictment as it stands should remain with
19 the exception of Count 1 obviously, but that we can go forward
20 because he's on notice of the conduct that he's being charged with.

21 THE COURT: Ms. Forsman.

22 MS. FORSMAN: Briefly, Your Honor.

23 Mr. Staudaher has not mentioned one time that the Supreme
24 Court decided that the indictment and the conduct that was alleged
25 constituted a crime because it's not in that opinion.

1 Let me use Mr. Staudaher's example of the consultant.
2 And he said, well you only produce three PowerPoints and you didn't
3 produce a report. What are you going to tell the jury about if he
4 produced five PowerPoints and a three-page report? Will that --
5 will that bring it back behind the line of what's a crime? That's
6 the problem.

7 I've challenged the State on several occasions to try to
8 come up with a definition of use for the benefit of another which
9 is the misconduct statute or unauthorized which is the theft
10 statute to be able to say how are you going to instruct the jury
11 based upon the facts of this case.

12 The State has repeatedly said -- now they say well for
13 abuse of a friend. If there were a conflict of interest, they
14 would have alleged a conflict of interest. We went through all of
15 the disclosure statutes. They're not alleging that. In fact, Mr.
16 Mitchell told this Court clearly it doesn't have to be a conflict
17 of interest. It doesn't have to be that -- that there was -- that
18 Mr. -- Mr. Thomas benefited in any way 'cause they've never alleged
19 that he personally benefited in any way.

20 There is a rotten core to this case which simply cannot
21 be ignored and it's this business about friends and colleagues.
22 The way they presented that to the grand jury was despicable. What
23 they said to the grand jury was isn't it true that these people are
24 all black and that's the rotten core of this case 'cause they're
25 alleging, well their friends and colleagues 'cause they're member

1 of a service fraternity, a service fraternity to which Thurgood
2 Marshall belonged. Martin Luther King belonged. And that's the
3 rotten core of this case.

4 This courthouse -- this courthouse, the elevators don't
5 work. Did anybody get charged with a crime where the work was done
6 so shoddy that you can't -- that you for years we couldn't get up
7 in the elevator? Is anybody charged with a crime when a friend of
8 a County Commissioner made -- may get a piece of -- of County land
9 and then uses it for development? No one is charged with a crime
10 in those cases. And I think that must be considered here.

11 The reason this case is so highly unusual, the reason
12 that it -- that it cannot possibly state a crime is that you can't
13 tell me where the line is crossed. Is it -- are you going to
14 instruct the jury that a crime is committed when a public official
15 does not -- does not act consistently with his mission which is
16 what -- which is what the Prosecutor is suggesting? Is that a
17 crime? Is that what the jury is going to be instructed?

18 Here's the mission of a County official, a mission of a
19 County official is to act on behalf of the County. If you find
20 that Mr. Thomas failed to act consistently with his mission, you
21 can then find that he's committed a felony. That's the problem in
22 this case. I saw it throughout the transcript of the trial.

23 And I will tell you who said that this -- we need to send
24 a message that this is not Chicago. It was the detective. And it
25 was in this hearing. It was before the evidentiary hearing. I was

1 shocked to hear that, that that was the whole point of this
2 Prosecution at least from his perspective.

3 Your Honor, this -- the case should not go forward. This
4 man should not have to be put through this based upon the kind of
5 prosecution that this is.

6 THE COURT: Thank you, counsel.

7 When reviewing this matter for this morning I reviewed my
8 decisions, in-Court decision, motion for reconsideration and one
9 sentence denial of the motion for reconsideration. I have to
10 assume that the Supreme Court reviewed the entire record when this
11 case was up on appeal. I'm assuming that they reviewed my decision
12 because like I said it was crystal clear to me that I never said
13 the -- that the allegations were unclear. I said the allegations
14 in my opinion at the time did not constitute a crime or it was more
15 of I called it an ill-conceived -- I think I said something like an
16 ill-conceived contract. Yeah, ill-conceived contract.

17 But the Supreme Court came out with their decision and
18 said that Mr. Thomas was sufficiently put on notice. And I would
19 look at page 4 of their decision, the original one, Thomas was
20 sufficiently put on notice of the criminal acts charged in Counts 2
21 to 5. And by the Supreme Court deciding the matter in a way they
22 did as well as by denying the motion for consideration, I believe
23 that they took into consideration the arguments today.

24 And I think I'm being asked to overrule the Supreme Court
25 because it just seems to me that the defense and the motion for

1 reconsideration said, look, Judges or Justices -- Villani didn't
2 say it wasn't clear. He said it is clear. But it's not -- it's
3 not -- it's not alleging a crime. And then they just said denied.
4 And so I've got to believe they reviewed the entire record and the
5 briefs. And based upon that, I'm going to deny the motion at this
6 point.

7 If anything is unclear, then the defense will appeal this
8 decision today and hopefully we'll have more clarity down the road,
9 but -- and maybe the State will -- the State does say it's crystal
10 clear where we're at and the Supreme Court perhaps it's saying it's
11 crystal clear as well. I didn't read it that way, but I file -- I
12 will follow the directives of the Nevada Supreme Court. And so I'm
13 going to deny the motion for the unconstitutional as applied here.

14 And, Mr. Staudaher, would you please prepare an order so
15 then -- I don't know if the defense is going to appeal this. They
16 can't appeal until we have a formal order signed by the Court.

17 Anything else for today?

18 MS. FORSMAN: Your Honor, I would like to request that if the
19 -- if the Prosecutors can prepare the order that it'd be provided
20 to the defense.

21 THE COURT: Oh yeah, I was going to have him run it by
22 counsel.

23 MS. FORSMAN: Yeah.

24 THE COURT: Yes. Approved as to form and content.

25 MR. STAUDAHER: Your Honor, would I be able to get a

1 transcript of this then to make sure that the wording, the findings
2 of the Court were -- I just don't put something --

3 THE COURT: You should request it from Michelle.

4 MR. STAUDAHER: -- and have an issue.

5 THE COURT: And she'll get it to you.

6 MR. STAUDAHER: Yes.

7 THE COURT: Now, we have a trial date and there was an issue
8 with that.

9 Counsel, I -- I think this has happened probably twice in
10 the last eight years because events come up with my schedule. I
11 will be at the Judicial College as a facilitator for the two-week
12 course for new Judges from October 19 to October -- October 29.
13 So, I don't know if we can start November 2nd and then go for -- I
14 don't know if this case may take two to three weeks. I'm assuming
15 it might take three weeks or hope -- is it going to be five weeks,
16 three weeks? Anyone have a good --

17 MR. STAUDAHER: I think it will be shorter based on --
18 although it'll still be long, but it should be shorter based on the
19 fact that Count 1 is not the case any longer. Let me look and see.
20 You said the Court wants to start in November.

21 MR. ALBREGTS: Well --

22 THE COURT: You know, I'm just -- you know, my calendar is
23 similar to any other Judge here. You know, I've got trials booked
24 through the end of next year and I know we try to double and triple
25 stack them because cases get continued, cases get negotiated. But

1 I do have for the first week of November I have two murder cases.
2 One is a death penalty case which we typically take priority for,
3 you know, death penalty cases. That one's been continued numerous
4 times.

5 I mean, I just can't tell you when I'm going to have a
6 five week stack where I don't have murder cases or death penalty
7 cases. It's supposed to be random. It just seems like I'm getting
8 more other departments. I don't know.

9 MR. STAUDAHER: Would it be possible to be inserted in a civil
10 stack then, Your Honor, for this -- just because of the issues with
11 regard to -- when we might be able to get this case tried? I know
12 that's not the Court's preference, but based on all of the capital
13 cases that the Court has.

14 THE COURT: Can counsel approach on a scheduling issue please?

15 MR. ALBREGTS: Sure.

16 [Bench Conference]

17 THE COURT: And then Mr. Staudaher how long will it take you
18 for the -- to prepare the order for this --

19 MR. STAUDAHER: I mean, as soon as -- as soon as I get the --
20 the transcript. What do you want from me? Do you want an order
21 from transcript? Okay. I'll go back and get the request for
22 transcript.

23 THE COURT: Is that going to be three weeks, Michelle?

24 THE COURT RECORDER: Let's just do 30 days just to make it
25 safe.

1 THE COURT: All right. No, 30 days. Right, 30 days?

2 THE COURT RECORDER: Yeah.

3 MR. STAUDAHER: And I can do it off the minutes and my notes,
4 but especially because the issues I just prefer to have it straight
5 out of what the Court has stated.

6 THE COURT: All right. Let's do 45 days status check from
7 today if the order is filed. This way it's on everyone's tickler
8 system. And if it's been filed, we'll vacate this date. So,
9 Carol, if you can give us 45 days from today.

10 THE CLERK: August -- September 10th, 8:30.

11 THE COURT: All right. Anything else before I leave the
12 bench?

13 MR. STAUDAHER: No thanks or no, Judge.

14 MS. FORSMAN: Thank you, Your Honor.

15 [Proceeding concluded at 11:08 a.m.]

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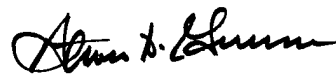
21 ATTEST: I hereby certify that I have truly and correctly
22 transcribed the audio/video proceedings in the above-entitled case
to the best of my ability.

23

24

25


Michelle Ramsey
Court Recorder/Transcriber



CLERK OF THE COURT

1 **FCL**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **MICHAEL V. STAUDAHER**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #008273**
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9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-vs-**

12 **LACY L. THOMAS,**
13 **#2676662**

14 **Defendant.**

CASE NO: 08C241569

DEPT NO: XVII

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 **DATE OF HEARING: 7/31/15**
18 **TIME OF HEARING: 9:30 A.M.**

19 **THIS CAUSE** having come on for hearing before the Honorable MICHAEL P.
20 **VILLANI**, District Judge, on the 31th day of July, 2015, the Defendant being present,
21 **REPRESENTED BY DANIEL J. ALBREGTS, ESQ., AND FRANNY A. FORSMAN, ESQ.,**
22 the State being represented by STEVEN B. WOLFSON, Clark County District Attorney, by
23 and through MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and the Court
24 having considered the matter, including testimony, briefs, transcripts, arguments of counsel,
25 and documents on file herein, now therefore, the Court makes the following findings of fact
26 and conclusions of law:

27 //

28 //

29 //

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1 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2 The Court has reviewed the briefs filed by the parties, has heard argument from the
3 parties, the testimony of the witnesses at the evidentiary hearing and has also reviewed the
4 applicable case law cited by the parties in their briefs.

5 THE COURT FINDS THAT, with regard to the issue of the "binder," that the "binder"
6 contained exculpatory evidence indicating that ACS representatives were working diligently
7 and were trying to perform under the contract with University Medical Center which would
8 negate the allegations in Count 1.

9 THE COURT FURTHER FINDS THAT and that there was a Brady violation by the
10 State because the evidence adduced at the evidentiary hearing showed that the "binder" was
11 given to the District Attorney's Office by the police. The Court does not, however, find that
12 there was any intentional act by the District Attorney to withhold the evidence.

13 THE COURT FURTHER FINDS THAT because the Nevada Supreme Court
14 determined that Count 1 of the original indictment should be dismissed and also because there
15 was no intention to withhold any evidence by the State, that there is no carryover to the other
16 counts so jeopardy did not attach to those counts.

17 THE COURT FURTHER FINDS THAT the Nevada Supreme Court has previously
18 determined that Defendant was sufficiently put on notice of the criminal acts charged in the
19 remaining counts of the indictment. The court assumes that the Nevada Supreme Court
20 considered the arguments made by Defendant in the briefs and Motion for Reconsideration
21 and therefore this court is without authority to consider the Defendant's Renewed Motion to
22 Dismiss Based on Failure to State a Crime, or in the alternative, Unconstitutional Vagueness
23 of the Statutes.

24 THE COURT FURTHER FINDS THAT Defendant's motion to compel is moot since
25 the requested information by Defendant was obtained during the evidentiary hearing which
26 was held in the instant matter.

27 //

28 //

1 ORDER

2 IT IS HEREBY ORDERED that Defendant's Supplemental Motion to Dismiss on
3 Double Jeopardy grounds is denied.

4 IT IS ALSO HEREBY ORDERED that Defendant's Renewed Motion to Dismiss
5 Based on Failure to State a Crime, or in the Alternative, Unconstitutional Vagueness of the
6 Statutes is also denied.

7 IT IS ALSO HEREBY ORDERED that Defendant's Motion to Compel is moot and,
8 therefore, is taken off calendar.

9 DATED this 24 day of September, 2015.

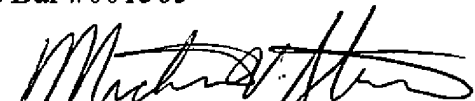
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11 DISTRICT JUDGE

12 JJ

12 STEVEN B. WOLFSON
13 Clark County District Attorney
14 Nevada Bar #001565

14 BY

15 
16 MICHAEL V. STAUDAHER
17 Chief Deputy District Attorney
18 Nevada Bar #008273

19 CERTIFICATE OF SERVICE

20 I certify that on the 24th day of September, I e-mailed a copy of the foregoing
21 proposed Findings of Fact, Conclusions of Law, and Order to:

22 DANIEL J. ALBREGTS, ESQ.
23 albregts@hotmail.com

24 FRANNY A. FORESMAN, ESQ.
25 f.forsman@cox.net

26 BY

27 
28 Secretary for the District Attorney's Office

MS/tgd/MVU

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Oct 29 2015 02:17 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

LACY THOMAS,)	Case No. 69074
Petitioner,)	
vs.)	
THE STATE OF NEVADA,)	
Respondent,)	

PETITIONER’S APPENDIX
Volume II

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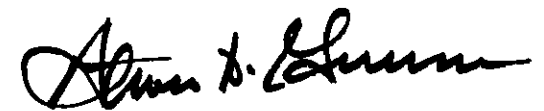
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CLERK OF THE COURT

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13 *Attorneys for Defendant*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 THE STATE OF NEVADA,)	CASE NO. C241569
17 Plaintiff,)	DEPT. NO. XVII
18 vs.)	
19 LACY L. THOMAS,)	
20 Defendant.)	

21 **EXHIBIT IN SUPPORT OF MOTION TO DISMISS (DOUBLE JEOPARDY)**

22 This matter is scheduled for an evidentiary hearing on March 20, 2015. Defendant submits
23 the attached exhibit in support of the Motion to Dismiss. Exhibit 1 consists of a lengthy order from
24 the U.S. District Court for the District of Nevada issued on September 1, 2004, nearly six (6) years
25 prior to the trial in this case which resulted in a mistrial. The mistrial resulted from the failure of the
26 Clark County District Attorney's office to disclose materials which were subject to Brady v.
27 Maryland, 83 S.Ct. 1194 (1963), Kyles v. Whitley, 115 S.Ct. 1555 (1995) and Giglio v. United
28 States, 92 S.Ct. 763 (1972). The attached exhibit demonstrates that the Clark County District

1 Attorney's office has been on notice that in order to insure that a defendant's constitutional rights
2 to due process, and in this case, to not be placed in jeopardy twice, materials in the possession of
3 investigators with the Las Vegas Metropolitan Police Department must be reviewed to insure that
4 adequate disclosure has been made.

5 The attached order in Homick v. McDaniel, Case No. CV-N-99-0299-DWH (RAM).
6 Defendant asks that the court consider the findings of the federal court with regard to the practices
7 of the Clark County District Attorney's office which apparently continued until the time of the trial
8 in this case.¹ The findings which are relevant to the question before this court are as follows:

- 9 • The "open file" policy of the CCDA may have been neither "open" nor complete, Ex. 1, p.
10 7.
- 11 • The failure to insure that full *Kyles*, *Brady* and *Giglio* disclosures have been made has
12 resulted in reversals of capital cases by Nevada courts. Ex. 1, p. 7-8 and cases cited therein.
- 13 • No "institutional procedure" exists "by means of which Metro assures that all Kyles material
14 in its possession is forwarded to the CCDA's office for review.
- 15 • [T]he CCDA's office apparently lacks an institutional procedure or policy by means of
16 which it may ensure that its "open file" contains everything which it is required to disclose.
- 17 • The lack of an institutional procedure "demonstrates a pattern of organization behavior." Ex.
18 1, p. 9.

19 As a result of these findings, Judge Pro ordered discovery in federal court to assure that full
20 constitutional disclosure was made.

21 The right protecting a defendant from being placed in jeopardy more than once and against
22 the kind of hardship created here by the failure of the Clark County District Attorney to assure that
23 this defendant was provided with those materials to which he was constitutionally entitled is an
24 important constitutional right. When the CCDA decided to continue with its practices despite
25

26 . . .

27 . . .

28 . . .

29 ¹The order of the federal court is not a published order, however, it is not cited here as
30 authority but rather, as proof of notice of the constitutional flaws in the practices of the District
31 Attorney.

1 repeated warnings by courts and by the U.S. District Court, it did so at risk that if its conduct caused
2 a mistrial, the defendant is not required to shoulder the resulting hardship.

3 DATED this 18th day of March, 2015.

4 DANIEL J. ALBREGTS, LTD.

5 By: /s/ Daniel J. Albregts
6 DANIEL J. ALBREGTS, ESQ.
7 Nevada Bar No. 004435

8 LAW OFFICES OF FRANNY FORSMAN, PLLC

9 By: /s/ Franny A. Forsman
10 FRANNY A. FORSMAN
11 Nevada Bar No. 000014

12 *Attorneys for Defendant THOMAS*

13 **CERTIFICATE OF SERVICE**

14 The undersigned, an employee of DANIEL J. ALBREGTS, LTD., hereby certifies that on
15 the 18th day of March, 2015, she served a copy of the above and foregoing EXHIBIT IN SUPPORT
16 OF MOTION TO DISMISS (DOUBLE JEOPARDY), via Odyssey E-File and Serve to the emails
17 below:

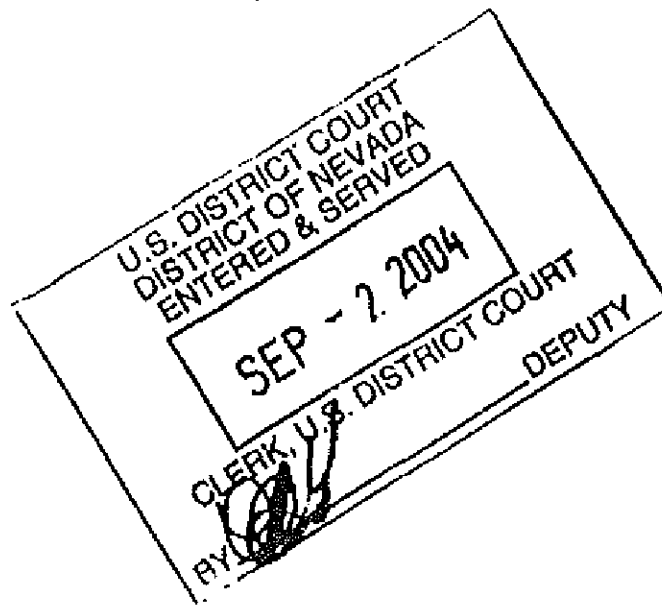
18
19 Michael Staudaher
20 Chief Deputy District Attorney
21 michael.staudaher@clarkcountyda.com

22 Clark County District Attorney's Office
23 pdmotions@clarkcountyda.com

24
25 Kimberly LaPointe
26 An Employee of Daniel J. Albregts, Esq

EXHIBIT 1

EXHIBIT 1



FILED
SEP - 1 PM 3:59
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN M. HOMICK,

Petitioner,

v.

E. K. MCDANIEL, et al.,

Respondents.

Case No. CV-N-99-0299-DWH(RAM)

ORDER REGARDING REMAINING
DISCOVERY ISSUES

Petitioner has filed a motion for leave to conduct discovery. Docket #73. In support of the motion, petitioner has filed and served voluminous exhibits. Dockets #74 through #85, containing Exhibits #1 through #357. Respondents have filed and served their points and authorities in opposition to the petitioner's motion. Docket #99. Petitioner has tendered his reply points and authorities in support of his motion for leave to conduct discovery. Docket #106. Petitioner has also filed with his reply points and

1 authorities supplemental exhibits in support of the motion for leave
2 to conduct discovery. These additional exhibits are attached to the
3 reply points and authorities themselves. The court has reviewed in
4 detail the petitioner's motion, the opposing points and authorities,
5 as well as the reply points and authorities. Furthermore, the court
6 has reviewed all exhibits tendered in support of the motion for leave
7 to conduct discovery. Based upon that review, and good cause
8 appearing, the court concludes that petitioner has demonstrated good
9 cause for leave to conduct some of the discovery he desires. Before
10 petitioner is allowed to serve his discovery requests, however, he
11 shall be required to file a supplemental brief in which he associates
12 the specific proposed discovery request (subpoena) by Exhibit number
13 with the allowed category of discovery.

14

15 1. Good Cause Showing.

16 As with all habeas corpus discovery questions, the court
17 must turn first to the analysis of the "good cause" requirement of
18 Rule 6, and as further defined in *Bracy v. Gramley*, 520 U.S. 899
19 (1997). In *Bracy*, case, the petitioner claimed that his trial judge,
20 Maloney, had been exposed in the infamous "Operation Greylord" FBI
21 sting and investigation in Chicago. "Greylord" revealed that Maloney
22 was sodden with corruption, and that he accepted money from defense
23 lawyers to "fix" all manner of criminal trials on his docket. So
24 pervasive was Maloney's corruption, according to *Bracy*, that a
25 criminal defendant such as he that did not (or could not afford to)
26 bribe the jurist faced a form of retaliatory action. Maloney would

1 demonstrate a "compensatory bias" (i.e., give harsher rulings than
2 warranted under the facts and law) against those criminal defendants
3 not bribing him in part to attempt to deflect charges of corruption,
4 but also to assure the future flow of depraved cash into his coffers
5 in other important matters. *Bracy*, supra, 520 U.S. at 907-909.

6 The Supreme Court ruled that Bracy's discovery request
7 established "good cause" based upon a number of specific factors: 1)
8 petitioner's request was grounded in specific and demonstrable facts;
9 2) the discovery request established a logical and direct nexus
10 between the discovery sought and the pending claims; 3) there was real
11 and factual evidence to which the petitioner could point in order to
12 establish that the claims had a factual basis and were not purely
13 speculative; and 4) the discovery request was narrowly tailored to
14 obtain specific, identifiable things. The Court specifically
15 emphasized

16 that petitioner supports his discovery request by
17 pointing not only to Maloney's [the judge's]
18 conviction for bribe taking in other cases, but
19 also to additional evidence ... that lends support
20 to his claim that Maloney was actually biased in
21 petitioner's own case. That is, he presents
22 "specific allegations" that his trial attorney, a
former associate of Maloney's in a law practice
that was familiar and comfortable with corruption,
may have agreed to take this capital case to trial
so quickly so that petitioner's conviction would
deflect any suspicion that rigged Rosario and Chow
cases might attract.

23 *Bracy*, 520 U.S., at 909 (emphasis in original).

24 The petitioner in *Bracy* could point to an actual parade of
25 horrors in terms of specific and detailed facts with direct nexus
26

1 to the claim before the court, including: 1) Judge Maloney's
2 conspiracy conviction; 2) the trial lawyer's having acted as Maloney's
3 "bag man"; 3) Maloney's having appointed that lawyer to represent
4 Bracy; 4) that lawyer's statement that he was ready to take the case
5 to trial after only a few week's appointment; 5) the lawyer's failure
6 to request a continuance to investigate any mitigation evidence for
7 the penalty phase; 6) the lawyer's failure to call any witnesses at
8 trial; 7) the fact that Bracy's trial was sandwiched in between two
9 other murder trials in which the defense actually had bribed Maloney;
10 and 8) a history of Maloney's having retaliated against those
11 defendants that did not bribe him. *Id.*, at 906-07.

12 In the case at bar, the petitioner has demonstrated the
13 required nexus in some of the discovery requests, particularly those
14 in which he seeks *Brady* material. In order to establish a *Brady*
15 claim, the petitioner must demonstrate: 1) that the state suppressed
16 evidence, either willfully or inadvertently; 2) that the evidence at
17 issue was favorable to the accused, either as exculpatory or
18 impeachment material; and 3) that the evidence was material to the
19 outcome such that the petitioner was prejudiced by the suppression.
20 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

21 As set forth below, petitioner has made the required
22 showings for some of the discovery which he desires. In his motion,
23 petitioner seeks specific categories of discovery. These consist
24 almost exclusively of *Brady*, *Giglio* and *Kyles* material which
25 petitioner maintains he was denied prior to trial. Specifically,
26 petitioner seeks:

- 1 A. Norma Thompson Interview and FBI Informant Reports;
- 2 B. Art Taylor Interview Reports and Raw Notes;
- 3 C. Records of Payments to Art Taylor;
- 4 D. Impeachment Information Regarding the Testimony of
5 Michael Dominguez;
- 6 E. Impeachment Evidence regarding testimony of LAPD
7 Detective Jack Holder;
- 8 F. FBI Surveillance Records;
- 9 G. Impeachment Evidence regarding Stewart Siegel;
- 10 H. Depositions and Third Party Alibi Evidence.

11 Petitioner seeks much of this discovery from Las Vegas
12 police and law enforcement entities. The investigation of
13 petitioner's case, however, was conducted not only by Las Vegas
14 entities. In addition to the Las Vegas area police authorities,
15 petitioner was being investigated by both the Los Angeles Police
16 Department and the FBI for murder (in Nevada and California), arson
17 (in Hawaii), drug trafficking, and other crimes. Indeed, when
18 petitioner stood trial for the Nevada murders (the Tipton murders),
19 the Clark County District Attorney (herein "CCDA") introduced into
20 evidence during petitioner's penalty phase evidence tending to show
21 his culpability in the California murders (the "Ninja" or Woodman
22 murders), as well as various other facts which were the basis for
23 petitioner's federal RICO prosecution. Petitioner argues that all of
24 the various investigations are inextricably bound together, and that
all investigations up with the others.

25 As a result of the "cross-pollination" of the investigations
26 and trials involving petitioner, he sought informal discovery from

1 various divisions of the Las Vegas Metropolitan Police Department
2 (herein "Metro"), numerous field offices of the FBI, the Bureau of
3 Alcohol, Tobacco and Firearms, the Drug Enforcement Administration,
4 the U.S. Postal Service, and various divisions of the Los Angeles
5 District Attorney's Office.

6 Petitioner approached these entities in an informal manner,
7 insofar as this case was designated an "open file" case by the Clark
8 County District Attorney. As fully set forth below, the designation
9 of this case as an "open file" matter, together with the integration
10 of the California and federal prosecutions into the penalty phase,
11 have generated substantial debate whether petitioner should have been
12 given access to more documents.

13

14 2. "Open File" Debate

15 The Clark County District Attorney's generally maintains an
16 "open file" policy with respect to all capital murder cases, and this
17 case was no exception. Indeed, the state court trial judge in this
18 case entered an order directing that discovery should be given to the
19 defense under that policy. See Exhibit 38, attached to petitioner's
20 motion for leave to conduct discovery, Docket #73. What "open file"
21 means is not entirely clear, but petitioner here contends that the
22 term conveyed to his trial counsel that the CCDA's file was a complete
23 representation of law enforcement's files and documents regarding the
24 petitioner and the case against him, including all *Brady*, *Giglio* and
25 *Kyles* material. Petitioner claims that because his case was "open
26 file," his trial counsel was not obliged to look any further than the

1 CCDA's file for documents and evidence, the sort of which a prosecutor
2 is compelled by law to disclose to the accused. Thus, all of the
3 *Brady, Giglio* or *Kyles* material ought to reside in the "open file,"
4 according to petitioner, and trial counsel ought to have been able to
5 rely on the completeness of that file. In the alternative, those
6 documents which were not in the CCDA's file ought, in petitioner's
7 view, to have been provided to the defense without any further request
8 or demand by the petitioner's counsel.

9 Petitioner's reliance on the "open file" policy may have
10 been misplaced. Asserting numerous ineffective assistance of counsel
11 claims in the petition, petitioner claims that his lawyers failed to
12 conduct adequate investigation into a vast number of matters,
13 including, but not limited to, mitigation evidence available from
14 federal and state records, and potential *Brady, Giglio* and *Kyles*
15 material. The particular twist which makes all of this difficult is
16 as follows. Because the petitioners' lawyers were officially informed
17 that this case was "open file," they may (or may not) have been within
18 their rights to assume that all of the information which law
19 enforcement officials should have disclosed to them (particularly
20 *Brady, Giglio* and *Kyles* material) was actually located in the physical
21 files of the district attorney.

22 Petitioner has presented evidence that the "open file"
23 policy of the CCDA may have been neither "open" nor complete, much to
24 the petitioner's detriment. In particular, petitioner has provided
25 evidence from various other capital cases from our district, in which
26 Nevada courts have found that the CCDA's office has failed to comply

1 with its duties of disclosure in "open file" cases such as
2 petitioner's. For example, in *State v. Butler*, Case No. C155791, the
3 Eighth Judicial District Court vacated a capital sentence because of
4 the prosecution's failure to disclose evidence, following a previous
5 incident in which the state had deliberately failed to disclose,
6 despite a pending request for complete discovery. Petitioner has
7 cited almost ten other similar cases in which Nevada courts have
8 either vacated capital and length non-capital sentences for failure
9 to disclose by the CCDA, or in which members of the CCDA's office have
10 admitted to serious defaults regarding their obligations regarding
11 disclosure of documents in "open file" cases. See e.g., *Jiminez v.*
12 *State*, 112 Nev. 610, 620-21, 918 P.2d 687 (1996) (court finding that
13 CCDA failed to comply with disclosure obligations regarding *Giglio*
14 material and exculpatory evidence); *Miranda v. McDaniel*, Clark County
15 Case No. C057788, Findings of fact and Conclusions of Law
16 (2/13/96) (finding ineffective assistance of counsel for failure to
17 investigate inconsistencies in testimony of key prosecution witnesses,
18 where inconsistencies known to prosecution and information was
19 disclosed partially by prosecution); *Haberstroh v. McDaniel*, Clark
20 County Case No. C076013 (prosecution devoted much of the penalty phase
21 in this death penalty case to the evidence suggesting petitioner had
22 made a "shank" [a jail-made stabbing weapon]; prosecution failed to
23 disclose evidence in possession of Clark County Detention Center that
24 suggested the "shank" was in fact a digging tool, used by another
25 inmate in an escape attempt, and which had then allegedly been hidden
26 in petitioner's cell without his knowledge; prosecutor did not

1 disclose this evidence to defense, because he was himself unaware of
2 it.)¹

3 This particular alleged failing may have significant
4 consequences. The records custodians of the CCDA and of the LVMPD
5 (herein "Metro") have given sworn testimony in the *Haberstroh* case to
6 the effect that no institutional procedure exist by means of which
7 Metro assures that all Kyles material in its possession is forwarded
8 to the CCDA's office for review. Further, the CCDA's office
9 apparently lacks an institutional procedure or policy by means of
10 which it may ensure that its "open file" contains everything which it
11 is required to disclose. This testimony is certainly relevant to the
12 issue at hand, insofar as it demonstrates a pattern of organizational
13 behavior under Fed. R. Evid. 406. See generally *Bouchat v. Baltimore*
14 *Ravens, Inc.*, 226 F.3d 489, 493 (4th Cir. 2000). An "open file" case
15 which does not contain all of the material it is supposed to have is
16 not only misleading, it may also violate the requirements of Kyles and
17 its progeny. See generally *Smith v. Secretary, New Mexico Dept. of*
18 *Corrections*, 50 F. 3d 801, 828 (10th Cir.), cert. denied, 516 U.S. 905
19 (1995).

20 Petitioner has alleged in this case that his own counsel was
21

22 ¹ The court is aware that the cases cited herein and by petitioner in his
23 brief are not reported authorities. As such, they may not be cited for their
24 precedential value. Petitioner has not cited them for that purpose, nor has
25 the court relied on them in that role. Instead, petitioner has cited these cases
26 as evidence of the alleged problems in transmission of critical documents between
the outlying police enforcement agencies in Las Vegas and the Clark County District
Attorney's office. Insofar as the cases are cited as evidence, they are not
precedential, and do not violate any of the court's or the Ninth Circuit's
proscriptions against citation of unpublished authorities.

1 constitutionally ineffective, because he was apparently unaware that
2 large volumes of discoverable material, even though arguably "open
3 file," lay buried deep within the files of Metro, the LAPD or the FBI.
4 Petitioner claims that at least some of this evidence was employed at
5 trial to convict him, even though his counsel was previously unaware
6 of its existence. Because trial counsel was unaware of this evidence
7 prior to trial, there is simply no means by which petitioner may be
8 assured that documents critical to the litigation of this case have
9 been found. And, as a result, petitioner claims that there is simply
10 no way to tell whether critical *Brady*, *Giglio* and *Kyles* material has
11 been glossed over as in *Haberstroh*.

12 Adding to this problem, numerous documents and other
13 discovery in the possession the California and federal authorities was
14 never transmitted to the CCDA, nor placed in its "open file." Metro,
15 the Los Angeles Police and the FBI cooperated substantially with each
16 other throughout the investigation of petitioner. There are several
17 documents attached to petitioner's motion for leave to conduct
18 discovery in which the FBI officials in charge of their portion of the
19 investigation compliment the Nevada and California police and
20 prosecution agencies for their assistance in the "joint" investigation
21 of petitioner. Particularly telling is a series of letters from
22 William Webster, the Director of the FBI, to Metro detectives, in
23 which Webster compliments the individual detectives for their
24 outstanding work in this "joint" investigation. See, Exhibit #191-
25 198. Respondents claim that the FBI and the LAPD were independent of
26 the Nevada investigation, but these exhibits suggest the contrary.

1 Moreover, the sheer volume of documents and testimony introduced into
2 evidence in Nevada that came from FBI and California sources proves
3 that all three entities were operating as one, hybrid investigating
4 agency. Petitioner has provided charts in support of his motion which
5 detail the significant degree to which all of the evidence was used
6 by all three investigating agencies. See Exhibits #176-178; #233-236.

7 Petitioner claims that the status of the "open file"
8 material, and the degree to which documents were withheld alone
9 constitutes "good cause" for discovery. First, the case was
10 officially designated as an "open file" matter by the trial court.
11 Petitioner ought to have been provided with that information in the
12 possession of the prosecutor which was in their actual or constructive
13 possession. Moreover, petitioner has shown that the FBI and LAPD
14 investigations were part and parcel of the Nevada investigation, and
15 that evidence which the FBI and LAPD had also ought to have been
16 produced to petitioner.

17 Petitioner's first discovery request is that he be allowed
18 to copy all of the "open file" material in the possession of the CCDA.
19 Since this case was originally designated an "open file" matter by the
20 trial court, there seems to be no logical reason that the petitioner
21 should be prevented from having access to all of the "open file"
22 materials in the CCDA's possession. Indeed, the respondents do not
23 object to this request, and the court shall allow this discovery as
24
25
26

1 requested and stipulated to by respondents.²

2

3 3. Lack of Exhaustion of Claims.

4 Notwithstanding the showing of "good cause" which may be
 5 promoted by the "open file" evidence, it appears that discovery cannot
 6 be had for claims that do not relate to an exhausted claim for relief.
 7 *Calderon v. U.S. District Court (Nicolaus)*, 98 F.3d 1102, 1106-07 (9th
 8 Cir. 1997), cert. denied, 520 U.S. 1233 (1997); *McDaniel v. U.S.*
 9 *District Court, (Jones)*, 127 F.3d 886, 888 (9th Cir. 1997); *Calderon*
 10 *v. U.S. District Court (Hill)*, 120 F.3d 927, 928 (9th Cir. 1997). In
 11 *Nicolaus*, for example, the Circuit vacated by means of mandamus a
 12 district court's order granting a pre-petition discovery request.
 13 Noting specifically the impropriety of granting a discovery request
 14 upon unverified, unspecific allegations, the Circuit concluded that

15

16 . . . pre-petition discovery is impermissible
 17 for at least four reasons. First, a prisoner
 18 must outline *factual allegations in a petition*
 19 *before the district court will be able to*
 20 *determine the propriety of the discovery.* As
 21 the Supreme Court stated in *Harris v. Nelson*,
 22 394 U.S. 286 . . . (1969), which established
 23 the basis for Rule 6: "In appropriate
 24 circumstances, a district court, confronted by
 25 a petition for relief, may use or authorize
 26 the use of suitable discovery procedures." . . .
 In sum, we hold that the district court erred
 in granting Nicolaus' discovery request before
 Nicolaus presented *specific allegations in the*

24 ² The court emphasizes that all that is allowed under this request is an
 25 exact duplicate of that which existed in the CCDA's "open file." The CCDA is
 26 obliged under this request to make available for inspection and copying its entire
 and complete file as it exists today, and should make any changes from the file at
 the time of trial readily apparent.

1 *form of a verified petition.*

2
3 *Nicolaus, supra*, 98 F.3d at 1106-07 (emphasis added). If pre-petition
4 discovery is not allowable unless the petitioner has made specific
5 allegations by means of which the district court may judge the
6 propriety of the discovery, then surely post-petition discovery (such
7 as that requested here) is equally improper. Absent specific
8 allegations, the district court cannot determine whether the discovery
9 requests are the sort of "specific allegations before the court,"
10 which, "if the facts are fully developed, ... demonstrate that [the
11 petitioner] is ... entitled to relief... ." *Bracy*, 520 U.S. at 908-
12 909.

13 The court concludes that discovery in federal habeas cases
14 extends only to currently exhausted claims. As the Circuit noted in
15 *Hill*, "[u]ntil [a petitioner] has filed a federal habeas petition on
16 an exhausted claim, he cannot avail himself of Rule 6 discovery."
17 *Hill, supra*, 120 F.3d at 928 (quoting *Nicolaus*, 98 F.3d at 1109).
18 Aside from all of the obvious reasons of comity and federal-state
19 judicial balance for requiring exhaustion prior to granting Rule 6
20 discovery, it appears to the Court that *Bracy* and Rule 6 themselves
21 compel this result.

22 There is no dispute that "a habeas petitioner, unlike the
23 civil litigant in federal court, is not entitled to discovery as a
24 matter of ordinary course." *Bracy v. Gramley*, 520 U.S. *supra*, at 908
25 (1997). Only if a petitioner can demonstrate, by means of a showing
26 of "... specific allegations before the court ... that the petitioner

1 may, if the facts are fully developed, be able to demonstrate that he
2 is entitled to relief," is it "the duty of the courts to provide the
3 necessary facilities and procedures for an adequate inquiry." *Bracy*,
4 *supra*, and *Harris v. Nelson*, 394 U.S. 286, 299, (1969)) (emphasis
5 added).

6 This analysis raises the following question: "How is it
7 possible for a habeas petitioner to be entitled to relief on an
8 unexhausted claim?" The answer is that he is not. Perhaps the most
9 fundamental principle of habeas litigation is that all claims for
10 relief must be exhausted, or the federal courts cannot grant relief
11 on them. 28 U.S.C. 2254(b)(1)(A).³ So sacrosanct is this principle,
12 that the federal courts are obliged to dismiss an entire petition if
13 it contains even one unexhausted claim. *Id*; *Rose v. Lundy*, 455 U.S.
14 509 (1982). This being the case, can a federal court grant discovery
15 on a claim, for which the petitioner is not entitled to relief by
16 virtue of that claim's lack of exhaustion? The *Bracy* case itself
17 compels the answer: the court cannot allow discovery on an
18 unexhausted claim, for the petitioner cannot demonstrate that he is
19 entitled to relief on a claim that is not exhausted.

20 The court shall therefore not grant the wide-ranging
21 discovery sought by petitioner with respect to claims that he has not
22 exhausted in state court. To do so would undermine the exhaustion
23 requirement, which is based on the doctrine of federal-state comity,
24 and which is one of the foundational prerequisites of a federal habeas

25
26 ³The District Court may deny relief on an unexhausted claim. 28 U.S.C.
§2254(b)(2). It merely cannot grant relief on an unexhausted claim.

1 corpus petition. As the United States Supreme Court stated in *Keeney*
2 *v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992), *superceded by statute as stated*
3 *in Williams v. Taylor*, 529 U.S. 362, 432-34 (2000): "The state court
4 is the appropriate forum for resolution of factual issues in the first
5 instance, and creating incentives for the deferral of fact-finding to
6 later federal-court proceedings can only degrade the accuracy and
7 efficiency of judicial proceedings."

8 The case law indicates that the question of exhaustion of
9 claims remains an important aspect of this court's discretion in
10 considering discovery requests under Rule 6. The court will exercise
11 that discretion to deny the discovery that petitioner seeks on claims
12 that he not yet exhausted in state court.

13 It is the intersection of the exhaustion principle with the
14 existing claims in this case which causes difficulties to arise. As
15 noted above, all of the existing claims in the petition are, in fact,
16 fully exhausted in state court. Only some of the discovery requests,
17 however, relate to one of the existing, exhausted claims in the
18 petition.

19 The current petition consists of the following, fully
20 exhausted claims:

21

22 Claim #1. That petitioner's conviction and sentence violate his
23 5th Amendment right against self-incrimination. In
24 specific, the petitioner contends that statements made
25 by the prosecutor implicated the petitioner's right to
26 remain silent. During closing argument, the

1 prosecution allegedly commented on the petitioner's
2 right to remain silent, observing that petitioner left
3 out of his allocution various critical facts. Because
4 petitioner did not testify in the merits of his guilt
5 phase, he claims that the prosecution's comment on his
6 allocution constitutes a violation of his right to
7 remain silent.

8
9 Claim #2. That petitioner's conviction and sentence violate his
10 8th and 14th Amendment due process of law and his rights
11 to be free of cruel and unusual punishment, because
12 his sentence was a result of arbitrary and capricious
13 standards. Petitioner contends here that the state
14 was allowed to utilize both burglary and robbery as
15 separate aggravating circumstances, despite the fact
16 that both crimes were based upon the same alleged
17 acts. In petitioner's view, such "stacking" of the
18 offenses results in the arbitrary and capricious
19 imposition of the death penalty.

20
21 Claim #3. That petitioner's conviction and sentence violate his
22 5th and 14th Amendment rights to due process of law, in
23 that the joint prosecution team failed to collect and
24 preserve specific, critical evidence, or intentionally
25 destroyed exculpatory evidence during the
26 investigation. A crucial aspect to the defense was

1 the alibi testimony of witnesses Susan Hines and
2 Lawrence Ettinger, specifically that on December 11,
3 1985, after leaving Stewart Bell's office, petitioner,
4 Ettinger and Hines had gone to the New York deli for
5 something to eat. If this evidence had been
6 sufficiently documented by the authorities, the
7 petitioner would have had much stronger alibi evidence
8 for the time during which the crimes were committed.
9
10

11 Claim #4. That petitioner's conviction and sentence violate his
12 8th and 14th Amendment rights in that he was prevented
13 from using residual doubt as a mitigating
14 circumstance. Petitioner submitted a jury instruction
15 on mitigating circumstances that included lingering or
16 residual doubt as mitigation. The trial court refused
17 this instruction, and instead instructed the jury
18 using the two statutory mitigating circumstances and
19 Nevada's "any other mitigating circumstances"
20 instruction.
21

22 Claim #5. That petitioner's conviction and sentence violate his
23 4th and 14th Amendment rights to be free from
24 unreasonable searches, seizures, intrusions and
25 invasions of privacy. In this claim, the petitioner
26 argues that numerous irregularities in the electronic

1 surveillance infected the conduct of the investigating
2 parties. The illegal conduct, which was known to
3 trial counsel, was raised on trial and on direct
4 appeal from the conviction and sentence.

5
6 Claim #6. That petitioner's conviction and sentence violate his
7 6th Amendment to reasonably effective assistance of
8 counsel at trial, as well as his 14th Amendment right
9 to a fair trial and due process of law. Petitioner
10 identifies two intertwined areas which consist of the
11 trial counsel's failures, specifically: the failure
12 to prepare for trial and present available evidence;
13 and the inability or failure to obtain evidence
14 necessary to prepare present a full and adequate
15 defense on petitioner's behalf. The errors of counsel
16 consist of the following: (a) the failure to call
17 Raymond Jackson; (b) the failure to identify Dominguez
18 as the Tipton murderer; (c) the failure to call
19 Dominguez's associates to identify him and Danielson
20 as the actual murderers; and (d) the failure to
21 contact witnesses in order to impeach Timothy Catt's
22 testimony.

23
24 Claim #7. That petitioner's conviction and sentence violate his
25 5th and 14th Amendment rights, based upon the
26 withholding of substantial exculpatory materials

1 until long after his Nevada trial. Petitioner claims
2 that Las Vegas homicide detectives worked hand-in-hand
3 with both the FBI and the Los Angeles Police
4 Department to develop evidence against petitioner in
5 the Nevada murders as well as the California cases.
6 In particular, petitioner claims that evidence
7 developed by the prosecution about Art Taylor's
8 meeting with petitioner was critical to the theory of
9 defense. The Taylor evidence could have supported
10 petitioner's alibi that he was chauffeuring Hines and
11 Ettinger around Las Vegas at the time of the Tipton
12 murders.

13
14 Claim #8. That petitioner's conviction and sentence violate his
15 5th and 14th Amendment rights to the presumption of
16 innocence and due process, and his right to a
17 fundamentally fair trial. In petitioner's view, the
18 state failed to prove his guilt beyond a reasonable
19 doubt. Circumstantial evidence presented by the state,
20 in petitioner's view, was more consistent with his
21 innocence than with this guilt. There were no
22 eyewitnesses to the murders, and no murder weapon was
23 ever recovered. Further, nothing discovered at the
24 Tipton residence or observed outside of the Tipton
25 home directly linked the petitioner to the murders.
26 If anything, petitioner claims the evidence arguably

1 pointed to Michael Dominguez, not him. Petitioner
2 observes that the only evidence tied him to the
3 homicides was that of accomplice turned informant
4 Michael Dominguez and petitioner's alleged confession
5 as recollected by Catt.
6

7 Claim #9. That petitioner's conviction and sentence violate his
8 14th Amendment right to due process and a fair trial.
9 In this regard, petitioner claims improper and
10 prejudicial evidence was introduced during trial.
11 Among the illegal evidence improperly permitted by the
12 trial court was the following:
13

14 (A) in July, 1985, Michael Dominguez attempted to
15 kill Craig Maraldo and Cheryl McDowell, allegedly
16 at the petitioner's request. Ballistics results
17 showed that same .22 caliber shots fired in the
18 Maraldo crime matched those found at the Tipton
19 residence;

20 (B) petitioner had sold an ounce of cocaine to
21 Dominguez in the past, and Dominguez attempted to
22 kill Maraldo in order to pay off his cocaine debt
23 to petitioner;

24 (C) petitioner's participation in a burglary and
25 robbery of Mr. Godfrey included torture by
26 applying pliers to the victim's fingernails, and

1 dunking him into a tub of water to get him to
2 disclose where his money was kept; and

3 (D) petitioner threatened Timothy Catt and his
4 girlfriend to refrain from cooperating with the
5 authorities about the jewelry in the petitioner's
6 possession.

7 In the petitioner's view, the incidents detailed above
8 were evidence of other bad acts, and failed to meet
9 the test of admissibility. Petitioner claims his
10 conviction was infected with constitutional error, as
11 such "character" evidence prevents adequate cross-
12 examination of witnesses to the prior events.

13
14 Claim #10. That petitioner's conviction and sentence
15 violate his 5th and 14th Amendment right to the
16 presumption of innocence, due process of law, and a
17 fair trial, in that the state intentionally violated
18 a pretrial ruling and elicited evidence of the Woodman
19 murders in California. Before trial commenced, the
20 court made specific rulings that the state could not
21 introduce testimony concerning the Woodman murders
22 against the petitioner during the guilt phase of the
23 trial. The prosecution intentionally violated this
24 action by eliciting from detective Dillard evidence
25 that the petitioner was under suspicion for the
26 Woodman murderers in California.

1 Claim #11. That petitioner's conviction and sentence
2 violate his 14th Amendment right to due process and a
3 fair trial, because the trial court refused
4 petitioner's request for continuances. Petitioner
5 argued that he was being denied discovery and that
6 witnesses, that he had previously located and
7 interviewed, had recently become unavailable to him.
8 As result, petitioner argued for continuances of trial
9 which the state trial court denied.

10
11 Claim #12. That petitioner's conviction and sentence
12 violate his 8th and 14th Amendment rights to due process
13 and freedom from the arbitrary imposition of the death
14 penalty, because improper evidence was admitted during
15 the petitioner's penalty phase. The state introduced
16 considerable testimony concerning the charges pending
17 against petitioner in California. This testimony was
18 elicited from Los Angeles County Police Department
19 Detective Holder and consisted of hearsay and
20 secondhand information gathered during his
21 investigation.

22
23 Claim #13. That petitioner's conviction and sentence
24 violate his 5th and 14th Amendments rights to due
25 process and a fair trial by the continued concealment
26 of exculpatory evidence. In particular, the

1 petitioner argued that the veracity of informant
2 Steward Siegel was crucial to numerous search warrants
3 and wiretaps that were secured by the prosecution.
4 Petitioner has uncovered evidence suggesting that
5 Steward Siegel's reliability is subject to question.
6 If reliance upon Siegel could be shown to be
7 unfounded, the evidence From Siegel used to convict
8 petitioner could arguably be considered unreliable.
9

10 Claim #14. That petitioner's conviction and sentence
11 violate his 4th Amendment rights to be free from
12 unreasonable search and seizure. Petitioner argues
13 that the evidence seized in violation of his fourth
14 amendment rights with respect to the pen registers
15 constitutes constitutional error and should result in
16 the granting of the writ of habeas corpus.
17

18 4. Discussion of Specific Requests

19 With these principles in mind, the Court has reviewed each
20 of the petitioner's specific discovery requests. In addition, the
21 Court has reviewed all of the exhibits petitioner has supplied in
22 support of his motion for leave to conduct discovery. Based upon that
23 review, the Court shall grant and the deny the requests as set forth
24 below.
25
26

1
2 A. Norma Thompson Interview and FBI Informant
3 Reports.

4 Petitioner first seeks interview and FBI informant reports
5 for Norma Thompson, a friend of the petitioner who lives in New
6 Jersey.

7 At trial, the prosecution introduced the testimony of
8 Timothy Catt. Catt testified that during the second week of January,
9 1986, petitioner came to his house, showed him the Tipton jewelry and
10 threatened him into silence. Catt also testified that petitioner
11 admitted to the Tipton homicides while they sat in Catt's car outside
12 of the Town Pump Liquor Store in Las Vegas on January 28th or 29th.

13 Petitioner claims Catt's testimony was false, for FBI
14 reports establish that petitioner was on the East coast in January,
15 1986. On March 18th, 1986, FBI agents interviewed Norma Thompson.
16 During her interview, Ms. Thompson advised the FBI that petitioner was
17 in New Jersey and Philadelphia between January 1st through January
18 12th, and in New Jersey again from January 28th through January 30th.
19 In petitioner's view, these reports are Brady material, and ought to
20 have been produced to the petitioner as part of any "open file"
21 proceeding.

22 In addition, petitioner claims that his presence in New
23 Jersey and Philadelphia during the critical time periods is further
24 corroborated by informant interview reports, all of which were
25 withheld from petitioner during the Nevada proceedings. Each of these
26 documents is a report prepared by FBI Agent Livingston from the

1 Newark, New Jersey field office. In these reports, Livingston reports
2 the petitioner's location during the critical time frames in January,
3 1986 as either Newark, New Jersey, or Philadelphia. Petitioner
4 maintains that none of these documents was produced to him during
5 "open file" proceedings.

6 These documents consist of *Brady* material in petitioner's
7 view, for, if petitioner was in Newark or Philadelphia as the
8 Livingston reports suggest, it is unlikely that he could also have
9 been in Las Vegas during the second week of January, 1986 threatening
10 Catt and confessing murder to him. The documents also consist of
11 *Giglio* material, for Catt's testimony could have been effectively
12 cross-examined if petitioner's counsel had possession of the documents
13 during trial.

14 It appears that this evidence passes all three of the *Brady*
15 tests. First, it seems that the prosecution has, either willfully or
16 inadvertently, suppressed this information, which otherwise ought to
17 have been produced to petitioner. Further, the evidence was certainly
18 favorable to petitioner, for it tends to show that he was not in Las
19 Vegas during the critical time periods in question, and could
20 therefore not have committed the Tipton murders. Likewise, this
21 evidence was material to petitioner's case, for he raised an alibi
22 defense, and the suppressed evidence related directly to his alibi
23 claim. As such, this evidence ought to have been produced under
24 *Brady*.

25 Unfortunately for petitioner, none of this requested
26 discovery relates directly to an exhausted claim in the petition.

1 Although there are claims in the petition which are founded upon
2 *Brady, Giglio and Kyles*, none of those claims mentions even remotely
3 the facts set forth above. These fact issues cannot be "exhausted,"
4 for they have yet to be "fairly presented" to the state supreme court
5 for its decision. Exhaustion is an element of the "good cause"
6 analysis, for, if the claim to which the discovery relates is not
7 exhausted, it is not a claim for which relief could be granted, and,
8 therefore, cannot give rise to "good cause" under either Rule 6 or
9 *Bracy*. Because this discovery fails to relate to an exhausted claim,
10 the discovery shall not be allowed.

11 **B. Art Taylor Interview Reports and Raw Notes.**

12 At trial, petitioner sought to establish an alibi based upon
13 his driving Ettinger and Hines to and from a meeting with attorney
14 Stewart Bell. The prosecution made a two-pronged attack on the alibi.
15 First, the prosecution contended that petitioner did not drive on the
16 day of the Tipton murders, since the only proof that he did came from
17 Susan Hines. The prosecution strongly suggested Hines was lying to
18 protect petitioner because she was his paramour. Second, the
19 prosecution also attacked the timing of the proposed alibi. If
20 petitioner drove Hines and Ettinger to the meeting as suggested, they
21 left Bell's office no later than 10:30 a.m. Even if this were true,
22 according to the prosecution, petitioner then still had plenty of time
23 to drive to Ettinger's house, get a cup of coffee, and then make it
24 to the Tipton house to commit the murders at 11:00 a.m.

25 Both arguments could be attacked by the information provided
26 by a paid government informant, Art Taylor. Taylor reported to FBI

1 Agent Livingston that petitioner was with him on the morning of the
2 Tipton murders. Taylor reported that petitioner was driving
3 Ettinger's Cadillac and that they went together to a bank to cash a
4 check. While at the bank, Taylor reported that petitioner received
5 a telephonic page to return to a lawyer's office to pick up Hines and
6 Ettinger. After he received the page, Taylor said, petitioner drove
7 him back to Taylor's shop and then left for the lawyer's office.
8 Taylor testified in the California proceedings that it would have
9 taken 15-20 minutes to drive to Bell's office after petitioner
10 received the page.

11 This information was never disclosed to petitioner during
12 the "open file" proceedings prior to trial. Petitioner received some
13 of the information post-conviction, during petitioner's federal RICO
14 prosecution. According to petitioner, certain "raw notes" were even
15 more explicit regarding Taylor's comments about petitioner's
16 activities.

17 This requested discovery passes all three of the *Brady*
18 tests. There seems no doubt that the prosecution has, either
19 willfully or inadvertently, refused to produce this information, which
20 otherwise ought to have been produced to petitioner. The evidence was
21 certainly favorable to petitioner, for it tends to support his alibi
22 claim. If the jury had believed petitioner's alibi, it may have found
23 that he was physically unable to have committed the Tipton murders.
24 Furthermore, petitioner's defense rested partly on an alibi, and the
25 suppressed evidence was material to his defense. As such, this
26 evidence ought to have been produced under *Brady*.

1 This evidence also relates directly to exhausted claims in
2 the petition. Specifically, in Claims Three and Seven of the
3 petition, petitioner argues that the prosecution had evidence from Art
4 Taylor which related to petitioner's contacts with Susan Hines and
5 Larry Ettinger on the day of the Tipton murders. That this evidence
6 was withheld, petitioner further claims, amounts to error of
7 constitutional magnitude. The discovery which petitioner now seeks
8 is related directly to an exhausted claim for relief, and petitioner
9 ought to be allowed the discovery which he seeks.

10 C. Records of Payments to Art Taylor.

11 During the penalty phase of the Nevada murder trial,
12 prosecutors called LAPD Detective Jack Holder to provide a hearsay
13 summary of the California Woodman murder investigations. In that
14 testimony, Holder offered the hearsay statement of Art Taylor to place
15 petitioner in Los Angeles on the afternoon and evening of the Woodman
16 killings. Petitioner's attorneys introduced evidence that placed
17 petitioner in a divorce hearing in Las Vegas on that same morning, but
18 that information could not directly rebut Taylor's statements about
19 petitioner's whereabouts in the afternoon and evening of the same day.
20 Despite petitioner's presence in Las Vegas in the morning, it still
21 would have been possible for him to have traveled to Los Angeles in
22 the afternoon.

23 Apparently, Art Taylor had been paid \$10,000 for the
24 information which he had provided against petitioner. Petitioner
25 claims that his attorneys were unaware at trial of the fact that
26 Taylor had received any money at all, much less an amount such as

1 \$10,000. By virtue of the substantial bias which could have arisen
2 from payments of such size to Taylor, petitioner claims that this
3 Giglio material ought to have been disclosed prior to trial.

4 As with the previous discovery regarding Art Taylor, this
5 evidence also constitutes Brady and Giglio material. Petitioner was
6 not informed of the existence of payments to Taylor, nor their amount,
7 prior to trial. Without question, counsel would have used this
8 information to impeach Taylor's statements regarding petitioner's
9 whereabouts on the date of the murder. And, it seems to the Court
10 that a payment of \$10,000 to any witness for his testimony could have
11 a substantial impact on the believability of that witness.

12 As the with note of the Taylor interviews, these requests
13 also relate to claims Three and Seven of the petition. These claims
14 all deal with petitioner's alibi, and this evidence would have a
15 significant impact on petitioner's alibi claims. These requests
16 relate to an exhausted claim, and shall be allowed.

17 D. Giglio Material Regarding Michael Dominguez'
18 Testimony.

19 Dominguez testified that at approximately 1:30 p.m. on the
20 day of the Tipton murders, he saw a .22 caliber weapon on the
21 floorboard of petitioner's car. Dominguez also testified that this
22 was the same weapon that he had personally used in a burglary and
23 attempted homicide of Craig Maraldo and Cheryl McDowell, which he had
24 committed months earlier. Cartridges removed from the scene of the
25 Maraldo attempted homicide matched those recovered from the Tipton
26 murders. Petitioner's attorneys attempted to diffuse Dominguez'

1 testimony, arguing that he was lying, and that he was the actual
2 perpetrator of the Tipton murders because he had admitted possession
3 and prior use of the apparent murder weapon during the
4 Maraldo/McDowell crimes.

5 In efforts to corroborate statements made by Dominguez
6 during their investigations, the FBI investigated these and other
7 claims which Dominguez had made. Specifically, Dominguez claimed that
8 he had committed an arson in Texas at the petitioner's direction.
9 Although this claims was investigated, the FBI never uncovered any
10 evidence which corroborated this claim in any significant detail. None
11 of this evidence was ever provided to petitioner during or prior to
12 trial.

13 This evidence does not qualify as *Brady* material. It
14 appears that the FBI may never have told the CCDA or Metro about the
15 existence of the evidence, which would qualify as inadvertent
16 suppression of the material under *Brady*. As noted herein, the court
17 agrees with petitioner that the FBI, Los Angeles County Police and Las
18 Vegas authorities were a "joint" team, at least for purposes of
19 prosecution. Much inculpatory evidence which the CCDA used to convict
20 petitioner was provided by either the FBI or the Los Angeles
21 authorities; the same ought to have been true of any exculpatory
22 evidence in the possession of those parties as well.

23 In this case, however, the court is at a loss to understand
24 why the possibility that Dominguez may have lied about having
25 committed an arson in Texas is of substantial materiality in this
26 case. That Dominguez may have misrepresented the truth to the FBI

1 about an arson unrelated to the facts of this case simply does not
2 rise to the level of materiality required by *Brady*. If, for example,
3 the arson had been that which petitioner allegedly solicited in Maui
4 (and which was a predicate act in his RICO trial), Dominguez' alleged
5 lack of truthfulness may have had some degree of materiality to this
6 case. That he may have lied to the FBI about an unrelated arson in
7 Texas, however, does not provide sufficient grist for the *Brady* mill
8 here. The Court will therefore deny petitioner's motion with respect
9 to this discovery request.

10 E. Giglio Material Regarding LAPD Detective Jack
11 Holder.

12 Detective Holder was the conduit through which much of the
13 evidence of the California Woodman murders was introduced in the
14 Nevada case. His hearsay summary was offered during the Nevada
15 penalty phase, but petitioner claims his cross examination was
16 substantially hindered because Holder could not recall inconsistencies
17 within the hearsay declarants' statements, or he minimized those
18 inconsistencies to fit his testimony. In addition, petitioner alleges
19 that the day before the Nevada trial began, Holder signed a book
20 contract with an author for the purposes of writing about his
21 involvement in the Woodman murder case. As part of that deal, Holder
22 received a \$500 advance and a promise of future royalties. The
23 existence of this contract and its benefits were not disclosed to the
24 defense during or prior to trial. As a result, petitioner never had
25 an opportunity to examine Holder on any bias he might have developed
26 and the motive for making the case against petitioner appear stronger

1 than the available evidence.

2 This appears to be *Brady* material. There seems no dispute
3 that this material was not provided to petitioner until well after the
4 trial was complete. Certainly, the fact that a crucial witness was
5 authoring a book about the subject matter of his testimony would be
6 useful to the petitioner as impeachment material, as a jury could find
7 that the witness had shaded his testimony in order to make the book
8 more interesting and saleable. Moreover, the subject matter of
9 Holder's testimony was of great significance. In the penalty phase
10 of a capital murder trial, evidence that the defendant had only
11 recently committed another murder (and a murder for hire, at that)
12 could have a substantial impact on the jury's sentencing decisions.

13 Once again, however, this evidence does not relate directly
14 to an exhausted claim in the petition. The closest claim in the
15 petition is Claim 12. There, petitioner alleges that his sentence of
16 death was based upon Holder's uncorroborated hearsay testimony of the
17 California Woodman homicides. Because this was evidence of prior "bad
18 acts" was complete hearsay, petitioner had no means of challenging the
19 evidence as it related to the detective. Nowhere in this claim,
20 however, does petitioner mention the fact that Holder had signed a
21 book deal prior to his trial. Likewise, allegations regarding
22 Holder's book deal are absent from the remainder of the petition.
23 This discovery request therefore fails for lack of association with
24 a claim exhausted in state court.

25 ///

26 ///

1 F. FBI Surveillance Records.

2 As the Nevada trial progressed, FBI Special Agent Donn Owens
3 testified that he personally tracked petitioner at least 200 times
4 between March 1985 and March 1986. Based upon this pattern of
5 surveillance, Owens testified regarding certain driving patterns of
6 the petitioner, such as his tendency to speed and run red lights,
7 which allegedly made possible petitioner's trip to the Tipton house
8 at the alleged murder time (11:00 a.m.) on December 11th, 1985. The
9 prosecution did not produce records for all of the 200 or more days
10 on which Owens had "staked-out" petitioner. Petitioner's counsel
11 requested production of all of these surveillance records, but the
12 trial court denied the request.

13 As of this date, petitioner still has not received any
14 information regarding Owen's surveillance of petitioner. Petitioner
15 has managed to garner from all pertinent sources (the Nevada and
16 California cases, the ongoing FOIA litigation and the RICO
17 prosecutions), the fact that Owens was positioned to observe
18 petitioner's driving habits for a total of only five days. Either a
19 significant amount of surveillance information was withheld from
20 petitioner prior to and during trial, or Owens' testimony regarding
21 the number of times which he had tracked petitioner itself was false.

22 As with the previous request, this discovery material cannot
23 be associated with a claim which has been exhausted in state court.
24 There is no claim in the petition to which Owen's surveillance itself
25 is directly related. Likewise, the fact that Owen himself may have
26 misrepresented the actual number of time he observed petitioner does

1 not appear in the current variant of the habeas corpus petition. This
2 claim therefore also fails for lack of exhaustion in state court.

3 G. Impeachment Evidence regarding Steward Siegel.

4 Prior to trial, prosecutors represented that Steward Siegel
5 was a government informant that had supplied information in the case.
6 During the penalty phase, Detective Holder of the LAPD testified
7 regarding certain hearsay statements of Siegel. Holder either failed
8 to relate, or the prosecutor failed to elicit certain critical
9 impeachment evidence regarding Siegel's testimony.

10 For example, during the FOIA litigation, petitioner
11 uncovered an FBI teletype, dated October 4th, 1985, in which Siegel
12 was described as a "man without integrity which reflects upon his
13 morals." This document was located in Siegel's FBI file, and was
14 produced in redacted form as a result of the FOIA litigation.

15 Also located in Siegel's FBI file, and produced in redacted
16 form to petitioner in the FOIA litigation, was an FBI teletype dated
17 September 10th, 1985. The document relates that

18 "[i]n view of the past prior difficulties involved
19 in the operation of captioned individual (Siegel)
20 as an informant for the Tampa Division and also in
21 view of the current investigation being conducted
22 into alleged illegal activities concerning his
23 association with Bingo games in the San Diego
24 Division, FBIHQ [Headquarters] denies Las Vegas
25 request to utilize captioned individual as an
26 informant."

23 A further FBI memo, dated August 31st, 1977, reveals that
24 "Atlantic City had no interest in Siegel and that in [the FBI's]
25 opinion he was possibly using the Bureau for his own interests." This
26

1 redacted document was also revealed to petitioner during the FOIA
2 litigation. Yet another such FBI memo, dated January 1st, 1976,
3 uncovered during the FOIA litigation, stated that "Siegel is so
4 unreliable and would do or say anything to weasel out of appearing in
5 court or going to trial in any matter."

6 This is Brady material. For whatever reason, the federal
7 authorities suppressed this evidence until the petitioner himself
8 uncovered it during the course of the FOIA litigation. This material
9 would have been of significant use to petitioner during trial, for he
10 could have used it to attack Holder's testimony during the penalty
11 phase. At a minimum, petitioner could have shown the jury that the
12 FBI believed Siegel to be highly untrustworthy, and that he was using
13 the FBI for his own purposes. Such evidence could have had a
14 significant impact on the jury, for they might have then disregarded
15 at least that portion of Holder's testimony which related to Siegel.
16 Accordingly, this material ought to have been produced to petitioner
17 prior to trial.

18 This discovery request relates directly to two fully
19 exhausted claim in the petition. As noted above, claim 12 presents
20 petitioners's argument that Holder's testimony is constitutionally
21 infirm because he could not cross-examine any of the hearsay
22 declarants, such as Siegel. In claim 13, petitioner claims that the
23 truthfulness of Siegel was critical to numerous warrants and wiretaps
24 in the case, and that much of the evidence used to convict petitioner
25 could be found inadmissible if the truth regarding Siegel's lack of
26 reliability had been known. Petitioner shall therefore be allowed to

1 serve these discovery requests.

2 H. Additional Discovery Requests

3 In addition to these requests petitioner has made further
4 additional requests that may be grouped into three major areas: the
5 depositions of all prosecutors in the case; records from third parties
6 concerning petitioner's alibi; and records from third parties
7 concerning alternative suspects.

8 i. Law Enforcement Depos.

9 As to the first of these requests, petitioner seeks leave
10 to conduct depositions of the prosecutors who tried the case against
11 him, as well as the lead law enforcement officers from Metro, the FBI
12 and LAPD. These individuals are: Mel Harmon; Brad Jerbic; James
13 Livingston; Jerome Doherty; Tom Dillard; Robert Leonard; Jack Holder;
14 and Richard Crotsley. Petitioner claims that "good cause" has been
15 established to depose these individuals based upon the status of the
16 "open file" dispute in Clark County.

17 The court does not consider the "open file" controversy
18 alone to be sufficient to give rise to good cause in and of itself.
19 Certainly, the CCDA's, the FBI's and the LAPD's alleged failure to
20 coordinate documents and provide *Brady* or *Giglio* material to the
21 petitioner is evidence which suggests the existence of good cause.
22 But, as in the *Bracy* case, evidence of generalized malfeasance alone
23 is not sufficient. The petitioner must show exactly how that
24 malfeasance has negatively affected his client. Thus, in this case,
25 petitioner has demonstrated that evidence regarding Art Taylor has
26 been withheld from him, and that that evidence relates to an exhausted

1 claim in the petition. As such, he shall be allowed to serve the
2 subpoenas regarding the Art Taylor discovery.

3 With respect to these depositions, however, petitioner has
4 not limited their scope in any way. He claims that the "open file"
5 controversy establishes good cause, and that he should be allowed to
6 depose these law enforcement officials without limitation. This
7 argument is unavailing for several reasons. First, there is no
8 indication that the proposed examination relates in any way to an
9 exhausted claim in the petition. As noted above, all discovery must
10 relate to an exhausted claim, or it cannot qualify as having qualified
11 for "good cause." With respect to these depositions, none of them is
12 related specifically to any claim in the petition, and they cannot
13 therefore be considered to be exhausted.

14 Moreover, these depositions do not appear to be related to
15 any specific items of evidence or claim in the petition. The court
16 has consented to allow petitioner's request to subpoena the CCDA's
17 "open file" records to determine the exact contents of the CCDA files.
18 That discovery is, by its very nature, limited to that which is
19 present in the CCDA files. All that the district attorney must do is
20 make its files (as they currently exist) available to petitioner for
21 inspection and copying. With respect to these depositions, petitioner
22 has not limited the scope or nature of the proposed examination. This
23 sort of wide-open discovery was specifically discounted in the *Bracy*
24 case, in which the Court declared that, among other things, discovery
25 requests had to be narrowly tailored to obtain specific, identifiable
26 things. *Bracy, supra*, 520 U.S. at 909. These depositions will

1 therefore not be allowed.

2 ii. Third Party Alibi Evidence

3 Petitioner next seeks leave to conduct discovery of certain
4 third parties as to any evidence they may have that supports
5 petitioner's alibi claim. First, petitioner seeks leave to subpoena
6 Michael's Gourmet Steaks and Fine Seafood (Exhibit 351), seeking
7 employment records regarding the victim, James Meyers. Petitioner
8 seeks records relating to other deliveries that Meyers may have made
9 the morning of the murder, as well as for the purpose of further
10 refining the exact time of the murders.

11 Petitioner also seeks to subpoena telephone records from
12 Sprint Telephone (Exhibit 350), seeking the records of David Tipton,
13 the husband of the victim, Bobbi Tipton, for calls made to the Tipton
14 residence on the date of the murder.

15 Also sought is a subpoena for Wells Fargo Bank (Exhibit
16 349), the successor bank to First Interstate Bank, the institution in
17 which petitioner alleged cashed a check for petitioner or Mr. Taylor
18 on the morning of the murders. To the extent that documents still
19 exist, a time stamp may further define the time when petitioner and
20 Taylor were in the bank. Wells Fargo is also the successor
21 institution to Continental Bank, the bank in which Hines, Ettinger and
22 petitioner allegedly stopped on their way to the meeting at the
23 attorney's office. Again, petitioner hopes that a time stamp may
24 exist, which may further define the exact time when these individuals
25 were at the bank.

26 Petitioner also seeks information regarding Bill Keeton, a

1 former Metro police officer who issued the check cashed by Mr. Taylor
2 and petitioner on the morning of the Tipton murders, December 11th,
3 1985. Keeton was disciplined by Metro for his conduct involving
4 petitioner, and it is possible that the bank's and/or Metro's records
5 may contain information regarding the check which was cashed.

6 It appears to the court that all of this discovery should
7 be allowed. First, the material relates directly to exhausted claims
8 in the petition. Specifically, issues regarding petitioner's
9 whereabouts on the day of the Tipton murder, the cashing of checks and
10 banks, and telephone calls were raised in claims Three, Six and Seven
11 of the petition. The proposed discovery thus relates to exhausted
12 claims in the petition and is not subject to fault on that count.

13 Likewise, there is independent "good cause" to allow this
14 discovery to go forward. Although the material in this case does not
15 appear to have been withheld by the prosecution, either intentionally
16 or negligently, and would therefore not qualify as *Brady* evidence, it
17 nonetheless all falls within the *Bracy* guidelines for "good cause"
18 discovery.

19 First, the discovery requested is grounded in specific and
20 demonstrable facts. The material sought generally consists of banking
21 records which, in all likelihood, have been transferred to either
22 microfilm or computer records and archived. As such, the material is
23 very identifiable and demonstrable. Second, there is a logical and
24 direct nexus between the discovery sought and the pending claims. If
25 petitioner can locate any of the documents which he seeks, they may
26 very well help establish his alibi claim to a degree greater than has

1 been before demonstrated. Moreover, these claims do not appear to
2 be purely speculative. Although the prosecution successfully defeated
3 the alibi claim at trial, there was at least "some evidence" supporting
4 the alibi claim, and it therefore cannot be said to be purely
5 speculative. Finally, these specific discovery requests have been
6 narrowly tailored to obtain specific, identifiable things. As opposed
7 to many of the petitioner's other discovery requests (more about this
8 later), these four claims are narrowly tailored to seek out specific
9 items, and will therefore be allowed.

10 iii. Third Party Alternative Suspect Records

11 Petitioner here seeks leave to subpoena the Department of
12 the Interior, Steve Stein and Stuart Bell for information relating to
13 alternative suspects. The Department of the Interior investigated a
14 boating accident which allegedly occurred on January 31st, 1986,
15 involving Kelly Danielson and Laurence O'Dell. These men were
16 associates of Mr. Dominguez, and someone fitting the description of
17 Mr. Danielson was seen in the vicinity of the Tipton home on the
18 morning of the murders (December 11th, 1985). Further, Danielson paid
19 a visit to District Attorney Rex Bell in January sometime prior to the
20 marine incident, ostensibly for social purposes.

21 This material relates only very tangentially to one of the
22 exhausted claims in the petition. In claim Six, petitioner accuses
23 his trial counsel of ineffectively representing him during the guilt
24 and penalty phases of trial. Petitioner alleges that his lawyers
25 ought to have explored more deeply the existence of other potential
26 suspects, such as Dominguez and Danielson. But this claim makes no

1 mention of a boating accident or of a social call by Danielson to Rex
2 Bell. Yet, giving the petitioner the benefit of the doubt, it would
3 seem that these discovery requests could relate to this claim in the
4 petition.

5 The requests do not, however, pass muster under the Bracy
6 "good cause" analysis. First, although the requests are grounded in
7 specific and demonstrable facts, there does not appear to be a logical
8 and direct nexus between the discovery regarding the boating accident
9 sought and the pending claims. Whether O'Dell and Danielson were
10 involved in a boating accident of January 31st, 1986 seems to have
11 little to do with their location on the morning of December 11th,
12 1985. Likewise, whether Danielson visited Rex Bell during January,
13 1986, does not have any impact on his potential as an alternative
14 suspect in the Tipton murder. Accordingly, the court concludes that
15 these requests fail to establish "good cause" under Bracy, and the
16 requests shall, for that reason, be denied.

17

18 I. Identification and Formulation of Subpoenas.

19 The court has concluded that petitioner ought to be allowed
20 to serve the discovery requests identified above as:

- 21 B. Art Taylor Interview Reports and Raw Notes;
- 22 C. Records of Payments to Art Taylor;
- 23 G. Impeachment Material of Steward Siegel; and
- 24 H(ii). Third Party Alibi Evidence.

25 Unfortunately, with the exception of category H(ii),
26 petitioner has failed to identify with any degree of reliable

1 specificity which of the dozens of subpoenas relate to these specific
2 discovery requests. In category H(ii), for example, petitioner has
3 identified Exhibit #351 to be served on Michael's Fine Steaks and
4 Seafoods. This discovery request and subpoena request employment and
5 delivery records of James Meyers regarding the date of the Tipton
6 murders, in order that petitioner might refine the exact time of the
7 murders on December 11th, 1985. The court has reviewed the subpoena,
8 and finds that it is acceptable in form and content.

9 Petitioner has failed to identify which proposed subpoenas
10 correspond with the discovery requests which the court has granted.
11 Until such time as petitioner can specifically pair a subpoena (and
12 its corresponding (Exhibit number) with the discovery which the court
13 has granted above, the court is unable to authorize the issuance of
14 any subpoenas for discovery. Accordingly, the court shall allow the
15 petitioner a short period of time within which to correlate the
16 existing exhibits/subpoenas with the allowed discovery. Petitioner
17 may do this by means of a short set of points and authorities, in
18 which the specific exhibit attached to the motion is associated by
19 exhibit number with discovery claims B, C, G and H(ii).

20 Respondent should be allowed a short period of time within
21 which to comment on the petitioner's filing, in order to point out to
22 the court any proposed subpoenas which do not readily relate to the
23 discovery requests which the court has actually authorized.

24 As a final matter, the court notes that petitioner's
25 subpoenas generally cast extremely broad nets. And, while Rule 26(b)
26 discovery generally tends to be inclusive, rather than exclusive,

1 petitioner must bear in mind that this discovery is borne out under
2 the auspices of Rule 6 of the Habeas Rules and the "good cause" case
3 law which *Bracy* begot. As such, petitioner's discovery requests ought
4 to be tailored as narrowly as possible to ferret out only those
5 specific items that petitioner seeks. Discovery requests which seek
6 out every possible document in the respondents' possession, and which
7 contain lengthy definitions of "document" and other such obvious terms
8 will fall under jaundiced eyes. The court has allowed specific
9 categories of discovery, and the petitioner's proposed subpoenas
10 should limit themselves as narrowly as possible to those documents,
11 items and things which fall into those categories. Therefore,
12 petitioner should use this opportunity to tailor the subpoenas as
13 narrowly as possible so as to comply with *Bracy's* requirement of
14 specificity.

15

16 5. Conclusion

17 Petitioner is entitled to some, but not all of the discovery
18 which he seeks. In addition, he is obliged to file a supplemental
19 document with the court in which he specifically identifies those
20 subpoenas and/or exhibits which he contends would be those served
21 pursuant to the court's order granting discovery. Concurrently with
22 that document, petitioner ought to utilize the opportunity to review
23 and review those subpoenas which are not specifically tailored enough
24 to pass muster under *Bracy's* requirement of specificity.

25 Respondents shall, of course, be given an suitable period
26 of time within which to file any appropriate opposing points and

1 authorities.

2 In addition, it should be apparent to all that the time for
3 collection of records and other documents is close to, if not already
4 at an end. Accordingly, the court wishes the petitioner and his
5 counsel to focus their next budget proposal on the discovery as
6 outlined in this order, and on the development of the amended
7 petition. It is fully the intention of the Court to enter a final
8 order regarding discovery before the end of September.

9 After the discovery order is entered, the scheduling order
10 will oblige petitioner to complete discovery within 120 days. That
11 order will require the petitioner to file and serve the amended
12 petition within 60 days of the termination of discovery. The Court
13 will hold all parties strictly to these time deadlines. Accordingly,
14 petitioner must draft his next budget proposal with these requirements
15 in mind.

16 IT IS THEREFORE HEREBY ORDERED that petitioner's motion for
17 leave to conduct discovery (Docket #73) is GRANTED IN PART AND DENIED
18 IN PART. The court finds that petitioner has demonstrated good cause
19 for the discovery requests identified as

20 B. Art Taylor Interview Reports and Raw Notes;
21 C. Records of Payments to Art Taylor;
22 G. Impeachment Material of Steward Siegel; and
23 H(ii). Third Party Alibi Evidence.


24
25 Petitioner and respondents have further stipulated to the discovery
26 of the CCDA's files regarding the petitioner's case, and petitioner

1 shall be allowed to conduct that discovery. Petitioner shall not,
2 however, be allowed to serve his discovery requests until further
3 ordered of the court.

4 IT IS FURTHER ORDERED that petitioner shall have ten days
5 from the date of the entry of this order on the record within which
6 to file and serve supplemental points and authorities in which he
7 specifically identifies those subpoenas and/or exhibits which would
8 be those served pursuant to the court's order granting discovery.
9 Concurrently with those points and authorities, petitioner shall
10 attach any and all subpoenas which have been specifically tailored
11 enough to pass muster under Bracy's requirement of specificity.

12 IT IS FURTHER ORDERED that respondent shall have ten days
13 from the filing and service of the petitioner supplemental document
14 within which to file and serve any opposing points and authorities.

15 Dated, this 1stth day of September, 2004.

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UNITED STATES DISTRICT JUDGE
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DISTRICT COURT
CLARK COUNTY, NEVADA

Defendant.

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DEPT. XVII

1 LAS VEGAS, NEVADA; FRIDAY, MAY 15, 2015

2 [Proceeding commenced at 9:43 a.m.]

3
4 THE COURT: This is the Lacy Thomas matter. And we were going
5 to have some -- some testimony regarding the receipt of these
6 records that came out in the last trial, correct?

7 MR. ALBREGTS: That's correct.

8 THE COURT: Okay. And how many witnesses do we have?

9 MR. ALBREGTS: Three.

10 THE COURT: Okay.

11 MR. ALBREGTS: And I don't suspect any of them will be lengthy
12 at all because of the -- the limited scope of the issues before the
13 Court.

14 THE COURT: All right. You ready, Mr. Staudaher?

15 MR. STAUDAHER: I believe so, yes.

16 THE COURT: All right. Who's our --

17 MR. ALBREGTS: Your Honor -- Your Honor --

18 THE COURT: -- who's our first witness?

19 MR. ALBREGTS: Don Campbell. I've asked for an exclusionary
20 before the Court, but the officer's already went outside.

21 THE COURT: Okay.

22 MR. ALBREGTS: So we're ready to go.

23 THE COURT: I'm just -- I'm going to in an abundance of
24 caution, probably more caution than I need, okay, Mr. -- Mr.
25 Campbell represented me in a election matter. I have to announce

1 that the bill's been paid in full, okay. In an abundance of
2 caution I'm going to disclose.

3 MR. ALBREGTS: From our perspective, I don't see any issues
4 with that and we appreciate the disclosure.

5 THE COURT: Anything from the, State?

6 MR. STAUDAHER: No, Your Honor.

7 THE COURT: All right. Let's have Mr. Campbell come on up.
8 He'll get sworn in.

9 **DONALD JUDE CAMPBELL**

10 having been called as a witness and being first duly sworn,
11 testified as follows:

12 THE CLERK: Please be seated and then state and spell your
13 name on the record.

14 THE WITNESS: Donald Judge Campbell, C-A-M-P-B-E-L-L.

15 THE COURT: Interesting. I was told by one person that I just
16 need to make that disclosure probably for the six months after the
17 last event, so I don't know if that's true or not, but that's what
18 I'm going to do. Okay.

19 MR. ALBREGTS: Your Honor, may we proceed from the --

20 THE COURT: Yes.

21 MR. ALBREGTS: -- counsel table? Thank you.

22 **DIRECT EXAMINATION**

23 BY MR. ALBREGTS:

24 Q: Mr. Campbell, what is your profession?

25 A: I'm an attorney

1 Q: And in the scope of that profession, did you represent a
2 company known as ACS?

3 A: I did.

4 Q: And in what capacity did you represent ACS?

5 A: I principally represented them with respect to an inquiry
6 that was being made by the Las Vegas Metropolitan Police Department
7 and the Federal Bureau of Investigation.

8 Q: And what was that investigate -- what did that
9 investigation entail or involved?

10 A: Generally that there were a number of questionable
11 activities that had been alleged by certain individuals that were
12 connected with the -- with UMC regarding contracts that have been
13 entered into by UMC, by and through Mr. Lacy Thomas with ACS and
14 other vendors.

15 Q: And it was your understanding that this was a -- a single
16 investigation of all of the activities of Lacy Thomas, UMC and
17 various vendors?

18 A: Yes. It was -- it was initially a joint investigation as
19 I understood with the Federal Bureau of Investigation. They -- to
20 my -- at least to my knowledge dropped out rather quickly of the
21 investigation.

22 Q: And so you were then dealing mainly with Metropolitan
23 Police Department detectives?

24 A: I was.

25 Q: Did you ever deal with anybody from the District

1 Attorney's Office directly?

2 A: I can never recall ever dealing with anyone at the
3 District Attorney's Office.

4 Q: Who specifically did you deal with at Las Vegas
5 Metropolitan Police Department?

6 A: Principally as I recall, Detective Whitley or Whitely.
7 I'm not quite sure how he pronounces his name.

8 Q: And he's the individual that was in the courtroom
9 earlier?

10 A: Yes. Correct.

11 Q: Briefly tell the Court some of the things you did on
12 behalf of ACS in relation to defending them in this investigation?

13 A: I was contacted by the client with reference to the
14 representation. There were a number of articles written and
15 published in the Las Vegas newspapers including the Review Journal.
16 There were also a number of -- of news stations that covered
17 hearings as I recall before the Clark County Commission. All of
18 which were generally alleging wrongdoing at the -- the UMC
19 University Medical Center with respect to contractual issues.

20 And their focus was principally on a loss of revenue, a
21 continuing stream or loss of revenue that had been occurred. And
22 that the contracts that have been entered into were contracts that
23 essentially were facially valid only in the sense that they were
24 there, but they weren't being -- my recollection of the allegation,
25 they weren't being subject to any sort of reciprocal services.

1 That they were basically paying for services that were not
2 rendered.

3 Q: Was it your goal in representing ACS to avoid charges
4 being filed in the first place?

5 A: My principal goal was to represent the company with
6 respect to these -- these allegations because it was alleged that
7 ACS was at least one of the vendors that was engaged in wrongdoing
8 and that had achieved contracts for which they were not providing
9 services. So that was my principal engagement as I recall.

10 Q: And did you gather evidence, documents, information and
11 the like from your clients to provide to Metro during the course of
12 the investigation?

13 A: I did.

14 Q: And could you explain briefly for the Judge what it was
15 that you provided and what did to provide that?

16 A: Initially, there was an inquiry made by Detective
17 Whiteley along with the FBI to conduct interviews. As I think most
18 good criminal defense counsel you've -- you generally say no to
19 that. But in that I was representing the corporation in that the
20 individuals that was subject of the request for interviews were --
21 were demanding to be interviewed almost and wanted to be
22 interviewed.

23 I secured counsel for them through Mr. Stan Hunterton as
24 I recall. And I believe he represented -- I know he represented an
25 individual by the name of Bob Mills. He may have also represented

1 another individual that was very much involved in the process of
2 providing services to UMC and that was an individual by the name of
3 Ross Fidler.

4 There was -- ultimately Mr. Mills insisted upon being
5 interviewed. Asked that Mr. Fidler -- I remember specifically the
6 Mills' interview because it was conducted in my -- in my conference
7 room. In attendance were detectives from the Metropolitan Police
8 Department. As I recall it was conducted specifically by Detective
9 Whiteley and an FBI agent was present as well. That interview was
10 conducted over a number of hours and I know following that
11 interview when Mr. Mills had contested and informed Detective
12 Whiteley that the allegations that have been made were false and
13 that they were not substantive with those allegations and further
14 that there were a number of documents which would specifically
15 prove the false of the allegations that had been made by
16 individuals at UMC to Detective Whiteley and that he was pursuing
17 insofar as pursuing as rightfully he should allegations of
18 wrongdoing.

19 ACS contended those allegations were completely without
20 foundation and fact and we have documents to back that up. He
21 asked for those documents on successive requests and we provided
22 every single document that he asked for.

23 Q: When you say he, you mean Detective Whiteley?

24 A: Correct.

25 Q: And so, how were those provided those documents? Do you

1 recall? Were they hard copies, electronically?

2 A: My best recollection is that they were on -- they were
3 provided on a disc that -- a digital -- digital copies were
4 provided on disc.

5 Q: Do you know how many times over the course of the period
6 after the interview you were asked to -- to provide documents? Was
7 it --

8 A: You know, I tried to look at that this morning knowing I
9 was coming over this morning and our -- all of our files are in
10 storage. My best recollection and that's all what it is is that it
11 involved thousands of documents and they were contained on at least
12 three discs that I can recall.

13 Q: Now, you're aware of a -- of a binder notebook with ACS
14 action items in it that as ultimately created in relation to this
15 case?

16 A: I'm aware that there was some controversy regarding a
17 binder of books; that's correct.

18 Q: And you've seen at least -- maybe not recently, but had -
19 - had seen that binder before?

20 A: I think at one time, yes.

21 Q: And that binder had ACS minutes and other information
22 from ACS records regarding the work they conducted at UMC?

23 A: Yeah. My recollection is it had the one stop meeting
24 minutes and other minutes demonstrating Mr. Fidler's involvement.
25 As I recall with respect to services that he was providing on an

1 ongoing basis that the original claim by UMC officials internally
2 was that no such meetings ever took place.

3 Q: So --

4 A: That's the one thing I do -- as I can recall, I think
5 there may have also been documents we provided demonstrating that -
6 - and I think that this is a case because there was also, Your
7 Honor, and I don't know if his Honor's aware there was also a
8 tandem civil case in which ACS was owed money and I sent that case
9 to the firm of Pisanelli Bice. They later sued USMA -- US -- UMC
10 and the County and achieved a judgment of several hundreds of
11 thousands of dollars for services that were, in fact, rendered that
12 UMC said were not rendered.

13 So I can't recall all of these documents. They may blend
14 into one another. But I think that that also delved into the fact
15 that these contracts were, in fact, reviewed by UMC's internal
16 counsel.

17 Q: You have no question in your mind as you sit here today
18 that the documents in this book and other documents showing the
19 work ACS did were provided to the detectives pursuant to their
20 request?

21 A: Well, I don't know what you have sitting in front of you,
22 but I -- but I have no doubt that there were thousands of documents
23 that were, you know, that were sent to them because I reviewed them
24 generally before they were sent.

25 Q: Just so the record's clear if I may approach, let me just

1 have you take a quick look at the book and make sure that that be
2 the type of documents that you provided to the detective at their
3 request, obviously not with the stickies on there.

4 A: Okay. Yeah. The one stop meeting -- steering meetings I
5 know we provided all of those.

6 MS. FORSMAN: Your Honor, the -- this -- this binder is in
7 evidence. We actually got it out of the evidence vault. I'm sorry
8 I don't remember the exhibit number, but it was actually admitted
9 into evidence already.

10 THE WITNESS: That's what all this is, then yeah, we provided
11 all this.

12 THE COURT: All right. There should be a sticker on it --

13 MR. ALBREGTS: It is.

14 THE COURT: -- if this --

15 THE WITNESS: G.

16 MR. ALBREGTS: Exhibit G.

17 THE WITNESS: Yeah. We provided all the steering committee
18 meetings and the one stops and I believe those are the ones that
19 Mr. Ross Fidler was directly involved with. And he was the one
20 conducting all those meetings which was in stark contrast to the
21 original claim that had made internally at UMC by others to the
22 Metropolitan Police Department.

23 MR. ALBREGTS: I have no further questions. Thank you.

24 THE COURT: Are there any cross-examination?

25 MR. STAUDAHER: Yes.

1 CROSS EXAMINATION

2 BY MR. STAUDAHER:

3 Q: I guess first thing that I want to make sure we're clear
4 on is the attorney-client privilege issue. I mean, he represented
5 ACS as I understand. Is that correct?

6 A: That's correct.

7 Q: Did you represent Mr. Fidler?

8 A: I represented Mr. Fidler insofar as he was an ACS
9 employee and representative of the company, that's -- I represented
10 him in his representative capacity. Stan Hunterton was his
11 personal attorney. And quite frankly I don't even know if Stan was
12 there for his interview. But I know his interview was recorded by
13 the Metropolitan Police Department so he can -- I'm sure that they
14 can tell you if Stan was there or not.

15 Q: Sure. What about Bob Mills? Did you represent him?

16 A: Excuse me. Bob Mills. I was there for the Bob Mills and
17 Bob Mills I know is represented by Stan. That's the one interview
18 that I can recall. I don't know if Ross Fidler was actually --

19 Q: Okay. So you didn't represent Bob Mills at that
20 interview, but you were present; is that right?

21 A: No, I did represent him in his representative capacity.
22 In that I represented the corporation. If you represent an
23 officer, director or senior management of that corporation, you
24 represent them in their representative capacity -- did not
25 represent him in his personal capacity. That was done by Stan

1 Hunterton. And I don't know if Stan Hunterton was there for the
2 interview. My recollection was that he may have been, but I don't
3 know.

4 Q: Okay. So my concern would be issues of -- related to
5 procuring, disseminating contents of documents and so forth, any
6 attorney-client privilege issue related to what we're here to
7 discuss that there would have to be a waiver of that related to how
8 the documents came into possession, where they came from, who he
9 gave them to, under what request, that kind of thing.

10 A: I can answer all that for you.

11 Q: You can?

12 A: Yes.

13 Q: Okay. I just want to make sure that we don't --

14 THE COURT: All right.

15 MR. STAUDAHER: -- err into an area --

16 THE WITNESS: No.

17 MR. STAUDAHER: -- that's a problem.

18 THE WITNESS: No. No.

19 BY MR. STAUDAHER:

20 Q: So if we do, will you let us know --

21 A: Sure.

22 Q: -- if we get into something?

23 A: Absolutely.

24 Q: Okay. So let's -- let's go back just a little bit. You
25 said that essentially the records that you produced to UMC and they

1 -- and I believe Mr. Albregts already came up to you, not to UMC,
2 but to the police department --

3 A: Police department.

4 Q: -- related to UMC.

5 A: Correct.

6 Q: That those -- among the documents that you provided was
7 this book; is that correct?

8 A: No, I don't think I provided a book.

9 Q: Well, a disc containing documents that was represented to
10 you.

11 A: We provided multiple discs of documents. And I mean
12 there were thousands of discs because what had happened is that
13 there was literally like a laundry list of allegations that had
14 been made internally by some people at UMC that Detective Whitley
15 or Whitely was -- was following up on.

16 And in his investigation of those topical inquiries --
17 listed inquiries, he would ask whether or not we could provide
18 certain documents. For example, another one of the things that I
19 remember was they were suggesting that Mr. -- they weren't
20 suggesting, they said that Mr. Mills had been provided a trip to
21 the Caribbean aboard a jet and we had to provide the company's jet
22 log, the flight logs --

23 Q: Tail numbers, things like that?

24 A: Yeah.

25 Q: Okay.

1 A: Demonstrating that he had never been on a plane. And we
2 have to maintain those logs pursuant to the FAA standards. He'd
3 never been a plane. We didn't give him any free trip or anything
4 like that. We had to get that like right away.

5 But the other thing that I remember that they were keenly
6 interested in were these minutes because there was -- there was the
7 allegation right up front that we weren't providing services. And
8 our people are saying, absolutely, completely untrue. There's a
9 documented history of this. So when all this came tumbling out in
10 the interviews, Detective Whiteley would ask for those documents
11 and every single document that he asked for we provided.

12 Q: Okay.

13 A: And there were thousands of them.

14 Q: So this way before any charges are brought in the case?

15 A: Absolutely, yes.

16 Q: Okay. And may I approach? I just want to make sure
17 we're talking about the same document, Your Honor. And this is the
18 cover page I think that the documents that are contained in the
19 book.

20 [Colloquy between counsel]

21 A: And there would have been -- it would have been our
22 practice if we send something out to a detective, there'd be a
23 forwarding letter.

24 Q: Yes.

25 A: You know, here we have X, Y and Z. Here they are.

1 Q: Okay. So, does that look familiar to you?

2 A: Okay. Bates stamp, yeah 'cause that's our practice to
3 bates stamp everything including the UMC one stop [indecipherable]
4 status for Deloitte Touche recommendations, Lacy Thomas memorandum
5 [indecipherable] -- yup.

6 Q: And it bares your signature?

7 A: It does.

8 Q: And if -- just so I'm clear on this.

9 A: And this probably -- and this would have been in my view,
10 this absolutely would -- would have been our first production
11 because of the bates stamp numbers that we have here.

12 Q: As a matter fact, the bates stamp numbers that we're
13 talking about here are entitled ACS followed by it looks like five
14 leading zeros and then two.

15 A: Correct.

16 Q: So it starts with. And then going through ACS, three
17 leading zeros, two, the number five seventy-nine.

18 A: That is correct.

19 Q: Is that correct?

20 A: Right.

21 Q: I assume that means that it would all numbers and 22 and
22 five seventy-nine?

23 A: It would have.

24 Q: And so we're talking about at least delineating four or
25 actually five different things. UMC one stop committee meeting

1 minutes, two is the steering committee -- committee meeting
2 minutes, three was the status on Deloitte and Touche
3 recommendations, four was Lacy Thomas memorandum to Jeremiah Carol
4 and five was Jeremiah Carol ACS audit. Is that fair?

5 A: Correct.

6 Q: Okay. So, at least related to this book or when I say
7 the book it's the -- it's the printed out version of the disc that
8 you provided?

9 A: Yes.

10 Q: These.

11 A: I mean, those -- those one stop minutes and the -- the
12 other committee minutes I think are -- are in that book right
13 there.

14 Q: Yes. And I can -- I've got it available. I can bring it
15 up to you to see it.

16 A: Well, I'm sure --

17 Q: But you said that there was -- it was contained -- your
18 best recollection it was on a disc with this letter. You give it
19 to them and then they print it out essentially.

20 A: That's my best recollection. And -- but you could verify
21 that by looking at the -- at -- at the bates stamp that's on those
22 -- what's ever in that book.

23 Q: And I see bates numbers on this as well. Okay.

24 So, that's the -- that's the information that you
25 provided to the police.

1 A: Some of it.

2 Q: Some of it. When -- at least during the investigation
3 was being done, fair?

4 A: Yes, sir.

5 Q: Now, eventually that information makes its way to Mr.
6 Albregts from you; is that correct?

7 A: No.

8 Q: How did Mr. Albregts -- I mean, did he communicate with
9 you to get this book or get this information?

10 A: What happened is I think during the course of the trial,
11 Mr. Albregts contacted me to arrange scheduling for Mills. I think
12 Fidler and maybe somebody else. I don't know.

13 Q: Okay.

14 A: He asked me about what documents had been produced. I
15 had a conversation with him what documents had been produced. He
16 said something to the effect I don't have what you're talking to me
17 about. And my recollection -- and I may be wrong in this regard,
18 okay. It's been awhile. However, many years that trial was. But
19 my recollection was is that I had the letters and we -- because he
20 was asking about what -- what were in my recollection the one stop
21 and the other minutes that would demonstrate that we had, in fact,
22 provided services and he said, I don't know what you're talking or
23 something to that effect or -- and I offered to get them for him.

24 Q: Okay. So he asked you for the documents then --

25 A: And he said how many there were and we started counting

1 them up and there were a lot and so.

2 Q: Did you provide --

3 A: I think that's --

4 Q: -- those to him?

5 A: To my recollection, I don't think I did. I think that
6 this happened in -- in the midst of a trial --

7 Q: Uh-huh.

8 A: -- in which testimony as ongoing. As I sit here, I may
9 have, but I don't know. I just -- I just have no recollection as I
10 sit here today that I did.

11 Q: So you talked about them and it may be that you provided
12 the documents to him?

13 A: It maybe, but what makes me think that I probably did not
14 is because when I told him about these, I think it was in the eve.
15 It was actually in the evening. And my recollection is that I was
16 not at my office and I don't remember where it was.

17 Q: Did you ever -- beside giving to them to the police --

18 A: Yes.

19 Q: -- did you ever give them to anybody else?

20 A: Not that I can ever recall, no.

21 Q: So at least the police would have had it -- had them at
22 some point during their investigation preceding any charges?

23 A: They would have had what -- they would have had whatever
24 I sent them on or about the dates of the forwarding letters.

25 Q: Fair enough.

1 A: So for example on that one, I don't know what the date of
2 that one was.

3 Q: 2000 -- February of 2007.

4 A: Okay. So they would have had whatever I sent them on
5 that date on or about.

6 Q: Okay. So just so I'm clear on this, you -- you had --
7 you could have produced those at any time, right, 'cause you still
8 had a copy of the documents that you've given to the police?

9 A: That's a good question.

10 Q: You have them 'til this day?

11 A: I don't know. And the reason I don't know that is
12 because they're in storage. It would probably -- it would likely
13 be my practice that I would have kept a master disc or a copy of
14 what we had copied at QUiVX. For example, we take all the stuff,
15 send it to QUiVX, they put it on a disc and then send it out. So
16 I'd either have the hard copies or I'd have the hard copies and the
17 disc or I just might have one disc because they may have been
18 compiled at ACS headquarters and sent to me by a paralegal at their
19 headquarters.

20 Q: Fair enough.

21 A: See what I'm saying?

22 Q: If it was represented at trial that the documents came
23 from you, does that refresh your memory at all?

24 A: That -- that -- the defense?

25 Q: Uh-uh.

1 A: It doesn't, but I would trust their representations.
2 They're far more than my memory at this point.

3 Q: But to your best recollection you get the documents, you
4 have them yourself obviously --

5 A: Correct.

6 Q: -- at that point?

7 A: Correct.

8 Q: Give you give a copy to the police --

9 A: Absolutely.

10 Q: -- and at some point at least you have a conversation
11 with defense counsel and the case for Mr. Thomas. The subject
12 matter of these documents comes up. So at least there's an
13 awareness of them.

14 A: Yes, that is correct.

15 Q: And subsequent to that, during the time of the trial --

16 A: Yes.

17 Q: -- you're aware that Mr. Albregts was able to obtain this
18 book or when I say this book, the documents that make up the book
19 essentially.

20 A: I believe --

21 Q: And you were present in Court a couple of times on this.

22 A: Yeah. I believe that there was an acknowledgment by the
23 Metropolitan Police Department. They had some documents. They
24 were -- I believe that there was ultimately a sharing of those
25 documents at some point. I don't recall when, whether it was

1 during trial or after trial or whatever, but --

2 Q: Did you ever refuse to provide those documents? If Mr.
3 Albregts asked you for them at the time, you have them available;
4 would you have refused to provide them to him?

5 A: Likely I would not have refused to have provided to him
6 unless there was some privileged or special request that had been
7 made by the FBI not to disclose. But I can't recall any such
8 requests by the Bureau not to disclose something at the point in
9 time I wished I disclosed it --

10 Q: Okay.

11 A: -- so --

12 Q: So to the best of your recollection there was no
13 prohibition --

14 A: Prohibition. Not that I can recall, there was none.

15 Q: And may have been in fact that you did provide those at
16 trial?

17 A: I could very well have done that because I can't conceive
18 that I would not have had the original documents at least.

19 Q: I'm just trying to find out if there was -- if they were
20 accessible by the defense to you.

21 MR. ALBREGTS: Judge, I think the record from the trial was
22 that he gave them to me during the trial; that's where I got them
23 from.

24 MR. STAUDAHER: It is. That's why I'm asking him these
25 questions.

1 THE COURT: That's my recollection as well.

2 MR. ALBREGTS: And so I'll stipulate to that.

3 MR. STAUDAHER: Yeah.

4 MR. ALBREGTS: I mean, I --

5 MR. STAUDAHER: Okay.

6 THE WITNESS: I'm sorry. I can't recall.

7 BY MR. STAUDAHER:

8 Q: No, that's okay. And that's why I'm saying --

9 A: The more gray hair I get, the less --

10 Q: Right.

11 A: -- my memory is --

12 MS. FORSMAN: You're pretty good.

13 THE WITNESS: Right.

14 BY MR. STAUDAHER:

15 Q: I mean, I was there too. I remember how they came in.

16 A: Okay.

17 Q: So I'm -- and that's why I'm asking that you actually

18 provided them to --

19 A: Right.

20 Q: -- I know we got a stipulation here, but in -- in reality

21 it sounds like you discussed the documents. He must have requested

22 them. You provide them to him, so he had them.

23 A: Okay.

24 Q: Because he had a copy of them that -- it was at least was

25 represented by you --

1 A: Makes sense to me.

2 Q: -- that you provided them.

3 A: Right.

4 Q: They came into trial. Okay.

5 A: That would have been -- I would have been the only party
6 he would have gotten them from.

7 Q: Sure. So let's -- let's leave that for just a moment. I
8 want to go and talk to you briefly about Bob Mills.

9 Now, you said that you represented him as a corporate
10 attorney and he being --

11 A: My client --

12 Q: -- and employee.

13 A: Right. My client was ACS.

14 Q: ACS.

15 A: And I represented him in his representative capacity as
16 an executive with ACS.

17 Q: Sure. How did he become employed at ACS or part of ACS?

18 MR. ALBREGTS: Your Honor, I'm going to object as to relevance
19 on this line of questioning. I don't know what it has to do with
20 present.

21 THE COURT: What's the relevance to that 'cause we're dealing
22 how and when Metro received these documents from Mr. Campbell?

23 MR. STAUDAHER: Well -- and I'm sorry I'm not standing, Your
24 Honor. But the -- the issue is related to again the relevance
25 related to the charge and whether or not these documents are

1 somehow exculpatory. If there was an allegation, for example, that
2 ACS at least in the charging document did no work, then I think
3 that there's an issue. But since the charging document never
4 alleged that ACS did no work, that's something that if in fact the
5 -- what's alleged in the charging document relates primarily to Bob
6 Mills' interaction directly with Lacy Thomas.

7 So the extent that ACS and Bob Mills are together, then
8 whether or not these meeting minutes are relevant to the case at
9 all really becomes an issue. And I think that's at the heart of
10 the matter is whether or not the documents that are contained here
11 that were ultimately given to counsel by an outside source, that
12 originally had been provided to the police that those documents
13 somehow show that Mr. -- excuse me -- Mr. Thomas did not commit a
14 crime as it pertains to Count 1 and a companion count related to
15 the misconduct, the theft count and a misconduct count.

16 MR. ALBREGTS: Here's

17 MR. STAUDAHER: That is important to know what the
18 relationship is between Mr. Mills and ACS because the -- if you
19 boil the entire ACS thing down, it comes down to essentially one
20 page, a single document, entitled administrative clarification.
21 And in that administrative clarification at the bottom of it, it is
22 signed by Bob Mills, not ACS, but Bob Mills and Lacy Thomas. That
23 is in a sense the underpinning foundation for Count 1 charge.

24 It's important to know then if -- if we're charging --
25 ACS was never obviously charged in the case. The recommendation is

1 we're going to hear from the police is that their recommendation
2 was to not charge ACS, but the actions of Bob Mills were central
3 because Bob Mills had the relationship with Lacy Thomas. Because
4 of that, knowing how Bob Mills came to be at -- at ACS because
5 during the initial phases of the -- the relationship with UMC, Lacy
6 Thomas, Bob Mills, it was under a different corporate entity,
7 Superior Consulting, which was later taken up or at least absorbed
8 by ACS. And from that point forward, ACS is at the hospital.

9 So the whole issue of Bob Mills, how he interacts, how
10 he, you know, falls under ACS, what -- what sort of power he has to
11 represent ACS is important in the case. And that's why since we're
12 talking about documents that specifically relate to ACS' actions at
13 the hospital and Bob Mills potentially subverting something related
14 to a contract that ACS entered into, I want to know what essential
15 authority he had, what role he played and what -- and how it is
16 that Superior Consulting and Bob Mills become part of ACS going
17 forward. I think it's relevant.

18 MR. ALBREGTS: You know, Your Honor, sometimes I -- and
19 absolutely at a lost as to how to respond. I mean, that has
20 absolutely nothing to do with this.

21 First of all, you've already found that it was
22 exculpatory evidence.

23 MR. STAUDAHER: Actually, you've never found that.

24 MR. ALBREGTS: You have too --

25 MR. STAUDAHER: Never have found that.

1 MR. ALBREGTS: -- on page 10 --

2 THE COURT: Okay. You know what?

3 MR. ALBREGTS: -- of the transcript.

4 THE COURT: One attorney talks. You guys know better. One

5 attorney talks at a time and then -- then we move on. Go ahead,

6 Mr. Albregts.

7 MR. ALBREGTS: You've already found -- counsel should read the

8 transcript from day 10 of the trial when you -- when you found for

9 a mistrial. You found that it was exculpatory. That's not the

10 issue here today. The issue today is what the State had when they

11 had it and what happened to it.

12 Bob Mills' relationship and what -- whether this is

13 relevant or not isn't today's hearing, Judge.

14 THE COURT: I'm going to sustain the objection.

15 MR. STAUDAHER: Well, Your Honor, I must correct the correct.

16 And if counsel can actually point --

17 THE COURT: I --

18 MR. STAUDAHER: -- to the page --

19 THE COURT: -- I'm going to sustain --

20 MR. STAUDAHER: -- that says that the Court --

21 THE COURT: -- the objection. Let's move on.

22 MR. STAUDAHER: But -- but there's a material miss --

23 inaccuracy in the record. This Court, and I defy counsel to pull

24 the transcript up and show it, has never made a finding.

25 THE COURT: I want to know how the documents got to Metro, you

1 know, who held them and when the DA's Office received them, why
2 didn't they receive them, etcetera. That's why we're here today,
3 okay. Let's -- next question.

4 [Colloquy between counsel]

5 THE COURT: Counsel -- gentlemen, you know better.

6 MR. ALBREGTS: I'm sorry, Your Honor.

7 THE COURT: Objection. Makes a ruling. You like it or you
8 don't. You move on.

9 MR. ALBREGTS: I'll try to hold my frustrations better. I
10 apologize.

11 THE COURT: Next question please.

12 BY MR. STAUDAHER:

13 Q: So you at least testified just a moment ago about an
14 interview that you participated in I believe it was at UMC with the
15 police and --

16 A: No. It was in my -- it was in my conference room.

17 Q: In your office? Okay.

18 So Bob Mills is present?

19 A: Bob Mills is present. Detective Whiteley --

20 Q: You're present?

21 A: -- is present. My recollection is an FBI agent and FBI
22 special agent was present. And Stan Hunterton likewise may have
23 been present, but I have -- I can't say with any degree of accuracy
24 that he was.

25 Q: And it's my understanding, and please correct me I'm

1 wrong --

2 A: Sure.

3 Q: -- that meeting is when the issue of -- of production of
4 these documents come -- comes out; is that fair?

5 A: No. When Mills is being -- when Mills is being
6 interviewed, Whiteley is taking him through like a bullet point
7 list of allegations that apparently were made by people internal to
8 UMC of wrongdoing, okay. He's going through this laundry list --
9 list. And as he's going through it, Mills is saying no, that's not
10 the case and that's not the case because X, Y and Z happened and we
11 can provide documents to that effect.

12 And I gave an example of the -- they were all over this
13 notion that he had taken -- we had given him this trip or ACS had
14 given this trip to -- I think it was Aruba -- and put him on a jet,
15 there was a lavish party or something for him. It was just
16 completely and totally untrue. And I think that -- that was one of
17 the things that was discussed.

18 And also one of the -- you know, he said well, show me
19 the corroboration for that. And as a result of that we gave him
20 the flight logs and that sort of thing. So that's what happened.
21 I can't -- I don't believe that we gave him any documents.

22 I believe what happened is with, you know, Detective
23 Whiteley then did is he said okay I want to see whatever documents
24 that set up on these topics. We said okay. We went back, got all
25 of the documents on those topics and I would have had ACS retrieve

1 those through headquarters or whatever offices they were at.

2 Q: It was the discussion of documents at that meeting which
3 led to the production of these.

4 A: That's to my best recollection.

5 Q: Okay. So, at least related to the interview with police
6 and you and Bob Mills, at that time that's what ultimately got
7 these documents produced to the police?

8 A: That's my recollection, correct.

9 Q: And at that time, did Bob Mills have authority to act for
10 ACS because you were representing him as an employee essentially of
11 ACS?

12 A: Yeah. He was -- he was a senior executive. He was
13 extremely well thought of. He had been with ACS through the
14 acquisition and they were a publicly traded company, had been with,
15 as I recall, the processor corporation in a similar position. It's
16 extremely well thought of.

17 Q: Acquisition. What acquisition are we talking about?

18 A: I think ACS I think acquired -- maybe on the other -- but
19 I think ACS was the acquiring company of whatever company that
20 Mills may have been with prior to that. That's --

21 Q: Superior Consulting, does that sound familiar?

22 A: That may have been it.

23 Q: Okay.

24 A: ACS though was -- was my client in the matter and my
25 recollection is that they were publicly traded big company

1 operating all over. Internationally I think.

2 Q: Okay. Have you ever seen the charging document in this
3 case?

4 A: The indictment?

5 MR. ALBREGTS: Objection, relevance.

6 THE WITNESS: Indictment.

7 THE COURT: What's the -- what's the relevance?

8 MR. STAUDAHER: It has everything to do with whether or not
9 there -- there was even a charge in this case that ACS did no work.
10 I'm asking him if he seen since --

11 THE COURT: Well, that's for me to --

12 MR. STAUDAHER: -- that was the allegation --

13 THE COURT: -- that's for me to decide whether or not Mr.
14 Campbell thinks that there's allegations against his former client.
15 His interpretation of the indictment is irrelevant --

16 MR. STAUDAHER: No, I'm not asking --

17 THE COURT: -- to my determination.

18 MR. STAUDAHER: -- I wasn't asking about his interpretation of
19 the indictment.

20 THE COURT: Okay. If he's --

21 MR. STAUDAHER: I'm asking --

22 THE COURT: -- why is it relevant?

23 MR. STAUDAHER: It's relevant because his entire testimony
24 roll production of these documents relates to allegations that ACS
25 did no work, fair?

1 MR. ALBREGTS: It gets back to the argument, Judge.

2 MR. STAUDAHER: That's no argument. I'm just saying that's
3 why he produced the documents.

4 THE COURT: It's not relevant here. Sustained.

5 BY MR. STAUDAHER:

6 Q: Your role with ACS and Bob Mills was to at least provide
7 information that the police were requesting in either interview
8 form or document form, fair?

9 A: Right. There was a determination made that we will
10 cooperate fully.

11 Q: And is -- and was it your understanding that at least
12 during the investigation, predating any charges in this case, the
13 investigation, that there had been in the newspaper internally at
14 UMC somewhere allegations that ACS did no work at UMC?

15 A: That was one of the allegations of many allegations. I
16 mean, there were a lot of allegations. There are other allegations
17 that contracts had been reformed, you know, to give ACS a better
18 deal or to -- or to release them from contractual obligations that
19 otherwise they would have been compelled to make that they did
20 certain -- I remember one thing some sort of a sweetheart deal with
21 respect to collections of outstanding accounts receivables that --
22 I mean, there were just so many allegations, and that was only one
23 of the many allegations in that bullet point list that -- that
24 Whiteley was going through.

25 Q: Okay. So let's -- let's just talk about that briefly

1 then.

2 A: I don't want to mislead you in that regard.

3 Q: Right.

4 A: If you listen to that interview, he went through and
5 asked a number of questions about a number of different subjects.
6 And I didn't mean to say that there was only one subject matter
7 that was discussed.

8 Q: So when we look at the -- what is actually contained in
9 this book which are steering committee meeting minutes, one stop
10 committee meeting minutes, memorandum from to Jeremiah Carol and
11 audit from Jeremiah Carol and it looks like a status of Deloitte
12 and Touche recommendations; did that have to do anything with the
13 question about whether a contract was modified or anything?

14 MR. ALBREGTS: Again, relevance.

15 MR. STAUDAHER: I mean, is there anything in here related to
16 whether a contract is modified?

17 THE WITNESS: I don't recall because --

18 MR. ALBREGTS: Objection, relevance, Judge, again.

19 MR. STAUDAHER: It's following upon an answer that he
20 provided.

21 THE COURT: I'm going to allow the witness to answer. He said
22 he doesn't recall.

23 THE WITNESS: Well, I do recall.

24 THE COURT: Okay. I'm sorry. Here's what I do recall. I do
25 recall that the -- the minutes were related to not providing any

1 services.

2 BY MR. STAUDAHER:

3 Q: Not providing services, correct?

4 A: Yes. Or -- or providing, you know, minutes -- you know,
5 minimum amount of services or something. That's what the minutes
6 related too. Those other three subject matters or documents that
7 are in there, I don't know what they relate to. I have no -- I
8 haven't reviewed them. I can't recall. I've made hundreds of
9 productions and hundreds of cases since then.

10 Q: So at least you're -- as you're testifying today --

11 A: Right.

12 Q: -- the -- for this evidentiary hearing --

13 A: Right.

14 Q: -- and the purpose is of this evidentiary hearing, it
15 sounds like the only thing you can -- that you can remember related
16 to what these -- this document -- and I keep referring to the book
17 and I know it was a disc and it was produced later on, but the
18 information contained in this book, the meeting minutes and the
19 like, your best recollection is that this had to do with whether or
20 not ACS was performing services at UMC; is that fair?

21 MR. ALBREGTS: Well, again, I'm going to object as to
22 relevance because it's not Mr. Campbell's job in this case to
23 determine what relevance this book had to Mr. Thomas' defense.

24 THE COURT: Right. 'Cause I remember when it came in I had
25 some time to review it, and I made -- and I know this is in the

1 record, I made a determination that there's documentation showing
2 they were at least having meetings, doing some work --

3 MR. STAUDAHER: Yes.

4 THE COURT: -- and I felt that was exculpatory.

5 MR. ALBREGTS: And to cut to the -- to cut to the chase, it
6 also shows why the contract had to be modified so ACS --

7 THE COURT: Well, that's --

8 MR. ALBREGTS: -- could make money.

9 THE COURT: We're not arguing that right now.

10 MR. ALBREGTS: I know, but -- but --

11 THE COURT: Okay. I'm going to sustain your objection. Let's
12 move on.

13 MR. STAUDAHER:

14 Q: So at least there were other discussion -- there were
15 discussions at the meeting about other factors beyond whether there
16 were any services provided at UMC.

17 MR. ALBREGTS: Asked and answered.

18 THE COURT: Sustained. Besides, it's not up to Mr. Campbell
19 to give his interpretation as to what these minutes, notes, what
20 have you.

21 MR. STAUDAHER: I didn't say anything about minutes and
22 meetings. I said the meeting --

23 THE COURT: Documents.

24 MR. STAUDAHER: Okay. Let me --

25 THE COURT: Okay. I determine if the documents are relevant

1 to the defense and I made that initial determination.

2 MR. STAUDAHER: Then let me ask it a different way.

3 THE COURT: Okay.

4 BY MR. STAUDAHER:

5 Q: I'm not going to talk about the book or the documents
6 that you've provided. I'm going to talk about your -- your actual
7 knowledge of what happened at that meeting which -- which
8 facilitated this production, okay. And when I say which
9 facilitated the production, I'm talking about the actual documents.

10 A: The interview of Mills by Detective Whiteley?

11 Q: Correct.

12 A: Okay.

13 Q: So there were multiple subject matters that were covered.

14 A: Right.

15 Q: One of those was the services issue --

16 MR. ALBREGTS: Again.

17 MR. STAUDAHER: -- or lack thereof.

18 MR. ALBREGTS: This has all been asked and answered, Jude.

19 MR. STAUDAHER: Your Honor, if I could just go through it, I
20 think it's important for me to establish it.

21 THE COURT: You don't need to -- I take good notes. We have a
22 transcript. You don't need to recap everything. Ask the next
23 question. And you'll hear the next answer.

24 MR. STAUDAHER:

25 Q: There were many areas of inquiry that had nothing to do

1 with the services issue, correct? You mentioned some of them.

2 A: There was some, yes.

3 Q: Collections --

4 A: Yes.

5 Q: -- contracts, modifications and the like.

6 A: Well, those were the services that's the point. I mean,
7 there were a lot of services that ACS provided. A lot of them. I
8 mean, from soup to nuts. So that's --

9 Q: So contract modifications were a service?

10 A: No, but it would relate to the services that were
11 provided. If for example they had to provide A, B and C and there
12 was a modification of those services for whatever reason, that
13 they're either expanded or retracted, there would either be an
14 expansion, corresponding expansion of or retraction of services
15 under the contract. So, I don't want to mislead you and say that
16 had nothing to do with services.

17 It may have been -- the contract had -- there was
18 something else with respect to -- I don't know. They modified the
19 term for all I know. I have no recollection as to what the
20 modification was, but I remember that there was a discussion
21 modifications, the contract, why the modifications took place, but
22 also who was involved in that process. And I remember there was
23 some talk about the County being actually having people represent
24 them in these modifications.

25 Q: Okay.

1 A: And that --

2 Q: So you --

3 A: -- very well may relate to this Jerry Carol thing. I
4 think he was an auditor or something with the County.

5 Q: So let's -- let's go back to what the -- let's go back to
6 the conversation you have with Mr. Albregts at trial, okay, where
7 you disclose that there were these documents that were provided by
8 the police to you or actually by you to the police; correct?

9 A: Yes, but it wasn't during -- well, it was during the time
10 of the trial, but it wasn't during the actual trial. It was --

11 Q: Oh, it's before trial started then?

12 A: No. It was -- it was after trial started, but it was on
13 an evening. That's all I can recall. It was an actual evening
14 that he contacted me on it.

15 Q: So it was after trial started during the time of the
16 trial?

17 A: Correct.

18 Q: Okay. So during the time of the trial, you have the
19 discussion and he becomes aware of these materials?

20 A: Correct.

21 MR. ALBREGTS: And this is all been asked and answered, Judge.

22 THE COURT: True. Next question. Go ahead.

23 BY MR. STAUDAHER:

24 Q: In that discussion --

25 A: Right.

1 Q: -- that you have with Mr. Albregts --

2 A: Right. Do you -- do you recall the substance of the

3 conversation first of all?

4 MR. ALBREGTS: All been asked and answered, Judge.

5 MR. STAUDAHER: I have not asked that question.

6 THE WITNESS: Yeah. It was --

7 THE COURT: I'm going to allow it. Go head.

8 THE WITNESS: Yeah. It was like a holy s-h-i-t moment.

9 BY MR. STAUDAHER:

10 Q: So, he wanted those records?

11 A: Uh-huh.

12 Q: Okay. And we know that they were provided.

13 A: And he said I don't have these. He said I don't know,

14 you know, I don't know what you're talking about --

15 Q: Uh-huh.

16 A: -- 'cause I initially told him about them.

17 Q: Did you tell him what the contents of them were?

18 A: I told him what the contents of some of them were. I can

19 tell you that for sure.

20 Q: Were there any documents that you had that you withheld

21 from him?

22 A: No. Because he had never asked me for any documents

23 before. I hadn't withheld anything. He asked me if there were any

24 -- any documents that I had given to the Metropolitan Police

25 Department supporting this and it's my recollection that I had Ross

1 Fidler with me at that time and we were saying yeah, we gave him
2 documents of X, Y and Z and we requested this and that and the
3 other thing. And there were -- he says, I'm telling you I haven't
4 got those documents type of deal. I said, okay. And whether he
5 asked me for them and I then arranged to give them to him or not, I
6 honestly have no recollection.

7 Q: Do you have any recollection of the -- of the actual
8 scope of the documents that you gave him? I mean, this is a
9 segment 'cause you said there were thousands of pages, three discs
10 and this is one disc.

11 A: I don't. I don't know. All I know is that we were
12 talking about some documents and he said, I don't know what you're
13 talking about. I don't have those documents. And that was sort of
14 like what I referred to as the holy s moment. And then I said I'm
15 happy to, you know, retrieve them or something to that effect.

16 Q: And you get them 'cause obviously we got them, right?

17 MR. ALBREGTS: This has all been asked and answered.

18 THE COURT: Okay. We know we have them.

19 THE WITNESS: Okay. Right.

20 THE COURT: Next question.

21 MR. STAUDAHER: But we only have a portion of them, Your
22 Honor. And I want to make sure at least the ones that are at trial
23 that are an exhibit, I want to him to find if in fact others were
24 given to Mr. -- at least he had access to them.

25 THE COURT: What's your best -- you may have already answered

1 this, Mr. Campbell, what's your best estimate of all the items you
2 gave to Mr. Albregts?

3 THE WITNESS: Because I'm anal retentive, I likely would have
4 produced every single document to him that I would have produced to
5 Metro.

6 THE COURT: And I think it was listed as five hundred and --
7 or five hundred and seventy-seven pages.

8 THE WITNESS: I -- it --

9 THE COURT: According to the letter.

10 THE WITNESS: According to that particular production.

11 THE COURT: Okay.

12 BY MR. STAUDAHER:

13 Q: I want -- I need to clarify that because this is not the
14 sum total of the documents that you had that you provided to Metro,
15 fair?

16 A: No. There were -- to my recollection there were three
17 productions to Metro. Each with one disc. I wish I was more
18 precise, but all of my files are in storage.

19 Q: And the best recollection --

20 A: That was -- given those number -- bates stamp numbers,
21 that likely would have been the first one.

22 Q: But you don't have any reason to believe you would have
23 withheld the others? It's your best recollection that you probably
24 would have given him all of it; is that correct?

25 A: It's my best recollection. If he asked for -- for them,

1 I would have given them. But it -- you know, my impression was
2 that the things that we were talking about were things he didn't
3 have because he was saying, I don't have these. So I said, I'll
4 get you those or --

5 MR. ALBREGTS: Your Honor, this --

6 THE WITNESS: -- I can provide them --

7 MR. ALBREGTS: -- as it relates to the --

8 THE WITNESS: -- or something to that effect.

9 THE COURT: Hang on. Let him finish his answer.

10 MR. ALBREGTS: I thought -- I'm sorry. As it relates to the
11 other stuff, this isn't -- the books the only issue for today, so
12 anything else you may have given Metro or me is irrelevant for the
13 purposes of our hearing.

14 THE COURT: I mean, it's not an issue for today, but if you
15 were given other information, reciprocal discovery, that needs to
16 be turned over. I don't know what you -- I don't know if you did
17 receive anything or not, but just both parties need to be aware of
18 discovery rules and defense has reciprocal discovery required,
19 okay. Next question.

20 MR. STAUDAHER: I think that does it. I'm done, Your Honor.

21 THE COURT: Anything else, Mr. Albregts?

22 MR. ALBREGTS: No, Your Honor.

23 THE COURT: Okay. May Mr. Campbell be released this morning?

24 MR. ALBREGTS: Please.

25 MR. STAUDAHER: Yes.

1 THE COURT: All right. Thank you, sir, for your testimony.
2 THE WITNESS: Thank you, Your Honor.
3 THE COURT: Next witness.
4 THE WITNESS: Do I have to stick around today or anything?
5 I'm not going to be recalled.
6 MS. FORSMAN: No.
7 MR. ALBREGTS: No. No. No.
8 MR. STAUDAHER: I don't think so. No, I think you're done.
9 THE COURT: Next witness.
10 MR. ALBREGTS: Detective Whiteley. I guess he's a sergeant
11 now.
12 THE COURT: Let's have the witness sworn. I'm going to take a
13 less than -- I'm just going to take a five minute break. I have to
14 take some medicine.
15 MR. ALBREGTS: Absolutely.
16 THE COURT: Okay.
17 MR. STAUDAHER: Sure.
18 [Court recessed from 10:32 a.m. to 10:36 a.m.]
19 THE COURT: Good morning, Detective. I believe he's been
20 sworn in.
21 MR. ALBREGTS: He has.
22 THE COURT: All right. Let's go ahead.
23 DIRECT EXAMINATION
24 BY MR. ALBREGTS:
25 Q: Sergeant Whiteley, you used to be a detective with the

1 Las Vegas Metropolitan Police Department?

2 A: Yes, sir.

3 Q: And in that capacity were you assigned to the UMC
4 criminal investigation?

5 A: Yes, sir, I was.

6 Q: And would you consider that -- well, one all-encompassing
7 investigation focusing around UMC and Lacy Thomas?

8 A: There was a myriad of individuals involved I guess.
9 There was one individual investigation.

10 Q: And you and Detective Ford were the two lead detectives?

11 A: Yes, sir. I'm sorry. Yes, sir.

12 Q: I'd like to focus your testimony to one of the entities
13 in addition to UMC and Lacy Thomas, and that would be ACS. Do you
14 recall that entity?

15 A: Yes, sir.

16 Q: And were they a part of the investigation -- the criminal
17 investigation?

18 A: Yes, sir. Initially they were.

19 Q: Do you recall interviewing two of their principals, Bob
20 Mills and a Ross Fidler?

21 A: Yes, sir.

22 Q: Do you recall where that was at?

23 A: It was at Don Campbell's office, sir.

24 Q: And was Don Campbell there?

25 A: Yes, he was.

1 Q: And during that interview, was there a discussion about
2 documents, evidence, records that ACS had that they wanted to
3 provide to you?

4 A: Yes, sir. We made a request for those records.

5 Q: And was that request honored?

6 A: Yes, it was.

7 Q: And how was that done?

8 A: It was done through I believe one or two CD's that were
9 provided to us that we had signed for.

10 Q: And those CD's contained hundreds of pages of documents
11 related to ACS and their work at UMC?

12 A: Yes, sir.

13 Q: From those documents, did you and/or Detective Ford
14 create a notebook?

15 A: That notebook would have been created by Nancy Sampson.

16 Q: Okay. And Nancy Sampson is a financial analyst with the
17 Las Vegas Metropolitan Police Department?

18 A: Yes, sir.

19 Q: And you're aware of that notebook generally?

20 A: Yes.

21 Q: And you had reviewed that notebook previously?

22 A: Yes.

23 Q: And -- and that was Exhibit number G that was admitted
24 back -- way back when in the trial; do you recall that?

25 A: I don't remember what exhibit it was or I think that was

1 entered by you from what I understand, but I wasn't there during
2 that day. I was on -- I went on vacation at that point.

3 MR. ALBREGTS: And the Court can take notice that it is
4 Exhibit G.

5 THE COURT: It is. Right, Carol, is it G?

6 THE CLERK: I think he looked at the book, Exhibit G.

7 MR. ALBREGTS: Let me -- let me --

8 THE COURT: There might be a tag on the book, sir.

9 THE WITNESS: Okay.

10 THE COURT: Do you have that in front of you?

11 MR. ALBREGTS: Real briefly, this is --

12 THE WITNESS: Is this --

13 MR. ALBREGTS: -- the book in question.

14 THE WITNESS: Now real quick, is this your copy or is this our
15 copy because I can't --

16 MR. STAUDAHER: I've got -- I've got the one here if you want
17 to use that one, counsel.

18 BY MR. ALBREGTS:

19 Q: This is -- this is a copy taken from the Court with the
20 exhibit list on it.

21 A: Okay. Again, I was -- the day that I testified I was
22 supposed to go on vacation. I canceled my vacation for the extra
23 days that I had to testify, but I wasn't here when this was
24 admitted into evidence, but I understand that it was admitted into
25 evidence.

1 Q: And more importantly this is a book compiled by your
2 counterpart, Nancy Sampson, from the information that ACS provided
3 to you in the course of the investigation?

4 A: I don't think this book was compiled by Nancy Sampson.

5 Q: Who compiled this book, do you know?

6 A: From what I understand, I thought you compiled this book.
7 I thought you were the one that brought this book in.

8 Q: Let's talk separate apart from the book. Let's -- the
9 information in it though is the documents that ACS provided to you
10 on a disc?

11 A: Yes.

12 Q: And that was provided before the case was presented to
13 the grand jury, correct?

14 A: Yes, sir.

15 Q: Now, did you provide -- what did you do -- let me back
16 up. Who was the prosecutor assigned to the investigation that you
17 were reporting to from the DA's Office?

18 A: It was initially Eric Jorgenson, but I think at that time
19 it was Scott Mitchell was also involved.

20 Q: And did Scott Mitchell ultimately take over the case from
21 the DA's Office?

22 A: Yes, sir.

23 Q: And did you provide the discs that ACS provided to you to
24 Scott Mitchell?

25 A: I didn't personally. No, sir.

1 Q: Do you know if they were provided?

2 A: I do not know. I understand that they didn't get them,
3 but I do not know if they were actually provided to him.

4 Q: When you say they didn't get them, what do you mean?

5 A: Well, there -- from -- from what I understand from the
6 case, Scott was saying he didn't get those discs or he wasn't aware
7 of them.

8 Q: Okay. I'm not asking what you heard from Scott or what
9 Scott said. Do you know specifically what you did or whether you
10 would give them -- you gave them to the DA?

11 A: I did not give them to the DA. No, sir.

12 Q: Did you have -- do you know if Detective Ford gave them
13 to him?

14 A: I could not say either way.

15 Q: Okay. Did --

16 A: I don't know.

17 Q: -- did you ever sit down and meet with Mr. Mitchell
18 during the course of the investigation about what was happening in
19 the investigation?

20 A: Yes, sir, we did.

21 Q: How many occasions do you recall?

22 A: I want to say two or three, but it was a long time ago.

23 Q: And did you talk about evidence that had been presented
24 to you by ACS during the course of your investigation to Mr.
25 Mitchell?

1 A: Yes, sir. We'd go over the merits of the case.

2 Q: Would that have included the information contained in the
3 notebook as it relates to ACS and the investigation related to
4 that?

5 A: Yes, sir.

6 Q: Were you there or did you make recommendations regarding
7 a charging decision as to whether ACS or the principal should be
8 charged as well as Mr. Thomas?

9 A: Yes. As outlined in our officer's report, we put in
10 there that we recommended that ACS not be charged due to the fact
11 that we were able to show that some work had been done.

12 Q: And due to the fact that the information that was
13 provided to you by -- by Mr. --

14 A: Yes, sir.

15 Q: -- Campbell?

16 A: And the interviews we did.

17 MR. ALBREGTS: Nothing further.

18 THE COURT: Any cross examination?

19 MR. STAUDAHER: Yes.

20 CROSS EXAMINATION

21 BY MR. STAUDAHER:

22 Q: So, it's to the best of your recollection you -- when you
23 made this submission -- I mean, you had discussions with Scott
24 Mitchell and/or Eric Jorgenson about the case during the time you
25 were investigating it?