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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17-cr-151 (AJN)

5 ROBERT PIZARRO and
6 JUAN RIVERA,

7 Defendants.

Conference

8
9 New York, N.Y.
May 17, 2018
10 9:46 a.m.

11 Before:

12 HON. ALISON J. NATHAN

13 District Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

16 BY: JASON M. SWERGOLD, ESQ.

JESSICA FENDER, ESQ.

17 JARED P. LENOW, ESQ.

LISA ZORNBERG, ESQ.

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Attorneys for Defendant Pizarro

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Attorneys for Defendant Pizarro

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1 APPEARANCES (Cont'd)

2 LAW OFFICES OF BOBBI C. STERNHEIM, ESQ.

Attorneys for Defendant Rivera

3 BY: BOBBI C. STERNHEIM, ESQ.

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4 ROTHMAN, SCHNEIDER SOLOWAY & STERN, LLP

Attorneys for Defendant Rivera

5 BY: JEREMY SCHNEIDER, ESQ.

6 Also Present: Hannah Harney
7 Paralegal

8 Mayerlin Ulerio,
9 Paralegal

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1 (Case called)

2 THE COURT: I will take appearances, counsel, starting
3 with the government.

4 MR. SWERGOLD: Good morning, your Honor.

5 Assistant United States Attorneys Jason Swergold,
6 Jessica Fender, Jared Lenow, and the Chief of the Criminal
7 Division for the United States Attorneys Office, Lisa Zornberg,
8 at counsel's table, along with our paralegal, Hannah Harney.
9 And I would also note the presence in the courtroom as well,
10 Robert Khuzami, Deputy United States Attorney, John McEnany,
11 Associate United States Attorney, Audrey Strauss, Senior
12 Counsel to the United States Attorney, and Michael Gerber,
13 Co-Chief of the Violent and Organized Crime Unit.

14 THE COURT: Good morning to you all.

15 For the defendants.

16 MS. MACEDONIA: Good morning, your Honor. Elizabeth
17 Macedonia, Carla Sanderson and Louis Freeman for Mr. Pizarro.

18 THE COURT: Good afternoon -- good morning. And good
19 morning, Mr. Pizarro.

20 MR. FREEMAN: It may feel like afternoon but it's
21 still morning.

22 THE COURT: Still feels like last night.

23 MS. MACEDONIA: Judge, if I could, just for the record
24 I have a visiting student from Canada, Chris Cheverie, is
25 present in the courtroom.

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1 THE COURT: Ms. Sternheim.

2 MS. STERNHEIM: Good morning, Judge.

3 Bobbi C. Sternheim, Jeremy Schneider for Juan Rivera,
4 who is present at counsel table, and Mayerlin Ulerio, our
5 paralegal, is present in the gallery.

6 THE COURT: Good morning.

7 Good morning, Mr. Rivera.

8 DEFENDANT RIVERA: Good morning.

9 THE COURT: Well, we are here -- we were scheduled to
10 pick our jury this morning, which I called off the venire after
11 receiving defense motion to dismiss the indictment, and I think
12 a rather extraordinary letter from the government last night.

13 Just to recount where we are. On May 4, which was the
14 Friday before trial, the government disclosed what I deemed
15 significant new information pertaining to an alternate
16 perpetrator as well as a series of individuals related to that
17 person and in a connection between that person and the
18 defendant who was on trial when the victim in this case, Robert
19 Bishun, was to testify in that trial was murdered. All of that
20 significant new information had not previously been disclosed
21 by the government and it was disclosed the Friday before trial.

22 We met then on Monday, May 7, when we were prepared to
23 go to trial or planning to go to trial and discussed this
24 disclosure. That time the government vigorously opposed
25 adjournment of the trial. And I disagreed with that based on

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1 what I saw in the new disclosures and the record defense
2 counsel made to me as to the lines of investigation that were
3 newly opened in light of the new material which also, I should
4 say, contradicted affirmative statements that the government
5 had made previously about the absence of any additional
6 material that pertained to that alternate perpetrator.

7 There was consideration as to the length of
8 adjournment. We came to discuss adjourning for two weeks,
9 adjourning possibly until June or until August, but ultimately
10 the joint request was for a two-week adjournment and, with a
11 great deal of effort, I was able to accommodate. And so we
12 were scheduled to pick our jury today and proceed to trial on
13 Monday after that and, quite surprisingly, the government has
14 continued to produce new information. And I don't mean
15 surprisingly because they ought not to have done that,
16 surprisingly because we continue to learn of new information.

17 I've received, and the defense received, two written
18 submissions from the government turning over additional
19 information that I think there can be no question they were
20 obligated to turn over. It was new information and at least --
21 at least with respect to one of them an entirely new, I
22 think -- there was no contention even made by the government
23 that this was something that the defense had any basis for
24 knowing previously.

25 In response to that, the defendants have moved to

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1 dismiss the indictment and the government, needless to say,
2 opposes that motion. And in a letter originally filed under
3 seal, for which I saw no basis for filing it under seal and now
4 publicly docketed, the government said this: There is no
5 question that the government made several mistakes both with
6 respect to the disclosures surrounding Guillen's statements to
7 the CI and regarding statements by the District Attorney of
8 New York cooperating witness. These mistakes have received
9 attention at the highest levels of the office which has already
10 initiated training and other remedial measures throughout the
11 office to avoid these and similar mistakes in criminal cases.
12 The government apologizes to the Court and to the defense for
13 those mistakes for which we make no excuses.

14 I've never seen anything quite like that. I've
15 unsurprisingly discussed it with a fair number of colleagues,
16 many of whom have been here far longer than I, and all of whom
17 agree that it was a rather extraordinary statement. I did
18 request Ms. Zornberg to be here, and I'm pleased to see that
19 additional supervisors and leadership are in the office here in
20 light of that extraordinary statement.

21 It's concerning to see this admission of the failure
22 of the office, again, not concerning because it was made. It
23 should be made if that's where we are, and I do appreciate the
24 necessary candor and appreciate that steps are being taken to
25 ensure to the extent that something has failed here or failed

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1 systemically that measures are being taken, and I think it's
2 necessary not only in light of what's happened here.

3 I note just anecdotally that within the last few weeks
4 adjournments for similar reasons were necessary in a case in
5 front of Judge Seibel and in a case in front of Judge Woods.
6 That's deeply concerning.

7 I've have countless cases in which defense counsel
8 have made motions or requests for Brady and Giglio material and
9 the assistants stood up, as they did here, or wrote in a
10 submission to the Court that they're fully aware of their Brady
11 obligations. The credibility of these assistants in particular
12 and the office in general on that score has taken a serious
13 hit, not only with me but with many of my colleagues who are
14 aware of this case and the others that I have mentioned.

15 We are here on the defense motion to dismiss the
16 indictment. And I raise this level of concern because I do see
17 no authority cited in the defense brief, nor can I find any
18 that would allow me to dismiss the indictment under these
19 circumstances, but we do need to assure ourselves, I need to
20 assure myself that what has occurred here is the result of
21 error and not bad faith or a willful or intentional withholding
22 of materials. It seems to me that is the immediate question as
23 to what has occurred here, and the necessity to know what has
24 occurred here and why I required the head of the criminal
25 division to be here so that I have assurance as much as

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1 possible as to the accuracy of any representations that I am
2 getting as to what occurred here and that -- and what we know
3 or don't know as to what is -- has not yet been turned over or
4 disclosed.

5 So, Ms. Zornberg, do you want to take this?

6 I think I'll begin by asking what steps you've taken
7 to assure yourself that the disclosure failures here are the
8 result of error and maybe a lack of supervision and not bad
9 faith or willful disregard of obligations.

10 MS. ZORNBERG: Thank you, your Honor.

11 Obviously this is not -- this is not an event in which
12 we celebrate. This is not the finest hour of the office.

13 We do have an abiding commitment to this Court, to the
14 entire Court, to the Bar, to do the right thing. And in this
15 case, and your Honor referenced anecdotally two other cases of
16 recent vintage where we've had disclosure issues pop up for a
17 variety of reasons. I want to assure the Court that to the
18 highest levels of the office, myself, the U.S. Attorney, all
19 those present in the back of the courtroom today, we take this
20 with utmost seriousness. We regard it as a training issue.

21 I have personally done a -- what I'll call a
22 postmortem in each case, including this one, which has involved
23 the briefings with unit chiefs and with other personnel of the
24 office to understand the particularities of what occurred, to
25 identify what action items we can take as an office to

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1 implement better training.

2 I do view it in this area as an area that requires
3 constant training and vigilance. I do regard the increase in
4 electronic data, the changes in how prosecutors and
5 investigators communicate about cases, the very and
6 ever-expanding means of electronic ways of communication as
7 presenting challenges at times, to really make sure that we are
8 scrubbing our files appropriately, that we're living up to all
9 of the disclosure obligations that are imposed on us and that
10 which we embrace.

11 And so in the wake of what occurred here and the
12 errors that were made in this case and the two others that the
13 Court referenced, we held an all-hands-on-deck internal
14 training of our unit chiefs this Monday of this week. There
15 was no delay in our reaction that the errors themselves cannot
16 repeat and that we have an obligation to undertake every
17 responsible action we can do as managers in the office to make
18 sure that errors don't happen. And when errors do happen, our
19 principle is that we need to openly and promptly understand the
20 errors, correct them, make them right, and live up to our duty
21 of candor to defendants and to the Court.

22 And that's what I think has happened here. And so in
23 terms of responding to the Court, what we've done, I can report
24 to the Court that Monday we had and I led an internal training
25 for unit chiefs. I worked with leadership of the office to

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1 identify specific learning points and issues for further
2 training. I directed that this week every AUSA in the criminal
3 division be -- receive additional training on those points
4 which are -- which make specific reference of efforts to ensure
5 no repeat of the errors that have come before your Honor.

6 So that training is ongoing and happening and will be
7 done this week. That is the degree of swiftness and
8 seriousness with which we're learning from these issues and
9 reacting to them and I think living up to our obligation to
10 make sure that they are addressed fully.

11 In terms of whether there was any bad faith, I can
12 report to your Honor that I have -- I have found no indication
13 that any AUSA in this case or in the other two cases to which
14 you referred intentionally acted willfully to withhold
15 information.

16 I view this as an issue of the need for increased
17 training and vigilance, but I do think that the errors were
18 inadvertent. There have been a lot of sleepless nights and a
19 lot of agonizing. There is no AUSA involved -- this is my
20 belief -- who has purposely tried in matters of great
21 importance to the defendants, to the government, to the Court,
22 to withhold information. These are errors. That doesn't make
23 them excusable, but I do not believe that anyone has purposely
24 tried to sandbag the defense in this case or the other two.

25 THE COURT: Then let me ask, just to press on that,

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1 that and what's occurred here. There was a disclosure on
2 May 4 -- and I think something had -- I don't know but
3 something had triggered some final review or some additional
4 concern, and I believe Mr. Swergold represented at the time
5 that it had already gone up to the highest levels in the
6 office, something had triggered the disclosure that happened on
7 the Friday before trial. And yet -- and the government opposed
8 the adjournment and subsequently there have been additional
9 disclosures. And so I think what I want to know is what --
10 what was known at the time -- and I don't know if this is for
11 you or Mr. Swergold -- but when the government did what it did
12 that produced the disclosure on May 4 and yet came in on May 7
13 opposing the adjournment, was there anything known at that
14 point about either additional material being out there that
15 needed to be turned over or that the searches -- that
16 additional searching needing to be done.

17 MS. ZORNBERG: First of all, I know that Mr. Swergold
18 is prepared to address that point and I think he can speak to
19 the details. But just so you hear from me on it, what I can
20 tell your Honor is that one of the AUSAs who was involved in
21 the case is out on maternity leave and there were efforts made
22 to have her come back into the office and start reviewing her
23 e-mail as part of sort of an all-hands-on-deck scrub of the
24 file to ensure that there was nothing further or if there was
25 anything further that needed to be disclosed, that we found it.

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1 So from my perspective I would offer the Court that
2 when we're in this situation we have the highest obligation to
3 make things right. And I think that there were dual efforts,
4 both to understand what happened with the late May 4 disclosure
5 but simultaneously to do a full scrub to satisfy ourselves and
6 then the Court and the defense that there was no stone
7 unturned, that we had the done the additional work necessary to
8 look.

9 So, I am aware that as a result of those further
10 e-mail searches that an additional piece of information was
11 located, that then prompted a follow-up disclosure.

12 I would also -- and, again, this is by no means of
13 excuse but I think one of the lessons learned by our office in
14 this particular case is that the vast majority of our violence
15 work, murder cases, are often initiated in a manner that's
16 cooperator-based where the way that it comes in, the timing in
17 which we learn of information is not a trying to solve a
18 whodunit in real time.

19 There was some unique aspects of this case. As you
20 know, the murder victim was a federal cooperator. It was --
21 there was a very urgent response by our office together with
22 various pieces of law enforcement to try to figure out who had
23 killed a federal cooperator and why. And that is a smaller --
24 a very small slice of a unique scenario; that is, the majority
25 of violence cases that we handle do not come in and present in

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1 that fashion.

2 And I think that there was, perhaps, a lack of
3 adequate systems in place or sufficient awareness that when you
4 have a very fast-moving, multifaceted whodunit investigation of
5 this type, that there needs to be significant appreciation
6 along the way of how you identify, set aside, don't forget
7 about the various different tentacles that may arise along the
8 way in that type of fast-paced investigation.

9 So that is a learning point. That is a training
10 point. That is one of the points on which every AUSA is being
11 trained.

12 But it did come up in a case where I think, not to our
13 credit, but to acknowledge it and to own it, there was some
14 sloppiness in or inadvertence in the manner in which that
15 information of any suspect identified from every source and
16 ruled out was maintained. Was it forgotten six months later in
17 an e-mail count? Was it set aside in a file?

18 I do know -- I will note, too, that this is not --
19 there were some Brady disclosures made in this case months ago.
20 I think that one of the errors made was that even though very
21 substantive information was provided to the defense, in
22 retrospect it should have been accompanied not just by a
23 letter, a disclosure letter but by further scrubbing of the
24 files at that time to see if there were any underlying
25 documents or investigative reports that went along with that

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1 disclosure that provided more detail about the disclosure.

2 That's another training point on which every AUSA is
3 being trained in the office this week.

4 THE COURT: And, again, this may be for Mr. Swergold,
5 but relatedly, I don't know if you're aware but presume that
6 you are, that the government actually here filed a motion in
7 limine seeking to preclude the defense from offering any
8 alternate perpetrator defense for which there was insufficient
9 evidence. And it's always -- it bothered me on May 7 and it
10 continues to bother me and it could just be coincidence, but it
11 raises a question that an affirmative motion is being made to
12 preclude the defense from speculating wildly without nexus or
13 evidence as to alternate perpetrators while the government has
14 in its possession, very real, very substantial, though the
15 government disbelieves it, but of course that's irrelevant to
16 the Brady analysis, evidence of the involvement of other
17 individuals.

18 And I do want assurance that those two things didn't
19 happen in conjunction; that the government isn't saying while
20 it's withholding information that could lead to investigative
21 lines, that the defense should be precluded from speculating as
22 to any alternate perpetrators.

23 MS. ZORNBERG: Based on all of the attention that I've
24 personally given this matter over the last week you have my
25 assurance, first of all, that I have found -- I have found no

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1 indication or suggestion that those two were linked as part of
2 a willful effort. I think that this was product of
3 inadvertence and sloppiness and of thoughtlessness by AUSAs who
4 are exceptionally hard-working and exceptionally honorable and
5 in whom I have tremendous confidence and who have lost a
6 tremendous amount of sleep over these inadvertent errors and
7 working around the clock to try to make them right.

8 You also, your Honor, have my assurance that I will
9 continue to go back and speak in this case with the chiefs of
10 our violent crime unit about the motion in limine briefing and
11 the regretful position that we're in now for having that, that
12 seeming contradiction of the position that we took before your
13 Honor that is now quite in tension with disclosures that were
14 made by the office.

15 So I appreciate the seriousness of that. I remain
16 steadfast in my belief that these errors were not intentionally
17 in bad faith.

18 THE COURT: Thank you.

19 Who will I hear from for the defense? Ms. Macedonia?
20 Ms. Sanderson?

21 Ms. Sternheim.

22 These are not separate issues, obviously, for the
23 reasons I've articulated. But it is the case -- I have found
24 no authority, and you cite me none, for the proposition that
25 the -- in light of the pretrial but late disclosures of the

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1 government would necessitate the dismissal of an indictment.

2 I think in the -- certainly in the absence of any
3 affirmative showing by the defense as to bad faith or willful
4 withholding and then, as you've seen, I'm probing that, and
5 perhaps even in the face of that, though there would be
6 obviously very serious other repercussions for the attorneys
7 involved.

8 So, what is the authority for the proposition that a
9 pretrial but late disclosure under the circumstances that we're
10 presented with here would require a dismissal of a very serious
11 indictment?

12 MS. STERNHEIM: Your Honor, I'm not prepared to give
13 you citations at the moment, although we will provide those to
14 you. But the analysis, I believe, starts from the Brady
15 violation which speaks for itself. The spoliation issues --

16 THE COURT: To stop you on that. Brady is, as a
17 violation, is necessarily a backward-looking analysis.

18 Did the disclosure and the absence of the availability
19 of that information lead to an unfair trial? It's examined
20 after the fact.

21 We have the information now. So we will proceed to a
22 fair trial with the information in hand.

23 MS. STERNHEIM: Well, we will proceed to trial but in
24 the interim period between being appraised of this information,
25 avenues of investigation have been closed to us, which has

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1 eliminated viable evidence that we would have put forth.

2 When we speak about a pretrial situation such as this,
3 it is not going to lend itself to appellate decisions that
4 would be handy to cite to the Court. This is an unusual
5 situation.

6 In spoliation situations where evidence has been
7 destroyed, cases have been dismissed, instructions have been
8 given concerning inferences.

9 I was prepared to speak to the Court on the very issue
10 that your Honor just brought up. It has always disturbed us
11 that the government preemptively moved to preclude us from a
12 viable defense and threw the gauntlet down that we needed a
13 good faith basis if we were to pursue this. I view it as if
14 they dealt the cards but they held back the ones that would
15 have made it a fair game.

16 The coincidence of their moving and the existence of
17 the information that provides the good faith and brings us
18 before the Court today is too coincidental for me to be or for
19 us to be confident that there is no connection whatsoever, and
20 that is quite disturbing to us.

21 As I said before, this is an extraordinary situation,
22 one that my colleagues and I have not had, and we have been
23 practicing in this courthouse for decades. The only other
24 time, I was telling Ms. Zornberg, that I had a situation like
25 this was a trial I had before Judge Motley when Rudolph

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1 Giuliani came into the courtroom and we were called to the
2 robing room because one of the assistants had taken all the
3 drugs in the case and basically snorted it, and we had to deal
4 with those situations.

5 So, none of us take this lightly or with any sense of
6 happiness. It is extremely disturbing and we feel that it is
7 egregious enough to be tantamount to denying our clients a fair
8 trial, even with an adjournment and for the reasons stated in
9 our papers, and we will supplement them if the Court wishes,
10 that the appropriate remedy here is dismissal.

11 THE COURT: Let me just press you, Ms. Sternheim. I
12 think the government makes this point in its papers and it
13 occurs to me if the government had continued to withhold this
14 information, we proceeded to trial, the defendants are
15 convicted, and then the information surfaces and it's concluded
16 that there was a Brady violation, the remedy is a new trial.

17 MS. STERNHEIM: Your Honor, that's only a partial
18 remedy. The Court may grant a new trial. But if we could
19 establish that it resulted in a due process violation that
20 foreclosed us from effectively using that which was not
21 disclosed, there would be another basis for dismissal.

22 THE COURT: Well, I don't see any authority on that.

23 And on your showing with respect to the spoliation
24 contention, here is the -- I mean I think there's a number of
25 difficulties. Number one, you've surfaced the -- I think two

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1 primary categories, right. You've got Guillen who has been
2 indicted and convicted of other charges who is represented by
3 counsel and who would plead the Fifth.

4 There is no indication that if the government turned
5 over the September 30 investigative report one month, two
6 months, six months, eight months, ten months ago, that you
7 would have faced any different set of circumstances than you
8 face now, and it seems to me unlikely.

9 And the same with respect to the social media
10 information that you've said accounts -- some of the new names
11 that we've learned about and that have surfaced. To the extent
12 that those social media accounts no longer exist, once again,
13 there is no showing that that wouldn't have been the case. And
14 it's inconceivable to me that had the government turned over
15 all of this information, even two months ago, that you would
16 have made a contention that the indictment should be dismissed.
17 And there's been no showing that in any interim period of time
18 between when the government should have disclosed it and when
19 they, in fact, did that the spoliation concerns that you've
20 raised are the result of that time period as opposed to a
21 reality of the circumstances you would have otherwise faced if
22 there had been a timely disclosure.

23 MS. STERNHEIM: Your Honor, it is somewhat of a
24 hypothetical and it could be answered both ways but I have --

25 THE COURT: Surely, for the -- we do know from the

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1 Circuit that the dismissal of an indictment -- and this is
2 obviously a very serious set of charges -- is an extraordinary,
3 rarely taken measure. Surely the showing, the burden of making
4 such a showing as to any harm to the defendants as a result of
5 the delay falls on you, and you've not made such a showing.

6 MS. STERNHEIM: Your Honor, I would also point out
7 that in the balance here this is not, as the government would
8 like the Court to believe, one instance of negligence. It is a
9 continuing pattern of negligence. And that in and of itself
10 raises the specter that warrants a remedy and we believe the
11 remedy is dismissal.

12 THE COURT: Who of the assistants want to take the --
13 Mr. Swergold.

14 MR. SWERGOLD: Yes, your Honor.

15 I'm happy to respond to any specific questions the
16 Court has either from its order yesterday, following up from
17 anything that was said today, or also to address any of the
18 points raised by the defense. I'm happy to take the Court's
19 direction as to where you'd like me to start.

20 THE COURT: Why don't we first focus on just the
21 immediate motion and the point which I didn't take up with,
22 because it goes to the merits of the motion, with Ms. Zornberg,
23 the defense's contention that the government's disclosure
24 failures here have prejudiced them in a way that can't be
25 solved by an adjournment because they've lost access to

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1 information that they would have otherwise had.

2 MR. SWERGOLD: OK, your Honor.

3 We obviously disagree with the contention that they've
4 lost access to information. We don't think they've made the
5 required showing. I think Ms. Sternheim said it was somewhat
6 of a hypothetical. I don't think that meets the standard. And
7 what I'll say is that the crimes that are charged in this case,
8 this is not an example of, say, like an ongoing wire fraud or a
9 securities fraud taking place within a company where it's --
10 these are discrete points in time that are all captured on
11 video. That video is all preserved. The defendants have it.
12 There are -- there is OPR data for the cars in the vicinity.
13 The defendants have it. There is the cell tower dumps which
14 would show any phones using those cell towers, both at the
15 location where the robbery, kidnapping took place and the
16 location where the body was recovered. There's video from the
17 body recovery site as well. So these cell towers would show
18 phones using those as well as numbers that phones using those
19 dialed or received calls from. And so -- look, the government,
20 as we have set forth --

21 THE COURT: I don't know what the point of any of that
22 is to the analysis that I'm undertaking and, frankly, it seems
23 to me it is symptomatic of exactly the same thing which has
24 produced the problems that we find ourselves with now, which is
25 that the government's got its view of the evidence. I

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1 understand that. You're probably going to get to put on a
2 trial about that. That, as you I hope know by now, is
3 irrelevant to the Brady obligations to turn over potentially
4 exculpatory information. It doesn't matter a lick that you
5 find that information not helpful to your case. That's the
6 point.

7 So why don't you try to focus on the question,
8 Mr. Swergold, as to where there is now new information that the
9 defense may legitimately want to use in their defense that they
10 claim that the government's failure to turn over what you --
11 you do now -- you admit, as I mean Mr. Lenow has told me in his
12 letter but I'd like to hear it from you -- that this is
13 material that the government was required to turn over.

14 MR. SWERGOLD: Absolutely it was, your Honor.

15 THE COURT: So then the question is -- and it does
16 open up new lines of investigation for the defense.

17 MR. SWERGOLD: Absolutely, your Honor.

18 THE COURT: So then the question is has the failure,
19 the delay, the time delay in the government's error,
20 substantial error, irreparably harmed the defendants' ability
21 to defend themselves in the way that they wish to defend
22 themselves.

23 MR. SWERGOLD: The answer to that is no, your Honor.
24 And I tried to answer it in a roundabout way.

25 There are --

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1 THE COURT: But, a telling roundabout way.

2 MR. SWERGOLD: Your Honor, I did not --

3 THE COURT: Do you see that, Mr. Swergold?

4 MR. SWERGOLD: Your Honor, I did not mean to suggest
5 at all that what the government was -- what I was standing up
6 and saying is we have our view of the evidence and the
7 defendants, and we're discounting the credibility of the other
8 avenues of investigation.

9 What I meant to say, your Honor, is that they have the
10 new information and to the extent that the defendants want to
11 use the existing evidence that preserved the crime scene to see
12 whether -- to see whether those individuals were there, to see
13 whether they're in contact with people, that's all I'm saying,
14 your Honor. Those avenues of investigation are still available
15 to the defendants because the events of that night have been
16 preserved. That's all I'm saying.

17 In their letter, the defendants are saying that
18 they're not able to speak with these individuals. I do think
19 it's a little bit counterfactual because -- I think it does --
20 it's a little implausible to think that drug dealers on the
21 street who are engaged in violence and drug dealing, had they
22 been approached by a defense lawyer or a defense lawyer's
23 private investigator would simply say, yeah, I'm happy to talk
24 to you, you know, ask me any questions you want about a murder
25 that you're investigating. The fact that they have lawyers

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1 help them make that decision now I don't think changes the
2 equation. I don't think there can be a showing that these
3 individuals would have necessarily spoken to them at the time.

4 I will note that a number of the individuals in the
5 Second Avenue -- the second piece of information, that's the
6 one that we've referred to as the Danny cooperator, the people
7 who are named, that the identities are known, are not in
8 custody now and were not in custody then and are not in custody
9 now. The people who provided the information or -- and the
10 second level of communication, the Danny cooperator heard it
11 from somebody. Those two people were in custody then and are
12 in custody now. One individual who is in custody has since
13 been released. We've given the defense his parole officer's
14 name if they want to try to track him down. We don't have that
15 person's contact information.

16 The point I was making, your Honor, is not to say we
17 see the evidence one way. It was to say that to the extent
18 that the defense wants to investigate these individuals'
19 involvement in the crime, the events of that night and the
20 surrounding time period has been preserved and produced in
21 discovery and so they can do that investigation. They can see
22 what cars were on the block at the time, what phones were being
23 used, what people were walking on the street. All of that is
24 available to them and with time they can make that
25 investigation.

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1 THE COURT: Thank you.

2 When was Guillen indicted?

3 MR. SWERGOLD: He was arrested in August of 2017. I
4 think the indictment probably came right before then.

5 THE COURT: Let me ask you -- you heard me pose to
6 Ms. Sternheim the I think reality that the remedy for a Brady
7 violation posttrial is new trial and so it almost falls as a
8 logical matter that the remedy for a late disclosure is an
9 adjournment. But at some point that pushes up against speedy
10 trial rights. And I suppose my -- the other end -- the other
11 end of the spectrum of that question to you is: What happens
12 if we adjourn for however amount of time the defense thinks
13 it's necessary to follow it and then we get again the Friday
14 before trial and the government says and here is more
15 information that we should have turned over but didn't. And
16 then they say but you know if the defense requires an
17 adjournment, then that time should be excluded and we go on and
18 on.

19 At what point -- how would you measure, how would you
20 state the analysis for at what point the late disclosures
21 burdens the -- both the fairness of the trial and the speedy
22 trial rights.

23 MR. SWERGOLD: Your Honor, I think on the speedy trial
24 analysis there's, obviously, two pieces to it, the
25 constitutional speedy trial analysis under the Sixth Amendment

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1 and then just the Speedy Trial Act 70-day requirement.

2 I don't --

3 THE COURT: So start with the statute.

4 Why in light of -- and this was the question I posed
5 in the order -- why in light of what has occurred here, the
6 government's fault for delay, why would I exclude time?

7 MR. SWERGOLD: Right. So, your Honor, there's a full
8 70 days left on the clock. And so if your Honor wants to set a
9 trial within that time period, the government would not ask to
10 exclude time. If the defense, however, wants time beyond the
11 70 days, I think then we get into an area where the interests
12 of justice require the exclusion of time because if the Court
13 is going to dismiss the indictment for a due process violation,
14 that's a different inquiry. And if that's what the Court's
15 going to do, then that's what the Court is going to do. But if
16 the Court is going to deny that motion to dismiss, then the
17 defendants' -- the Speedy Trial Act doesn't work in a way in
18 which the defendants can simply run out the clock by saying we
19 want more than 70 days, we strenuously object to the exclusion
20 of time, which obviously your Honor can overrule anyway. So if
21 it's within 70 --

22 THE COURT: And the constitutional analysis.

23 MR. SWERGOLD: Your Honor, at this point the
24 defense -- I mean it's been 14 months since the defendants were
25 indicted. Certainly -- I tried to do a little research on this

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1 this morning. I did find an Eastern District of Pennsylvania
2 case where under the factor analysis for constitutional -- we
3 certainly are not at an extensive delay at this point, given a
4 trial of this nature, for it to take place 14, 15, 16, 17
5 months.

6 THE COURT: Not unusual.

7 MR. SWERGOLD: But if we were in a position where
8 continued disclosures kept delaying a trial, then under the
9 prejudice -- I mean that would weigh against the government in
10 a prejudice analysis should we ever come to that point down the
11 road under the constitutional inquiry. And in that case that I
12 found it just -- it happened to be the case where I think
13 something like four years.

14 THE COURT: I saw that case.

15 MR. SWERGOLD: So I hope that answers your Honor's
16 question on that point. And, of course, I'm more than happy to
17 answer any of the other questions that your Honor asked.

18 THE COURT: Let me put to you the question about the
19 motion in limine which was an unusual motion in limine and
20 stands out now as -- what's the right word -- a troubling
21 contrast with the failure of the government to produce
22 precisely what the government claimed defense did not have.

23 MR. SWERGOLD: I understand.

24 THE COURT: So what was your level of knowledge at the
25 time of making that motion as to the materials that have

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1 subsequently been produced?

2 MR. SWERGOLD: Your Honor, the level of knowledge
3 differs among various members of the team and I'm happy to
4 address that in turn as well as to talk about, again, the
5 knowledge and why it wasn't turned over. I understand the
6 Court's view that it's troubling. I can see why, given the
7 timing of the disclosures and us making the motion. I can
8 assure the Court that in no way were we trying to say to the
9 defendants you can't do this and we're withholding information
10 from you, knowingly withholding information from you.

11 THE COURT: I think I asked this on the 7th but
12 maybe you didn't answer. I don't recall your answer. What did
13 you have in mind? What was the defense line and who were the
14 individuals you were thinking about when you made that motion?

15 MR. SWERGOLD: We were thinking about Merlin Alston
16 and Gabriel Guillen. I wrote that motion, your Honor. That's
17 what I was thinking about. And I don't think we went into real
18 specifics about it. We just talked generally about the fact
19 that he was a cooperating witness. But I was thinking about
20 Merlin Alston, because that's the person that the trial was
21 coming up against, and Gabriel Guillen. And I did that, your
22 Honor, based on -- I was added to this trial team on March 28,
23 2018. I did everything I could to get up to speed on this case
24 as quickly as I could. I read all our disclosures letters. I
25 read our discovery letters. I reviewed the discovery. I tried

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1 to get as familiar as I could about the facts of the case. I
2 personally did not know about some of the things that we've
3 since turned over. Other people --

4 THE COURT: You said some of them.

5 MR. SWERGOLD: No. Actually, your Honor, I did not
6 know about anything that the government has turned over since
7 May 7 which was in your Honor's order of last night.

8 THE COURT: So that implies you did know what was
9 turned over on May 4.

10 MR. SWERGOLD: No. I did not know that.

11 THE COURT: You said May 7 so I wanted to make sure I
12 understood.

13 MR. SWERGOLD: Your Honor, I was not aware. I did not
14 know. I did not know about the DEA-6 that memorialized the
15 confession that the CI had received. I knew about the
16 recording. I knew about the text messages, because I had
17 reviewed the discovery, and I knew about the disclosure letters
18 in which we said that there was a confession that had taken
19 place and then the subsequent disclosure letters talking about
20 the issues with the CI's credibility and whether or not those
21 text messages were true. I did not know about the existence of
22 the --

23 THE COURT: And the representations in the face of
24 direct questions from the defense, if there was anything
25 further with respect to Guillen's confession, who made those?

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1 MR. SWERGOLD: The initial -- any one that predated
2 March 28 was made by Ms. Graham, Ms. Fender, and Mr. Lenow.
3 And the one that was asked to us after, which I think was in
4 early April, was -- I had been added to the team at that point.
5 I was not aware of the underlying DEA-6. I will say that I --
6 our -- I was not aware of the underlying DEA-6. Should I have
7 said I want to review literally every piece of paper in this
8 case and every piece of paper in the Guillen case at that time,
9 in retrospect, obviously I should have done that.

10 THE COURT: So when you had Guillen in mind when you
11 made that motion your representation now is that you were
12 unaware of any additional information in the government's files
13 that might have provided that access to the defense that you
14 were arguing would preclude them from raising it.

15 MR. SWERGOLD: Right. When I wrote that motion, your
16 Honor, I had in mind the disclosure letter in which we said
17 there was recorded meetings and text messages in which Guillen
18 had confessed to the crime. So I had that disclosure in mind.
19 I had the recording in mind. I had the text messages in mind.

20 Again, I wrote the motion. I wrote that motion. As a
21 trial team, we submitted one motion and all reviewed each
22 other's work. As we've already admitted over and over again,
23 the error with respect to the Guillen piece was that when we
24 were saying to the defense we've already given you -- we've
25 already given it to you, we were thinking we've already told

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1 you about the fact of the confession and at every moment at
2 that point in time we should have gone back in the file and
3 said wait a minute let's just go back and make sure that we
4 have scrubbed our file, that there is nothing else related to
5 that Guillen confession. Because what we meant -- what I
6 understand from my team members was meant in the letters where
7 we said that we have -- that there's nothing else from the CI
8 is that apart from the confession which, again, we should have
9 turned over the DEA-6, we should have gone back and found it,
10 that the CI had not provided himself --

11 THE COURT: Frankly, you shouldn't have -- I hope this
12 is part of the changes, but you shouldn't have needed to find
13 it. It should have been in a Brady file as soon as it came in,
14 obviously.

15 MR. SWERGOLD: Yes.

16 To that end, your Honor, to the separate disclosure on
17 the, again, what we've termed the Danny cooperator, this is
18 something that Ms. Zornberg spoke to a little bit, is that
19 another change that absolutely needs to be made and is
20 particularly important in the small universe of cases where we
21 are dealing with a realtime crime like this case is that when
22 pieces of information come to us and we send an agent or a
23 detective to run it down real quick like we did here, that
24 information is then set aside in a folder or in some
25 organizational structure so that whenever -- however many

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1 months or years down the line that we've solved the case or we
2 believe we've solved the case and we bring charges against
3 people that we believe did it and it's time to start making
4 disclosures to that person, we can just go right back to that
5 because with respect -- it's a different mistake with respect
6 to the Danny cooperator. It was the failure to flag at the
7 time it came in, which was about six months before this case
8 was charged, that this is something that now must be on our
9 mind when we eventually charge a case here. And because of
10 that mistake at the outset, at every step when we were
11 providing disclosures, when we were making -- when we were
12 making the motion in limine, I personally did not know about
13 it, the members of the team who did know about it just did not
14 remember it because it happened so quickly in the early stages
15 of the investigation and our mistake, and an office practice
16 that we have been trained on and is going to be made better is
17 making sure that that information is flagged at the outset so
18 that it is available and on everybody's mind when the time
19 comes to make a disclosure.

20 THE COURT: And on May 7 when you pretty strenuously
21 opposed the adjournment what was the level of awareness as to
22 what work still needed to be done?

23 MR. SWERGOLD: As we came out of the May 7 conference,
24 your Honor, we realized that we needed to go back and as
25 quickly as possible, but in a very systematic and methodical

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1 way to avoid any mistakes, needed to go back and pull every
2 single thing in which, as Ms. Zornberg alluded to, included
3 e-mails and files from the AUSA, Ms. Graham, who has gone out
4 on maternity leave. She just gave birth less than a month ago.
5 We had her come into the office with her baby and review every
6 one of her hard copy files. That happened this week.

7 And it was in the process of doing that that we --
8 that we found the information that, again, should have been
9 noted earlier at the time it came in related to the Danny
10 cooperater, and turned that over immediately, like absolutely
11 immediately.

12 Any time that we found anything in now reviewing all
13 of our hard copy files, our e-mails, the DEA's files, the
14 NYPD's files.

15 As your Honor may have seen, and in response to the
16 defense requests, we have reached out to other prosecutors'
17 offices to see if they have proffer notes related to the Danny
18 cooperater that are completely unrelated to the Bishun
19 investigation. We've obtained those. We've turned those over.

20 We've immediately informed witnesses, lawyers, that we
21 are going to be making attorney-eyes-only disclosures about
22 individuals' names that we otherwise, you know, because of
23 serious safety concerns and in earlier parts of the
24 investigation we would not.

25 And so we treated this -- we knew right away that this

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1 was something that we had to go back, we had to figure this
2 out, and that's why since May 7 we have produced information to
3 the defense.

4 A fair amount of it has been in response to their
5 requests like rap sheets or phone records, but there are
6 things, the Danny cooperator, there was a cooperator in a
7 separate investigation. We went through and looked at all of
8 that person's notes and that's when we found the two lines in
9 the proffer notes that we put in a letter to the Court
10 saying -- again, I was not aware of that, Mr. Lenow was not
11 aware of that, that was something from the case that was being
12 run by Ms. Fender and Ms. Graham, as soon as we found that we
13 turned it over. We sent a letter to the Court saying
14 regardless of what you make of what this note says from this
15 cooperator, absolutely should have been in the narrative on
16 May 7. If it was on people's minds we, of course, would have
17 done it.

18 And, again, your Honor this all speaks to the mistakes
19 that were made that were not deliberate and not willful and not
20 a product of any intention to withhold anything but just a
21 failure by the members of our team to make sure that we are
22 doing it right.

23 And we have tried as hard as we can through, as
24 Ms. Zornberg said, many sleepless nights to make sure that we
25 have scrubbed everything now. We had the NYPD go back and

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1 check every -- for the existence of any crime stopper tip, you
2 know, that could have possibly come in on this. They've
3 assured us that none have come in. We've checked with other
4 prosecutors for their proffer notes. We've checked with other
5 agents and we are taking this extremely seriously.

6 (Continued on next page)

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1 THE COURT: Ms. Fender, do you want to speak to what
2 you knew?

3 MS. FENDER: Yes, your Honor. Thank you.

4 Your Honor, I think, as is obviously clear at this
5 point, enormous mistakes have been made, and by myself in
6 particular, because I was involved in the Gabriel Guillen
7 investigation as well, and all I can say is at this point it is
8 very clear that the way in which we proceed with these
9 investigations, just as Mr. Swergold said, when we made the
10 disclosure in the December letter that we've discussed a lot
11 about the confession to Mr. -- well, Mr. Guillen's alleged
12 confession, that we made that disclosure trying to do what we
13 thought we should do, which was get the information out there,
14 and made the mistake of not going back. What happened in my
15 mind is, frankly, just a mistake of not thinking about what the
16 underlying source of that information was and never going back
17 to check.

18 As far as the Danny cooperator, again, just as
19 Mr. Swergold said, that was something that was a blip on the
20 radar. Obviously, an incredibly important blip that should
21 have been turned over and compartmentalized in an appropriate
22 fashion but one that passed through our knowledge and was not
23 captured appropriately at the time. So, as I hope has been
24 made clear here, we have taken incredibly seriously our need to
25 make absolutely sure that we have chased down every possible

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1 source of any other alternate perpetrator evidence, anything
2 that even remotely resembles the information that the defense
3 is seeking, and tried to get our hands around that.

4 All I can say is, your Honor, we strive for
5 perfection. We are human. I am human. This is a huge mistake
6 and one that you will never see repeated again from myself or
7 Ms. Graham or anybody on this team because I cannot tell you
8 how seriously we are taking this. But there has never been a
9 point at any point where we intentionally determined to
10 withhold information. That's just not what happened here.

11 THE COURT: Thank you.

12 Any other defense counsel want to speak to the motion
13 in hand?

14 Ms. Macedonio.

15 MS. MACEDONIO: May we have a moment to discuss
16 amongst ourselves?

17 THE COURT: You may. I'll step down for a moment.

18 MS. MACEDONIO: Thank you.

19 (Recess)

20 THE COURT: Ms. Macedonio.

21 MS. MACEDONIO: The defense takes issue with the idea
22 that this was merely an issue of training. I think to fully
23 flesh that out, we need to think about the history of this
24 entire situation.

25 On September 20 of 2016, Robert Bishun was killed.

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1 On September 27 of 2016, a confidential informant
2 advises Mercurio, Special Agent Mercurio, that he has obtained
3 a detailed confession from Gabriel Guillen. In that
4 confession, Guillen implicates not only himself but three other
5 individuals. That's September 27, one week after the homicide.

6 Thereafter, the government --

7 THE COURT: More than three other individuals. It
8 implicates Tapia, the brother, the two named individuals.

9 MS. MACEDONIO: Right.

10 THE COURT: Or three named individuals and two others
11 unnamed.

12 MS. MACEDONIO: But there are four individuals that
13 Gabriel Guillen names who are later indicted in the Guillen
14 indictment which is currently pending in front of Judge Wood.

15 After this confession is given to Special Agent
16 Mercurio, the government sees fit to wire up the informant in
17 the hopes that he will get Guillen to confess while on tape.
18 They also go back and retrieve video surveillance which
19 corroborates what the informant had said that Guillen had
20 confessed to, because ---

21 THE COURT: Car passing guy.

22 MS. MACEDONIO: Car passing by the auto body shop. So
23 they wire him up. He goes out. There's a conversation that he
24 has with Guillen.

25 Also, the government uses this information to obtain

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1 other investigative leads. So they, in affidavits and things
2 of that nature, use at least some of the information that the
3 informant has given them to get cell site information and other
4 information in the course of the investigation of Gabriel
5 Guillen.

6 Thereafter, in March of 2017, these two defendants are
7 arrested for the Bishun homicide.

8 In August of 2017, Gabriel Guillen and the three
9 others who he mentioned during his confession are arrested and
10 charged in a narcotics case in front of Judge Wood.

11 During the course of our investigation the last couple
12 of weeks, I have come to learn that the attorneys in that case
13 were told by some of the same prosecution members at this table
14 that their clients were being investigated for a homicide.

15 On December 11 of 2017, the government turns over to
16 us the recorded conversation between Gabriel Guillen and the CI
17 and the text messages. Now, it should have --

18 THE COURT: They still had no reason to think it's a
19 false confession. They didn't think it was a false confession
20 at that point, right? It isn't until April or whatever.

21 MS. MACEDONIO: Right. Still no reason to think it
22 was a false confession. Still no reason to think text messages
23 were fabricated. But at some point it should have dawned on
24 the prosecutors in this case, why did we wire this guy up? He
25 must have told us something and where is that report? It

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1 wasn't just he wandered into the office and we said "Here's a
2 wire, go out and see what you can get on Gabriel Guillen."

3 There was an underlying reason. And so in December --

4 THE COURT: The underlying reason is that --

5 MS. MACEDONIO: Confession.

6 THE COURT: Yes, which they in their minds had
7 disclosed in that December 13 letter.

8 MS. MACEDONIO: I don't even see how that's possible
9 given the details of the confession that Special Agent
10 Mercurio --

11 THE COURT: Well, I understand, and I've ruled --

12 MS. MACEDONIO: Right.

13 THE COURT: -- in adjourning the trial that they
14 didn't give everything that they needed to give and that it
15 opened up other lines of investigation, but it is true in
16 response to the question you're raising, well, it must have
17 occurred to them that something happened that caused them to
18 wire up the CI, and the answer is yes, it was the fact that
19 Guillen had testified to this murder and, again, in their minds
20 they thought that they had disclosed and they had, in fact,
21 disclosed that.

22 MS. MACEDONIO: My review of that transcript --

23 THE COURT: Not the transcript. It's in the letter.
24 It's the statement in the letter. We can pull it up. Again,
25 it's not enough, but it says "recorded and text statements made

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1 to a confidential informant by another individual who stated to
2 CI-1 in the course of meetings and text message exchanges, in
3 substance and in part, that Individual A and others were
4 involved in the murder of Robert Bishun."

5 MS. MACEDONIO: So, we then pressed the government.
6 We're moving forward now. We pressed the government. First
7 Mr. Freeman did it, and we get back consistently --

8 THE COURT: There's nothing.

9 MS. MACEDONIO: -- there's nothing more. No one says,
10 again, "How can we wire this guy up?" But they do indicate to
11 us that there were meetings. So at some point we focus in on
12 what were the meetings, plural, and again we're told "We're
13 giving you nothing else. You get nothing else."

14 It's not until we file requesting an order from the
15 Court that they give us the rest of the material that someone
16 in this office pauses and says, "Wait a minute. There must be
17 something else." So we're taking issue with the idea that this
18 is simply a matter of training. We have prosecutors at this
19 table who were involved in both investigations, and we think at
20 a minimum it was neglect to the extent that it raises a level
21 of negligence that requires this Court to exercise its
22 supervisory powers and dismiss the indictment.

23 THE COURT: On what authority do you think I can
24 because of a high level of negligence dismiss the indictment?

25 MS. MACEDONIO: Judge, I don't have a case to cite to

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1 you at my fingertips.

2 THE COURT: You've looked. It's not there. In fact,
3 what we have is it talks about how extraordinary a remedy it is
4 to dismiss an indictment, and I haven't found -- and you
5 haven't found, because you would have cited it to me if you
6 had -- anything even closely approximating this that would
7 allow me a basis to conclude that I should dismiss this
8 indictment.

9 I mean, negligence may well be what we have, and there
10 are repercussions to negligence, but negligence is not the
11 standard for the dismissal of an extremely serious indictment
12 for which there is evidence of these defendants' involvement
13 and that the matter is to be tried by a jury.

14 There was a bail hearing. Mr. Pizarro has pressed
15 both his innocence and his request for a speedy trial at every
16 moment that he's been in court in front of me. I take that
17 very seriously, as I know counsel does, but it doesn't answer
18 the remedy question if what we have is negligence and
19 incompetence and error on the part of the government rather
20 than a willful, intentional bad faith failure to meet its
21 obligations.

22 MS. MACEDONIO: Judge, there has to be at some point
23 some deterrent right? The government --

24 THE COURT: Yes, there has to be deterrent. Look,
25 there are -- I don't know maybe this is a question for

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1 Ms. Zornberg. These kinds of things do sometimes lead to OPR
2 investigations. I don't know if that has occurred or is being
3 considered here. There's consideration in Congress now as to
4 bills to allow for civil lawsuits against prosecutors who
5 withhold exculpatory information. There has to be deterrence.

6 It doesn't mean that negligence is the standard for
7 dismissal of a very serious indictment, and I just don't see
8 any authority for that proposition. What I see is
9 statements -- I see an absence of that, and there are certainly
10 other instances of prosecutors failing, as these prosecutors
11 have. There are lots of instances of *Brady* violations where
12 comparable material comes out after trial and retrial is the
13 solution.

14 I don't see anything suggesting it appropriate here,
15 and I see a standard for dismissal as being at the highest
16 level of a bar. I obviously understand the defendants'
17 frustration, defense counsels' frustration. Defense counsel
18 has been, as far as I can tell, extraordinarily diligent from
19 the record that's in front of me in pressing on precisely these
20 points based on what you learned and being told that nothing
21 more existed. And I think at some level, as I did, assuming
22 that there was credibility behind those statements and yet
23 still pressing to the point of moving in front of me in a way
24 that produced what we have now.

25 All of that to say it is not on this record, not on

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1 this showing, not on the absence of a showing of truly bad
2 faith and intentional willful withholding of known exculpatory
3 information could I begin to imagine that dismissal of the
4 indictment is the appropriate remedy, and that showing hasn't
5 been made.

6 With respect to the spoliation issues, again, I think
7 Ms. Sternheim sort of conceded that we just don't know but no
8 showing -- it is the defense's burden to establish that the
9 delay is what would cause an irreparable harm here and that
10 showing hasn't been made.

11 So it seems to me that the obvious solution at this
12 point is to figure out what resources defense counsel need and
13 what about a time they need to follow these investigative lines
14 to fruition and proceed to trial. That is the question we are
15 faced with.

16 And I put in the order what we talked about in terms
17 of potential dates. We were sort of back and forth on May 7 as
18 to whether it would be a two-week adjournment or August, and we
19 settled on the two-week adjournment. So I will move whatever
20 needs to be moved to do this in a time that is expeditious but
21 allows the defense to pursue these lines, provide funding for
22 whatever resources you need so there can be no claim, as was
23 suggested in the defense motion, that there is any lack of
24 resources or manpower. But I just see no basis, no authority,
25 no sufficient record made for the truly extraordinary remedy of

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1 dismissal of the indictment.

2 So what, practically speaking, is the request?

3 MR. FREEMAN: Your Honor, we have -- I thought my
4 voice would be loud enough.

5 THE COURT: Nothing in this room survives without a
6 microphone.

7 MR. FREEMAN: 318 is worse.

8 THE COURT: OK.

9 MR. FREEMAN: We have a problem which I will put on
10 the record. Based on today's ruling, and your understanding of
11 the case and the facts that have been laid out before you,
12 defense counsel need time to follow these paths of
13 investigation. And we also need time, although I think we've
14 established it, but I think we need to nail down the nexus for
15 our alternate perpetrator defense. My client, Mr. Pizarro, and
16 I think I speak for Mr. Rivera as well -- I do speak for
17 Mr. Rivera as well -- they're the ones that have been in jail
18 and they want to go now. They are ready to go, and they're
19 incarcerated, and we need the time.

20 I think the solution is release on bail to allow this
21 issue to be solved by letting the defense lawyers and our
22 investigator follow these paths while the defendants are out on
23 bail. When I say bail, I mean reasonable bail, not bail that
24 they can't meet. And that's my first suggestion before we pick
25 a date.

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1 THE COURT: I'll hear from the government.

2 MR. SWERGOLD: Your Honor, the government would oppose
3 a request for bail for both defendants. I'm happy to do a full
4 bail argument now.

5 THE COURT: I mean, we've had a bail argument, and I
6 guess the question, Mr. Freeman, and I made an analysis at the
7 time, I don't see, but I'll let you make an argument how
8 anything that has occurred affects the standard that I am
9 required to an apply in making the bail determination. To the
10 extent that there is obviously alternate perpetrator evidence
11 that you're going to pursue, that seems to me not to weigh into
12 the strength of the evidence analysis that I engaged in 12
13 months ago or so.

14 MR. FREEMAN: Well, I think this is an extraordinary
15 case and an extraordinary set of circumstances that have just
16 been laid out before the Court, and I think it demands an
17 extraordinary remedy. Your Honor has ruled on the motion to
18 dismiss.

19 However, I think that the extraordinary remedy could
20 include release on bail, and I think it would be an appropriate
21 remedy under the circumstances. And it would be done in a way
22 that would assure the Court and -- I don't know about the
23 government -- but I think would assure the Court that there is
24 no risk of flight or danger to the community.

25 So we're making that application. The details would

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1 be discussed separately, but we are making that application.

2 THE COURT: Well, look, I'll let both sides brief the
3 bail issue. As I sit here, I am unaware of any circumstances
4 that have changed that actually go into the bail analysis that
5 I'm required to apply. I obviously recognize the extraordinary
6 nature of where we are.

7 MR. FREEMAN: Judge, I think this is somewhat
8 speculative but I think it's accurate. I think if we had
9 gotten the *Brady* material with respect to Guillen and with
10 respect to Alston, we would -- I should say Guillen and Danny
11 CW, I think that we would have made use much earlier and I
12 think the trial would have gone on on time, and I think that
13 the reason the trial is not going on time rests on the feet of
14 the government, and that does affect, I think, the bail
15 determination in the sense that our clients, should we get the
16 adjournment that we need, they're going to have to stay in jail
17 longer than was anticipated.

18 So that I think it does speak to strength of the
19 government's case, and I think it speaks to a delay in the
20 game, and I think that's unfortunate.

21 THE COURT: I am not in a position to evaluate that.
22 You can brief it if you want. Obviously, I sit skeptically of
23 it, not because I'm not concerned about what has occurred and
24 the effect that delay has on pretrial detention of Mr. Pizarro
25 and Mr. Rivera, but it is the case that the bail determination,

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1 the assessment of those factors is what it is. And 14 months
2 in detention is obviously concerning but not unusual for a case
3 like this, nor would I presume the additional time that's
4 needed. But I will be happy to read any authority that you
5 want to cite me. And I'll give the government a chance to
6 oppose it but I'll take that argument in writing.

7 When would you like to submit that?

8 MR. FREEMAN: Your Honor, could we revisit that after
9 we decide what the trial date is?

10 THE COURT: Yes.

11 MR. FREEMAN: Right now I would like a moment to speak
12 with my client.

13 THE COURT: OK. I can step down again. What I'd
14 asked for in my order was given the possibility certainly that
15 I would deny the motion that counsel confer and let me know
16 what the requested --

17 MR. FREEMAN: Your Honor, we did confer amongst
18 ourselves, and we did confer with the government this morning.
19 However, the added piece is the need to speak to Mr. Pizarro
20 and to Mr. Rivera.

21 THE COURT: Understood. I'll give you that time and I
22 will step down for a few moments.

23 (Recess)

24 THE COURT: Mr. Freeman.

25 MR. FREEMAN: Your Honor, we -- that is, the

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1 lawyers -- propose September 11. The only way that we can
2 figure out a way to have Mr. Pizarro tried earlier would be if
3 the defendants are severed, in which case Mr. Pizarro's counsel
4 would be ready by July 16.

5 I don't know if Mr. Pizarro is going to consent to the
6 exclusion until that time. I don't know if it's within the 70
7 day period or not.

8 THE COURT: I think you're looking at July 30 as the
9 70-day period.

10 Ms. Sternheim, just so I hear your position.

11 MS. STERNHEIM: Your Honor, as Mr. Freeman stated, the
12 attorneys having gone over this and considering the amount of
13 time that is needed to develop the information and obtain
14 information related to the newly disclosed information, that we
15 picked a date that would give us sufficient time
16 professionally, ethically and effectively to represent our
17 client in a case in which he faces life without the possibility
18 of parole.

19 THE COURT: Yes.

20 MS. STERNHEIM: We have picked a date, and in doing
21 so, we have shuffled other things to accommodate that. But
22 that is the date that I believe will give us time to
23 effectively represent Mr. Rivera. And that is our foremost
24 concern here.

25 THE COURT: Mr. Swergold.

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1 MR. SWERGOLD: Your Honor, the government will be
2 prepared to try the case at whatever date is set by the Court.

3 On the issue of severance, I want to, of course, start
4 by saying that we are even having this discussion again because
5 of the mistakes made by the government, so I'm not seeking to
6 say we make mistakes and they don't get to sever.

7 What I will say though is that under the severance
8 analysis, which has already been extensively briefed before
9 your Honor, and for the reasons set forth in those motions, we
10 think a joint trial does make the most sense. It will
11 literally be an identical trial against both defendants.

12 THE COURT: And the government's -- I mean, what is
13 your position with respect to the exclusion of time?

14 MR. SWERGOLD: I think I touched on this earlier, your
15 Honor. If the trial was within the 70-day period, the
16 government would not seek to exclude time. If the trial is
17 outside the 70-day period because the defense is asking for
18 that time in order to effectively prepare for trial, then that
19 would be an instance where even if the defendants themselves
20 objected to the exclusion of time, your Honor could, and the
21 government's position would be, that your Honor should grant
22 the exclusion in the interest of justice again because it can't
23 be a position -- the Speedy Trial Act does not work to allow
24 the dismissal of an indictment by saying we need time but you
25 can't exclude the time that we need.

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1 THE COURT: So in light of the fact that counsel has
2 indicated that they need until September 11, is the
3 government's position I should exclude from now until
4 September 11 if that's what I set trial for, or that I should
5 exclude between July 30 and September 11?

6 MR. SWERGOLD: Your Honor, the government's position
7 would be that if they need the time until September 11 to
8 prepare for trial, then the exclusion of time should be through
9 the trial date. Obviously, there needs to be an exclusion of
10 time sufficient so that the clock does not run out for the
11 purposes of the defendants preparing for trial.

12 THE COURT: All right.

13 I understand the position of the defendants and I
14 understand the position of defense counsel. What is most
15 important here is that the defense counsel are able to do
16 everything that they can to provide a strenuous and effective
17 defense of these defendants.

18 Obviously, I'm troubled by the delay, which is the
19 result of the government's conceded error. I am troubled by
20 the fact that the defendants have pressed throughout for their
21 speedy trial, as I said before, and they face continued
22 pretrial incarceration, but I must ensure within my power that
23 we have a fair trial, and that means I will give defense
24 counsel the time that they need to do the investigation they
25 do.

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1 I recognize, Mr. Rivera and Mr. Pizarro, the hardship
2 that you're facing, but it is clearly the case that what would
3 be far worse would be to proceed to trial without counsel
4 adequately prepared and ready and these lines investigated in
5 light of the very substantial penalties that you face for these
6 charged crimes.

7 I will take defense counsel written submission on a
8 renewed bail argument in light of what has occurred. I will
9 set trial for September 11, 2018. I recognize the defendants'
10 objections, but I do find that the ends of justice served by
11 granting an exclusion from speedy trial computations for the
12 period from today's date through September 11, 2018 outweigh
13 the interest of the public and the defendants in a speedy trial
14 as this time is necessary for defense counsel to investigate
15 the disclosures and prepare for trial.

16 Let me also say I would consider severance even
17 despite my earlier ruling on severance because I think the
18 government has put itself in a position where that might have
19 been the answer if what we're talking about is the time needed
20 because of schedule and the like, but defense counsel have
21 represented that the time is necessary for their investigation,
22 and certainly in light of what I've seen, the multiple avenues
23 of investigation, legitimate avenues of investigation that have
24 opened in light of the record made to me by defense counsel as
25 to what they intended to do and needed to do, and in light of

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1 the additional new disclosures containing new information, I do
2 believe that time is necessary and trial appropriately set for
3 September 11.

4 Mr. Freeman, when would you like to submit a written
5 submission on your renewed bail argument?

6 MR. FREEMAN: Ten days.

7 THE COURT: Ten days. And the government will have a
8 week to oppose.

9 Ms. Macedonio.

10 MS. MACEDONIO: Judge, we had conferred earlier this
11 morning, and we tried to come up with a schedule that made
12 sense for all counsel. I am the one, I think, who has a
13 squeaky wheel because I have another September commitment which
14 may or may not go. To the extent that goes, I have a trial in
15 front of Judge Swain. This is an earlier commitment, the
16 Pizarro trial, so if I need some help, I would hope that I
17 could call your Honor and ask that you reach out to Judge
18 Swain.

19 THE COURT: Yes. Thank you. We'll deal with that. I
20 have many matters to move if they go, but we'll proceed as soon
21 as we can and do that on the 11th.

22 Mr. Freeman.

23 MR. FREEMAN: Yes, your Honor. When I said a
24 severance, I did mean a severance of defendants so that
25 Mr. Pizarro could go first in July. But another option that

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1 came to mind is, you may recall, we moved to sever the 2015
2 robbery from the 2016 attempted robbery and homicide. And to
3 the extent that you would like to revisit that, we would also
4 be prepared to try the 2015 case earlier. That wasn't
5 affected, as far as I know, by any of the disclosures, and I
6 think we put forth strong argument at the time, but I know that
7 you denied that motion. I would just ask you to reconsider.

8 There is one other thing I'd like --

9 THE COURT: Just to spin it, I don't see a basis to
10 reconsider, but I will think about it. Of course, if
11 Mr. Pizarro were either convicted or acquitted of that crime,
12 he would still remain detained until the trial on the 2016
13 crime. So I'm not sure from Mr. Pizarro's perspective how that
14 is helpful.

15 MR. FREEMAN: Well, because of the reasons we put
16 forth in our motion, we still believe that the 2015 robbery is
17 unduly prejudicial to the trial of the 2016 case, and also it
18 would provide some movement forward in getting the cases tried.

19 However, finally, I would like to say, I would like
20 the record to be clear, I think it is already, but that
21 Mr. Pizarro does not consent to any exclusion of speedy trial
22 from today forward.

23 THE COURT: I do understand that. I had presumed that
24 from what you had earlier represented, and I'm regretful we are
25 in the position we are, but I have made my ruling with respect

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1 to the exclusion of time for the reasons indicated over the
2 lack of consent of Mr. Pizarro.

3 Any other matters to take up?

4 MR. SWERGOLD: Your Honor, there is one matter that
5 the government would just ask: Docket No. 123 in this case,
6 which has been part of the back-and-forth letter writing, the
7 defendants have done a remarkable job in respecting the secrecy
8 and the sensitive nature of a lot of the information the
9 government has turned over.

10 I just think Docket No. 123 was inadvertently publicly
11 filed, and it contains basically all of the details of the
12 information provided by the person we've referred to as the
13 Danny cooperator, and those notes and that information was
14 provided under the protective order. So we would just ask that
15 docket be taken off the public record and just be maintained
16 under seal.

17 THE COURT: Any objection?

18 MR. FREEMAN: Would the government be kind enough if
19 it has the document to hand it over because there's been such a
20 flurry of filing, I don't want to say something thinking about
21 the wrong document.

22 MS. MACEDONIO: No objection, your Honor.

23 THE COURT: Give me the Docket No. again please.

24 MR. SWERGOLD: 123.

25 THE COURT: 123 will be sealed.

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1 That did remind me, I saw no basis for the
2 government's opposition to the defendant's motion to dismiss
3 the indictment to be filed under seal, which I included in my
4 order last night, and the government filed it. I hoped it was
5 simply because the defense had filed their motion under seal
6 and not because the government was trying to hide its admission
7 of error from the public record.

8 MR. SWERGOLD: No, of course not, your Honor. In
9 fact, we were preparing trying to also include a whole factual
10 background, but given the time limits on when we needed to get
11 it done by, and your Honor's familiarity with the record and
12 our understanding we'd probably have argument today, we cut the
13 background out which would have necessitated the sealing and
14 then just didn't make the change.

15 THE COURT: I accept that representation. Thank you,
16 Mr. Swergold.

17 But on the defendant's motion, I do think that could
18 be filed in redacted form rather than fully under seal. So I
19 will ask defense counsel within the next week to file a
20 redacted version on the public docket.

21 Other matters to take up?

22 MR. SWERGOLD: Nothing more from the government.

23 MR. FREEMAN: Thank you.

24 MS. STERNHEIM: Thank you.

25 THE COURT: Ms. Zornberg, I am grateful for your

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1 presence here as well as the leadership of the office. I am
2 not a judge who likes -- I've never done that before in a case.
3 I don't like to unnecessarily give a hard time to any lawyers
4 in front of me. I hope that the steps that are being taken
5 will be fully followed through.

6 Needless to say, when I step back and think about this
7 case, which involves the murder of a witness in a federal case,
8 it was charged with capital eligible charges, I would think
9 that's the case that produces the most dotting of I's and
10 crossing of T's and supervision and level of care possible.
11 And that didn't happen here, and it is troubling. To the
12 individual lawyers involved, you've come forward now with, I
13 hope, a full statement of the errors that have been made, and
14 that's important. And even if you discover more down the road,
15 obviously there is only one reasonable option, which is to put
16 that in front of the defense and the Court as soon as possible.

17 And generally I hope what you will learn from this is
18 the need for caution and care. Your reputation as credible
19 representatives of the government and officers of this court
20 should be first and foremost in your mind, and mistakes like
21 this can lead to damage to that credibility that is not easily
22 repaired.

23 So whatever impact this has on this case, I hope those
24 lessons will be carried with you not only here but going
25 forward.

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1 Ms. Zornberg.

2 MS. ZORNBERG: You have our full assurance, your
3 Honor, that there has been no waste of time by the leadership
4 of our office, by the AUSAs at counsel table in learning the
5 lessons that need to be learned and taking every proactive
6 measure to prevent recurrence.

7 We take incredibly seriously the fact that we as an
8 office stand on the shoulders of those who came before us, that
9 we are officers of the court, that our credibility with the bar
10 and with the bench is something that is of utmost importance
11 that cannot be squandered.

12 I just want to give you my personal assurance on
13 behalf of myself and the leadership of the office that this is
14 receiving the promptest and most serious attention which it
15 deserves.

16 THE COURT: I appreciate that, and, of course, just
17 the continued attention, very immediate attention to ensure
18 that these two individuals, these two defendants have a fair
19 trial because all of the required disclosures have been made or
20 will be made immediately.

21 Thank you. We're adjourned.

22 (Adjourned)

23

24

25