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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 7, 2018
10 9:15 a.m.

11 Before:

12 HON. ALISON J. NATHAN

District Judge

13 APPEARANCES

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15 Interim United States Attorney for the
Southern District of New York
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APPEARANCES (Cont'd)

LAW OFFICES OF BOBBI C. STERNHEIM, ESQ.

Attorneys for Defendant Rivera

BY: BOBBI C. STERNHEIM, ESQ.

-and-

ROTHMAN, SCHNEIDER SOLOWAY & STERN, LLP

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BY: JEREMY SCHNEIDER, ESQ.

Also Present: Hannah Harney
Paralegal

Mayerlin Ulerio,
Paralegal

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1 MR. SCHNEIDER: Your Honor, I don't have a chair. We
2 have been trying to get furniture.

3 THE COURT: I cannot personally supply you a chair at
4 this moment, Mr. Schneider, but Mr. Scott will do what he can.

5 We have a lot to get to, so let's get to it.

6 The first thing I want to do, so that we are prepared
7 to proceed, is my law clerk will hand out what I have labeled
8 version 4 of the voir dire. It is essentially the same as what
9 I sent out over the weekend or Friday.

10 Ms. Sternheim had put in a request for a few
11 additional questions related to individual jurors. I took one
12 or two of those. I thought many of them were covered in any
13 event, but I did add to question 3 in addition to "What school
14 did you go to?" "What did you study?" which I do usually ask in
15 any event.

16 No. 4, "What do you do and who is your employer?"

17 And I clarified with 9. I asked how do you typically
18 consume news.

19 I went through the examples that Ms. Sternheim
20 proposed.

21 I have also added to this the list that the parties
22 sent with potential, with names that may come up and addresses
23 and places that may come up.

24 So I am ready to finalize that and have my staff print
25 it for when we get our panel of prospective jurors.

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1 Take a moment or two to look at that, and I will ask
2 in a few minutes whether there is anything -- just take a
3 minute to look at it now so that we can print it.

4 Anything further?

5 MR. FREEMAN: Your Honor --

6 THE COURT: I can't hear you.

7 MR. FREEMAN: Pardon me?

8 THE COURT: I can't even begin to hear you.

9 MR. FREEMAN: I will be so advised.

10 THE COURT: You can talk without me hearing you if you
11 would like, but I would like the benefit of your words.

12 MR. FREEMAN: Yes. I would hope that they get heard.

13 Your Honor, I took a quick glance at the names and
14 places, and there appears to be some names that are in there
15 twice, but I will finish reading it, and I will let you know.

16 THE COURT: We have cut and paste in what was sent in
17 to us. But perhaps that is the case.

18 What do you say? I don't see it?

19 MR. FREEMAN: From the bottom is Casheen Samuels.

20 THE COURT: Yes.

21 MR. FREEMAN: I see his name up above as well.

22 THE COURT: OK.

23 MR. FREEMAN: It is spelled differently.

24 THE COURT: OK. Does anyone know? Is the name with
25 an N or an M?

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1 MS. FENDER: It is with an N, your Honor.

2 THE COURT: N like Nancy?

3 MS. FENDER: Nancy. Yes.

4 THE COURT: So we will cut the misspelled duplicate of
5 Casheem Samuels.

6 Anything else?

7 Ms. Sternheim.

8 MS. STERNHEIM: Judge, there is a little bit of a
9 housekeeping matter, and I'm yelling because there is no
10 microphone here.

11 I understand from the gentleman who is doing tech he
12 needs a request from you for adding certain electronics. I
13 would ask that we be permitted one more monitor and a
14 microphone.

15 THE COURT: Yes.

16 MS. STERNHEIM: Thank you.

17 For today I will speak very loudly.

18 THE COURT: OK. Thank you.

19 Thank you, Ms. Sternheim.

20 Anything else on the voir dire?

21 MR. SWERGOLD: Not from the government.

22 MR. SCHNEIDER: How would you expect to put the
23 numbers of jurors so we know how to number accordingly, please.

24 THE COURT: Sure.

25 I will get as many as I can fit in the box, beginning

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1 with the seat closest to me.

2 MR. SCHNEIDER: Yes.

3 THE COURT: And working to the right, and then next up
4 closest to me and working to the right.

5 MR. SCHNEIDER: That seems to be 24.

6 THE COURT: 24.

7 And then we will, I think what we will do is then we
8 will begin in the first row on the left and work our way all
9 the way across.

10 MR. SCHNEIDER: Just to make it easier, how many do
11 you expect to put in the first row on the left and the right
12 just so we know how to write it.

13 THE COURT: I am afraid you will have to eyeball it.
14 It is not my courtroom. I think I tried a case here before,
15 but I don't recall. It depends how close jurors like to sit
16 next to each other and the like. But you can eyeball. I don't
17 know. Ten?

18 MR. SCHNEIDER: May I suggest -- if you have 24, and
19 you get a total of 38, may I suggest seven and seven? Just a
20 suggestion.

21 THE COURT: That's fine.

22 Anything else?

23 We will finalize the voir dire and print it.

24 Thank you, Mr. Freeman, for catching that duplication.

25 All right. Let's then turn to the significant issue

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1 that came in to me yesterday. I have a motion for adjournment
2 or, in the alternative, to dismiss the indictment filed by -- I
3 am not sure I took appearances, because I am rushing. Let me
4 begin.

5 Counsel for the government.

6 MR. SWERGOLD: Good morning, your Honor. Jason
7 Swergold, Jessica Fender and Jared Lenow for the government,
8 joined by Hannah Henry, a paralegal from our office.

9 THE COURT: For the defendants?

10 MR. FREEMAN: If the Court permits me, I will let each
11 of us identify him or herself.

12 THE COURT: Please.

13 MR. FREEMAN: My name is Louis Freeman I represent
14 Mr. Pizarro.

15 MS. SANDERSON: Carla Sanderson, for Mr. Pizarro as
16 well.

17 THE COURT: Good morning, Ms. Sanderson.

18 MS. MACEDONIO: Good morning, your Honor. Elizabeth
19 Macedonio, for Mr. Pizarro.

20 THE COURT: Good morning, Ms. Macedonio.

21 MS. STERNHEIM: Good morning, Judge. Bobbi C.
22 Sternheim and Jeremy Schneider, assisted by Mayerlin Ulerio,
23 paralegal for Juan Rivera.

24 THE COURT: Good morning to counsel and good morning,
25 Mr. Rivera.

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1 DEFENDANT RIVERA: Good morning.

2 THE COURT: We are here to commence trial in this
3 matter.

4 As I indicated, I did receive a motion yesterday
5 afternoon by defense counsel, a joint motion seeking
6 adjournment of the trial, or, in the alternative, to dismiss
7 the indictment based on late disclosures by the government of
8 material produced on May 4 that the defense contends is,
9 contained new information that is significant enough to affect
10 their investigative efforts and potential trial strategy.

11 I have put out two orders. One I had received
12 briefing from the defense and briefing from the government.

13 I put out an order indicating my preliminary take on
14 the issue with the express set of questions I intended to
15 pursue.

16 I did I think almost simultaneously or right after
17 that receive a reply from defense counsel, which I have read as
18 well, and I put out a supplemental order this morning
19 indicating some additional questions that I intended to pursue.

20 Let me begin with the government.

21 The question that I asked in the order this morning
22 goes specifically to one particular document that defense
23 counsel spends some time, rightly, focusing on, and that is the
24 September 27 investigative report that I asked about in my
25 order this morning.

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1 And I want to know when the government lawyers in this
2 case became aware of that document and why it was not produced
3 until May 4 and what possible grounds for that decision
4 existed.

5 To be clear as to what this document contains, it is a
6 report by Officer Mercurio or Detective Mercurio reporting
7 information provided to him by the SOI, who we have otherwise
8 referred to as CI or CI1, reporting the specifics of Gabriel
9 Guillen's confession of involvement in the murder of the victim
10 here, Bishun.

11 It talks about the CI and Guillen driving by the auto
12 body shop, Guillen providing details -- this is approximately a
13 week after the murder -- providing details about the murder,
14 describing Guillen's own knowledge of and prior dealings with
15 Bishun, describing Guillen's brother's -- who is Tapia --
16 relationship to Alston, who is the defendant, police officer
17 defendant in the case that Bishun was set to testify in, and
18 indicating that Alston told Tapia, Guillen's brother, to take
19 care of Bishun and that Guillen indicated that Tapia contacted
20 Guillen to take care of it and that Guillen along with others
21 specific named individuals would, did commit the crime that the
22 defendants here are charged with.

23 There is new information in this document, which was
24 prepared, as I said, approximately one week after the murder,
25 and this conversation took place on September 27, 2016.

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1 Who will I hear from?

2 MR. SWERGOLD: I will be speaking, your Honor.

3 THE COURT: First, to confirm, this document was not
4 turned over to defense counsel until May 4, 2018, that is
5 Friday.

6 Is that correct?

7 MR. SWERGOLD: Correct, your Honor.

8 THE COURT: Why?

9 MR. SWERGOLD: Your Honor, if I can take sort of all
10 the questions that were wrapped up there --

11 THE COURT: You can.

12 MR. SWERGOLD: -- and also in your Honor's order.

13 The government learned of the existence of the
14 confession at the or around the time that it took place, which
15 was in September 2016. That's about seven months before these
16 defendants were charged in this case.

17 The government received this 6, which contains the
18 details, in or around August 2017, around the time of the
19 arrest of Gabriel Guillen in the unrelated case. There is an
20 unrelated case where Guillen and the members of his drug
21 trafficking organization are charged, and as part of preparing
22 for that, excuse me, that indictment and discovery we received
23 the 6 from the DEA.

24 THE COURT: What was the date of that?

25 MR. SWERGOLD: That is August 2017.

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1 I think it is important, your Honor, to understand
2 that at the time the government -- first of all, at the time
3 that the government initially learned of the confession, seven
4 months before these defendants were charged, right, the
5 government was looking at a number of different people.

6 Robert Pizarro and Juan Rivera were already on the
7 government's radar. Robert Pizarro was on the government's
8 radar September 21, 2016, the day after the murder, and the
9 government was looking into a whole variety of people who may
10 have been involved in the murder.

11 Then, in March 2017, despite the fact that this is
12 this what we believe is a false confession, which the facts
13 show is a false confession, we charged these defendants with
14 the murder because the evidence points to them, not to Gabriel
15 Guillen, not to anybody else.

16 Then in December of --

17 THE COURT: Well, to be clear, this evidence points to
18 Guillen.

19 MR. SWERGOLD: Right.

20 Apart from this confession, your Honor, which the
21 other evidence shows is false, and which this confession itself
22 contains no details that are anything other than public
23 information about the actual killing -- and I will get to
24 those.

25 But, putting that aside, in December of 2017, the

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1 government produced to the defense a discovery letter, one
2 page, in which it stated that another individual, individual A,
3 had confessed in meetings, plural, and text messages to a CI
4 that he and others were involved in the murder of Bishun.

5 In conjunction with that letter, we produced the
6 recording that your Honor asked for the transcript last night,
7 and I want to walk through that transcript, because there are a
8 number of significant details in that transcript that are facts
9 that are in the DEA 6 that we are talking about.

10 So we produced the transcript and the recording, and
11 we produced the three text messages.

12 At the time the government, that the government
13 produced that, there was not a decision -- there was no
14 decision, We cannot produce this DEA 6.

15 The decision was, Let's get the fact out there that
16 there is this confession while we try to figure out what it
17 means.

18 Because, quite frankly, from the government's view at
19 that time, it was unclear whether it was Rule 16, because
20 Guillen was a coconspirator, or whether it was *Brady*, because
21 it was a truthful statement by Guillen, or whether it was just
22 a false confession.

23 And so if you look at the defendant's letters, they
24 make it seem as if there are only two points in time, December
25 11, 2017, and May 4, 2018.

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1 Your Honor knows -- because they have attached all the
2 letters that took place between then -- that that simply is not
3 true.

4 Because then the government continued to investigate.
5 We learned then that the text messages were fabricated. We
6 immediately disclosed that information to the defense.

7 The defense suggests in their letter that the
8 government led them to believe that any information about
9 Guillen was false.

10 That is simply not true. The letters that they have
11 attached to their own filings show that what we said to them
12 was that the text messages were fabricated.

13 Now, in the -- so at the time, in December 2017, this
14 is what the defendants knew. They knew that there was another
15 individual out there who had confessed to being involved in the
16 murder. We then gave them that Elizabeth Macedonio on February
17 8, 2018, which they -- which is -- sorry -- no, 2018. That is
18 almost three months to the day before this trial started, so
19 that they knew that his name was Gabriel Guillen.

20 Quite frankly, your Honor, one thing to remember is
21 that *Brady* does not require immediate disclosures every time
22 the government comes into a piece of information. The
23 government is allowed to investigate it.

24 The point is to produce it sufficiently in advance of
25 trial to let the defense make use of it to see if it leads to

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1 anything.

2 THE COURT: Mr. Swergold, I am fully aware of what the
3 law is and what the requirements are.

4 The question is not my awareness. It is the question
5 of whether the lawyers on this team were aware and met those
6 obligations.

7 MR. SWERGOLD: OK, your Honor.

8 Knowing that, I want to focus on what information was
9 available to the defendants. Yes, they learned Guillen's name
10 in February. That's three months before trial. I want to talk
11 about what information was available five months before trial.

12 THE COURT: Just so I understand, come December 11,
13 2017 you made a decision, We need to tell them that someone has
14 confessed to this crime --

15 MR. SWERGOLD: Uh-huh.

16 THE COURT: -- that is not the defendants?

17 MR. SWERGOLD: Right.

18 THE COURT: And there are text messages, there is a
19 recording, which I will appreciate you walking me through it.

20 I don't think it actually does contain, but you will
21 tell me if I am missing it, Mr. Guillen stating that he was
22 involved in the crime in the way that the September 27 document
23 indicates.

24 And you made a decision to turn over the text messages
25 which implicate Guillen in the crime, but you made a decision

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1 not to turn over the September 27 investigative report.

2 MR. SWERGOLD: Right.

3 Again, your Honor, at the time -- and nobody said we
4 can't turn this report over. At the time we gave them the fact
5 of the confession, we gave them the text messages, we gave them
6 the recording, because, again, we were still --

7 THE COURT: Did you give them the assertion that --
8 well, let's run through these one at a time.

9 Did you tell them that there was a connection between
10 Guillen and Alston?

11 MR. SWERGOLD: Your Honor, the text messages which at
12 the time everybody believed to be true and believed that all
13 the way through until late January when the CI then admitted
14 that --

15 THE COURT: Give me a yes or no and then give me your
16 explanation. Did you tell them --

17 MR. SWERGOLD: The answer is yes.

18 THE COURT: -- of the connection between Guillen and
19 Alston?

20 MR. SWERGOLD: Yes, in that the text messages state
21 that when he is talking about the fact of the murder he says
22 nobody will know that the cop -- he's admitted that he's the
23 person who did the killing, and we've disclosed that. Nobody
24 will know that the cop ordered it, so let's not talk about it
25 anymore.

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1 And there's no ambiguity about who he's talking about,
2 because everybody at the time was talking about the fact that
3 Mr. Bishun was set to testify against Merlin Alston, the NYPD
4 officer.

5 THE COURT: What that shows I think potentially in
6 that text message is that Guillen is aware that the murder is
7 ordered by a cop.

8 The September 27 letter includes that, the September
9 27 investigative report includes that Guillen has a
10 relationship and nexus and connection to Bishun, right?

11 MR. SWERGOLD: Yes.

12 THE COURT: That is not included in that text message?

13 MR. SWERGOLD: No, your Honor. That is included in
14 the transcript of the recording.

15 THE COURT: OK.

16 So you'll walk me through.

17 We've got Guillen's connection to Alston via his
18 brother.

19 Where is that in the information provided in December?

20 MR. SWERGOLD: Your Honor, that specific fact that
21 Guillen's brother knew Alston is not in the text messages and
22 is not in the recording. It is only in the 6.

23 THE COURT: The involvement of Tapia, Guillen's
24 brother, that fact is given to the defense in any form when?

25 MR. SWERGOLD: Again, that is in the 6, that Alston

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1 asked Tapia, who asked Guillen, according to Guillen, that
2 Alston asked Tapia, who asked Guillen, who then asked others to
3 do the murder.

4 That is in the 6. We will get back to this, your
5 Honor, because --

6 THE COURT: OK.

7 We have at least identified one fact and individual
8 who is included in that September 27 report who the defense is
9 not made aware of the government's information with respect to
10 that connection and potential person involved until May 4,
11 right?

12 MR. SWERGOLD: That is correct, your Honor.

13 THE COURT: So then the next is the first one that I
14 asked you, Guillen's connection to Bishun.

15 MR. SWERGOLD: Right. So, your Honor --

16 THE COURT: And you point --

17 MR. SWERGOLD: Sorry. Go ahead.

18 THE COURT: You point -- well, you tell me. Guillen's
19 connection to Bishun.

20 MR. SWERGOLD: It is in the transcript, your Honor, if
21 I can walk you through it.

22 Before we do, I want to give you just a little bit of
23 context that will help you understand the transcript.

24 THE COURT: Go ahead.

25 MR. SWERGOLD: After the CI reported this so-called

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1 confession, which is not recorded -- the confession itself is
2 not recorded. As your Honor rightly points out, the government
3 then tried to get something on tape from him. That's the
4 substance of this -- that's what this transcript is, and
5 there's not a direct confession in here, but there is a lot of
6 very important facts, all of which the defense had, all of
7 which gave them ample opportunity to investigate Guillen and
8 his connection and his crew quite frankly.

9 THE COURT: But not a direct confession.

10 MR. SWERGOLD: But not a direct confession.

11 THE COURT: Which is different from the September 27
12 report.

13 MR. SWERGOLD: But the letter from the government made
14 clear that the confession -- it is not that the confession
15 isn't here. The letter on December 11 said that in meetings
16 plural -- and this is something that defense counsel
17 highlighted in one of their earlier motions. They said, well,
18 there was more than one meeting, and all we have is the
19 recording.

20 THE COURT: They were asking you repeatedly for what
21 else there was.

22 MR. SWERGOLD: Right.

23 THE COURT: That would suggest that line contained in
24 the government's letter?

25 MR. SWERGOLD: Right. But the --

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1 THE COURT: You had that in the September 27
2 investigative report, and you continued to make the decision to
3 withhold it.

4 MR. SWERGOLD: Your Honor, again there was never --

5 THE COURT: Yes?

6 MR. SWERGOLD: No, your Honor. That is not true.

7 There as never direct decision to withhold.

8 Was it a mistake for the government, after facts kept
9 evolving, to then go back -- we should have gone back and said,
10 Wait a minute, was there any other document now that needs to
11 come out?

12 Now that we have produced all of this, now that time
13 has passed, now that we have had told them about the issues
14 with the CI should we have gone back and seen it? Yes.

15 THE COURT: You did that. You did it on May 4.

16 MR. SWERGOLD: Should we have done it sooner? That's
17 what I am saying. Yes.

18 THE COURT: There is zero doubt in my mind that you
19 should have done it sooner.

20 MR. SWERGOLD: Yes. And we admit --

21 THE COURT: You should have given them this report.

22 MR. SWERGOLD: Your Honor, we admit it was a mistake.

23 Here's why it doesn't matter.

24 I want to talk about -- if you start on page 87 of the
25 transcript.

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1 THE COURT: I have it.

2 MR. SWERGOLD: If you look on the third line, did you
3 see -- the confidential source says: Did you see the sign on
4 the door there, on the door at the McDonald's? What did it
5 say? Did you see? What did it say?

6 The photograph of the guy from the garage.

7 What they are talking about there is the wanted -- is
8 like a wanted poster for information that the NYPD put out.
9 That's what sparks the conversation.

10 And then, right, the photograph of the guy at the
11 garage, the guy on the news, and then they start talking about
12 it.

13 And if you go to page 89, individual A, who is
14 Guillen, says, The thing is that guy is a snitch, Toty. Shit
15 make themselves big --

16 THE COURT: I'm sorry. 89, what line?

17 MR. SWERGOLD: Right at the bottom.

18 THE COURT: Yes.

19 MR. SWERGOLD: It is going to carry over to the next
20 page.

21 THE COURT: OK.

22 MR. SWERGOLD: The thing is that guy is a snitch, Toty
23 Shit make themselves big. 2,500 to anyone with information --
24 that is a reference to the reward -- the snitch is left empty
25 from the information. That's useless.

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1 Then he goes down and says: I knew that thug was
2 snitching, from, from Fort Dix. Floss used to tell me he is no
3 good. Come buddy.

4 And the "come buddy" is actually, they're -- you will
5 see throughout this there's like -- interspersed because
6 they're driving, and he's giving him directions.

7 So right there, individual A, Guillen, is saying that
8 he knew Rob Bishun was a snitch back when Guillen was in Fort
9 Dix.

10 Then he provides later -- later, if you go to 93, your
11 Honor, right in the middle, confidential source: But wasn't
12 that dude also your buddy, I mean, the dead guy?

13 Individual A: He used to give drugs to one of my
14 connections, and then they would give me.

15 And then he says: It's so good, dude, that he got
16 killed.

17 So right there he is admitting that he knew Bishun.
18 He's admitting that they had a common individual related to
19 their drug trafficking, and he's saying -- he's basically
20 reveling in the fact that he got killed.

21 Then you go to the next page.

22 Individual A, which is around the -- just below the
23 middle of the page: Look, yes. But dude, look, at how life
24 is. This guy, right, for 1500, and for me to have problems on
25 my back, I was going to talk. They really wanted him dead.

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1 Sure.

2 The thing is that all the guys that he testified
3 against, they're all going to have their time reduced their
4 cases, all the ones who are fighting the cases because -- and
5 then it goes down -- because now there isn't -- there isn't,
6 you know what I'm saying, there isn't.

7 And so they're continuing to talk about it.

8 And then he says -- being the CS, asks, the CS asks
9 whether Bishun had cooperated against Guillen.

10 And Guillen says: I was already locked up. I was in
11 jail already. Basically, so I knew he was a snitch, but he
12 wasn't snitching against me because I had already been locked
13 up before Bishun got locked up.

14 Then he says -- and then he gives more context.

15 The confidential source says: At some point did he
16 cooperate against you Toty, as well?

17 And Guillen says: No, because I was already in jail.
18 I was arrested in 2012. Between 2011 and '12 I got arrested,
19 but their cooperation began when I was already in jail. I was
20 already arriving at Fort Dix.

21 Then he gives even more details about his knowledge of
22 Bishun on page 96: I was already in Fort Dix. It all started
23 in 2013 and on.

24 He got caught in 2012 and he began investigating. He
25 started to rat out everyone. And it was then when Floss and

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1 some other dude told me, Yo, be careful with these dudes. Find
2 out around your neighborhood if this dude didn't go to jail,
3 and this one did not go to jail none of them are in jail. But
4 what do they mean they're not in jail?

5 So it was in that moment when, bang, see what happened
6 to him? He got out six months ago, and they killed him. Well,
7 they strangled him, they took him out they kidnapped from his
8 place of business and everything, and then they choked him and
9 then they tied the workers up inside.

10 Confidential source: Really?

11 You know that is something that was done by the copos,
12 brother, that's for sure.

13 Then he says -- the confidence source says: The
14 police ordered it?

15 He says, Man, the police did it, right? Because
16 police officer are already fucked up, and they know the laws
17 here. He knows that shit. Go there now, kill that guy, and
18 most likely the guys weren't even from this country, most
19 likely they have workers from, from, you know, right -- that
20 guy was dealing heroin. When they deal heroin to -- to know
21 that the guy's -- they're all snitches.

22 Then he says: The snitches have to be taken out,
23 dude.

24 So up until this point in the conversation now, which
25 is the defense had in December, they know that Guillen has a

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1 prior existing relationship with Bishun that is related to drug
2 trafficking. They know that he is aware before -- years before
3 the murder even takes place he is aware that Bishun is a
4 cooperator. He's talking about the cops being involved in the
5 murder. He's talking about the fact that -- he's talking about
6 details of it, which, again, one of the reasons why the
7 government says that this confession is actually not that
8 detailed in the 6 is because the actual facts of the murder
9 were publicly reported at this time, and he's just repeating
10 them, but here he's saying them as if he knows them. They tied
11 up the workers, you know that -- inside, they strangled him,
12 they kidnapped him from his place of business and they choked
13 him.

14 Then, if you keep going, after he says, The snitches
15 have to be taken out dude on 97, the CS says: I agree with
16 that.

17 And then Guillen says: They have to be taken out,
18 dude. I know there's a lot of competition. I know this, that
19 there's enough for everybody. There's enough money for
20 everyone. I don't care how you slice it up.

21 Then he talks about something related to his family.

22 Then, if you keep going, he talks -- on page 99 he's
23 again talking about snitches, right?

24 The CS is sort of asking him questions. He's saying,
25 like, the CS says: I would pay to get him killed.

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1 He says, To take him out.

2 And then he says, Man, that guy's good for nothing
3 Toty. He's a dirty -- he's a pig.

4 They're talking about somebody else at that point.

5 Then he says -- if you go to, if your Honor goes to
6 101 -- again, this is all information to give them background
7 in Gabriel Guillen.

8 He says but now they're talking about -- this is not
9 Bishun because --

10 THE COURT: Go ahead.

11 MR. SWERGOLD: Do you need a copy, your Honor.

12 THE COURT: I'm missing 101.

13 MR. SWERGOLD: We can hand up a paper copy, if you
14 would like.

15 THE COURT: OK.

16 Go ahead.

17 MR. SWERGOLD: Thank you your Honor.

18 On 101, now they're -- again, this is all information
19 about Gabriel Guillen.

20 They have moved on from Bishun, but this is important
21 information if the defense wants know what kind of person
22 Gabriel Guillen is, because they say that the government never
23 told them that he was involved in -- that he was the head of a
24 drug trafficking organization, which, by the way, we disclosed
25 in our February 8 letter, that says, Guillen, the head of a

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1 drug trafficking organization.

2 But then he says here: But the guy knows, and I'm
3 just waiting because I want someone to get close to him,
4 someone else, who's also no good, and for him to be hanging out
5 with him as well so that they can tell me everything so that I
6 can give him something, give him something, and then I'll take
7 him down.

8 And then he says -- he talks about the fact that he
9 puts together a crew.

10 This is on bottom of 102: I'm putting together a crew,
11 and the crew that's coming up, this group, they're not
12 kidnapppers.

13 But then he says, But it may happen.

14 THE COURT: Where are you?

15 MR. SWERGOLD: Bottom of 102, into 103.

16 He's talking about putting together a crew in a later
17 point in time, saying: This crew is not kidnapppers because
18 that's not my thing, but it may happen.

19 Then he says, if you go to, if you go to 105 -- 104
20 into 105, your Honor, now they are having an additional
21 discussion about killing people who they believe are
22 cooperators, and he's actually talking about the fact that it's
23 easier to kill a cooperator that is not in some way related to
24 somebody that you're around.

25 So here they are talking about the fact that he says

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1 because -- this is on 105: Because if I were some other dude
2 who is not related to us, I would say like this, in life it
3 doesn't matter. Do you know what -- do you know that it
4 doesn't matter?

5 But when you do that to a guy who is the brother -- he
6 goes to say brother, but then it stops -- even worse, his
7 brother is always there. You will have to see his brother
8 there all the time. He would always be saying this, Damn, my
9 brother got killed. Man, all I want to -- all I want is to
10 know who did it. And when you know that it was you, us, who
11 did it, that doesn't sit well.

12 So that conversation is talking about how he
13 distinguishes between killing people that are cooperating who
14 are close to somebody who is in his crew versus somebody who is
15 outside of his crew.

16 Then if you go to 107, now he's admitting that he's
17 ordered other people to kill for him.

18 The confidential source says: But, come on, so then
19 you have to be careful Toty, because if you're saying that
20 Matthew has already killed on your behalf --

21 And individual A says yes.

22 Then, if you go to skip around, they talk about some
23 other stuff.

24 Page 113 they talk about another killing that he's
25 involved in.

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1 And then if you go to, again, there's some more
2 discussion, there's more discussions, violence on page 123.

3 That is not -- that's not specific.

4 Then on page -- then, your Honor, it -- the transcript
5 resets, because it was done in two parts.

6 THE COURT: Uh-huh.

7 MR. SWERGOLD: If you keep going to what would then be
8 page 12 of the new, of the second part, right in the middle,
9 they're again talking about something else, and Guillen says:
10 The feds pick you up and I kidnap you --

11 The confidential source says: Exactly.

12 And so, your Honor, what the information that is
13 contained in this transcript, which was produced to the
14 defense, shows that they have this individual name, who we
15 later say is Gabriel Guillen, so they know that there's this
16 person out there.

17 And then after the parts we've gone through, your
18 Honor, there is significant discussion about drug dealing. So
19 they know he is a drug dealer, and he's -- and even in the
20 parts we talked about, they are talking about drug dealing.
21 They know he's drug dealer, know that he, that he has a prior
22 connection to Robert Bishun.

23 They know that he was aware of Bishun as a cooperator
24 in advance. They know that Guillen is saying that the cops
25 were involved in the murder.

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1 They know that Guillen is a violent person who has
2 ordered other people to kill.

3 They know that Guillen is a violent person who talks
4 about other violence that his crew is talking about.

5 They know that Guillen is somebody who has recounted
6 details about the murder.

7 And then they have the text messages that also show
8 that he said that the cop ordered it.

9 So again, your Honor, the two points that you have
10 identified were not in any of what we just talked about, but in
11 terms of having over three months to investigate Gabriel
12 Guillen and his crew -- who are all charged, right, all their
13 names are on the docket sheet -- and to know about these
14 people, to know what they are capable of, to know what their
15 views are, to see them as somebody -- if they've truly believed
16 that Gabriel Guillen is person who did this murder, and they
17 want to ask themselves, well, is he somebody who's capable of
18 it, is he somebody who could -- who knows Bishun, who has
19 connections to the cops, it is all laid out in the discovery in
20 December 11, 2017.

21 And to be clear, your Honor, if we --

22 THE COURT: If you take that in conjunction with the
23 name being provided in February.

24 MR. SWERGOLD: Right, in February, right.

25 THE COURT: So it's not all --

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1 MR. SWERGOLD: Right.

2 THE COURT: I mean, there is an individual for whom
3 you just went through is laid out.

4 MR. SWERGOLD: Right.

5 THE COURT: Who that individual is isn't known until
6 February.

7 MR. SWERGOLD: Right. Which is still three months in
8 advance of trial, your Honor, three months to the day tomorrow,
9 because it was a February 8 letter.

10 Again, to make -- to be perfectly clear about this, at
11 the time when we produced it, the government did not know
12 whether this was, again, Rule 16 or *Brady* or just a false
13 confession that means nothing because it -- we were continuing
14 to work on the theory that there could have been other people
15 who were involved.

16 Now, the video shows that there was only this one car
17 over and over and over again and two people getting out of the
18 car outside of the shop. That's all obviously been produced in
19 discovery since the beginning of this case.

20 But the government was continuing to investigate, and
21 in fact has identified another person who was involved in an
22 earlier attempt in April that's Casheen Samuels. That's the
23 person who is charged in the case before Judge Ramos of which
24 we sent the related case letter to your Honors and to the
25 defense counsel.

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1 So it's not like the government just took this, just
2 had this information and said, Hmm. We continued to
3 investigate. We tried to find anything that would suggest that
4 this confession was true. We tried to find anything that could
5 suggest that these people were involved.

6 We have found nothing, and we've given the defense
7 counsel -- to take your Honor's point of when the name was
8 given -- they have had all of the information they had plus the
9 name three months to investigate.

10 . And I don't see in any of the defendant's filings
11 any discussion of what they've done with this information, and
12 I would submit, your Honor, that, you know --

13 THE COURT: I am going to get to that, as my order
14 from last night made clear.

15 MR. SWERGOLD: All right. Before I get to that --

16 THE COURT: Let me just continue to try to nail down
17 as clearly as we can what is new information from May 4.

18 Obviously, there's the document which your late
19 disclosure of it I think well indicates the mistake that you've
20 conceded, that it should have been disclosed earlier.

21 There is, of course, the separate question of how it
22 changes anything, what could be done with it. That's why I
23 think it is vitally important to identify as clearly as we can
24 what is new information.

25 I think so far I agree that the transcript shows the

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1 connection between Bishun and individual A, who came to be
2 known as Guillen. I think it does show that individual A,
3 Guillen, was involved in drug trafficking, and that he has
4 awareness of Bishun as a cooperator as well as Guillen's
5 expressions of interest and potential involvement in acts of
6 violence, including murdering of cooperators.

7 So that is there with respect to Individual A in
8 December, and therefore Guillen in February. Not there is that
9 Guillen himself gave a detailed confession to his own
10 involvement in that murder.

11 Now you point out that the December 11 letter includes
12 that factual statement. That is not in the transcript, but I
13 gather you are saying that it is in the text messages?

14 MR. SWERGOLD: Right. It is in the text messages.
15 It's in the letter, and it's not in the transcript, again
16 because we didn't -- that initial confession that is reported
17 in the 6 was not recorded.

18 That's what let to the recordings, right. It was
19 government saying, OK, we can't just take the word of this CI.
20 Let's try to get something on tape here.

21 Obviously, Guillen did not give a full confession on
22 tape. He said a lot of very important things for purposes of
23 giving the defense the ability to investigate the text messages
24 themselves, which at the time the government did not know were
25 false and did not learn about until late January, gave the

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1 confession, gave the link to Alston, and put Guillen squarely
2 in it. And the letter again references the fact that there are
3 un-- that there's this unrecorded meeting, again, not in the
4 detailed --

5 THE COURT: OK. Let's stay focused on isolating.

6 You have admitted that not ever provided to the
7 defense, what's contained in the September 27 investigative
8 report, not provided to the defense until May 4, Friday, is the
9 name Tapia?

10 MR. SWERGOLD: Uh-huh.

11 THE COURT: Who is Guillen's brother?

12 MR. SWERGOLD: Correct.

13 THE COURT: Who we are told by Guillen in that
14 investigative report that Alston told Tapia to have Bishun
15 taken care of, and that Tapia tells Guillen to have Bishun
16 taken care of, I mean, as suggested in Guillen's confession,
17 the sort of specific direction of the hit of Bishun.

18 MR. SWERGOLD: Uh-huh.

19 THE COURT: That is not given to the defense until May
20 4.

21 MR. SWERGOLD: Yes, your Honor.

22 THE COURT: Let me ask you.

23 You brought your *in limine* motion making sure that
24 everybody was aware of the law around alternate perpetrators.

25 MR. SWERGOLD: Yes.

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1 THE COURT: So let's say that during the course of the
2 trial the defense wanted to question the investigators about
3 Tapia. Would you have objected?

4 MR. SWERGOLD: Would we have -- well, we would have
5 objected to the fact that there is no witness on our witness
6 list who knows -- who was involved in the investigation about
7 Tapia, who wouldn't have even known about Tapia. Our witnesses
8 are NYPD officers who came to a crime scene and collected
9 evidence or NYPD officers --

10 THE COURT: So none of the investigators are aware of
11 the Mercurio report?

12 MR. SWERGOLD: Who are our on our witness list? Yes,
13 that's right, your Honor.

14 Because we are not putting on a case -- because it is
15 not proper, we are not putting on a case agent to sort of walk
16 through the jury through the excitement of an investigation and
17 how we got where we are.

18 We are just putting the evidence in through the
19 individual officers who recovered a piece of evidence or
20 through an officer, an agent who analyzed cell sites or a
21 criminalist who --

22 THE COURT: Let's say the defense wants to put on a
23 witness suggesting that -- let's move away from the sort of
24 evidentiary question, but they have some admissible means by
25 which to suggest that Tapia is involved, and sort of relaying

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1 that Tapia is this important connection between Alston and
2 Guillen and Bishun.

3 Would you have objected on the law that you cited in
4 your *in limine* motion that there would be an insufficient
5 nexus?

6 MR. SWERGOLD: Just one moment, your Honor.

7 Again, your Honor, we would have, because --

8 THE COURT: I'm sorry. You would have?

9 MR. SWERGOLD: We would have, because in your Honor's
10 hypothetical -- I mean, first of all, we are not aware of what
11 this admissible evidence might be. The confession would come
12 in, if they were to call the CI, which we don't think it comes
13 in any way because it's two layers of hearsay. The underlying
14 confession is not sufficiently a statement against penal
15 interest given the fact that there are no corroborating facts
16 that are required to admit that kind of statement.

17 And so there is no -- they have Guillen. They have
18 Guillen saying that the cop ordered it. The fact of Tapia
19 being the connection comes from Guillen. It all comes from the
20 confession. That's what they want to put into evidence. That
21 is inadmissible. They haven't demonstrated any nexus.

22 THE COURT: I'm sorry. They haven't demonstrated any
23 nexus?

24 MR. SWERGOLD: Any nexus between Guillen and this
25 crime other than his statement, which is the evidence they want

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1 to get in, right. The idea is, if you have evidence of an
2 alternative perpetrator, which here is just this confession,
3 you've got to have something more to put it in. There is
4 nothing more. We have found nothing more; they have found
5 nothing more.

6 THE COURT: Well, that's the question, whether they
7 could have found more if you had disclosed what you obviously
8 were required to disclose.

9 MR. SWERGOLD: Your Honor, we don't think they could
10 have found anything more. We are interested to hear what steps
11 they've taken and how this information --

12 THE COURT: I just wanted to understand, now that we
13 know what is in that confession, and maybe there would be
14 admissibility issues, but if that's where you're hanging your
15 hat, I mean, hypothetically let's say one of your investigators
16 was aware of Mercurio report. I mean, you're telling me it's
17 not true. Strange.

18 MR. SWERGOLD: No, no, no.

19 To be clear, your Honor, our investigators know of the
20 report. They are just not witnesses at this trial. We are not
21 calling our investigators to testify. We are calling members
22 of the NYPD who collected evidence at the crime scenes or
23 responded to --

24 (Continued on next page)

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1 THE COURT: By your investigators, I meant the
2 investigators of this crime.

3 MR. SWERGOLD: Right. The investigators of this crime
4 are the case agent and the special agents in our office.
5 They're not testifying. They're not. We are putting the
6 evidence in through the individuals who collected that evidence
7 or who analyzed the cell site, which is somebody unrelated to
8 the investigation.

9 THE COURT: Was a decision made not to show the
10 September 27 report to anyone who would testify in this trial?

11 MR. SWERGOLD: No, your Honor. Your Honor, when the
12 government prepares a witness for trial, we keep our witnesses
13 in their lanes. So if you have a witness who responded to the
14 crime scene and collected a cup and a sneaker and took a
15 picture of a bloody shoe print, that's what that person knows
16 about this investigation. The government does not educate them
17 about everything else about the case because --

18 THE COURT: It is often the case when law enforcement
19 witnesses testify in a trial about the investigation that those
20 are going to be people who would have seen something like the
21 September 27 report.

22 MR. SWERGOLD: You know what, your Honor, that's not
23 true. In fact, the trial I just --

24 THE COURT: It is true.

25 MR. SWERGOLD: Your Honor, there is no reason why an

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1 evidence collection detective from the NYPD who showed up at
2 Robert Bishun's garage on September 20 collected evidence, and
3 that was the end of their involvement in the case, would know
4 anything about what else was going on. There's a homicide
5 detective who's involved in the investigation. There's a DEA
6 special agent. There are special agents in our office. Those
7 people know about it because they're running the investigation.

8 THE COURT: So to be clear, we are trying individuals
9 for the murder of someone who was about to be a witness in a
10 federal case.

11 MR. SWERGOLD: Yes.

12 THE COURT: And none of the law enforcement witnesses
13 who you are going to put on are anybody who investigated the
14 possibility that the murder had something to do with that. Is
15 that right?

16 MR. SWERGOLD: That's right, your Honor.

17 THE COURT: OK.

18 MR. SWERGOLD: Because we don't need to -- none of our
19 current witnesses would have that information, and that
20 information is not related to our theory of the case because
21 it's not what happened.

22 THE COURT: It does seem as though -- you're telling
23 me it was not a conscious decision not to turn over that
24 September 27 report. That better be true.

25 MR. SWERGOLD: Your Honor, I am representing to you as

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1 an officer of the court and an Assistant United States Attorney
2 that nobody in our office said "we're not turning over this
3 report." We said --

4 THE COURT: Well, somebody on May 4 decided to turn
5 over the report.

6 MR. SWERGOLD: We did.

7 THE COURT: And I'm guessing you had other individuals
8 involved in that assessment. Am I right?

9 MR. SWERGOLD: Your Honor, it has gone all the way up
10 to the chief of the criminal division and the department United
11 States Attorney.

12 THE COURT: And that decision on May 4 was turn over
13 that report.

14 MR. SWERGOLD: Yes.

15 THE COURT: But that decision with knowledge of that
16 report was not made prior to bringing other people into the
17 assessment of that decision.

18 MR. SWERGOLD: No, your Honor --

19 THE COURT: What you did was: We're going to give you
20 a peek under the tent. We're going to give you the transcript.
21 We're going to give you the text messages, and we're going to
22 include that line, but we are not going to give you the full
23 monty.

24 MR. SWERGOLD: Your Honor, again, the context is that
25 we gave them the facts to start investigating. It was a

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1 mistake for the government after learning more information to
2 not go back and say let's make sure there was nothing else to
3 give them which was the report, which, as your Honor pointed
4 out, contains these two new facts. The government's position
5 is, again, it was a mistake not to do it then. There was never
6 a conscious decision to suppress the report. That is not what
7 happened in this case. We were not ordered to turn it over by
8 the higher-ups in our office. I'm simply saying they were
9 briefed on the situation and are aware of it. The team made
10 the decision to turn it over at this time. We concede that it
11 was a mistake not to turn it over. We don't think it makes a
12 difference in light of all the evidence --

13 THE COURT: I just want to get this down. So
14 December 11 when you give that peek under the tent, there is or
15 is not a decision to turn over the September 27 investigative
16 report?

17 MR. SWERGOLD: At that time there was a decision not
18 to turn over the specifics of the report for the same reason
19 that we did not name Guillen at that time --

20 THE COURT: And when the defense repeatedly asked
21 about meetings, plural, when all they've been given is the one
22 recorded conversation, give me the timeline on those requests.
23 Number one was?

24 MR. SWERGOLD: If I may, I need to look back, your
25 Honor.

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1 THE COURT: February 8, right?

2 MR. SWERGOLD: So we provide the December 11 letter.
3 We then provide the January 25 letter that talks about the fact
4 that the text messages are fabricated.

5 THE COURT: Let's take January 25. A decision was
6 made, yes, not to turn over the September 27?

7 MR. SWERGOLD: Your Honor, I respectfully disagree.

8 THE COURT: That's a question.

9 MR. SWERGOLD: But, your Honor, I can't answer that
10 yes or no. I respectfully disagree with the characterization
11 because *Brady* does not require the turning over of the specific
12 report.

13 THE COURT: I'm not making an assessment yet of
14 whether there was a violation. *Brady* is about an assessment of
15 overall materiality and prejudice. The question is about as
16 officers of the court, as members of the United States
17 Attorney's Office of the Southern District of New York and,
18 frankly, just as lawyers, whether -- all I'm asking is on that
19 date, was there a conscious: "Should we turn over the
20 September 27 investigative report? We don't need to, no."

21 MR. SWERGOLD: At that time, your Honor, there was no
22 decision made about it because the January 25 letter was merely
23 addressing the fact of the text messages.

24 THE COURT: OK. So then the next is, what,
25 February 8?

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1 MR. SWERGOLD: Right. There's the February 4 letter
2 which from the defense which does ask for any and all
3 information that CI-1 supplied to the government surrounding
4 the homicide of Bishun. Then there's our February 8 response
5 in which we repeat the fact, again, we give Guillen's name. We
6 say he's the head of the drug-trafficking organization. We
7 talk about the fact --

8 THE COURT: Hang on. I actually want to go back to
9 January 25.

10 MR. SWERGOLD: Sure, your Honor.

11 THE COURT: So that's when you are saying, you know,
12 defense counsel, these text messages in which Guillen seems to
13 be admitting to the crime, those are fabricated by CI-1.

14 MR. SWERGOLD: Yes.

15 THE COURT: But you didn't consider then whether you
16 should turn over the September 27 investigative report?

17 MR. SWERGOLD: Your Honor, we didn't know at that time
18 whether -- we had no basis to believe that the underlying
19 confession was not true, only that the text messages were
20 fabricated. To be clear, the CI has never said that the
21 underlying confession didn't happen.

22 THE COURT: Wait. On September 25 you did say that
23 the CI recently informed the government that the CI had been
24 untruthful with the government about a number of topics.

25 MR. SWERGOLD: But then we go on to say, "Relevant

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1 here, CI-1 stated that the text messages discussed above were
2 not in fact sent by Individual A and that he was the one who
3 sent them." We did not walk back everything that he said. We
4 didn't even know -- the defense points out in their letter in
5 December 11, 2017 we didn't tell them that the Guillen
6 confession was false. We didn't know that fact until what they
7 call a jailhouse cooperator told us about it in I think the end
8 of March, early April.

9 THE COURT: Wait a second. That I don't think is
10 true. When was Judge Wood informed that there was false
11 information in the warrant?

12 MR. SWERGOLD: No, your Honor. That's separate.

13 THE COURT: No.

14 MR. SWERGOLD: No, no, no. That's separate, because
15 the fact of Guillen's confession to the CI, which is unrelated
16 to the Judge Wood case which relates to this murder, that was,
17 we didn't learn until -- we didn't learn that Guillen had lied
18 about that. We didn't believe it to be true based on the
19 evidence, but we didn't learn that he had told somebody else
20 that it was a lie until we spoke to the jailhouse cooperator in
21 April.

22 THE COURT: So what was told to Judge Wood in January?

23 MR. SWERGOLD: That's related to other acts of
24 violence and stuff in the Guillen case, not the Bishun murder;
25 the amount of drugs, possession of guns, there was even

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1 something related to what the CI reported to be his own
2 kidnapping. Those are disclosures for the charges against
3 Guillen and his crew, which are obviously not the murder
4 charges here.

5 So we did not tell Judge Wood at any point in time
6 about this confession being false because we did not learn
7 about it -- we did not learn that Guillen told him that it was
8 a false confession until that cooperator told us in April.
9 Again, we believed it to be false because we have all the
10 evidence, and we didn't think it squared with it.

11 Just one moment, your Honor.

12 (Pause)

13 THE COURT: You told me that in February 9, 2018 -- or
14 somebody told me, it might have been defense counsel, that
15 Guillen's attorney writes Judge Wood that the government had
16 just told him that false information provided by a witness, who
17 was referred to as CS-1, was used in part to procure a warrant.

18 What is that referring to?

19 MR. SWERGOLD: Your Honor, can I ask what page you're
20 reading, what document you're reading from?

21 THE COURT: It might be on the docket in Judge Wood's
22 case.

23 MR. SWERGOLD: Just a minute, your Honor. I'm
24 actually not on the Guillen case, so let me just confer.

25 THE COURT: Docket No. 99 in the Guillen case at note

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1 2, it says that -- sorry. Docket No. 111.

2 MR. SWERGOLD: Your Honor, those other search warrants
3 are search warrants about the Guillen DTO. The CI-1 that we
4 call in our case is the same as CS-1 in that filing, just so
5 we're all clear, and the information we disclosed about the
6 lies there, again, related to the Guillen DTO, the amount of
7 drugs involved in the conspiracy, the amount of money the DTO
8 was making, the possession of firearms and even other acts of
9 violence in that case.

10 We made it abundantly clear that we have never relied
11 on the CI's information in that case with anything related to
12 the murder, this murder. And so, again, the idea that we --
13 the only time that we -- again, we know the evidence in our
14 case, and that's why we believe the Guillen confession is
15 false, but the fact of Guillen himself admitting it was false,
16 we didn't know in September, October, December, January,
17 February, we didn't know it until we were proffering a
18 cooperator in an unrelated case, somebody else's cooperator who
19 told us about this statement that Guillen had made to him about
20 having lied to the CI, and that was in April F this year.

21 And, again, your Honor, because I know your Honor was
22 asking this, every time that we learned over a letter in this
23 case, we never said: "Should we write this letter and withhold
24 the report?" We have admitted the mistake of we should have
25 gone back and looked and gotten that report back in the

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1 forefronts of our minds to turn it over earlier, but there was
2 never a decision that said -- except on December 11, when we
3 didn't produce the details, again, for the very reason that at
4 the time we did not know whether the people named in the report
5 were co-conspirators of these defendants, and we did not want
6 to just turn that information over right away without having
7 the ability to investigate first whether those people were in
8 fact involved in tipping off our hand about the existence of an
9 investigation into other people.

10 Then there came a time where we definitely believed
11 that those people were not involved. We made disclosures about
12 the CI and about the text messages not being true. We provided
13 Guillen's name. We never said consciously affirmatively "Let's
14 just keep not producing this." We have admitted it was a
15 mistake. There should have been a point in time in which we
16 went back and said, "OK. Let's re-set. Let's see where we
17 are. Is there anything that we have that goes back to the
18 underlying information on December 11, 2017?" There obviously
19 is in the DEA-6. It was a mistake not to do that process and
20 turn it over sooner. We admit that mistake.

21 Our position is, as your Honor has alluded to, on the
22 other prongs it does not -- there is not more that the defense
23 could do with it. They have the names of the individuals.
24 They have their lawyers. If those individuals want to come to
25 court and testify that they did the murder and not the

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1 defendants, they certainly can. But our position is, yes, it
2 was a mistake. We are not saying it was not.

3 THE COURT: So we have identified the Tapia issue. I
4 also just want to ask briefly, because I think you alluded to
5 who our -- the other names that are listed in the September 27
6 investigative report as to who was directly involved, according
7 to Guillen, in the murder. When did the government provide
8 that information to defense counsel?

9 MR. SWERGOLD: So those names would be the Vasquez
10 name and the Perez name. And, again, that was in the report.
11 There is extensive discussion about Matthew in the transcript,
12 but there is certainly -- I don't think the defense would have
13 been able to just read that and know it's Vasquez. The Guillen
14 crew was charged at the time all of these people -- the only
15 person named in this report who -- it's not even in this
16 report. So everybody in this report has been charged in the
17 Guillen case. They're all on the same docket.

18 THE COURT: Is the contention that that meant you
19 weren't required to disclose that information?

20 MR. SWERGOLD: No, no, no.

21 THE COURT: Or that the defense should be expected to
22 have known and investigated that information because they're
23 charged in another case?

24 MR. SWERGOLD: Well, no, I mean, look, your Honor, if
25 they had started investigating Guillen, they would have

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1 immediately found out he was charged in the other case, and
2 they would have seen the names of the people he was charged
3 with, but I am agreeing with your Honor that that information
4 was first turned over in the May 4 disclosure.

5 THE COURT: So we have Tapia. We have Vasquez. We
6 have Perez. I think we have isolated -- and then I suppose the
7 only other question -- then I think we turn to the CW, when the
8 CW told the government that Guillen's confession was false.

9 MR. SWERGOLD: Yes.

10 THE COURT: That's the other new piece of information
11 made known to defense counsel only on May 4.

12 MR. SWERGOLD: Right. And, your Honor, the fact that
13 they didn't have that -- what that piece of information
14 suggests is that Guillen's confession to the CI is false.
15 That's not *Brady* material because what that information does is
16 it would have said to the defense, hey, stop investigating
17 Guillen. The guy you think is an alternative perpetrator,
18 stop, because he made it up.

19 So they had all the information to investigate
20 Guillen. The fact that we then learned it was false, you're
21 right, we turned that over on May 4, but that would not have
22 changed their strategy in that if Guillen is the person they've
23 been focusing on all this time -- and, quite frankly, they want
24 to have it both ways because their position, as I've seen it in
25 their letters is, well, you say the text messages are false.

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1 We think they're true. You say his confession is false. We
2 think it's true. You say he told the CW that he lied about the
3 confession. We think that he was just trying to cover for
4 himself. Of course, they have to say that because they want
5 Gabriel Guillen to be the guy that they can point the finger at
6 because all of the evidence in this case points to their
7 clients.

8 THE COURT: Both sides do that a little bit. As you
9 walked me through that transcript, the thrust of your argument
10 was, look how incriminating the stuff Guillen is saying about
11 his involvement in the murder? There's a little bit of that on
12 both sides in this argument.

13 MR. SWERGOLD: Your Honor, certainly there's tons of
14 information in there.

15 THE COURT: Here's the thing: I don't disagree with
16 you. This fact is, at least in the abstract, not exculpatory.
17 But here is the question, because it's weird.

18 MR. SWERGOLD: I'm sorry, the fact of the statement to
19 the CW?

20 THE COURT: Yes. What we have is the government
21 having -- the government's position is that the CI falsely
22 implicated Guillen in this murder, and now what we have that is
23 arguably new in conjunction with that fact is that Guillen also
24 falsely implicated Guillen in this murder. And I'm not sure
25 what investigatively what one would have done with that, but

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1 I'm not sure it's irrelevant to the defense. And that is new
2 information also learned on May 4.

3 MR. SWERGOLD: Yes, your Honor. Just to be clear, the
4 government's position with respect to the CI falsely
5 implicating Guillen is, again, we did not have any information
6 until we spoke to that cooperator to suggest that Guillen lied
7 to the CS, right? We know the text messages are false, but we
8 have nothing --

9 THE COURT: You believe the text messages are false.

10 MR. SWERGOLD: He told us the text messages are false.

11 THE COURT: He also told someone else that he killed
12 Bishun, so you've picked and choose --

13 MR. SWERGOLD: No, no, no.

14 THE COURT: Sorry, he also told -- oh, well, did the
15 CSI ever tell anyone -- you're saying your position is that the
16 CS -- the CI, sorry, the CI was truthful with Mercurio when he
17 reported that Guillen confessed to the murder.

18 MR. SWERGOLD: Aside from -- yes. We have no
19 information one way or the other to know whether or not that
20 conversation took place. The statement made by --

21 THE COURT: You have evidence to suggest it took
22 place.

23 MR. SWERGOLD: No, we don't. I mean, we have the
24 video that shows a car driving by. We can't see who's in the
25 car.

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1 THE COURT: You have the statements of the CI--

2 MR. SWERGOLD: No, no.

3 THE COURT: -- recorded at the time corroborated by,
4 as was pointed out in the warrant, that car driving by.

5 MR. SWERGOLD: Right. So, look we have the CI saying
6 this conversation took place. It wasn't recorded. We don't
7 know whether they were -- we don't know who was in that car.
8 So the point is, is that we don't know one way or the other
9 what was said in that car. Even if you assume that Guillen
10 made that confession, which was the assumption that we were all
11 operating under, right? He then has these text messages. We
12 tell the defense that the CI has confessed to us that the text
13 messages are fake, that he sent them. We said nothing about
14 the other meetings --

15 THE COURT: Did you do anything to corroborate that?

16 MR. SWERGOLD: That the text messages were fake?
17 There was nothing we could do to corroborate that. We didn't
18 have the phone that they were sent from. It was Gabriel
19 Guillen's phone.

20 THE COURT: So you've just tone it as gospel that the
21 text messages are fake. You don't have evidence corroborating
22 the CI's statement that the text messages are fake.

23 MR. SWERGOLD: No, I mean, look, he lied --

24 THE COURT: Is that no, you do?

25 MR. SWERGOLD: No. He lied about a number of things.

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1 He's been charged with obstruction related to his lies in the
2 Guillen case.

3 But if we have his phone and has text messages on it
4 and we have Gabriel Guillen out in the world and we do not have
5 the phone that they were used to say--

6 THE COURT: So you have the actual text message else
7 that appear to be from Guillen?

8 MR. SWERGOLD: We have pictures of them off of the
9 CI's phone.

10 THE COURT: You have those.

11 MR. SWERGOLD: Yes.

12 THE COURT: And then you have the CI saying that he
13 created those falsely.

14 MR. SWERGOLD: Yes, by taking Guillen phone when they
15 were together and sending the text messages to himself.

16 THE COURT: Did you ever pursue why?

17 MR. SWERGOLD: Why he made them up?

18 THE COURT: Yes.

19 MR. SWERGOLD: Just one moment, your Honor.

20 (Pause)

21 MR. SWERGOLD: As far as we know, your Honor, he did
22 it because he wanted to show that there had been a confession
23 because when he reported the confession to us in the first
24 instance, again, we didn't just take him at his word. We sent
25 him out and tried to have him do a recording. Guillen did not

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1 come out in that recording and say "I did it." So he was
2 trying to corroborate -- he was trying to prove his value and
3 corroborate what he says happened in the past. That's why he
4 made up those text messages.

5 THE COURT: So he made up false text messages to
6 corroborate what the CI contends actually happened.

7 MR. SWERGOLD: Yes.

8 THE COURT: Namely, that Guillen had confessed to him
9 of his involvement in these murders.

10 MR. SWERGOLD: Yes, that's right.

11 THE COURT: And, again, just to be clear, you don't
12 have whether you could or could not, you don't have any
13 corroboration of the falsification of the text messages.

14 MR. SWERGOLD: No, we don't, and we told the defense
15 all of this in our letters, that our basis of believing that
16 the text messages were false came from the fact that the CS --
17 CI represented by an attorney came in and admitted to us, not
18 only that they were false, but admitted to us a whole bunch of
19 other lies that have now been the basis of the obstruction of
20 the justice guilty plea that he entered in the sealed case
21 before Judge Caproni.

22 THE COURT: But the falsification of the text messages
23 was part of that, or no?

24 MR. SWERGOLD: No, it was not. It was not part of
25 that.

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1 THE COURT: Why not? You can't prove he falsified
2 them?

3 MR. SWERGOLD: Your Honor, again, I was personally not
4 involved in that charging decision. I understand that it's
5 because there were a number of falsehoods, there were plea
6 negotiations with defense counsel, and that is what was arrived
7 at for the obstruction charges.

8 THE COURT: But your evidence that they're false is
9 his word that they're false.

10 MR. SWERGOLD: Yes, that's correct.

11 THE COURT: I think as best I can, I have isolated
12 what seems to be new information. The government concedes, as
13 it must, that the September 27, 2016 investigative report
14 obviously should have been turned over sooner. It has been
15 represented to me that that was a mistake, but not a conscious
16 decision to withhold it, other than on December 11 when it was
17 still part of the investigation. If anything comes to light
18 that suggests that that representation made to the Court is
19 inaccurate, at whatever point down the road, you will bring it
20 to my attention immediately.

21 MR. SWERGOLD: Of course, your Honor.

22 THE COURT: All right. Ms. Sanderson.

23 MS. SANDERSON: Yes, Judge. We're dealing with two
24 confessions here. We're dealing with the text that the
25 government claims are false and we're dealing with the 9/27

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1 confession, which was suppressed until May 4. We weren't
2 informed of the fact of the confession.

3 THE COURT: You were informed of the fact of the
4 confession in the December 11 letter.

5 MS. SANDERSON: Not of the -- I'm sorry, Judge, not of
6 the September 27 confession. There were multiple confessions.
7 There's one on September 27, and we were not informed of that.

8 THE COURT: Well, you were informed in the December 11
9 letter in that line of the text, it says in that letter that
10 Individual A I think was involved in, let me get the language
11 so we're clear.

12 MS. SANDERSON: "In the course of meetings and" --

13 THE COURT: Just a moment. Number 6 says: "Recorded
14 and texts statements made to a CI by Individual A who stated to
15 the CI in the course of meetings and text message exchanges in
16 substance, and in part, that Individual A and others were
17 involved in the murder of Robert Bishun."

18 MS. SANDERSON: Exactly, Judge, and that's a discovery
19 letter, accompanied with copies of the text messages and
20 recordings of meetings that we inferred from that discovery
21 letter were the meetings referred to in that letter and
22 provided to defense counsel. So we had the text messages and
23 we had the recordings.

24 THE COURT: So you know as of December 11 that
25 Individual A, later identified as Guillen, had made statements

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1 and text messages, some recorded, some presumably not,
2 implicating himself in the murder of Bishun, and you pursued
3 that.

4 MS. SANDERSON: Judge, we were not aware of unrecorded
5 meetings. We believed that the meetings referred to in the
6 letter were provided with discovery.

7 THE COURT: No, you asked repeatedly --

8 MS. SANDERSON: Correct, Judge.

9 THE COURT: -- showing diligence noting the plural and
10 asking about it, and, therefore, showing that made aware that
11 there are meetings and text messages in which Individual A,
12 Guillen, is implicating himself in this crime.

13 MS. SANDERSON: Yes, Judge. And there were no names
14 provided in the December 11 disclosure.

15 THE COURT: I understand.

16 MS. SANDERSON: And then, importantly, we have sent
17 follow-up letters requesting more information, and as the
18 government noted, any information provided surrounding the
19 homicide of Bishun by CI-1. This is the most important point,
20 Judge. In the government's February 8 response, that's the
21 first time we get Guillen's name.

22 THE COURT: That's right.

23 MS. SANDERSON: At the same time, the government says
24 the text messages were fabricated. They were not actually
25 Guillen's text messages.

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1 In addition to saying that, the government says in the
2 letter: "Other than as described in the government's
3 January 25, 2018 correspondence, CI-1 had no involvement in the
4 instant investigation, nor has provided any additional
5 information surrounding the homicide of Bishun."

6 So we were informed in the February 8 letter that
7 there was no other information provided by CI regarding Bishun,
8 and we were also informed that the text messages were
9 fabricated. At that point we had no incentive to look into
10 Guillen because the only information provided --

11 THE COURT: What about the transcript?

12 MS. SANDERSON: The transcript, Judge, it says: "They
13 killed him." It references, it's a discussion between two
14 people about a homicide. From the transcript, we could garner
15 nothing of that individual saying he admitted to it, any type
16 of confession. The only confession upon reviewing the
17 December 11 disclosures were the text messages.

18 THE COURT: So what you're saying is you took the
19 government at its word that the text messages were fabricated
20 and, therefore, assumed that Guillen had no involvement.

21 MS. SANDERSON: No, Judge. We sent letters and we
22 asked specifically in our February 4 letter a series of over
23 ten questions about the text messages and why they believed
24 they were false, who sent them, who received them.

25 THE COURT: What did you do to investigate Guillen?

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1 MS. SANDERSON: Well, February 8, when we finally got
2 Guillen's name and the government saying that the only
3 information surrounding Guillen was these text messages and
4 this recording, the only information we believed linking
5 Guillen to the homicide based on what they gave us were the
6 text messages, which, according to the government, were false
7 and we sought more information about that. We were taking the
8 government at its word that there was no other information
9 connecting Guillen based on what they gave us. We demanded all
10 the information they had. And they said, "This is it." We
11 asked and asked repeatedly for the information, and we didn't
12 get it, and we didn't --

13 THE COURT: I know, or at least I understood from the
14 motion response, that you intended to pursue an alternative
15 perpetrator theory as part of the defense.

16 MS. SANDERSON: Correct.

17 THE COURT: Is what you're saying that based on the
18 government's representation, that there was nothing further
19 beyond what they told you, which was that there were meetings
20 and the text messages, the government's assertion that they're
21 false, that that led you not to investigate Guillen?

22 MS. SANDERSON: One moment, Judge.

23 (Pause)

24 MS. SANDERSON: Judge, yes, we did investigate Guillen
25 at that point. I'm sorry if I was unclear before. We gave his

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1 name to our investigator, and we spoke to his lawyer. So we
2 did begin investigating him at that point, but we did not have
3 the significant detailed ample information now --

4 THE COURT: What is your position as to when the
5 defense became aware that Guillen gave a confession, false or
6 otherwise, as to his involvement in this crime?

7 MS. SANDERSON: May 4, Judge. The text messages,
8 while they peaked our interest, it wasn't until May 4 we knew
9 there was a confession by Guillen because when we were informed
10 Guillen -- when we were informed on February 8 that it was
11 Guillen, we were also informed that the text messages were
12 fabricated.

13 THE COURT: That remains to be the government's
14 position.

15 MS. SANDERSON: Correct. So, on May 4 we finally
16 received information that Guillen had made a confession on
17 September 27.

18 THE COURT: But you -- well, I mean, the problem with
19 that is that the language in the December 11 letter indicates
20 that there are, in addition to the text messages, meetings in
21 which Guillen, then identified as Individual A, has implicated
22 himself in this crime.

23 MS. SANDERSON: And that's why we kept asking for it,
24 Judge. We continued to on February 4 and then on April 17, and
25 we were told we were getting nothing, and in the, again, the

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1 February 8 letter, it led us to believe there was nothing else
2 out there, and we didn't let it go.

3 THE COURT: And what?

4 MS. SANDERSON: We didn't let it go. We still had our
5 investigator trying to look into it, but we didn't have enough
6 information that now we were provided on May 4.

7 THE COURT: So what is it that you believe you need to
8 do now?

9 MS. SANDERSON: Judge, could the defense counsel speak
10 with you ex-parte on this?

11 THE COURT: Yes.

12 MS. MACEDONIO: May we have our investigator come up?

13 THE COURT: You may.

14 (Pages 61 to 686 SEALED)

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1 (Pages 69 to 76 SEALED)

2 (In open court)

3 THE COURT: We are on the record.

4 I have some follow-up questions for the government.

5 As I consider what the defense has laid out as their
6 anticipated lines of investigation in light of the new
7 information what that would look like, how long it would take,
8 one question that I have agreement from defense counsel I can
9 inquire with the government is, in light of the new information
10 disclosed on May 4, they intend to renew their request to
11 inspect the CI's phone, and I want the government's position on
12 that.

13 MR. SWERGOLD: Your Honor, we don't have the phone.
14 The phones that were used to send these messages, when he was
15 kidnapped, he lost his phones, so we just have the pictures
16 that were taken off of the phone.

17 THE COURT: Do you have the phone numbers?

18 MR. SWERGOLD: Yes. And I think they are in the --
19 sorry, your Honor. Let me just find -- here it is -- no. The
20 6s, your Honor, have the number --

21 THE COURT: Mr. Swergold, into the microphone.

22 MR. SWERGOLD: I'm sorry. Thank you.

23 The 6s that were turned over have the number for the
24 Guillen phone. And then the number for the CS's phone -- we
25 will check our file and see if we have the number for that

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1 phone.

2 THE COURT: Relatedly, they are renewing their request
3 for the identification of the CI.

4 MR. SWERGOLD: Your Honor, we continue to maintain the
5 position that we should not have to turn that over, and Judge
6 Caproni has sealed that individual's case for the very fact
7 that there are safety concerns about having his identity
8 publicly disclosed. We have given them his counsel's contact
9 information. We understand Mr. Freeman has reached out to that
10 attorney from speaking with that attorney. We asked him if he
11 had gotten any -- if anybody had reached out.

12 THE COURT: Well, we now have a detailed statement
13 from the CI as to Guillen's confession to involvement in this
14 crime.

15 So, I am not ruling on it now, but it seems to me that
16 changes the assessment as to whether pursuant to a protective
17 order that person's identification and -- I'm sorry,
18 Mr. Swergold what did you say about his phone numbers?

19 MR. SWERGOLD: We don't have the phone, so we will
20 check our file and see if in the Guillen case we ever had that
21 phone number from something that he did that was turned over in
22 discovery there. The number for Guillen is in the 6s, the
23 number that he used.

24 THE COURT: So, turned over for the first time on May
25 4?

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1 MR. SWERGOLD: Yes. That phone number is there.

2 THE COURT: That wasn't the question.

3 MR. SWERGOLD: Yes. Turned over for the first time on
4 May 4.

5 THE COURT: But requested by the defense prior to May
6 4?

7 MR. SWERGOLD: They certainly made requests for
8 information related to the text messages, so that covers the
9 phone number, your Honor.

10 THE COURT: OK.

11 Then another issue they raised that they agree I can
12 ask you about is there is some back and forth in the letters on
13 this, but the line sheet that you provided on May 4.

14 MR. SWERGOLD: Yes, your Honor.

15 THE COURT: What is your understanding of that?

16 MR. SWERGOLD: Your Honor, if we can address -- for
17 the reason that we did not publicly file the e-mail that we
18 sent to defense counsel explaining it, maybe we can address
19 this at sidebar. It doesn't have to be ex parte, but I don't
20 want to talk about it publicly in court.

21 THE COURT: All right.

22 (Pages 80 to 84 SEALED)

23 (Continued on next page)

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1 (In open court)

2 THE COURT: All right. We are in a regrettable
3 position. I do believe the defense in the ex parte
4 communication has outlined some reasonable and necessary
5 investigative steps in light of the new information contained
6 in a few aspects of the May 4 disclosure, and some of what
7 they've outlined I don't think can be done immediately and I
8 don't think it can be done during the course of the trial.
9 That's a problem.

10 I am extremely hesitant to delay this trial, but I am
11 not sure that there is a choice. The government has conceded
12 that it ought to have turned over the September 27
13 investigative report earlier, and I have worked hard to isolate
14 precisely what new information is contained in that and other
15 materials turned over opens up reasonable new lines of
16 investigation that could not have been pursued before, and it
17 is there. They have identified it, including -- well, I won't
18 go into the specifics of it, but from my colloquy with the
19 government, the government has conceded in particular that the
20 individuals discussed in the September 27 investigative report
21 containing Guillen's confession includes Tapia, the name Tapia,
22 as well as Perez and Vasquez and the investigative report
23 contains details about Guillen's confession that generally were
24 not made known to defense.

25 To the contrary, and I do think this is significant,

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1 in the face of their follow-up questions, we're told that there
2 was not further information and that is not accurate.

3 So the question is when we can proceed to trial that
4 allows the defense to proceed as they've indicated they want
5 to, and I think need to in light of the new information.

6 I am going to step off in a minute, and counsel can
7 confer with each other, obviously with the defendants and
8 defense counsel.

9 There are no great options here from the Court's
10 perspective. I think the dates we should be thinking about
11 include June 11 -- there are some difficulties with that, I
12 have two days of unavailability during that, and we run into
13 the July 4 weekend, which may make selecting a jury difficult.

14 The other option is August 6. I have a few
15 unavailable days, August 23, 24, and 27, but otherwise I think
16 workable, and then we are looking at October.

17 Anything to address before I step down for conferring
18 on that?

19 MR. SWERGOLD: Yes, your Honor.

20 For the purposes of making sure the record is clear,
21 obviously the government has no idea what the defense counsel
22 and their investigators say they need to do.

23 There is sufficient -- not sufficient, I'm sorry --
24 significant information. I understand that these three names
25 are new, but I just want to make sure the record is clear, the

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1 defense has had the security video from outside the shop from
2 April all the way through the murder for every single day in
3 which they can look and see if there are other people who
4 appear as suspicious as the two people that we have identified
5 as being involved.

6 THE COURT: Nothing in that implicates what they have
7 represented to me are their planned investigative steps.

8 MR. SWERGOLD: I understand.

9 We have already informed them about whatever cell site
10 we have for these individuals, which included Guillen, which
11 put him nowhere near the site of the murder, and these names
12 were included in the October 2016 application to Judge Fox,
13 and.

14 THE COURT: What names were included?

15 MR. SWERGOLD: Sorry. Let me just look at it. One
16 second, your Honor.

17 We sought to obtain, but were unsuccessful in getting
18 cell site for Matthew Vasquez, Joel Tapia, Gabriel Guillen. We
19 did get one, a name, Jesus Calderon, which we've never even
20 been able to identify. And we did that based off of -- we did
21 that based off of numbers -- and Sammy Velazquez, which we did
22 turn over because we got that back.

23 These are based off of numbers that, you know, came to
24 us either from the CI or because there was an NYPD report that
25 somehow had this number.

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1 Whatever we got back from the service providers did
2 not put -- to the extent that the numbers were accurate, that
3 they were being, that that service provider had numbers for
4 them, that it was a number that was in use at the time, which
5 we don't have a way of knowing until we asked, we didn't get
6 anybody that put them at either of the relevant scenes, and
7 obviously we told defense counsel that.

8 So I do -- I mean, there is -- I just want the record
9 to be clear that there is significant -- I know we -- again, we
10 are not disputing that those names are new, and that they are
11 avenues that they want to pursue, but there is significant
12 information that they have had for the entire length of this
13 time, because that was in the initial discovery, those large
14 amounts -- including the cell tower information, which would
15 allow them to see any and all cell phones that are using the
16 cell towers in the relevant locations around the times of the
17 murder and the body being dumped.

18 The other thing I just want to say, your Honor, is
19 that --

20 THE COURT: I will just say, I mean, it is a helpful
21 clarification, but it doesn't alter the analysis based on what
22 they have proffered as reasonable lines of investigation.

23 MR. SWERGOLD: Right, of course.

24 Again, your Honor, we are just putting information on
25 the record without knowing what they have said.

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1 The other thing I would note is that we've negotiated
2 a significant numbers of stipulations with the defense, which
3 the government thinks has really shortened the case.

4 I mean, again, we don't know what the defense said.
5 We don't know what they represented to your Honor. The
6 government thinks that if we started the trial next Monday we
7 could still get it done in the time period that your Honor has
8 set aside for the case, especially in light of stipulations
9 that we have reached with defense counsel.

10 Again, I don't know what they said --

11 THE COURT: So that's two weeks for the government's
12 case?

13 MR. SWERGOLD: Two weeks for the government's case.

14 THE COURT: Obviously what's implicated here may open
15 new avenues for a defense case along the alternate perpetrator
16 line.

17 MR. SWERGOLD: Certainly, I'm sure they represented
18 that to your Honor. We don't think it will, because again we
19 don't see any other evidence -- again, apart from the Guillen
20 confession, we don't see any other evidence that any of the
21 people who were being discussed in here were involved in this.
22 We don't see evidence of Alston being involved, we don't see
23 evidence of Guillen being involved, we don't see evidence of
24 his crew being involved.

25 We obviously would expect that, to the extent the

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1 defense is finding information that they think is relevant for
2 their defense, they are going to turn that over to us right
3 away under their reciprocal discovery object obligations, but
4 our position is that there's no there, there. There hasn't
5 been a there, there since they started investigating, when they
6 did what they are now saying is a preliminary look at Guillen
7 back before they just decided not to look at it anymore.

8 We think that, given a week to have their
9 investigator -- and, I mean, I actually know Mr. Dwyer. We
10 interviewed him about something some work for the government in
11 an unrelated case. I have no doubt that he is a very competent
12 and thorough investigator. If he's out working, they have the
13 contact information for these individuals because they are all
14 charged and they have lawyers, and they can reach out to them.
15 If he's working hard with all the evidence they have and these
16 leads and where we think the trial could be, we see no --

17 THE COURT: I will add as another option on the menu
18 delaying the trial for a week.

19 MR. SWERGOLD: Excuse me, your Honor?

20 THE COURT: I will add that as another option for us
21 to consider, which is delaying the trial for a week.

22 MR. SWERGOLD: Great.

23 THE COURT: I would like to try it as soon as we
24 possibly can.

25 MR. SWERGOLD: Yes. That would be the government's

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1 preference as well, your Honor.

2 THE COURT: Anything else before I step down?

3 MR. SCHNEIDER: Just, while we discuss scheduling, if
4 your Honor would be available right after Labor Day, September
5 4 as a possibility. We have a trial scheduled on September 10.
6 I know that, because I am on that case, but I don't think that
7 case is actually going to go. I believe it will probably be
8 disposed of.

9 That is my understanding, but I can't speak for
10 everybody. All those defendants are out. I am just asking if
11 September 4 would be a possible date if we can all do it,
12 because I have a trial scheduled, but I think I could deal with
13 that trial in the Eastern District.

14 THE COURT: I have two criminal trials scheduled
15 during that time, and it is the Jewish holidays. But if that's
16 what everybody chooses, taking into account the difficulty of
17 jury selection with the holidays there, I would look to see if
18 I can make it work.

19 MR. SCHNEIDER: OK. Thank you, Judge.

20 THE COURT: Anything else before I step down while you
21 confer?

22 MR. SWERGOLD: Not from the government.

23 MS. STERNHEIM: No. Thank you.

24 THE COURT: I will step down.

25 (Recess)

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1 (In open court)

2 THE COURT: Who will I hear from?

3 MR. SWERGOLD: Your Honor, the government has spoken
4 with defense counsel, and it would be our joint proposal to
5 start the trial two weeks from today, which is May 21.

6 THE COURT: So, I think as my deputy conveyed, the
7 difficulty with that is that I am on Part 1 duty beginning
8 May 28 through June 10, and the possibility of -- I cannot
9 schedule a trial during that time if I'm on duty. I can try to
10 find a colleague to switch with me but at this late date, given
11 schedules, it's highly unlikely, but I will try.

12 MR. SWERGOLD: We understand, your Honor. I think we
13 have optimistic hope that one of your colleagues will come to
14 the rescue.

15 THE COURT: You have no basis for that optimism. I
16 will try, but I think we need a contingency plan. As I said, I
17 am available immediately afterwards, which is June 11.

18 MR. SWERGOLD: Your Honor, as we conveyed to defense
19 counsel, we just, for personal and family reasons for some of
20 the prosecutors on this case, cannot do the June date. So I
21 think the fall-back would be the August date, but, again, the
22 parties looking at, you know, the schedules of eight lawyers,
23 it is tough to get everybody together.

24 So, again, I understand your Honor's position that I
25 have no basis for my optimism, but we still hope we will be

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1 able to do it starting in two weeks.

2 THE COURT: Just to think that through, and,
3 obviously, as I said, if I can't find a substitute, I can't do
4 it, period.

5 MR. SWERGOLD: We understand, your Honor.

6 THE COURT: If we move it to the 21st, just to think
7 this through, that does put us right in Memorial Day weekend.
8 That will likely mean for jury selection not sitting on Friday,
9 the 25th, and not sitting on Monday, the 28th.

10 MR. SWERGOLD: Right. It would be the one extra day
11 from your Honor's usual practice.

12 THE COURT: And then the government can try this case
13 in two weeks?

14 MR. SWERGOLD: We think we can.

15 Look, your Honor, based on the stipulations, we've
16 mapped out how fast we think witnesses will go. We cannot
17 predict what defense counsel will do on cross-examination, but
18 just thinking about how long directs are, we think there is the
19 very good possibility of getting it done in two weeks, again,
20 without being able --

21 THE COURT: Two weeks on the calendar even with the
22 Memorial Day weekend?

23 MR. SWERGOLD: I guess we mapped it out on two
24 four-day weeks, again, not sitting Fridays based on your
25 Honor's current practice. Just based on what we think about

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1 the length of our directs, which there are very few witnesses
2 who have very long directs, we think there is a very real
3 chance -- again, not knowing how long cross-examinations will
4 be -- that we can move pretty quickly through most of our
5 witnesses.

6 I'm sorry, your Honor, just one other thing. To try
7 to speed it up, we could also pick a jury a week from today and
8 then bring the jury back in one week. So on Monday, the 14th,
9 and however long it takes to pick the jury, then bring the jury
10 back one week from that day and then start the first thing that
11 Monday morning at 9:30 or with your Honor's preliminary
12 instructions and the opening.

13 THE COURT: Yes, I was going to suggest that we pick
14 the jury on -- well, on the Thursday before the anticipated
15 Monday.

16 MR. SWERGOLD: Sure.

17 THE COURT: So we can have our pool first thing in the
18 morning and presumably we can get that done within the day.

19 Just to think through, again, if I can find a
20 colleague to swap with, we will have to deal with Memorial Day,
21 and then the only other thing to alert you to is that I am not
22 available June 15 or June 18. So if we are continuing at that
23 point, we will have to delay until the 19th

24 MR. SWERGOLD: That's fine, and in discussions with
25 defense counsel, when we were proposing the two weeks, I think

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1 nobody thought the case would go that far even if we started
2 two weeks from today, nobody is envisioning that week or weeks.

3 THE COURT: And so, beginning on May 21, if I can find
4 a substitute -- a swap for the Part 1 weeks. And if I can't --
5 so that's option number one.

6 Option number two --

7 MR. SWERGOLD: That would be the August date that your
8 Honor proposed.

9 THE COURT: August 6.

10 MR. SWERGOLD: Which is August 6.

11 MS. STERNHEIM: I just want to remind the Court that I
12 am out of the country until August 8.

13 MR. SWERGOLD: Of course, your Honor, if we are
14 talking about the August date, two weeks from today, it's easy
15 enough, we do have to check the availability of all of our
16 witnesses and make sure there are no issues there because that
17 is sufficiently far out enough that we don't know anybody's
18 schedules at that time.

19 THE COURT: So if we are -- I think what you are
20 proposing then, Ms. Sternheim, is jury selection on August 9,
21 which is the Thursday.

22 MS. STERNHEIM: Yes, your Honor.

23 THE COURT: Wait. No.

24 MS. STERNHEIM: The 13th is a Monday.

25 THE COURT: The one problem I think I indicated when I

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1 mentioned those dates, I am not available August 23, 24 and 27
2 so we would have a gap.

3 MS. STERNHEIM: Your Honor, we are aware of that, but
4 most of the defense counsel need to be in Washington D.C. on
5 the 27th anyway, and I think if we are not done before, we
6 could work around that if need be.

7 THE COURT: So that our alternate proposal is jury
8 selection on August 9, trial commencing on August 13 with the
9 understanding that we wouldn't sit August 23, 24 and 27. OK.

10 Mr. Freeman, if you can pull up a mike, please.

11 MR. FREEMAN: Just my two cents. Mr. Pizarro would
12 much prefer the option A.

13 THE COURT: I'm sorry?

14 MR. FREEMAN: Mr. Pizarro much prefers option A to
15 option B.

16 MR. SCHNEIDER: As does Mr. Rivera as well. We
17 really, really, really -- not only are we optimistic about --
18 we're not only optimistic about your colleagues, we're
19 optimistic about your powers of persuasion, your Honor, to hope
20 to get the June dates because both defendants would like to see
21 this go in June if possible.

22 THE COURT: Well, I fully understand that. I will do
23 what I can, but I think we need to understand that that may not
24 work, and we just need to be realistic about that.

25 The Court is available June 11, and so from the

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1 Court's perspective, that's alternate number 2. Now, if the
2 parties are saying they can't do that, that's one thing, but
3 from the Court's perspective, although I may not be available
4 to just put this off two weeks because of Part 1, I am
5 available on June 11, so it's not a substantial delay in terms
6 of the Court's availability, which is why I'm asking you to
7 tell me your two options if I'm not available because of Part 1
8 duties. So you tell me if we should be considering that as an
9 additional option.

10 Ms. Sternheim.

11 MS. STERNHEIM: I believe the defense is available.
12 For reasons disclosed by the government, we believe that they
13 are not.

14 THE COURT: OK. What I would like to do is have
15 absolute clarity as to what we're talking about. I will try to
16 get a substitute for Part 1. If so, we will start on May 21.
17 I understand that the alternate joint request is that if that
18 does not work, that we pick a jury on August 9 and start on
19 August 13. Is that where we are?

20 MR. SWERGOLD: Yes, your Honor.

21 MR. FREEMAN: Yes, your Honor.

22 MR. SCHNEIDER: Yes.

23 MS. STERNHEIM: Yes.

24 THE COURT: Then that's what we will do. I will put
25 my powers of persuasion to work immediately and obviously let

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1 counsel know. It's the kind of thing where I will know soon if
2 there is a volunteer.

3 MR. SCHNEIDER: If you want us to put a good word in
4 for you, we'll do that, your Honor.

5 THE COURT: Just to be clear, my colleagues will want
6 to help me here. The question is simply whether their
7 schedules, in light of all the criminal cases that they have to
8 try as well as other matters and summer schedules, will
9 prohibit them. I have no doubt my colleagues, if any are
10 available, but it is late enough that it's difficult, and as I
11 say, because I am available on June 11, the difference between
12 May 21 and June 11 is not that significant, but you've told me
13 what your requests are. I will let you know as soon as
14 possible whether I can make that work.

15 In the meantime, needless to say, I hope and expect
16 that the government will continue to make all efforts to
17 provide the defense with things that they're entitled to in
18 light of these new disclosures and otherwise

19 MR. SWERGOLD: Yes, your Honor.

20 THE COURT: Anything else?

21 MS. MACEDONIO: In that vein, part of the reason why
22 we have agreed to just a two-week adjournment is because the
23 government indeed has indicated they would be cooperative with
24 us in getting things they may not ordinarily give to us. We're
25 hoping they will use their good offices to do that. If we have

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1 a problem, we'll report back to the Court.

2 MR. SWERGOLD: The only other thing, your Honor, is
3 that I guess if we're operating off of, say, May 21, just for
4 the time being that we perhaps set that as the control date to
5 start trial, and the government would respectfully request that
6 the Court exclude time between today and May 21 to allow the
7 parties to continue to prepare for the trial.

8 THE COURT: I will hear from defense counsel.

9 MS. STERNHEIM: No objection.

10 THE COURT: I find the ends of justice served by
11 excluding time between today's date and May 21, 2018 and in the
12 interest of justice the time is necessary for the parties to
13 continue to prepare for trial, and it outweighs the interest of
14 the public and the defendants to a speedy trial.

15 To be clear, if we are proceeding on May 21, it is my
16 intention to have you in at 9:30 a.m. on May 17, Thursday,
17 May 17 to pick a jury. Clear?

18 MR. SWERGOLD: Yes, your Honor.

19 MS. STERNHEIM: Yes, your Honor.

20 THE COURT: Anything else I can address at this time?

21 MR. FREEMAN: I assume the final pretrial conference
22 would be on the 17th, the same date as jury selection?

23 THE COURT: Well, if there are new matters to take up,
24 I would schedule them. Otherwise, we have had our final
25 pretrial conference.

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1 MR. FREEMAN: Understood.

2 THE COURT: If there are other matters to take up, new
3 matters, then I will have you in earlier in that week because I
4 want to use all of May 17 to pick the jury so that I can do
5 what I can to make sure that we get our jury selected on the
6 17th because I am not sure of my availability on the 18th if we
7 don't get the jury selected.

8 MR. FREEMAN: Understood.

9 THE COURT: Make sense? So if there are any new
10 matters, raise them immediately. If I need to hear from you in
11 person, I will bring you in in the time that we have between
12 now and the 17th. Anything else I can address at this time?

13 MR. SWERGOLD: Not from the government.

14 THE COURT: We're adjourned.

15 (Trial adjourned pending notification)

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