



**Proceedings**

1 THE CLERK: Criminal Cause for Hearing, case  
2 number [REDACTED].

3 We have defendant [REDACTED] and defendant [REDACTED]  
4 present. We also have an interpreter, [REDACTED],  
5 previously sworn.

6 (INTERPRETER PREVIOUSLY SWORN.)

7 THE CLERK: Counsel, please state your name for  
8 the record.

9 MR. [REDACTED] and [REDACTED]  
10 [REDACTED] for the United States.

11 Good morning, your Honor.

12 THE COURT: Good morning, your Honor.

13 MR. CREIZMAN: Good morning, your Honor.

14 Eric Creizman, Gibson, Dunn & Crutcher. CJA  
15 appointed counsel for Mr. [REDACTED] I'm appointed counsel  
16 for Manuel [REDACTED] and with me is Sara Colb from Gibson  
17 Dunn.

18 MR. [REDACTED] Good morning, your Honor.

19 James [REDACTED] for Alexander Eiseman who  
20 unfortunately could not be here today and he sends his  
21 regrets. We represent [REDACTED]

22 THE COURT: All right. Welcome to all of you.  
23 Please be seated. This is on for oral argument in  
24 connection with defendant [REDACTED] pretrial motions which  
25 were joined by co-defendant [REDACTED]

**Proceedings**

1           As an initial matter, I just want to note that  
2 yesterday I received through ECF a letter from the  
3 government indicating that the defendant ██████████ Fernandez  
4 Torres was erroneously included in Counts 1 and 2 of the  
5 third superseding indictment. And further indicates that  
6 the government anticipates presenting evidence to a grand  
7 jury to demonstrate that the conspiracy's charged  
8 separately in Counts 1 and 3 of the third superseding  
9 indictment, are in fact part of one larger conspiracy.

10           I frankly was a bit surprised and taken aback  
11 by that comment. One of the central issues pending  
12 before me on a referral from Judge Korman is the defense  
13 motion to -- for severance based on the allegation that  
14 the two separate conspiracies were improperly joined and  
15 frankly, I had been focusing a lot of time and attention  
16 on that issue.

17           Why this change in strategy after the  
18 government in its opposition stated on several occasions  
19 that Counts 1 and 3 charged separate conspiracies?

20           MS. ██████████ Good morning, your Honor.

21           It's the government's position it's not a  
22 change in strategy. This has been an ongoing  
23 investigation. The case was originally indicted in 2009.  
24 The superseder in the indictment that's currently before  
25 the Court was indicted -- brought down by the grand jury

**Proceedings**

1 in January of this year and we have been continually  
2 investigating the case since then and been gathering  
3 information as is our duty to do. And in the process, we  
4 have learned new information that suggests that these  
5 conspiracies are not distinct but that they're linked and  
6 they involve a common scheme and that it would be  
7 appropriate to charge them as one conspiracy.

8 THE COURT: So you're saying this is new  
9 evidence that you've obtained since the filing of the  
10 third superseding indictment.

11 MS. [REDACTED] That's correct, your Honor.

12 THE COURT: So that the motion to sever in your  
13 view would then be moot.

14 MS. [REDACTED] Yes, if the grand jury agrees, of  
15 course, with the government's presentation of evidence;  
16 yes.

17 THE COURT: And is this evidence going to be  
18 presented to the same grand jury that returned the third  
19 superseding indictment?

20 MS. [REDACTED] I believe the grand jury's -- I  
21 would have to check that, your Honor. I believe they're  
22 all being renewed within the last month. I would have to  
23 check if that exact grand jury is still available, so we  
24 may need to represent the entire case. I can check on  
25 that and get back to your Honor.

**Proceedings**

1 THE COURT: Judge Korman has not been advised  
2 that the government intends to move -- intends to seek a  
3 fourth superseding indictment; is that correct?

4 MS. [REDACTED] That's correct, your Honor.

5 THE COURT: And, in fact, in writing to  
6 Judge Korman two days ago, the day before you sent the  
7 letter to me, you requested that he adjourn the status  
8 conference that he had scheduled for today but did not  
9 advise him that the government was contemplating seeking  
10 yet another indictment.

11 MS. [REDACTED] That's correct.

12 THE COURT: All right.

13 Mr. Creizman?

14 MR. CREIZMAN: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. CREIZMAN: We have three motions as your  
17 Honor is aware; the bill of particulars motion, the  
18 discovery motion and a severance motion. I would like to  
19 start with the bill of particulars motion, then address  
20 one aspect of our discovery motion which is the  
21 communications between federal and state law enforcement  
22 and prosecutorial authorities. And unless the Court is  
23 interested and has questions about any other aspect of  
24 that motion, specifically the notes of Mr. [REDACTED]  
25 statements to ICE, an early witness list, Brady and

**Proceedings**

1 Giglio material, I will rest on the papers.

2           And then with respect to the severance motion,  
3 I am happy to argue it but if your Honor thinks it's --  
4 it makes more sense to wait until the grand jury returns  
5 a superseding indictment, that's fine with me.

6           THE COURT: Well I assume the issues will  
7 change if that happens.

8           MR. CREIZMAN: I would agree. And I am happy  
9 to proceed anyway, your Honor, with like maybe starting  
10 with the bill of particulars and then have the government  
11 respond or I can go through both motions and then have  
12 the government respond to both.

13           THE COURT: Why don't we take each issue and  
14 I'll hear from both sides? That probably makes more  
15 sense.

16           MR. CREIZMAN: Okay. Thank you, your Honor.  
17 There's a palpable need in this case for a bill of  
18 particulars to amplify, the bare bones charges in the  
19 indictment. And nothing underscores this fact more than  
20 the government's letter yesterday.

21           First, [REDACTED] [REDACTED] [REDACTED] was a  
22 co-defendant in Counts 1 and 2, along with Mr. [REDACTED] and  
23 others unidentified. The government advises that by an  
24 oversight, Mr. Torres was charged in those counts. That  
25 idea sort of boggles the mind given the fact that they --

**Proceedings**

1 I would assume that they presented evidence of Mr.  
2 Torres' involvement in Counts 1 and 2 and the grand jury  
3 voted to indict,

4           And then also for the first time, where there  
5 was Counts 1 and 2 and Counts 3 through 5 were separate  
6 conspiracies with separate ends, the government now says  
7 that it's an overarching conspiracy, even though  
8 Mr. Torres has dropped out of Counts 1 and 2. And wasn't  
9 charged in Counts 3 through 5.

10           So what we have here is a conspiracy that  
11 really is a rolling deck of cards and Mr. ██████ cannot be  
12 expected to prepare for trial in those circumstances.  
13 The indictment's allegations here are so general that  
14 they do not apprise Mr. ██████ of these specific acts with  
15 which he is charged. The indictment alleges a date and  
16 some co-conspirators; actually one co-conspirator now and  
17 the statute that's alleged to have been violated.

18           It does not provide the specific nature of the  
19 conspiracy alleged. It does not provide who Mr. ██████ is  
20 alleged to have conspired with. It does not say anything  
21 about the method and means of the conspiracy. There are  
22 no meetings listed in there. The roles of the  
23 co-conspirators are not in the indictment. Nothing in  
24 the indictment shows how anyone including Mr. ██████  
25 manifested their participation in the conspiracy or an

**Proceedings**

1 agreement. And there's nothing about what these  
2 defendants did to actually violate the statute.

3           The information also is not contained in any  
4 document provided by the government. There's a  
5 complaint.

6           THE COURT: Well the -- you are in possession  
7 of the search warrant application in the state  
8 prosecution. I gather from what you have said in your  
9 papers, you obtained that independently. It was never  
10 provided to you by the government.

11           MR. CREIZMAN: Well, your Honor, I obtained  
12 some of the state court files independently. On the eve  
13 of the government's opposition, they produced more of the  
14 state case files. This is something that they denied us  
15 at the beginning, up until they filed their opposition.  
16 And then they changed their mind and turned it over.

17           They still do not identify whether this act,  
18 and it seems to be but they don't identify whether this  
19 act is part of the conspiracy or how it relates to the  
20 conspiracy or whether it's the same -- or whether it's  
21 the entire conspiracy. In addition, there's --

22           THE COURT: Well right -- and I agree with  
23 you, we're dealing with a moving target and that's  
24 difficult but the -- at least the existing superseding  
25 indictment charges and let me find it, it charges a

**Proceedings**

1 conspiracy on a single date. We're not dealing here with  
2 a conspiracy that extends over a period of years or even  
3 months which is often the case.

4           So when you ask for more specific information  
5 about time, you have a pretty narrow window right there.  
6 I don't know what's going to happen with the superseding  
7 -- the fourth superseding indictment, so that's another  
8 issue. But you know right now your client is charged  
9 with participating on a single date and it's the same  
10 date that he was arrested by the state's. So doesn't  
11 that give you a pretty good idea of what's involved here?

12           MR. CREIZMAN: It gives me -- of course,  
13 your Honor, it gives me an idea of one act that Mr. ██████████  
14 may have committed in furtherance of the conspiracy . It  
15 says nothing about Mr. ██████████ involvement. It says  
16 nothing about Mr. Torres' involvement, probably because  
17 he was not involved. It says nothing about the  
18 unindicted co-conspirators.

19           And all I am asking for, your Honor, I am not  
20 asking for much here, I am asking for what is -- who are  
21 the unindicted conspirators? Who else did he agree with  
22 to commit the charged crime and that's important for two  
23 reasons. One reason is it's important to determine what  
24 the actual agreement is that the government is going to  
25 prove at trial that allegedly violated the statute.

**Proceedings**

1           The other point is an evidentiary reasons.  
2 Statements of co-conspirators are admissible at trial and  
3 we can impeach unavailable declarants. And how can we do  
4 that if we don't know who the declarants are?

5           There's also -- we also are asking for simply  
6 the shared common purpose of the conspiracy. That's the  
7 essence of what the agreement is. And that's critical to  
8 preparing because I --

9           THE COURT: Well what -- give me an example of  
10 what you mean by what is the common purpose. The count  
11 charges that the common purpose was to distribute and  
12 possess with intent to distribute a kilogram or more of  
13 heroin. So beyond that, when you say you want to know  
14 what the common purpose is, how much more specificity are  
15 you seeking?

16           MR. CREIZMAN: Well, your Honor, I think that  
17 that's actually the statute. That's the statute he's  
18 alleged with violating.

19           THE COURT: That's right. But it's not a vague  
20 statute. So give me an example of what additional  
21 specificity you would want with respect to the purpose of  
22 the conspiracy.

23           MR. CREIZMAN: Well is Mr. [REDACTED] -- there are  
24 apparently other people -- there are other  
25 co-conspirators involved in this count. Is Mr. [REDACTED] and

**Proceedings**

1 another co-conspirator distributing or possessing with  
2 intent to distribute because it's in the or to others?  
3 And in that case, the issue would be whether Mr. [REDACTED]  
4 had in mind that there would be further distribution of  
5 the heroin because a buyer/seller is not a conspiracy  
6 just standing alone.

7           Also, on the other side of the coin, Mr. [REDACTED]  
8 could be -- his co-conspirators could be part of some  
9 organization, some sort of drug organization -- drug  
10 distribution organization. So I am not sure what the  
11 conspiracy is.

12           And it's -- if I can just make an analogy,  
13 let's say Mr. [REDACTED] was charged with burglary or bank  
14 robbery, just the substantive count of bank robbery on  
15 the day -- on July 14, 2010. I don't think that provides  
16 sufficient detail. You know, in the eastern district or  
17 elsewhere, there's hundreds of banks. There's -- we  
18 don't know who you robbed. We don't know who. And in  
19 the same case here, we don't know who he distributed the  
20 heroin to, if he did distribute the heroin or whether he  
21 was a recipient and was planning to distribute it onward.  
22 So there's a great confusion here as to what this  
23 conspiracy is.

24           And I believe that the government here can't be  
25 permitted to play a shell game where Mr. Torres is in one

**Proceedings**

1 day. He's out the other day. And that's the problem  
2 with Counts 1 and 2 and Counts 3 through 5. We had a --  
3 we now have an over arching conspiracy, the same common  
4 goal apparently, they're going to prove to the grand jury  
5 but prior to that, all we had was that they were separate  
6 goals. That they had separate ends.

7           And so in order to prepare for trial, we really  
8 need to know what the crime was, what the -- and we're  
9 not asking for evidence. We're not asking for theories.  
10 We're asking simply what is the conspiracy that the grand  
11 jury voted to indict Mr. ██████ on.

12           In addition -- and there's a case, Ramirez that  
13 we cited in our brief, we're asking for some detail as to  
14 method and means. And of course the drug conspiracy  
15 statute doesn't require an allegation of an overt act.  
16 But in Ramirez the Court said -- Judge Friedman says that  
17 because of that, actually the logic cuts the other way --  
18 in the way of more particulars because it's so -- because  
19 the indictment itself provides so little detail.

20           Your Honor, we've looked at many cases; the  
21 government's cases, our cases. I have never seen an  
22 indictment in a case with so little detail provided in  
23 discovery, in the indictment. And in fact, if one sit --  
24 I've sat with my colleague for hours looking at the  
25 complaint underlying the original indictment in this case

**Proceedings**

1 which makes no reference to Mr. [REDACTED] transaction. And  
2 I've sat with the state case evidence. And I can sit for  
3 hours and come up with numerous permutations of what this  
4 conspiracy is and I don't think that's -- and the bill of  
5 particulars is just meant to provide facts, basic facts  
6 as to what the conspiracy -- what the charges are. And  
7 that's lacking in this case.

8 THE COURT: Well why don't you tell me about  
9 the papers from the state case because those were not  
10 addressed in your reply. So what -- specifically what  
11 papers did the government produce, albeit belatedly?

12 MR. CREIZMAN: Okay. Thanks, your Honor.  
13 Actually I do address the state papers in the opening  
14 brief, what I found independent.

15 THE COURT: What you had gotten independently?

16 MR. CREIZMAN: Right.

17 THE COURT: Yes.

18 MR. CREIZMAN: And then in the reply, in the  
19 discovery section. But what it says basically is that a  
20 joint investigation of ICE --

21 THE COURT: So what are the -- first tell me  
22 what are the documents that the government produced?

23 MR. CREIZMAN: Yes. There's a search warrant  
24 affidavit.

25 THE COURT: And is that -- I can't -- is that

**Proceedings**

1 what you had obtained independently?

2 MR. CREIZMAN: No, that's --

3 THE COURT: You got the criminal complaint.

4 MR. CREIZMAN: I have the criminal complaint.

5 What I got from the government I think that was new, was  
6 the search warrant affidavit which I am happy to hand up  
7 to your Honor.

8 THE COURT: Well the search warrant affidavit  
9 was attached in your reply papers.

10 MR. CREIZMAN: That's correct. So I imagine,  
11 your Honor --

12 THE COURT: So I apologize if I said you didn't  
13 address it because I do remember it was attached to your  
14 reply papers.

15 MR. CREIZMAN: Thank you. What it describes  
16 here is --

17 THE COURT: What else?

18 MR. CREIZMAN: Oh, what else do I have? I  
19 think essentially that -- I am just taking a look at what  
20 I do have here. We have the complaint, the criminal  
21 complaint. I have a -- the Mr. [REDACTED] agreed to forfeit  
22 something in the range of \$45,000 and I have a receipt of  
23 the Queens District Attorney depositing that into a bank  
24 account. I have a statement of Mr. [REDACTED] in Spanish and  
25 then translated into English. And I have --

**Proceedings**

1           THE COURT: So you did get his statements  
2 because that was one of the -- that was one aspect of  
3 your discovery motion.

4           MR. CREIZMAN: Well I have -- I got one  
5 statement which he made to the NYPD. What I don't have  
6 are statements that he made to special agents of ICE who  
7 were also at the scene of the arrest and who obviously --  
8 who didn't take notes or did not and apparently did not  
9 record it in a memo or take any notes of these  
10 conversations. So that's really all I have.

11           And the co-defendant in this case, Richard  
12 Castro, is not identified in the indictment here. I  
13 would imagine he's a co-conspirator but I still have no  
14 idea who the other co-conspirators are, what the other  
15 roles of those co-conspirators are.

16           And just to make another point on that, Mr. --  
17 the information -- the government has never -- has given  
18 us mixed messages about the state case. When we asked  
19 for these documents early on, the government gave us  
20 documents, not anything related to the state case and  
21 told us that we are -- this is all we're entitled to  
22 under Rule 16. And again, on the eve of their  
23 opposition, they decided that maybe they had -- that was  
24 incorrect.

25           But still we have no -- the fact that they said

**Proceedings**

1 wasn't -- we weren't entitled to it under Rule 16 makes  
2 me wonder what -- whether this transaction -- I imagine  
3 it is related and I imagine it could be the same  
4 transaction but I have no idea how it relates to the  
5 conspiracy as a whole.

6           And so, your Honor, again I think that the  
7 particulars that we seek and that we lay out in our  
8 papers are very basic. I don't see how the government  
9 can be prejudiced by it -- by giving them to us,  
10 especially since Rule 7(f) permits the government to  
11 amend its particulars at any time.

12           But by having them put this information in the  
13 bill of particulars will help us prepare for trial and  
14 prevent a constructive amendment of the indictment at  
15 trial, as well which given the letter that we received  
16 yesterday is I think a very real consideration. So I  
17 think that's all I have to say, your Honor, on this  
18 issue.

19           THE COURT: Thank you very much.

20           MR. [REDACTED] Your Honor, Ms. [REDACTED] will  
21 address the bill of particulars argument but since I  
22 handled the discovery with respect to the state case, I  
23 would like to address that.

24           Counsel for the defendant just characterized  
25 our conduct as entailing a change of mind and sending

**Proceedings**

1 mixed messages and that's absolutely not true. We've  
2 provided to the defense every single document that we had  
3 in our possession relating to the state case, as soon as  
4 we had it. And we obtained what we were made to believe  
5 was the entire case file from the Queens DA. We provided  
6 that to defense counsel. It seemed thin to us. We  
7 pushed for more and we were told that that was it.

8           Subsequently, after more back and forth with  
9 the Queens DA, I finally got the entire case file and  
10 without going into the back and forth, I am now satisfied  
11 that we have all of it, as soon as we got it we produced  
12 it. Mr. Creizman told -- you know, went through with you  
13 the documents that we produced to you. He left out at  
14 least a dozen more documents, I think. It's the  
15 application for the search warrant. It's the statements,  
16 the translation of the statements and it's all of the  
17 documents relating to the funds that were seized and  
18 steps -- subsequent investigative steps that were taken  
19 in connection with the investigation. The defense has  
20 all of that. He's had it ever since the government  
21 received it. With respect to --

22           THE COURT: Well let me just stop you because I  
23 -- you know, I am a little confused myself and so I think  
24 it's -- his confusion is not unreasonable. In response  
25 to the defense request for communications between federal

**Proceedings**

1 and state law enforcement, you responded -- and I am not  
2 -- we'll get into the merits of that specific request in  
3 a moment but you specifically -- you responded that your  
4 office had not communicated with the Queens DA's office  
5 between the time of his state arrest and his federal  
6 arrest. That wasn't entirely responsive because the  
7 question concerned law enforcement.

8           And there does -- there is information before  
9 the Court that seems to suggest that the investigation of  
10 Mr. ██████ leading to his state arrest or local arrest  
11 was, in fact, the result of a joint investigation. So  
12 without getting into whether he's entitled to  
13 communications between different law enforcement  
14 agencies, my question to you is this. Was there a joint  
15 investigation?

16           MR. ██████ There was a joint investigation  
17 that lasted, your Honor, for the duration of that  
18 afternoon. That is it. And that's a fact that I  
19 communicated -- I communicated to defense counsel --

20           THE COURT: That afternoon meaning July 14,  
21 2009?

22           MR. ██████ Yes, that's correct. And before  
23 the filing of the reply brief, I thought I made it clear  
24 to defense counsel that in addition to their not being  
25 entitled to anything because there were no communications

**Proceedings**

1 either before or after and that nevertheless --

2 THE COURT: Well but what you said in the  
3 papers was your office had no communications with the  
4 Queens DA's office. That really begs the question  
5 because ICE presumably had communications with officer or  
6 possibly did, that they were involved in a joint  
7 investigation with.

8 MR. [REDACTED] But I think and I apologize if  
9 our brief was unclear, your Honor, I think just to get to  
10 the heart of the matter, what actually happened as I  
11 understand it, without going into all of the details of  
12 the investigation, to the extent relevant here, ICE was  
13 conducting an investigation. That investigation took  
14 them into Queens. And once they were in Queens events  
15 unfolded in such a way that for reasons, you know, that  
16 are particular to ICE, they wanted to involve the Queens  
17 NYPD and made the initial communication on that day.

18 And subsequent to the arrest of Mr. [REDACTED]  
19 there were not additional communications. So it really  
20 is a very ad hoc, short-lived but nevertheless joint  
21 investigation.

22 THE COURT: So they wanted to use the Queens  
23 NYPD to make the stop?

24 MR. [REDACTED] Correct, your Honor.

25 MR. CREIZMAN: Your Honor, I would like to

**Proceedings**

1 respond to those points but --

2 THE COURT: I think I --

3 MR. CREIZMAN: -- I could wait until after.

4 That's all.

5 THE COURT: So that that would certainly  
6 suggest that it was part of a joint investigation and  
7 that any documents that were generated by the locals,  
8 whether it's in the Queens -- in possession of the Queens  
9 DA or the NYPD would be documents that under the case  
10 law, the government would seem to have had access to.

11 MR. [REDACTED] Correct. And to the extent that  
12 any such documents exist, those documents were turned  
13 over as soon as we had them at our office -- in our  
14 possession and I do not mean to finesse and I am --  
15 again, I regret that that --

16 THE COURT: Well what about ICE? Did ICE have  
17 them earlier?

18 MR. [REDACTED] Everything -- we've communicated  
19 with ICE. We've communicated with the Queens DA. There  
20 are no documents relating to prior communications and  
21 there were no prior communications between ICE and local  
22 law enforcement. And given the communications between  
23 law enforcement agencies, that are sometimes imperfect, I  
24 acknowledge our office's ongoing obligation to disclose  
25 any such documents that come to our attention. And we

**Proceedings**

1 will do so as we have done.

2 THE COURT: And does the government intend to  
3 rely on the evidence concerning the local arrest as part  
4 of its case in this federal action?

5 MR. [REDACTED] I don't know that we're prepared  
6 to make a decision on that now but I wouldn't want to  
7 foreclose that possibility. I think we're entitled to  
8 use that evidence to the extent that it's admissible.

9 THE COURT: Well but that's the problem. We're  
10 engaged in pretrial motions practice now and if the  
11 government is going to offer that evidence, there may  
12 well be a motion to suppress. I am not going to get into  
13 the merits of it now but certainly that is something the  
14 defense is entitled to know and the Court is entitled to  
15 know. So that we don't go through these pretrial motions  
16 and then shortly before trial, the government -- it  
17 becomes clear because the government turns over its 3500  
18 material and the defense says they're offering evidence  
19 of this local arrest. We want to move to suppress. It  
20 was an unlawful stop.

21 So you can't have it both ways. If you want to  
22 reserve the right to offer that evidence, then you should  
23 advise the defense and advise the Court immediately.

24 MR. [REDACTED] I understand, your Honor. I  
25 think then the government's position is that we intend to

**Proceedings**

1 use the evidence from the state case file that was  
2 produced to the defendants in our case in chief.

3 THE COURT: All right. I would like to hear  
4 the government's response on the bill of particulars. Is  
5 there anything, Mr. Creizman, that you want to respond to  
6 with respect to that last exchange?

7 MR. CREIZMAN: There definitely is. I can hold  
8 off until the discovery portion because I think it's more  
9 appropriate there. Your Honor, Mr. [REDACTED] though --

10 MR. [REDACTED] Your Honor, I have something. I  
11 think that I would like to respond very briefly to  
12 Mr. Creizman's statements about the bill of particulars  
13 just because it might save time for the government to  
14 respond to both at once.

15 I have a very hard time taking a strong  
16 position on such a beautiful Friday but I do have to say  
17 that everything that Mr. Creizman said about the state  
18 case against his client, our client doesn't have a state  
19 case related to this. And so to the extent that the  
20 information in Mr. [REDACTED] state case furnishes his  
21 attorneys and Mr. [REDACTED] with the adequate means to mount  
22 a defense, our client doesn't really have those same  
23 facts. And I think it --

24 THE COURT: Is your client -- I know that there  
25 were intercepted -- I don't know if they were intercepted

**Proceedings**

1 conversations or consensually recorded but I understand  
2 there were recordings of conversations that were turned  
3 over. Is your client one of the individuals who is  
4 captured in those recordings?

5 MR. [REDACTED] There is a mention of a man named  
6 [REDACTED] on those consensual recordings but it does not  
7 appear to be our client, your Honor.

8 The only thing that we have to say is that we  
9 would like to stress what Mr. Creizman said originally.  
10 Apparently we're in the situation where one of the  
11 co-defendants has apparently been charged by oversight.  
12 And furthermore, the conspiracies that were originally  
13 quite separate are now in light of new evidence, all part  
14 of one larger conspiracy.

15 This certainly seems like the government is --  
16 at the point that it filed its initial indictment, the  
17 government's evidence itself was incomplete to the point  
18 where their prosecution might have been not based on  
19 facts that have later come to light. And I think that if  
20 they have difficulty even prosecuting those initial  
21 facts, then we have difficulty defending with them.  
22 Obviously they might be mooted if they end up  
23 consolidating everything or there's some new indictment  
24 but that's our position as of now.

25 THE COURT: All right. Let me hear from the

**Proceedings**

1 government with respect to the bill of particulars.

2 MS. [REDACTED] Thank you, your Honor. If I may  
3 just make a few points in response to Mr. Creizman.  
4 Requests like the defendant's here for a bill of  
5 particulars as you are well aware are frequently made and  
6 often denied by the courts, especially in cases where the  
7 government charges a conspiracy case such as this one  
8 which is based largely on information provided by  
9 co-conspirators and where quite frankly there are not  
10 voluminous documents. And as always the case in those  
11 types of cases, the defendant doesn't know everything the  
12 government knows about him until shortly before trial  
13 when the government turns over its 3500 material.

14 And this motion highlights an important  
15 difference between --

16 THE COURT: One moment.

17 (Pause.)

18 MS. [REDACTED] May I continue?

19 THE COURT: Yes.

20 MS. [REDACTED] Thank you. The motion highlights  
21 an important difference between criminal and civil cases  
22 which is in a criminal case the government has an  
23 extraordinarily high burden with proving its case beyond  
24 a reasonable doubt. One of the advantages that comes  
25 with that burden, of course, is that --

**Proceedings**

1 THE COURT: One moment. I'm sorry.

2 (Pause.)

3 THE COURT: You may continue.

4 MS. [REDACTED] An advantage that comes with that  
5 burden, your Honor, as you well know is that the  
6 government is able to hold on to some of that information  
7 until right before trial. As the government has  
8 previously noted, this is an ongoing investigation.  
9 We're actively investigating this case and as we've  
10 discussed this morning, we're considering expansion of  
11 charges and one problem with the defendant's request is  
12 that it may lock the government into how it would prove  
13 its case.

14 Though the defendant here does not have as much  
15 information as he would like to have, he has more  
16 information that he is entitled to and here he knows a  
17 your Honor pointed out the specific date, not a period of  
18 years, it's one day.

19 THE COURT: Well he knows the date as currently  
20 charged but the government wants to go in and file a  
21 fourth superseding indictment and charge a broader  
22 conspiracy. What is the period that is going to be  
23 charged in the new superseding indictment assuming the  
24 grand jury returns it?

25 MS. [REDACTED] I cannot be specific with respect

**Proceedings**

1 to that date at this point, your Honor, but it will  
2 include this transaction.

3 THE COURT: Well but my point was that under  
4 the current version of the indictment, he has a lot -- he  
5 has -- the proof is limited and so he has more  
6 information at least with respect to timing than a lot of  
7 defendants have. But that's not going to be true once  
8 the -- or maybe that -- that's going to change when the  
9 government supersedes.

10 MS. [REDACTED] Your Honor, I understand the  
11 Court's concern. We anticipate that the superseding  
12 indictment will give additional information about other  
13 dates and times. At this point, given that the case  
14 hasn't been presented to the grand jury, we're actively  
15 investigating, I am very hesitant to give specifics about  
16 those dates and times and those particular acts but it  
17 will include this transaction.

18 THE COURT: And it's going to include the other  
19 transactions that were charged against other defendants  
20 in Counts 4 and 5?

21 MS. [REDACTED] That's correct, your Honor.  
22 Essentially, without -- essentially we have learned that  
23 these -- what we saw initially is two more discrete  
24 transactions are part of a larger criminal scheme to  
25 distribute narcotics.

**Proceedings**

1 THE COURT: But you don't know what the  
2 duration of that conspiracy is.

3 MS. [REDACTED] That's part of our ongoing  
4 investigation.

5 THE COURT: Well you say ongoing investigation,  
6 but you also represented in a letter that in the next  
7 week or two, the government is going to move to  
8 supersede. So you can't leave this open-ended. The  
9 government drafts the superseder. So what are you going  
10 to present to the grand jury in terms of the duration of  
11 the conspiracy?

12 MS. JAGER: May I have just a moment,  
13 your Honor?

14 (Counsel confer.)

15 MR. [REDACTED] Your Honor, the investigation --  
16 we're trying to sort of police the boundary between what  
17 it's appropriate to say and not and the investigation is  
18 very, very active. We are developing multiple sources of  
19 information at the same time on different tracks.

20 We're very diligently attempting to discern the  
21 full parameters of the conspiracy. I think it's not at  
22 all uncommon in cases like this that what you take to be  
23 a discrete transaction or even a discrete conspiracy with  
24 further investigation as shown to be part of a larger  
25 one, and that's what's happened here. The precise time

**Proceedings**

1 frame at this point, we're very reluctant to say anything  
2 that would lock us in. It definitely embraces all of the  
3 dates contained in the current indictment. I don't think  
4 we'll be in a position, given how many different sources  
5 of evidence were developing and attempting to corroborate  
6 at the same time, I don't think we're in a position today  
7 to say exactly when it begins and ends. But it is a  
8 conspiracy of at least six months to a year in duration  
9 and it does embrace the dates in the pending indictment.

10 MS. JAGER: If I may respond to some of Mr.  
11 Creizman's other points, your Honor. With respect to his  
12 request that the bill of particulars identify the co-  
13 conspirators in this case, he notes that there are two  
14 reasons for the identification of co-conspirators; one  
15 knowing what the agreement and two, the evidentiary  
16 purpose.

17 But first the agreement, I mean the  
18 government's not hiding the ball here as your Honor  
19 pointed out, is this an agreement to distribute  
20 narcotics. The language in the statute is plain. I  
21 don't think there's any mystery there.

22 THE COURT: But I made that comment in the  
23 context of a charge that a conspiracy lasted a day which  
24 apparently is not going to be the charge in a few weeks  
25 if the government is successful in securing a fourth

**Proceedings**

1 superseding indictment.

2 MS. JAGER: But in that case, the agreement  
3 would still be an agreement to distribute narcotics. I  
4 don't think there's -- I mean the case law is clear,  
5 there is no requirement to show overt acts or it to be  
6 more specific than that and the government is permitted  
7 to proceed on different theories at trial and to present  
8 that different evidence. With respect --

9 THE COURT: What does the government mean when  
10 it says in its letter to the Court that the defendant  
11 [REDACTED] was inadvertently or by oversight  
12 charged in Counts 1 and 2?

13 MR. [REDACTED] But it's the defendant's  
14 inclusion in those counts is in the nature of a  
15 typographical error.

16 THE COURT: But presumably the superseding  
17 indictment which is going to pull the two conspiracies  
18 together is going to put them back in; isn't it?

19 MR. [REDACTED] That's correct, your Honor and  
20 again we made -- you know we're attempting to be as  
21 transparent as possible even though the government  
22 believes it has developed sufficient evidence to pull the  
23 defendant as named in Counts 1 and 2 of the current  
24 indictment into a larger conspiracy, it nevertheless was  
25 not the intention of the government to charge that

**Proceedings**

1 defendant in that conspiracy charged in Count 1 at the  
2 time that those charges were presented to the grand jury.  
3 And so we could not in good faith at this time allow the  
4 ministerial error to go unremarked.

5           And to be perfectly candid, your Honor, it  
6 wasn't until we were engaged in this litigation over  
7 these discovery issues that we refocused on the document  
8 itself, the pending superseding indictment and when we  
9 noticed it after vetting it and making sure without again  
10 going into the details that it was in error, we  
11 immediately brought it to the attention of the relevant  
12 defendant and then the Court.

13           THE COURT: All right. Anything further?

14           MS. [REDACTED] Just with respect to Mr. Creizman  
15 pointed to the other reasons he wants the identities of  
16 the co-conspirators is for evidentiary purposes. I mean  
17 that's precisely the reason why the bill of particulars  
18 is not meant to give evidence, it's meant to just give  
19 enough information to proceed at --

20           THE COURT: Well he didn't say he wanted it to  
21 know the government's evidence. He said he wanted that  
22 information for purposes of making evidentiary objections  
23 or if the government is going to be offering statements  
24 of co-conspirators, someone has to be -- the declarant  
25 has to be a co-conspirator for the information to come in

**Proceedings**

1 and then he has certain rights with respect to the  
2 impeachment of the declarant.

3 MS. [REDACTED] Absolutely, your Honor, and the  
4 government would turn over all of that information in  
5 accordance with the responsibilities under 3500 and 3500  
6 material. So the defense will get that information but  
7 that request at this point is under that basis is  
8 premature.

9 THE COURT: Well let me just make this  
10 observation because I really would like to move on to the  
11 other issues. I think given the fact that the government  
12 plans to supersede, this discussion is somewhat premature  
13 because we don't know how much detail is going to be  
14 included in the superseding -- the fourth superseding  
15 indictment and what overt acts, if any, are going to be  
16 charged.

17 I will say this, both sides have correctly  
18 noted that the determination of whether or not to order a  
19 bill of particulars is committed to the discretion of the  
20 trial court and in this case, the trial court has  
21 referred that to me and both sides cite cases that  
22 support their respective positions. The Court determines  
23 these issues on a case by case basis.

24 In this case, I will say that I think there are  
25 circumstances here that warrant additional information

**Proceedings**

1 than I otherwise would be inclined to order because of  
2 the changing theories of the case and whether or not  
3 these are separate crimes or part of a common scheme or  
4 plan. I do think that under these circumstances at a  
5 minimum, the defendants are entitled to a list of co-  
6 conspirators.

7           Now I would note that the government in its  
8 opposition papers argued that the defense is not entitled  
9 to the government's witness list. Ms. [REDACTED] did not make  
10 that argument in their oral argument. And rightly so  
11 because we're dealing with two separate issues; one is a  
12 witness list and we can talk about that in terms of  
13 discovery -- the discovery requests and the other is a  
14 list of co-conspirators. And the co-conspirators can be  
15 co-defendants. They can be as yet unapprehended  
16 individuals but it is not -- it's different from the  
17 government's witness list.

18           So at a minimum, I am going to require that the  
19 government make that disclosure and with respect to the  
20 other requests, I think that's just going to have to wait  
21 the presentation of the case to the grand jury and any  
22 additional superseding indictment.

23           MR. [REDACTED] Your Honor, just a point of  
24 clarification and maybe it's obvious but the requirement  
25 that we produce this list is with respect to the pending

**Proceedings**

1 indictment or should this await the filing of the  
2 superseding indictment?

3 THE COURT: Well if the list is going to  
4 change, I guess it should await the new one, although the  
5 government -- if the government knows now presumably who  
6 the co-conspirators are, and I just don't know when the  
7 new indictment is going to come down. So why don't -- on  
8 second thought, why don't you produce that in a week?

9 MS. [REDACTED] Your Honor, if I may also make an  
10 application, we can make an ex parte showing to  
11 your Honor. We have reason to believe there may be some  
12 concerns as to safety in disclosing some of those names.  
13 If we could make an ex part application to discuss that  
14 with your Honor before turning over the name.

15 THE COURT: That should have been done  
16 previously. And again, we're talking about co-  
17 conspirators. We're not talking about a witness list.  
18 And on the one hand, the government argues that the  
19 defendant doesn't need more particulars. He knows what  
20 he did and who he did it with. And then on the other  
21 hand, you're taking an inconsistent position saying we  
22 don't want to give this information because of danger.

23 If you want to make an application, I am not  
24 going to stop you from doing it. But I would suggest  
25 that you are going to have to make a pretty strong

**Proceedings**

1 showing.

2 MR. [REDACTED] Thank you, your Honor.

3 MS. [REDACTED] Thank you, your Honor.

4 MR. CREIZMAN: Your Honor, just with respect to  
5 that application, I mean I think that I would oppose an  
6 application such as that. I would like the opportunity  
7 to respond to such an application. As Judge Pauley said  
8 in the Lino (ph.) case where there were -- there was a  
9 contract for the murder of one of the witnesses, there  
10 were threats, and Judge Pauley said that there's a way to  
11 counterbalance to the government's security concerns  
12 which is the defendant's need for information to respond  
13 to the charges in the indictment.

14 And what Judge Pauley found significant there  
15 was that the defendants were either incarcerated, like  
16 Mr. Palma, or under house arrest. And so I -- and Mr.  
17 Palma has no history of violence. He has no criminal  
18 record other than there's a disorderly conduct violation  
19 which pertains apparently to this case. So I would  
20 strongly oppose such a motion -- an ex parte motion, at  
21 least where I can't respond to it.

22 THE COURT: You'll have an opportunity to  
23 respond. All right. Let's move on to the discovery  
24 issues, the severance may well become moot, so there's  
25 really no point in addressing that today.

**Proceedings**

1           MR. CREIZMAN: Your Honor, I noticed that the  
2 attorneys for the government were standing, so I don't  
3 want to show the Court disrespect.

4           THE COURT: No, I usually tell attorneys that  
5 they don't have to stand, so that's fine.

6           MR. CREIZMAN: Well in my case, one couldn't  
7 tell anyway whether I am standing or sitting. But first  
8 of all, I don't want to impugn Mr. [REDACTED] integrity.  
9 That's not what I intended to do. But the government  
10 quoted facts from the state case at two successive bail  
11 hearings with Mr. Palma. So when I asked the government  
12 for documents, I would have assumed that they had the  
13 documents and had reviewed them.

14           In addition, when I asked the government for  
15 the documents, I was never told that they didn't have the  
16 documents. I was told I was given everything that was  
17 responsive under Rule 16. And perhaps the government  
18 doesn't recall that and I am not impugning anyone's  
19 integrity here but that is precisely what happened.

20           As for -- now going to the actual merits of  
21 this motion, as for Mr. [REDACTED] statement that it was  
22 a day joint investigation, it's sort of belied by the  
23 search warrant affidavit which says in paragraph B --  
24 2(b), "Since the beginning of 2009, the Immigration and  
25 Customs Enforcement Service and the New York City Police

**Proceedings**

1 Department have been conducting an investigation into a  
2 group of narcotics traffickers who are based in Brooklyn  
3 and Queens."

4 It also then goes on to say that "In January  
5 2009, a confidential informant was arrested and has been  
6 providing information about this group of narcotics  
7 traffickers." In paragraph 2(c) it says, "On July 14, I  
8 observed at approximately 6 p.m., I observed this  
9 confidential informant meet with a Hispanic male in  
10 Queens and here, the two met with a person later known to  
11 me to be ██████████ ██████████, my client, and a person later know  
12 to me to be ██████████ ██████████."

13 That suggests to me that the police officer who  
14 drafted this search warrant affidavit, it would be  
15 surprising to me that he just happened upon the  
16 confidential informant of ICE. This seems to me to have  
17 been an ongoing investigation since the beginning of  
18 January 2009. Mr. --

19 THE COURT: If I had to venture a guess, I  
20 assume the government's response is going to be that  
21 there was a joint task force and police officers assigned  
22 to the joint task force but that the officers who made  
23 the stop were not part of that ask force; is that  
24 correct?

25 MR. ██████████ I actually don't know anything

**Proceedings**

1 about the larger task force. Again, I don't know how to  
2 be clear, we've investigated this, we've spoken to other  
3 law enforcement agencies. We're now providing the  
4 defendant with absolutely everything that he's asked for  
5 in connection with this. It was of a day. The ICE  
6 agents came over from New Jersey based on information  
7 from one of their informants.

8 THE COURT: Well who is the affiant on that  
9 search warrant?

10 MR. CREIZMAN: Detective [REDACTED] of the  
11 Narcotics Bureau of Queens of the NYPD.

12 MR. [REDACTED] So again our understanding is  
13 that a phone call was made to the Queens NYPD officer.

14 THE COURT: Have you spoken with  
15 Detective [REDACTED]

16 MR. [REDACTED] I have spoken with the Queens DA  
17 who handled the case and I have spoken with the ICE  
18 agents who were personally involved in the matter.

19 THE COURT: Well I think somebody ought to  
20 speak with Detective [REDACTED] to find out what he meant by  
21 that.

22 MR. [REDACTED] Yes, your Honor.

23 THE COURT: Because that -- you know, if in  
24 fact there was a joint task force but whoever did the  
25 arrest was just brought in for that stop in Queens,

**Proceedings**

1 that's one thing. But it may be that there is more  
2 evidence out there and it is disturbing to the Court that  
3 at this late date and after a succession of indictments  
4 you still don't have an answer to that question which is  
5 what's this joint task force as suggested in the search  
6 warrant affidavit?

7 MR. [REDACTED] Well specifically what we  
8 inquired into was the extent of the investigation into  
9 Mr. Palma because in our view, that's what was relevant  
10 and we've done that and we have confirmed with the ICE  
11 agents who are personally involved that they were led to  
12 Mr. Palma by the CW on that day and in connection with  
13 information that they developed on that afternoon,  
14 literally on the car -- in the car on the way, they  
15 picked up the phone as they sometimes do and reached out  
16 to a member of the NYPD uniformed officer detective with  
17 whom they had they contact and perhaps with whom they  
18 worked in connection with the task force.

19 But there was no -- there is no evidence that  
20 this office is aware of, of any prior communication  
21 between ICE and the NYPD concerning an investigation of  
22 this defendant.

23 THE COURT: But there's another defendant in  
24 this case and I realize that he was not involved on July  
25 14 and wasn't observed on July 14 but to the extent that

**Proceedings**

1 he may have been a subject of the -- any joint  
2 investigation, there might be additional evidence out  
3 there that you're not aware of. So focusing solely on  
4 Mr. Palma, when there are other defendants in this case,  
5 really isn't sufficient.

6 MR. [REDACTED] We'll look into it further.

7 THE COURT: Because if there is a joint task  
8 force, then usually when there's a joint task force,  
9 they are all working together and you don't have bits and  
10 pieces of the evidence in one office versus another. But  
11 the defense is entitled to know that, have answers to  
12 that question as is the Court.

13 MR. [REDACTED] Yes, your Honor. We'll look  
14 into it further and report back to the Court.

15 MR. CREIZMAN: Your Honor, to the extent --

16 THE COURT: Within a week?

17 MR. [REDACTED] Yes, your Honor.

18 MR. CREIZMAN: Your Honor, to the extent I  
19 understood Mr. [REDACTED] statements, I don't want to  
20 lock myself in, maybe I did not understand all of the  
21 statements but in terms of factual recitation, that's  
22 consistent with basically it seems to me what is in the  
23 search warrant affidavit that ICE -- it's a confidential  
24 informant of ICE who picked up Mr. Palma on July 14. And  
25 what's disturbing about this is that ICE brought the case

**Proceedings**

1 -- first ICE and the joint task force, whatever it was,  
2 brought the case to the Queens DA and for whatever  
3 reason, Mr. -- well, Mr. Palma was charged with felony  
4 money laundering relating to a controlled substance.  
5 There was no heroin found on him. I believe that the  
6 complaint describes a search that I think is questionable  
7 but that's for another time. And then three months  
8 later, the charges against Mr. Palma are basically  
9 dropped to a non-criminal disposition of a disorderly  
10 conduct in exchange for Mr. Palma agreeing to waive trial  
11 and the right to contest forfeiture.

12           Four months later, ICE arrests him when he  
13 tries to get -- to renew his permanent visa, permanent  
14 residency and according to Mr. Palma in a sworn  
15 affidavit, tells him we have been monitoring you for  
16 seven months. Then ICE brings that case to the federal  
17 government, to the United States Attorney's Office.

18           Now I don't know -- what I am looking for here  
19 is not prior communications between the NYPD and ICE  
20 before they arrested Mr. Palma. What I am looking for  
21 are communications between ICE, the United States  
22 Attorney's Office, the Queens DA and the NYPD regarding  
23 the disposition of Mr. ██████████ case in the Queens -- by  
24 the Queens District Attorney's Office.

25           THE COURT: Well you are entitled to evidence

**Proceedings**

1 where there's a joint investigation, whether it's in the  
2 hands of the feds or the locals. If it's part of a joint  
3 investigation, you're entitled to the evidence described  
4 under Rule 16. But you're asking for communications  
5 between offices and the law says you're not entitled to  
6 that. You seem to suggest that the reason that you --  
7 anymore than you would be entitled to communications  
8 between the two prosecutors sitting before me today. You  
9 seem to suggest that you need that information to know  
10 whether or not to move to dismiss on double jeopardy or  
11 due process grounds.

12 My question to you is your client knows what  
13 the agreement was when he pleaded guilty. What was that  
14 agreement?

15 MR. CREIZMAN: The agreement was that the DA  
16 would not prosecute him for the money laundering count  
17 with respect to laundering heroin.

18 THE COURT: Was that a written or an oral  
19 agreement?

20 MR. CREIZMAN: It was, as I understand it, it's  
21 an oral agreement that was -- it was disposed of in  
22 court. And just to answer your --

23 THE COURT: I'm sorry, you said it was oral?

24 MR. CREIZMAN: It was oral. I believe it was  
25 oral. I think that's how these cases are resolved in the

**Proceedings**

1 DA's office generally and not by a written plea  
2 agreement.

3 THE COURT: And he hasn't been prosecuted for  
4 money laundering.

5 MR. CREIZMAN: He hasn't been prosecuted for  
6 money laundering but it is the same transaction that  
7 that's at issue there. It appears to be the same  
8 transaction that's at issue here.

9 THE COURT: But what would be -- so what would  
10 the argument be, even assuming that this was part of a  
11 joint effort involving the feds. He was told he wouldn't  
12 be prosecuted for money laundering. He wasn't prosecuted  
13 for money laundering. So what is the violation there?

14 MR. CREIZMAN: Well -- and I wondered for -- I  
15 am going to address that right now but I just wanted to  
16 keep in mind that I am going to address also the 16(a) --  
17 Rule 16(a)(2) position of your Honor that he's not  
18 entitled to these materials.

19 So the prejudice would be here that ICE and the  
20 Queens DA just decided that this may not be the strongest  
21 case. The Queens DA induced him to plead guilty, to give  
22 up his right to a trial, to give up his right to  
23 challenge what we think could have been an illegal  
24 search, an unlawful search. And he's prejudiced to this  
25 very day because there could be an argument that we are

**Proceedings**

1 not -- that we can't move to suppress that evidence in  
2 federal court because he's already waived it. Or I am  
3 not sure I believed that.

4 THE COURT: I doubt that --

5 MR. CREIZMAN: I doubt that.

6 THE COURT: -- the government is going to be  
7 making that argument. Are you going to make that  
8 argument?

9 MR. [REDACTED] I don't know, your Honor. I  
10 haven't support -- that issue has not been squared away.

11 MR. CREIZMAN: And if he doesn't make that  
12 argument, there's still a problem --

13 THE COURT: I hope you don't make that  
14 argument.

15 MR. CREIZMAN: There's still another problem,  
16 your Honor, which is that witnesses, seven months -- Mr.  
17 [REDACTED] arrested seven months after this case -- after he  
18 was arrested in the state case. He gave up his right to  
19 challenge the search warrant -- to challenge the search.  
20 There were witnesses there. There is Mr. Castro. We  
21 can't locate Mr. Castro. There are people at this gas  
22 station where he was arrested who may have forgotten.  
23 Who may not work there anymore.

24 And Mr. [REDACTED] was led to believe basically that  
25 he wouldn't be prosecuted any further for the same act

**Proceedings**

1 and transaction.

2 THE COURT: But that was not the agreement.

3 MR. CREIZMAN: Well, your Honor, with all due  
4 respect, I think that that is -- that would be a rational  
5 understanding especially where ICE is involved in  
6 bringing Mr. [REDACTED] and monitoring him and then bringing  
7 him to the United States Attorney's Office on the same  
8 act or transaction four months later.

9 I think that that -- there's a case in the  
10 Sixth Circuit, United States v. Randolph which we cite in  
11 our papers where the United States Attorney's Office for  
12 Texas basically flipped a defendant who agreed to  
13 cooperate and as part of the cooperation agreement, the  
14 Texas promised him that they would not prosecute him for  
15 a particular charge.

16 After he gave up, you know, basically his Fifth  
17 Amendment right, the government learned -- Texas, United  
18 States Attorney's Office learned that he was -- that  
19 basically he was a bigger player than they had originally  
20 thought. So they sent all of the evidence that they had  
21 gathered in the Texas investigation and turned it over to  
22 the United States Attorney's Office for the District of  
23 Tennessee.

24 The Court in the Sixth Circuit held that this  
25 deprived the defendant of his due process. That this

**Proceedings**

1 kind of government conduct -- what the defendant entered  
2 into an illusory promise. Even though the agreement --  
3 the plea agreement said that this binds only the District  
4 of Texas and not any other United States Attorney's  
5 Office, the defendant was led to believe he would not be  
6 prosecuted for that offense, you know, without just --  
7 technically, he may not have had a right to believe that  
8 but that's what a defendant understands when they enter  
9 into a plea agreement.

10 THE COURT: Do you have any Second Circuit case  
11 law that supports that position?

12 MR. CREIZMAN: I don't have the Second Circuit  
13 case law with -- under the same facts. I do have the  
14 United States v. All Assets of GPS which basically  
15 addresses a Barcus (ph.) exception to the dual  
16 sovereignty doctrine where the Second Circuit remanded  
17 the case because like here, the state government got a  
18 large chunk of the forfeiture and then the federal  
19 government then basically brought the civil forfeiture  
20 action after the state convicted him of basically the  
21 same act or transaction.

22 Now I am not arguing necessarily that this is a  
23 double jeopardy case because as your Honor pointed out,  
24 there are different crimes that are alleged but I think  
25 that this is -- that the principles of due process could

**Proceedings**

1 apply here and that's why not -- it's not a broad --  
2 we're asking for a limited discovery which is discovery  
3 communications between those agencies that relate to the  
4 disposition of Mr. ██████████ case by the Queens DA and the  
5 decision of ICE to continue to monitor and investigate  
6 him.

7           That, I don't think falls within Rule 16(a)(2).  
8 Rule 16(a)(2) refers to attorney work products. I  
9 believe that things that -- documents that recover  
10 witness interviews, summaries of interviews, summaries of  
11 evidence, legal and factual memoranda and I am going to  
12 talk --

13           THE COURT: It talks about representatives of  
14 the government. It's not limited to attorneys of the  
15 government.

16           MR. CREIZMAN: That may be so. So it may no --  
17 so agreed, but that could still be work product, factual  
18 work product. But I want to point to a case, Gaelani.  
19 Judge Kaplan basically -- there was a defendant, a terror  
20 -- accused of terrorism. The defendant had a legal  
21 defense to his charges which was speedy trial and  
22 requested communications between the United States DOJ,  
23 the United States Attorney's Office, law enforcement  
24 agencies such as the CIA, FBI, regarding the decision to  
25 transfer him to the CIA black site instead of the SDNY

**Proceedings**

1 for prosecution to transfer him from -- to Guantanamo  
2 rather than the SDNY to prosecute him first in a military  
3 commission rather than the SDNY.

4           The Court basically said that there was one  
5 document, a DOJ bullet point memorandum that amounted to  
6 an order of proof. That fell within Rule 16(a)(2). But  
7 other communications did not and if the government wanted  
8 to assert a privilege over those documents because Rule  
9 (16)(a)(2) is a qualified immunity. It says except as  
10 provided in Rule 16(a)(1). Rule 16(a)(1) includes  
11 documents material to the defense. It would also, I  
12 would assume, include Brady material.

13           They had to produce a privilege log. The Court  
14 -- the government did produce a privilege. The Court  
15 reviewed the documents asserted that were privileged in  
16 camera and made a decision as to which documents could be  
17 produced and which documents couldn't. And which  
18 documents should be redacted.

19           I don't think that this -- the documents I  
20 request fall within Rule 16(a)(2). If they do, to the  
21 extent that they do, we don't want them. We want  
22 documents that go to the heart of what we're asking for  
23 and I don't think that the government -- if what I am --  
24 if my hypothesis is true, I don't think that Rule  
25 16(a)(2) should shield the -- what happened here if this

**Proceedings**

1 is what happened. If ICE basically and the Queens DA  
2 induced Mr. [REDACTED] to plead guilty and give up substantial  
3 rights and then ICE then brings Mr. [REDACTED] to the United  
4 States Attorney's Office to be prosecuted, I don't think  
5 that that should be shielded under Rule 16(a)(2).

6 THE COURT: And if the government for purposes  
7 of any motion did not dispute that the feds were involved  
8 in the plea in the state action; that is that this was  
9 part of a joint investigation, I take it you wouldn't  
10 need the communications then.

11 MR. CREIZMAN: I would like --

12 THE COURT: The need for it is simply to  
13 establish that it was a decision made jointly with the  
14 feds if for purposes of any motion, they don't dispute  
15 that, that eliminates the need for that information.

16 MR. CREIZMAN: I would agree with that,  
17 your Honor. And I think that we could have a hearing.  
18 You know, if necessary, there would be a hearing on the  
19 motion where we could question the ICE agents that were  
20 involved in the joint investigation if that were the  
21 case, rather than get the documents. I think the  
22 documents would help establish --

23 THE COURT: Well I am saying you don't need the  
24 information if the feds don't dispute that the plea was  
25 part of a joint investigation, that they were aware of it

**Proceedings**

1 and I don't know how it would have to be worded but the  
2 reason you need the information is not for proof at  
3 trial, it's so that you can make a motion to dismiss on  
4 due process grounds; correct?

5 MR. CREIZMAN: That is correct.

6 THE COURT: So if counsel could come up with a  
7 stipulation that would give you the connection between  
8 the feds and the locals for purposes of that motion, then  
9 you wouldn't need the information.

10 MR. CREIZMAN: I believe that's true except for  
11 the fact that to the extent, you know what I would be  
12 interested in is the extent to which ICE and the Queens  
13 DA communicated and may have determined to basically just  
14 allow Mr. ██████ to plead guilty to a non-criminal  
15 disposition.

16 You know, I think that the documents might  
17 basically establish the degree of government involvement  
18 and also establish the degree of deprivation of Mr.  
19 ██████ rights. So I don't want to give up on those  
20 documents so easily.

21 THE COURT: How does that establish the degree  
22 of the deprivation of his rights?

23 MR. CREIZMAN: To the extent that ICE could  
24 have suggested that Mr. ██████ -- to the Queens District  
25 Attorney's Office, this is a weak case. Please, why

**Proceedings**

1 don't we drop -- you can drop the charges of -- felony  
2 charges against Mr. [REDACTED] and we'll continue to monitor  
3 and investigate him. And in the meantime, by the way,  
4 you can take the money, the forfeiture and basically, you  
5 don't have to worry about this search warrant because --  
6 and basically the search because we're going to develop  
7 additional evidence against them.

8           And to me that's an illusory promise that Mr.  
9 [REDACTED] was given. I don't know that this happened but I  
10 do want to establish whether it happened or not.

11           THE COURT: And what if the facts are that the  
12 government -- according -- the government said we've got  
13 an ongoing investigation and if Queens prosecutes this  
14 guy for money laundering, we're going to have to disclose  
15 a lot of evidence. So let him just plead out to a minor  
16 infraction, so we don't have to disclose our evidence at  
17 this time?

18           MR. CREIZMAN: I think that's problematic, as  
19 well. I would move to dismiss the indictment as well. I  
20 think that that's --

21           THE COURT: I understand --

22           MR. CREIZMAN: Right.

23           THE COURT: But if there were, for example, a  
24 stipulation to that effect? You're saying it's  
25 problematic, so that would give you the basis for making

**Proceedings**

1 your motion.

2 MR. CREIZMAN: I would -- well I would like to  
3 know the facts. I mean that's all. I would -- if  
4 there's a stipulation that the government would come  
5 forward and make a representation and say this is what  
6 happened, we've reviewed the documents, this is what  
7 happened, we've talked to the agents, here's the  
8 stipulation and I am satisfied with that stipulation, I  
9 would agree to the stipulation; certainly.

10 THE COURT: All right. Let's move on because  
11 I've got another matter on and it looks like they've  
12 arrived. So was there -- let me just see if I have any  
13 other questions. All right. Let me hear from the  
14 government -- well is there anything that counsel for  
15 Mr. ██████ wants to add?

16 MR. ██████ No, your Honor.

17 THE COURT: I guess you don't have a dog in  
18 this race --

19 MR. ██████ It was interesting --

20 THE COURT: -- that particular one.

21 MR. ██████ -- but no dog.

22 THE COURT: All right. Let me hear from the  
23 government.

24 MR. ██████ Your Honor, I just -- I don't  
25 understand how absent some indication, some evidence,

**Proceedings**

1 that there's communication that could possibly rise to  
2 the level of the due process violation that the defendant  
3 under Rule 16 gets to explore communications between ICE  
4 and the Queens DA's office concerning resolution of  
5 facially problem that (inaudible).

6 THE COURT: But that's a catch 22 because I  
7 mean I was suggesting that maybe the government rather  
8 than having to disclose the communications themselves  
9 would simply stipulate that this was part of a joint  
10 investigation and -- I mean my assumption reading between  
11 the lines is if in fact there was a joint investigation  
12 between ICE and the locals or even assuming that it only  
13 arose on the day of his arrest, that ICE didn't want to  
14 have to produce witnesses and there's a CI, they don't  
15 want him to have to testify. So that ICE was involved in  
16 the decision to allow this particular defendant to plead  
17 guilty to a much lesser charge. Is that a correct  
18 understanding?

19 MR. [REDACTED] Of the facts?

20 THE COURT: Yes.

21 MR. [REDACTED] As to ICE's involvement?

22 THE COURT: Yes.

23 MR. [REDACTED] I don't believe so. I don't  
24 believe there was any involvement of ICE in the decision  
25 of how to charge or how to proceed against Mr. [REDACTED] by

**Proceedings**

1 the Queens DA's office at all. And if there were, it's  
2 the government's position that under Rule 16, the  
3 defendant is not entitled to that. If he were and if  
4 here were to enter into a stipulation such as the one  
5 suggested, it would mean that there's something like an  
6 entitlement to a hearing every time there's a joint  
7 investigation between the federal and state authorities  
8 that's resolved the way this one which happens all of the  
9 time. And that doesn't seem to me that as a practical  
10 matter it should be --

11 THE COURT: Well I don't think it's routine to  
12 have someone as part of a joint investigation arrested  
13 and prosecuted locally and then after that prosecuted for  
14 the same transaction federally. I'm not going to get  
15 into whether or not ultimately the defense would be able  
16 to prevail on a due process or double jeopardy claim. I  
17 guess even the defense is saying it wouldn't be double  
18 jeopardy but due process. It's not routine, I wouldn't  
19 think, so that you're suggestion that this would open the  
20 flood gates, I really don't buy it.

21 I mean I was trying to suggest that there would  
22 be a way to accommodate their need for the predicate to  
23 make the motion without having to have internal reports  
24 produced or a hearing but you don't seem to be taking the  
25 bait and I really am concerned because I would like to

**Proceedings**

1 take a look at the Gaelani and the Randolph cases but  
2 there are also other facts that have been proffered that  
3 suggest that this not a routine situation. For example,  
4 the defense's contention that the ICE agent said to him  
5 at some point, we've been watching you for seven months  
6 or eight months, whatever it was, do you deny that that  
7 statement was made?

8 MR. [REDACTED] I do not, your Honor. But I  
9 don't think there's a factual basis for the -- for a  
10 stipulation for which we agree that ICE was involved in  
11 the Queen's DA's decision making regarding the resolution  
12 of the state case. I don't think there was any such  
13 involvement and --

14 THE COURT: Well again, you're talking in terms  
15 of the Queens DA. I don't know that it had to be  
16 communications between ICE and the Queen's DA if there's  
17 a joint investigation or if ICE is dealing with the  
18 locals. The question is whether or not ICE had any  
19 involvement in the disposition because to arrest someone  
20 for money laundering and seize almost \$46,000 and then  
21 he's allowed to plead to disorderly conduct or whatever  
22 it was, I know they do reduce charges substantially in  
23 the state but that does strike me as somewhat unusual.  
24 And it may well be that I would like to look at this case  
25 law but you may have to make an in camera showing and

**Proceedings**

1 then I can determine whether or not that information  
2 needs to be provided.

3 MR. [REDACTED] I just want to make clear to the  
4 Court, I don't believe there is any such information. I  
5 am not aware of any and I've inquired and I don't believe  
6 there is any information of that nature. And I don't  
7 think that ICE or any federal law enforcement agency had  
8 any input into the disposition of the state case.

9 THE COURT: But again, you weren't even sure  
10 whether there was a joint investigation prior to July 14,  
11 2009. If there had been, it could be that another member  
12 of the task force who was not an ICE agent but was acting  
13 on behalf of the task force could have had communications  
14 and input.

15 MR. [REDACTED] With the Queens DA about the  
16 resolution (inaudible)?

17 THE COURT: Yes.

18 MR. [REDACTED] Yes, your Honor.

19 THE COURT: Or with local law enforcement who  
20 in turn communicated with the Queens DA.

21 MR. [REDACTED] Well as I said before, we'll  
22 explore with ICE and with the state again whether there  
23 were any communications of any kind between federal law  
24 enforcement and local law enforcement concerning the  
25 resolution of the case. But I do want to make clear that

**Proceedings**

1 that's something that I have done and although it's true,  
2 I don't know what the full scope of the reference to the  
3 task force's activities were, this office did make  
4 inquiry as to whether any information relevant to Mr.

5 ██████████ It is indeed as your Honor points out, there is a  
6 possibility and to thoroughly exclude that possibility,  
7 we will have to know the full parameters, I believe of  
8 the task force's activities. We will run that down. But  
9 I am fairly confident that we have spoken to everybody  
10 who was at all likely to have any information relating to  
11 those communications.

12 THE COURT: All right. And if you could get  
13 back to me within the week, as well.

14 MR. ██████████ Yes, your Honor.

15 THE COURT: I have a few questions for the  
16 government. Have all of the defendant's statements now  
17 been produced?

18 MR. ██████████ Yes, your Honor.

19 THE COURT: Including rough notes?

20 MR. ██████████ Yes, your Honor.

21 THE COURT: There weren't any memo book entries  
22 by --

23 MR. ██████████ We had -- I'm sorry. I  
24 apologize, your Honor.

25 THE COURT: -- by any of the Queens NYPD

**Proceedings**

1 officers regarding statements made by Mr. [REDACTED]

2 MR. [REDACTED] We have inquired of both local  
3 and federal law enforcement whether or not such documents  
4 exist. We don't believe they do. In connection with the  
5 report back to the Court in a week, we will redouble  
6 those efforts but as of this time, we're not aware of  
7 any.

8 THE COURT: All right. And one of the issues  
9 that was raised was Rule 404(b) notice. Does the  
10 government at the present time have 404(b) proof that it  
11 intends to offer against either of these two defendants?

12 MS. [REDACTED] Can I have just a moment, your  
13 Honor?

14 (Pause.)

15 MS. [REDACTED] The short answer is yes,  
16 your Honor.

17 THE COURT: And why -- is it against both or  
18 against just one? Do you have 404(b) evidence that  
19 you're intending to offer against Mr. [REDACTED]

20 MS. [REDACTED] Yes.

21 THE COURT: And what about Mr. [REDACTED]

22 MS. [REDACTED] I believe so, your Honor.

23 THE COURT: So why isn't the government  
24 providing notice of that? I mean the defendant is  
25 complaining they don't have sufficient information

**Proceedings**

1 regarding the crimes charged. Now you're saying you're  
2 going to be offering evidence that isn't even of the  
3 crimes charged but other evidence and they have no idea  
4 what that is.

5 MS. [REDACTED] Your Honor, it may be encompassed  
6 within the superseding indictment and we also haven't  
7 disclosed it because at this point there isn't a trial  
8 date. But we fully intend to give the defense advance  
9 warning of that information as we do in all of our cases.

10 THE COURT: Well when you say advancing  
11 warning, what do you understand -- what do you have in  
12 mind when you say advanced warning?

13 MS. [REDACTED] It's my understanding that it's the  
14 office's policy generally to give notice two to three  
15 weeks before trial.

16 THE COURT: Well I am ordering that it be  
17 produced 30 days before trial. And the government has  
18 committed to providing 3500 material at least a week  
19 before trial?

20 MS. [REDACTED] Yes, your Honor.

21 MR. [REDACTED] Yes, your Honor.

22 THE COURT: And does the government currently  
23 have any information regarding what I would characterize  
24 as exculpatory leads against either these defendants?  
25 That is, I understand your position that Giglio material

**Proceedings**

1 will be produced with the 3500 material but if you have  
2 exculpatory leads, that may not be sufficient time for  
3 them to utilize that information before trial. So do you  
4 have any exculpatory leads against either of these  
5 defendants?

6 MR. [REDACTED] Your Honor, I don't believe so  
7 but I think the appropriate thing to do here is in  
8 connection with our review of the file on other matters,  
9 we'll double check and report back to the Court on that  
10 in the course of a week.

11 THE COURT: All right. I declined to order the  
12 government to turn over 3500 or Giglio material earlier  
13 than they had committed to turning it over which at least  
14 under 3500 is even more than the defense is legally  
15 entitled to but I expect the government to adhere to its  
16 commitment to the Court and to the defense.

17 Are there any open issues?

18 MR. CREIZMAN: There's a request for an early  
19 witness list and in addition, we specified the number of  
20 items we believe fall under Brady. The government's  
21 responded and it's not aware of any exculpatory material  
22 but it hasn't really addressed the information we  
23 requested. But to that extent, I am going to rest on the  
24 papers unless the Court has any questions as to --

25 THE COURT: Well if there are things that can

**Proceedings**

1 be resolved now, I don't want to -- there are certain  
2 issues that I have to defer decision on but those that I  
3 can resolve now I would like to resolve now. I don't  
4 believe the defense has made a sufficient showing for the  
5 production of the government's witness list which the  
6 defense in effect will be getting at least a week before  
7 trial when it gets the 3500 material.

8           The government -- I inquired about Brady in the  
9 form of exculpatory leads and the government is going to  
10 in undertaking its review, report on that within the week  
11 because if there are exculpatory leads, I believe the  
12 defense is entitled to them. But to the extent the Brady  
13 is impeachment material of government witnesses, that  
14 will be provided with 3500 material at least a week  
15 before trial and that is sufficient to prepare for cross-  
16 examination.

17           And I think other than the bill of particulars  
18 which needs to be deferred and the issue of the  
19 communications I think that covers everything and the  
20 severance question is going to be mooted perhaps.

21           Is there anything I have overlooked?

22           MR. CREIZMAN: Not to my knowledge, your Honor.

23           MR. [REDACTED] I have just one further point.  
24 The Court, as I understand it, has directed the  
25 government to provide the defendant with a list of his

**Proceedings**

1 co-conspirators and I don't remember if that was within a  
2 week; is that correct?

3 THE COURT: Yes.

4 MR. [REDACTED] I just -- I want to emphasize  
5 again --

6 THE COURT: And that obviously is subject to if  
7 you then present the case to the grand jury and that's  
8 subject to change if there are additional names or I  
9 guess in this case, maybe someone's name will even drop  
10 off. But it should be based on the government's  
11 understanding as of next week as to who the co-  
12 conspirators are, regardless of the fact that you've got  
13 a narrow conspiracy charge alleged in Count 1 at the  
14 present time.

15 MR. [REDACTED] Your Honor, I just wanted to  
16 emphasize again that we are very actively investigating  
17 the case. I think there's a good possibility the list of  
18 co-conspirators will make actually change. I don't want  
19 to -- if we find evidence that suggests that someone is  
20 not a co-conspirator -- so I just want to build in a  
21 mechanism whereby we can -- I don't know, update the list  
22 but I am fairly --

23 THE COURT: I think Mr. Creizman acknowledged  
24 that, that a bill of particulars doesn't necessarily lock  
25 the government in forever but it can be amended or

**Proceedings**

1 supplemented.

2 MR. [REDACTED] Okay. Thank you, your Honor.

3 MS. [REDACTED] Thank you, your Honor.

4 THE COURT: Not during trial but before trial.

5 MS. [REDACTED] Yes, your Honor.

6 THE COURT: All right. Anything else?

7 MR. CREIZMAN: No, your Honor.

8 MS. [REDACTED] Not from the government.

9 MR. [REDACTED] No, thank you.

10 THE COURT: Okay. Thank you all very much.

11 MR. CREIZMAN: Thank you.

12 MR. [REDACTED]: Thank you.

13 (Matter concluded)

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## C E R T I F I C A T E

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 29th day of May , 2010.

  
Rosalie Lombardi  
Transcription Plus II