

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,)	Criminal Action
)	No. 21-00175
Plaintiff,)	
)	
vs.)	
)	
ETHAN NORDEAN, JOSEPH R. BIGGS,)	Washington, D.C.
ZACHARY REHL, ENRIQUE TARRIO and)	January 11, 2023
DOMINIC J. PEZZOLA,)	2:09 p.m.
)	
Defendants.)	
)	
* * * * *)	

TRANSCRIPT OF JURY TRIAL - DAY 12
AFTERNOON SESSION
BEFORE THE HONORABLE TIMOTHY J. KELLY,
UNITED STATES DISTRICT JUDGE

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1 THE COURTROOM DEPUTY: Your Honor, we're back on
2 the record in Criminal Matter 21-175, United States of
3 America versus Ethan Nordean, et al.

4 THE COURT: All right. Good afternoon, everyone.

5 I thought what we would do now is proceed to this
6 conflicts issue. I think we'll be able to walk through it
7 unscathed. But let me lay out where I think we are, and
8 then there are some points at which I may need information
9 from the parties or to have a colloquy with a Defendant or a
10 lawyer.

11 I think most of it can be done not under seal.
12 But I'll just tell everyone, if someone thinks at some point
13 during what I'm saying we need to be under seal, raise your
14 hand, get my attention, and we'll do that if we need to.

15 But I think for the most part, with maybe one
16 exception, we can just proceed.

17 So --

18 MS. HERNANDEZ: Your Honor, may I ask a question?

19 THE COURT: Yes.

20 MS. HERNANDEZ: Your Honor, I wasn't sure, when
21 the Court ruled on the objections, whether the Court had
22 ruled on my objection about the photograph of Mr. Rehl with
23 the -- I didn't hear the Court address that.

24 THE COURT: So there were -- I didn't address that
25 specifically, but it was one of the ones that I did

1 overrule. I don't think -- let me put it this way: To the
2 extent the item is even recognizable as what you proffer it
3 to be, I think -- it doesn't -- the photograph is from
4 January 6th. And nothing about the photograph suggests that
5 your client was with that person or operating together or
6 knew that person or anything.

7 So I think, for those -- for those two reasons, I
8 don't think it's an unfair graphic for the Government to
9 use.

10 MS. HERNANDEZ: As the Court knows, I feel
11 otherwise.

12 I think, given the emotions in this case and the
13 jurors and -- it's a picture -- the Government chose this.
14 This is not, like, evidence. This is a demonstrative piece
15 of evidence, which I understand from the Government they're
16 going to use throughout the case, not just in opening
17 statements. I think it would take them no time to change
18 it. So...

19 THE COURT: I also looked at -- I mean, part of it
20 also, I would say, is maybe -- I don't know how often they
21 plan to use it like this, but a lot of times, in the slides,
22 it was used in a very small format as opposed to a big one.
23 And the small format -- but I went and looked at the full --
24 all the slides about it. Where it's used sort of in the
25 small version, I don't think you can see this at all, to be

1 honest.

2 MS. HERNANDEZ: Yeah. My concern always is we
3 don't know what happens in the jury room.

4 The other question I had for the Court -- now it
5 completely --

6 THE COURT: Well, Ms. Hernández, I didn't really
7 recognize you. I wanted to go through the conflicts issue.

8 MS. HERNANDEZ: Sorry.

9 THE COURT: But what is it?

10 MS. HERNANDEZ: Never mind. I'll bring it up --
11 oh, on the issue, on the video, the Court -- on the slide,
12 the video that I find very problematic, I understand that
13 the Court looked at a different video. I'm just going to
14 ask the Court to please look -- review the one I submitted
15 to the Court this morning at some point --

16 THE COURT: Okay. I mean --

17 MS. HERNANDEZ: -- and the arguments that I made
18 in that memo that I submitted this morning.

19 THE COURT: I understand. Look, if -- I'll look
20 at it so as to be prepared. But obviously, you'll have the
21 chance to object if the Government tries to move that into
22 evidence.

23 MS. HERNANDEZ: Well, my understanding is that
24 that's an exhibit they will try to introduce. So I will
25 object.

1 Thank you, your Honor.

2 THE COURT: Okay. All right. So on the conflicts
3 front, first, I've been -- the first conflict or set of
4 conflicts has to do with Mr. Roots, his recent introduction
5 into the case. I think there are two categories of
6 conflicts raised by Mr. Roots's now representation of
7 Mr. Pezzola.

8 One of them, the parties have brought to my
9 attention is presented by the fact that Jonathon Moseley,
10 who used to represent Mr. Rehl in this case, and I -- at
11 least I think understand from representations that he has
12 since been disbarred -- he is now a paralegal at Mr. Roots's
13 firm.

14 The second category of conflicts is that
15 Mr. Roots's law partner, John Pierce, used to represent two
16 individuals with at least a tangential connection to our
17 case here, Paul Rae and William Pepe. So we'll -- we'll
18 circle back to them. Pepe used to be Mr. Pezzola's
19 Co-Defendant before Mr. Pezzola was joined into this matter.

20 So Roots's conflict, or potential conflict, could
21 arise out of D.C. Rule of Professional Conduct Rule 1.0, the
22 imputed conflicts rule.

23 That rule provides, quote, "When lawyers are
24 associated in a firm, none of them shall knowingly represent
25 a client when any one of them, practicing alone, would be

1 prohibited from doing so by Rules 1.7 or 1.9."

2 So let's just talk for a moment about the Moseley
3 conflict, which I think we've -- we have a way of addressing
4 that we've talked about already, and that I'll ask Mr. Roots
5 about here today.

6 So again, Moseley's conflict here would stem from
7 Rules 1.7 and 1.9. But because Mr. Moseley joined the firm
8 as a paralegal after his representation of Mr. Rehl ended,
9 which --

10 Mr. Roots, you correct me if I'm wrong on that,
11 but I think that's right; he did not join your firm as a
12 paralegal until his representation of Mr. Rehl ended.
13 Correct?

14 MR. ROOTS: Correct. And actually, it's even more
15 disconnected. I learned actually recently that Moseley is
16 not actually an employee of the John Pierce firm. He is a
17 contract paralegal employed by a company called Armchair
18 Detectives.

19 THE COURT: Okay.

20 MR. ROOTS: And he's only been with the John
21 Pierce firm in any capacity at all since -- I'm thinking
22 August or something like that.

23 THE COURT: Okay. So I'm going to proceed as if
24 he was an employee of your firm. It sounds like it may be
25 close enough for conflicts purposes. But I appreciate your

1 clarification of that.

2 So given that he -- by the time he came into
3 employ with your firm, he was no longer representing
4 Mr. Rehl. Given that, the conflict need not impute to you,
5 to Mr. Roots, if Moseley is screened from the matter and
6 apportioned no part of the fee therefrom under the rules and
7 Rehl receives notice of the arrangement and the screening
8 protocols.

9 The rule typically requires written notice, but
10 Mr. Rehl is obviously here and he can receive notice
11 firsthand.

12 So, Mr. Roots, we talked about this whenever it
13 was last week. Why don't you just put on the record for
14 Mr. Rehl and for all of us to hear what you are doing to
15 segregate, to screen off, Mr. Moseley from any activity and
16 any ability to view any materials that are related to this
17 case.

18 MR. ROOTS: Yes. I've confirmed that Mr. Moseley
19 is not -- has no way to access any materials from this case
20 at this time right -- this actual case, even though he
21 previously was a lawyer over a year ago for Mr. Rehl for a
22 short time.

23 He has no access to what we're doing here, what
24 I'm doing.

25 We use -- the John Pierce firm uses a platform

1 called Slack. Slack has different channels, each pertaining
2 to a different case. Mr. Moseley's cases that he's working
3 on, which I'll just say at the moment are mostly civil,
4 totally unrelated, they are walled off completely. And I'm
5 walled off from his stuff for the most part. I don't work
6 on the same cases he's working on.

7 THE COURT: All right. You will obviously -- he
8 will play no part, as you've said before, in your
9 representation of Mr. Pezzola?

10 MR. ROOTS: None. None whatsoever.

11 THE COURT: Okay. So I think that adequately
12 addresses the issue regarding Mr. Moseley.

13 The situation with Mr. Rehl is -- I mean, with
14 Mr. Pierce is slightly different. I've taken a closer look
15 at Rule 1.10 since our last -- since our earlier exchanges
16 on this. And because Mr. Pierce and Mr. Roots were law
17 partners while Mr. Pierce was representing Mr. Rae and
18 Mr. Pepe, it's not necessarily enough to screen him from the
19 matter even if Mr. Roots had no negligible involvement in
20 those cases.

21 Pierce would probably have conflicts under Rules
22 1.7(b) and 1.9 if he were to represent Mr. Pezzola, and
23 under Rule 1.10, those conflicts would be imputed to
24 Mr. Roots.

25 So let me just walk through those rules. Under

1 Rule 1.7(b) (4), a lawyer shall not represent a client with
2 respect to a matter if the lawyer's professional judgment on
3 behalf of the client will be or reasonably may be adversely
4 affected by the lawyer's responsibilities to or interests in
5 a third party.

6 Now, Pierce's and, therefore, by imputation,
7 Mr. Roots's obligation to Rae and Pepe include Rule 1.6's
8 requirement not to disclose confidence and secrets.

9 So Pierce and, therefore, Mr. Roots cannot use any
10 confidences attained from Mr. Rae or Mr. Pepe to benefit
11 Pezzola.

12 Now, it's not at all clear to me that such
13 information even exists. But out of an abundance of
14 caution, I think this is worth addressing.

15 The conflict is waivable if, A, Mr. Pezzola
16 provides informed consent to the representation after full
17 disclosure of the existence and the nature of the potential
18 conflict and the possible adverse consequences and, B,
19 Mr. Roots reasonably believes that he will be able to
20 competently and diligently represent Mr. Pezzola. That's
21 Rule 1.7(c).

22 Now, again, I guess this is belt and suspenders on
23 top of belt and suspenders. It's also possible the conflict
24 would not impute to Mr. Roots at all. Rule 1.10(a) (1)
25 provides that a lawyer's conflict under this rule does not

1 automatically impute to other lawyers at the same firm if,
2 quote, "that interest does not present a significant risk of
3 adversely affecting the representation of the client by
4 another lawyer at the firm."

5 Here, Mr. Roots has represented to me that he has
6 had no or negligible involvement with these cases. So I
7 think there's -- I don't think there's a substantial risk
8 that Mr. Pierce's prior representation of these individuals
9 would negatively impact Mr. Pezzola.

10 But out of an abundance of caution, especially
11 because Mr. Roots did work on, I believe, one small matter
12 for Mr. Rae, what I plan to do then is just conduct a quick
13 colloquy with Mr. Pezzola and with Mr. Roots. And the idea
14 for Mr. -- with regard to Mr. Pezzola would just be to get
15 him to understand --

16 MR. METCALF: Can I have 20 seconds with him?

17 THE COURT: Sure. Let me just finish what I'm
18 saying and then I'll give you a moment to confer with
19 Mr. Pezzola.

20 MR. METCALF: Thank you.

21 THE COURT: The purpose of my colloquy with
22 Mr. Pezzola will simply be to make sure that he understands
23 that there might be information that Mr. Roots has learned
24 or at least information that might be imputed to Mr. Roots
25 because he is associated in practice with Mr. Pierce --

1 there could be information that Mr. Roots might know but
2 that he would not be able to use to Mr. Pezzola's benefit.

3 So just -- you know, what I'm going to ask him
4 after further going into the issue and talking about the
5 case is just that -- whether he understands that if Mr. Rae
6 or Mr. Pepe gave Mr. Roots or his law partner, Mr. Pierce,
7 confidential information that could help Mr. Pezzola, but
8 that neither one of those gentlemen gave Mr. Roots
9 permission to share it, Mr. Roots might not be able to use
10 that information or represent him as well as he possibly
11 could because of that prior conflict. And that's all.

12 So -- and then with regard to Mr. Roots,
13 Mr. Roots, I'm just going to ask you again some questions
14 about whether you think your firm's prior representation of
15 Mr. Pepe or Mr. Rae -- whether you think that could hinder
16 your ability to provide competent and diligent
17 representation to Mr. Pezzola.

18 If Mr. Pezzola waives and, Mr. Roots, you're
19 satisfied it won't affect your ability to provide competent
20 and diligent representation, then I think we've addressed
21 the issue and we can move forward.

22 So let me give you, Mr. Metcalf and Mr. Roots, one
23 moment to talk to Mr. Pezzola and then we'll go from there.

24 MR. METCALF: Thank you, your Honor.

25 THE COURT: Absolutely.

1 (Discussion had off the record amongst counsel and
2 the Defendants.)

3 MR. ROOTS: Thank you, your Honor.

4 THE COURT: Mr. Pezzola, the reason for this
5 exchange we're going to have right now is to discuss the
6 potential risks or problems that could result from you being
7 represented by a lawyer, Mr. Roots, whose law partner,
8 Mr. Pierce, represented your former Co-Defendant, Mr. Pepe,
9 and Mr. Paul Rae, someone who, in theory, could be a witness
10 in this case.

11 Now, as you've heard me discuss, there are some
12 issues because Mr. Pepe's and Mr. Rae's cases are, under the
13 rules of ethics, similar to this one; they're all about the
14 events of January 6th. I have to assure myself that you
15 understand the risks of potential conflicts that could arise
16 by being represented by an attorney, again, whose law
17 partner formerly represented the two third parties that
18 we've mentioned.

19 So I'm going to discuss those risks and concerns
20 with you and ask you some questions about whether you
21 consent to proceed.

22 Do you understand? Any questions before we begin?

23 DEFENDANT PEZZOLA: No. I'm pretty clear, your
24 Honor.

25 THE COURT: Okay. If at any point you don't

1 understand something, wave your hand --

2 DEFENDANT PEZZOLA: Okay.

3 THE COURT: -- and I'll try to explain it better.

4 First, just some very basic questions.

5 How old are you, sir?

6 DEFENDANT PEZZOLA: 45.

7 THE COURT: Okay. How far did you go in school?

8 DEFENDANT PEZZOLA: Some college.

9 THE COURT: And what type of work did you do
10 before January 6th?

11 DEFENDANT PEZZOLA: I owned my own commercial
12 flooring installation business.

13 THE COURT: Okay. And do you have any -- prior to
14 this, did you have any experience in -- with the criminal
15 justice system at all?

16 DEFENDANT PEZZOLA: None.

17 THE COURT: And today, are you under the influence
18 of any alcohol, drugs or medication that could affect your
19 ability to understand our conversation today?

20 DEFENDANT PEZZOLA: No, sir.

21 THE COURT: Do you understand the charges against
22 you in this case?

23 DEFENDANT PEZZOLA: I do.

24 THE COURT: Okay. And do you understand the
25 penalties associated with them?

1 DEFENDANT PEZZOLA: Yes, sir.

2 THE COURT: All right. So the law -- the rules
3 governing how lawyers have to represent their clients
4 provide that every defendant in a criminal case is entitled
5 to be represented by a lawyer who does not have a conflict
6 of interest.

7 A lawyer must be loyal to each and every one of
8 his clients, and that means that the lawyer's advocacy on
9 behalf of his client must be for the benefit of that client
10 and not for anyone else.

11 A conflict of interest occurs when a lawyer has
12 divided or split loyalties as between his clients. When a
13 lawyer represents two different clients in the same case,
14 there is the possibility that a lawyer's loyalties will be
15 divided between the clients and, as a result, a defendant
16 might not receive from his lawyer the zealous advocacy that
17 the lawyer is supposed to provide.

18 Do you understand all that?

19 DEFENDANT PEZZOLA: I do.

20 THE COURT: And you understand that you have the
21 right to hire your own lawyer?

22 DEFENDANT PEZZOLA: Yes, sir.

23 THE COURT: And for the record, if you couldn't
24 afford a lawyer, you could have a lawyer appointed to
25 represent you.

1 DEFENDANT PEZZOLA: Yes.

2 THE COURT: All right. So the issue that might
3 arise here relates to confidentiality. A defendant in a
4 criminal case has the right to have his communications with
5 his counsel and any other secrets that his lawyer learns in
6 the course of the representation kept confidential.

7 You probably have heard of the attorney-client
8 privilege. Generally speaking, if a lawyer -- if a
9 defendant tells his lawyer something in connection with his
10 case, the lawyer can't share what was said with anybody
11 else, including co-defendants, without the defendant's
12 express permission.

13 Any questions there?

14 DEFENDANT PEZZOLA: No, sir.

15 THE COURT: So I want you to be aware of the
16 potential complication that could arise when one lawyer
17 represents a defendant in a case that is substantially
18 related to one in which the lawyer's law partner used to
19 represent another defendant.

20 That complication is when a client shares
21 information with his lawyer, the lawyer may only share it
22 with others if the former client gives permission for that
23 to occur.

24 And if that information is particularly helpful to
25 the lawyer's new client or current client at the expense of

1 the former client, there is the problem of the lawyer having
2 divided loyalties. It may be appropriate for a lawyer to
3 share that information with his other client only if the
4 former client gives permission for that to happen.

5 A further layer here is that if one lawyer at a
6 law firm would have such a conflict, the conflict applies to
7 every lawyer at the firm. So even though Mr. Pierce is not
8 your lawyer, any conflict he would have in representing you
9 applies to Mr. Roots by virtue of them being partners.

10 Do you understand all that?

11 DEFENDANT PEZZOLA: Yes.

12 THE COURT: And do you understand that if Mr. Rae
13 or Mr. Pepe gave Mr. Roots or Mr. Pierce confidential
14 information that could help you, but Mr. Rae or Mr. Pepe did
15 not give Mr. Roots permission to share it with you or use it
16 on your behalf, that Mr. Roots might not be able to
17 represent you as well as if he had been permitted to share
18 that information? Does that make sense?

19 DEFENDANT PEZZOLA: It does, your Honor.

20 THE COURT: Do you understand that Mr. Rae or
21 Mr. Pepe may have told Mr. Roots or Mr. Pierce something you
22 would want to know, but Mr. Roots may not be able to let you
23 know it? Do you understand that?

24 DEFENDANT PEZZOLA: Yes.

25 THE COURT: These would all be conflicts. So

1 knowing these potential conflicts as I've described them to
2 you, do you still want Mr. Roots to represent you?

3 DEFENDANT PEZZOLA: Yes, your Honor.

4 THE COURT: All right.

5 DEFENDANT PEZZOLA: Thank you.

6 THE COURT: Very well.

7 MR. METCALF: Thank you.

8 THE COURT: Mr. Roots, will you just give us --
9 obviously, without divulging any secrets or
10 attorney-client-privileged information, can you just
11 describe the extent of Mr. Pierce's representation of
12 Mr. Rae and Mr. Pepe? Just to the best of your knowledge.

13 MR. ROOTS: Yeah. Actually, Mr. Pierce actually
14 hasn't done much on either of those. He might have done a
15 little bit more on the Rae situation. But the Pepe case is,
16 as far as I know, almost completely or completely done by
17 another lawyer named Bill Shipley. And Bill Shipley has 100
18 percent handled that Pepe case.

19 John Pierce and Mr. Shipley have sort of a -- I
20 won't call it a partnership. They shared cases. I guess
21 that's a way of a partnership. And they no longer do so.
22 They're not even -- they don't speak. They've had a little
23 bit of a falling-out. Maybe I'm giving too much
24 information.

25 But anyways, there's no danger of Mr. Pierce

1 getting anything from Mr. Shipley. They're not on good
2 terms at the moment.

3 THE COURT: It sounds like they're not even --
4 they engage in joint representations as opposed to being --

5 MR. ROOTS: Yes.

6 THE COURT: -- business partners. Is that
7 accurate?

8 MR. ROOTS: Yes. It was a joint representation of
9 Mr. Pepe.

10 THE COURT: Okay.

11 MR. ROOTS: I'll say I've never -- I didn't even
12 know Mr. Pepe's first name until this -- until I got right
13 here.

14 And back to that Slack channel, the word "Pepe"
15 appeared. I was never ever allowed into that channel.
16 Never worked on a Pepe case. Never spoke to him.

17 THE COURT: So you never worked on Pepe's case.

18 And if you would -- I know you had discussed this
19 with me the other day. Tell me about Paul -- you had a
20 little bit of -- you played a small role in Paul Rae's case.

21 MR. ROOTS: I was called in -- and maybe it was a
22 last-minute thing -- to work on a motion to -- a motion for
23 Mr. Paul Rae to fly -- he had to go to a wedding or
24 something in Las Vegas. And also, he wanted a motion to
25 modify his conditions of release and remove his ankle

1 monitor. And so I worked on that motion, submitted it to
2 John Pierce, who filed it.

3 So that's the extent of my entire knowledge of
4 Paul Rae.

5 I've talked to him on the phone. Seemed like, you
6 know, a nice guy. Never read his indictment. That was the
7 extent of all I know about Paul Rae.

8 THE COURT: Okay. Do you have any reason to
9 believe that your firm's involvement with Mr. Pepe could
10 hinder your ability to provide competent and diligent
11 representation to Mr. Pezzola?

12 MR. ROOTS: I have no -- no doubt that I can
13 completely represent Mr. Pezzola without any conflict
14 whatsoever.

15 THE COURT: And do you have any reason to believe
16 that your firm's involvement with Mr. Rae might hinder your
17 ability to provide competent and diligent representation to
18 Mr. Pezzola?

19 MR. ROOTS: No. No doubts.

20 THE COURT: All right. There's -- we're not quite
21 done with the conflicts that -- potential conflicts that
22 flow out of this situation, because there are Rule 1.9
23 issues also stemming from Mr. Pierce's prior representation
24 of Mr. Rae and Mr. Pepe.

25 That rule provides that a lawyer who has formerly

1 represented -- quote: "A lawyer who has formerly
2 represented a client in a matter shall not thereafter
3 represent another person in the same or a substantially
4 related matter in which that person's interests are
5 materially adverse to the interests of a former client
6 unless the former client gives informed consent."

7 So under Rule 1.10(a), the imputation rule, if
8 Mr. Pierce would have a Rule 1.9 conflict representing
9 Mr. Pezzola, Mr. Roots would also have that same conflict.

10 I think Mr. Rae -- from what I understand of
11 Mr. Rae and Mr. Pepe's cases, they are likely substantially
12 related under Rule 1.9, so I assume that for purposes of the
13 analysis.

14 The bigger question is whether Mr. Pezzola's
15 interests in this case are materially adverse to Rae's or
16 Pepe's. The rule does not define "materially adverse."

17 The ABA has advised that material adversity
18 exists, quote, "where a lawyer is negotiating or litigating
19 against a former or prospective client or attacking the work
20 done for the former client on behalf of a current client in
21 the same or a substantially related matter.

22 "It also exists in many, but not all, instances
23 where a lawyer is cross-examining a former or prospective
24 client; and generally, it may exist where a former client is
25 not a party or a witness to a case but can identify some

1 specific material, legal, financial or other identifiable
2 concrete detriment that would be caused by the current
3 representation."

4 That's from an ABA opinion -- ABA opinion 21-491
5 dated February 10th, 2021.

6 "But a claimed detriment untethered from a
7 demonstrable and material harm or risk of harm to the former
8 client's interests doesn't suffice."

9 So I think what I need to do is just assess the
10 positions of Mr. Pepe and Mr. Rae vis-à-vis this litigation
11 to see if they would qualify as materially adverse. So I'll
12 begin with Mr. Pepe.

13 Again -- and I'll say my piece here and see if the
14 parties need to correct me on this. I don't think either
15 side -- I haven't seen any sign, I don't think, that either
16 side intends to call him as a witness, so I don't see how he
17 could have an interest materially adverse to Mr. Pezzola's
18 in this matter. So I don't think this is a case where a
19 demonstrable and material risk of harm would come from it.

20 So if that's so, I don't think there's a Rule 1.9
21 conflict with respect to Pepe. So he would not have to
22 consent to the representation.

23 But I just want to hear if any party thinks
24 otherwise.

25 I see everyone looking around, but -- no one

1 thinking -- well, hold on. I'll give the Government a
2 moment to...

3 MR. KENERSON: Your Honor, I guess -- Erik
4 Kenerson for the United States.

5 I think, as we've said in our papers, it's hard to
6 evaluate on the record that we have. It's theoretical. We
7 certainly would not take the position that such material
8 adversity exists on the current record.

9 But given that they were at one point
10 Co-Defendants charged as co-conspirators in an indictment,
11 depending on how the case comes in, that could crop up. But
12 on the current record, we don't see it.

13 THE COURT: Obviously, if -- at that point, we
14 would have the possibility of -- if that were to crop up, we
15 could, number one, seek Mr. Pepe's consent, if need be. And
16 if that -- failing that, I could -- Mr. Pezzola has two
17 lawyers. I could disqualify Mr. Roots if I need to.

18 But again, we're not -- we're not there. But I'm
19 just saying we have those in our back pocket. So I think
20 that seems like a reasonable place to move forward with
21 Mr. Pepe.

22 With regard to Mr. Rae, I'll note that he does
23 appear -- well, I -- I'm pretty sure he does appear on at
24 least one witness list. I don't know whether either side is
25 intending to call him or whether -- well, I don't know the

1 status of Mr. Rae in this litigation.

2 So let me just ask -- and if the parties need to
3 make this representation other than in open court, you can
4 let me know. But I do need to know whether there's any
5 information about Mr. Rae that we should be aware of.

6 MR. METCALF: The only other information other
7 than what was submitted in our writings and what was asked
8 or inquired of Mr. Roots is that I believe that Mr. Rae was
9 put on a defense witness list by someone who was not -- by
10 another Defendant other than Pezzola.

11 THE COURT: Right. But it's important for me to
12 know in this analysis whether any Defendant intends to call
13 him as a witness.

14 MR. METCALF: And I don't have any other
15 information on that.

16 THE COURT: You don't. But I may need to hear
17 from any other Defendant.

18 MR. SMITH: Your Honor, Mr. Nordean may call, or
19 attempt to call, Mr. Rae as a witness.

20 But again, I think -- just to skip to the next
21 beat here, I don't understand the issue, when there's two
22 defense lawyers for Mr. Pezzola, one of whom doesn't have a
23 conflict, because then that defense lawyer would conduct any
24 cross and there wouldn't be any ethics issue. So that's why
25 I'm --

1 THE COURT: Well, I'm not sure it's limited to the
2 cross-examination.

3 MR. SMITH: Or, you know --

4 THE COURT: Right. That's the issue. I mean,
5 you're right. There is a possibility of doing something
6 about a cross that would eliminate part of it.

7 But it also may be that, if that's the case,
8 Mr. Roots might not be able to remain as part of the defense
9 team.

10 You know, again, I think we'll -- if -- just as
11 long as all parties know that could be the case.

12 MR. SMITH: In terms of probabilities, your Honor,
13 because Mr. Rae has been charged and I believe he has new
14 counsel now, I --

15 THE COURT: No. I don't disagree with what you're
16 saying. You're telling me, though, that you don't -- let's
17 put it this way: Do you have any information to suggest
18 that he would not -- that you'd really be in a position to
19 call him and that he would provide testimony in the case?

20 MR. SMITH: It's possible, your Honor. It's
21 possible. But I can't give a probability.

22 But, you know, at the same time, I -- again, I
23 don't really see how it impacts Mr. Pezzola when he has two
24 counsel, one of whom doesn't have the conflict.

25 THE COURT: Right.

1 Again, I think -- you may be right with the
2 question. I think I might have to disqualify Mr. Roots if
3 that were to happen. But again, maybe not. But he does
4 have two lawyers.

5 So let me turn to the -- ask the Government. Are
6 you all comfortable going forward on this record?

7 MR. KENERSON: I think, similar with -- with
8 Mr. Pepe, things could arise that create a material
9 adversity where, right now, one is theoretical. So, you
10 know, that's what the Government noted in bringing this up;
11 and obviously, if all the parties know, we might have to
12 cross that bridge mid-trial, but we might have to cross that
13 bridge mid-trial.

14 THE COURT: All right. But in any event, the
15 worst-case scenario for Mr. Pezzola would be that he would
16 just continue on with one attorney. I'm not saying it would
17 have to be, but I'm just -- that's the worst-case scenario.
18 All right.

19 I think that sounds -- and as I said, the other
20 possibility is the individual gives consent. The other
21 individual gives consent. And then we don't have to
22 cross --

23 MR. SMITH: And, your Honor, I think that's a
24 reasonable possibility as well, so I --

25 THE COURT: Right.

1 MR. SMITH: If it were probable that this witness
2 would testify and decline to invoke any privilege he may
3 assert, then it's not unreasonable to expect that he would
4 also waive any kind of hypothetical privilege, you know,
5 power he has over -- to assert this conflicts issue.

6 THE COURT: I think -- on this record, I think we
7 can proceed. And if things evolve, we'll -- we'll address
8 them.

9 Okay. So, Mr. Roots, we're done with you.

10 MR. ROOTS: Thank you, your Honor.

11 MR. KENERSON: Could I ask a factual clarification
12 question, going back to Mr. Moseley?

13 I think I heard this correctly -- I just want to
14 make sure I heard it correctly -- that I understand that
15 Mr. Moseley is walled off from accessing any of Mr. Roots's
16 materials as it relates to this case. And I think Mr. Roots
17 said it went the other way. I just wasn't as clear on that.
18 I just wanted to double-check, that Mr. Roots is walled off
19 from anything Mr. Moseley may have as it relates to
20 Mr. Rehl.

21 THE COURT: Okay. Yes.

22 MR. ROOTS: The answer is absolutely yes, I'm
23 walled off from anything that -- I don't believe there is
24 anything that exists, but to the extent -- even if there
25 were, I would be walled off from it.

1 THE COURT: To the extent Mr. Moseley has come
2 into your employ, he's not -- there would be no reason to
3 have materials related to his representation of Mr. Rehl on
4 your firm's computers. Is that right?

5 MR. ROOTS: Mr. Moseley has no files. He just
6 works on paralegal work at times, I believe part-time. He's
7 sort of sailing off into retirement.

8 THE COURT: Okay.

9 MR. ROOTS: And he brings no files to the John
10 Pierce firm.

11 THE COURT: Okay. The second -- so now we turn to
12 Mr. Hull and some of the issues we've known about and some
13 that have been affected by recent developments.

14 There are three, at least, potential conflicts
15 arising out of Mr. Hull's representation of Mr. Biggs: his
16 prior representation -- "his" meaning, obviously,
17 Mr. Hull's -- prior representation of Mr. Tarrío before the
18 January 6th Committee and his representation of Tarrío in
19 some related civil cases; two, his contemplated
20 representation of Mr. Bertino before the -- and then two
21 issues the Government has raised more recently: his
22 contemplated representation of Jerry Bertino before the
23 January 6th Committee and, third, his representation of Jay
24 Thaxton, an individual -- another individual before the
25 January 6th Committee the Government has alerted me to.

1 So with regard to Mr. Tarrio, part of this is a
2 process we've already -- and Mr. Tarrio well knows; we
3 already addressed it fairly thoroughly -- a number of months
4 ago, I appointed an independent conflicts counsel to address
5 any potential conflicts posed by Mr. Hull's representation
6 of Tarrio before the January 6th Committee and some related
7 civil cases.

8 I'll note that the status of Mr. Hull's
9 representation of Tarrio in those related civil matters
10 seems to be in a gray area. It looks like, Mr. Hull, you
11 moved to withdraw, and Judge Mehta hasn't granted that
12 motion yet, or he denied them because they weren't
13 accompanied by Mr. Tarrio's written consent to the
14 withdrawal.

15 MR. HULL: That's correct, your Honor. It wasn't
16 done --

17 THE COURT: Right.

18 MR. HULL: -- and we had not gotten around to
19 doing it, but the intent is to withdraw completely.

20 THE COURT: Understood.

21 In any event, the report and recommendation that
22 the conflicts counsel provided me included a thorough
23 analysis of Rule 1.7's applicability here, which governs
24 conflicts generally and the simultaneous representation of
25 two individuals in substantially related matters, as well as

1 the rule I mentioned earlier again, Rule 1.9, which deals
2 with former clients.

3 And when I conducted colloquies with both
4 Mr. Tarrio and Mr. Biggs back in November, we discussed the
5 possibility that a conflict might arise stemming from either
6 or both sources.

7 And at bottom, as the report and recommendations
8 set out, the potential conflicts that might arise if Tarrio
9 is Hull's current client in civil matters, or former client,
10 are more or less the same.

11 Conflicts under both rules are waivable if
12 affected clients provide informed consent. And Mr. Hull
13 reasonably believes that he would be able to provide
14 competent and diligent representation to each client.

15 So as I set out in an order a few weeks ago, which
16 I filed under seal because it related to these hearings that
17 we had that were sealed because of the possibility of
18 getting into privileged and other sensitive information, I
19 did make a finding that both Mr. Tarrio and Mr. Biggs
20 provided informed consent to the representation.

21 Again, on the conflicts counsel's recommendation,
22 I appointed both Mr. Tarrio and Mr. Biggs independent
23 conflicts counsel, one for each of them, both of whom were
24 well-versed in these issues.

25 Both Defendants represented to me that they had

1 ample time to discuss the potential conflicts here with
2 their special counsel, and counsel represented them at that
3 hearing. And when I questioned both Defendants, I further
4 explained -- and they will remember -- in excruciating
5 detail, I think they'll agree -- all the issues that might
6 arise under Rules 1.9 and 1.7, and both Defendants consented
7 to Mr. Hull's representation of Mr. Biggs nonetheless.

8 In addition, I'll note that, after reviewing the
9 transcript of the colloquies I conducted with Mr. Tarrio and
10 Mr. Biggs, it was clear to me that neither Defendant's
11 consent sort of turned on whether Mr. Pattis was also
12 representing Mr. Biggs as Mr. Hull's co-counsel. For
13 example, one of the obvious issues that might arise here
14 would be if Mr. Tarrio ended up testifying and Mr. Hull had
15 to cross-examine him.

16 I questioned Mr. Tarrio about this very prospect,
17 and he responded that he was comfortable with it and
18 consented to Hull's representation of Biggs here.

19 Similarly, I explained to Mr. Biggs that, given
20 Mr. Hull's involvement with Mr. Tarrio, a conflict might
21 arise, let's say, during closing arguments if Mr. Hull had
22 to argue that the evidence against Biggs was weaker than the
23 evidence against Tarrio.

24 I then clarified that even if Mr. Pattis would be
25 delivering the closing, Mr. Hull would still be sharing

1 information and helping him to prepare. Mr. Biggs said he
2 understood, and he reaffirmed that he wanted Mr. Hull to
3 represent him.

4 So for all those reasons, I don't think there
5 are -- that any further colloquies of Mr. Biggs or
6 Mr. Tarrio on this issue are necessary, even in light of the
7 fact that we may not have Mr. Pattis in the case. I note
8 he's moved to withdraw.

9 Unless any party thinks I need to further engage
10 those colloquies, I'm going to move to talk about
11 Mr. Thaxton.

12 All right.

13 The Government also brought to my attention two
14 new potential issues regarding Mr. Hull's involvement here,
15 both of which it seems the Government only recently
16 discovered.

17 One potential issue the Government raised is
18 Mr. Hull's representation of an individual named Jay Thaxton
19 at his January 6th Committee deposition. Looking at it
20 closely, I don't see an issue -- I don't see a problematic
21 issue here.

22 Mr. Thaxton doesn't appear on either side's
23 witness list. I have no record of his knowledge of or
24 involvement with these Defendants, if he has any at all. I
25 think he is a member of the Proud Boys. That might be the

1 only nexus with the case.

2 So --

3 MR. HULL: Your Honor, I can help a little there.
4 There was a footnote in -- this will take a second. There
5 was a footnote in the Government's pleading on Mr. Thaxton.
6 And it said: Should Mr. Hull call Mr. Thaxton -- in other
7 words, if we suppose that he wasn't on the witness list now,
8 but I called him later.

9 The decision not to call Jay Thaxton was made for
10 reasons completely unrelated to me about two days before the
11 witness list was due.

12 So unless the Government calls him, he will not
13 appear.

14 THE COURT: Okay. So again, I think what I
15 explained previously as to why I don't see there being a
16 Rule 1.9 issue with Mr. Pepe applies with probably greater
17 force to the situation with regard to Mr. Thaxton. I don't
18 think there's any further inquiry I need to make of the
19 parties or colloquies I need to make with any Defendant.

20 The last I think -- and again, I know we're in
21 a -- I think this is all part of a publicly available
22 transcript -- but it has to do with Mr. Bertino.

23 MS. MOORE: Your Honor, good afternoon. Nadia
24 Moore for the United States. Just one thing.

25 We think it might be prudent, with regards to

1 Mr. Thaxton, just to get a brief colloquy from Mr. Biggs
2 that he is aware, given Mr. Hull's prior representation of
3 Mr. Thaxton, that he wouldn't be able to use information he
4 learned through the course of that representation in
5 representing Mr. Biggs in this matter, just in an abundance
6 of caution, your Honor.

7 THE COURT: All right. Out of an abundance of
8 caution, Mr. Biggs, you heard the colloquy I had. You and I
9 have had a similar colloquy like this before.

10 DEFENDANT BIGGS: Roger that.

11 THE COURT: And you've heard the colloquy I had
12 with Mr. Pezzola a moment ago. Correct?

13 DEFENDANT BIGGS: Yes, your Honor.

14 THE COURT: And you understand, from hearing that
15 colloquy, that in theory an issue could arise in this case
16 that relates to confidentiality. A defendant in a criminal
17 case has the right to have his communications with his
18 counsel and any other secrets that that lawyer learns in the
19 course of the representation kept confidential.

20 You've heard of the attorney-client privilege;
21 and, generally speaking, if a defendant tells his lawyer
22 something in connection with his case, a lawyer cannot share
23 what was said with anyone else, including co-defendants,
24 without the defendant's express permission.

25 Do you understand that?

1 DEFENDANT BIGGS: Roger that, your Honor.

2 THE COURT: I want you to be aware of the
3 potential complication that could arise -- that could arise
4 when one lawyer represents a defendant in a case that is
5 substantially related to one in which the lawyer used to
6 represent another defendant.

7 The complication is that when a client shares
8 information with his lawyer, the lawyer may only share it
9 with others if the former client gives permission for that
10 to occur.

11 And if that information is particularly helpful to
12 a lawyer's current client in a criminal case at the expense
13 of his former client, there is the problem of the lawyer
14 having divided loyalties. It may be appropriate for the
15 lawyer to share that information with his other client only
16 if the former client gives permission for that to happen.

17 So even though -- so do you understand all that,
18 sir?

19 DEFENDANT BIGGS: Roger that.

20 THE COURT: And do you understand that if Mr. Hull
21 has confidential information that he learned from
22 Mr. Thaxton, but Mr. Thaxton did not give him permission to
23 share that with you or to use it on your behalf, then
24 Mr. Hull might not be able to represent you as well as if he
25 were permitted to share that information with you? Do you

1 understand that?

2 DEFENDANT BIGGS: Fully understand.

3 THE COURT: And do you understand that Mr. Thaxton
4 might have told Mr. Hull something that you would want to
5 know, but Mr. Hull would not be able to tell you under those
6 circumstances? Do you understand that?

7 DEFENDANT BIGGS: Yes, your Honor.

8 THE COURT: All right. And knowing about these
9 potential conflicts, do you still want Mr. Hull to represent
10 you, sir?

11 DEFENDANT BIGGS: Roger that.

12 THE COURT: Is that a yes?

13 DEFENDANT BIGGS: Yes, your Honor.

14 THE COURT: All right.

15 DEFENDANT BIGGS: Affirmative.

16 THE COURT: All right. So now we turn to
17 Mr. Bertino.

18 I think -- is there any reason -- let me just ask
19 the Government, since they've been, as compared to the
20 Defendants, more sensitive to issues about being under seal.
21 I don't think any of this needs to be discussed under seal,
22 but let me ask -- okay. I see that the Government is
23 nodding no.

24 MR. HULL: No, your Honor. As the Government
25 knows, do I think that should be under seal [sic].

1 THE COURT: All right. The second issue the
2 Government raised presents a different kind of concern. So
3 when Mr. Bertino testified before the January 6th Committee,
4 he represented that he considered hiring Mr. Hull to
5 represent him.

6 They -- according to the transcript, they
7 discussed the possibility, and Mr. Bertino contacted
8 Mr. Hull for sort of initial advice before the FBI
9 apparently searched his residence. But Mr. Bertino never
10 formally became Mr. Hull's client, and another lawyer ended
11 up representing him at his Committee deposition.

12 So this implicates a couple of related rules.
13 Under Rule 1.1(a), a person who discusses with a lawyer the
14 possibility of forming a client-lawyer relationship with
15 respect to a matter is a prospective client. Section (b) --
16 Subsection (b) further provides that even if no
17 attorney-client relationship ultimately comes to pass, the
18 attorney still may not use or reveal information learned in
19 the consultation with the prospective client except as
20 allowed under Rule 1.6.

21 And except in those circumstances, the lawyer
22 shall not represent a client with interests materially
23 adverse to those of a prospective client in the same or a
24 substantially related matter if the lawyer received a
25 confidence or secret from the prospective client.

1 Under Rule 1.6(b), a confidence refers to
2 information protected by the attorney-client privilege under
3 applicable law and a secret is other information gained in
4 the professional relationship that the client has requested
5 be held inviolate or the disclosure of which would be
6 embarrassing or would likely be detrimental to the client.

7 So it seems, based on the deposition testimony,
8 that Mr. Bertino was Mr. Hull's prospective client, and the
9 cases are obviously substantially related to each other.

10 That being so, I think the cause for concern here
11 is that, given that Mr. Bertino -- that the Government
12 anticipates calling Mr. Bertino as a witness against
13 Mr. Biggs, then Mr. Biggs's interests would be materially
14 adverse to Mr. Bertino's.

15 So I think the first question I have to resolve
16 here is whether Mr. Hull ever did receive a confidence or
17 secret, as I've defined them, from Mr. Bertino. If not,
18 then Rule 1.18 poses no barrier to Mr. Hull's representation
19 of Mr. Biggs here.

20 Indeed, Comment 4 to that rule provides that,
21 quote, "In order to avoid acquiring confidences and secrets
22 from a prospective client, a lawyer considering whether or
23 not to undertake a new matter may limit the initial
24 interview only to information that does not constitute a
25 confidence or secret if the lawyer can do so and still

1 determine whether a conflict of interest or other reason for
2 nonrepresentation exists."

3 So one possibility is Mr. Hull did not receive a
4 confidence or secret from Mr. Bertino. We proceed.

5 But I think, if it turns out that Mr. Hull did
6 obtain a confidence or secret from Mr. Bertino, then I think
7 we'll need to do one of two things: The first option would
8 be to see if Mr. Biggs and Mr. Bertino both waive the
9 conflict, which that rule allows, 1.18, by providing
10 informed consent to the representation. And in theory, we
11 could also discuss the possibility that I could appoint
12 separate independent counsel to cross-examine Bertino and
13 take care of any other matter that would implicate the
14 conflict.

15 But the question first, I think, analytically is
16 whether Mr. Hull received any confidence or secret from
17 Mr. Bertino. That's the first question.

18 The second question is, then, could we get
19 Mr. Hull and Mr. Bertino to waive any related conflict?

20 So before I -- so I think -- I think what it makes
21 sense for me to do is discuss this with Mr. Hull, with no
22 one else present, for him to make representations about
23 whether he received a confidence or secret from Mr. Bertino
24 and then take the next step if we need to.

25 Let me just ask, does any party think that's not

1 the way we should proceed?

2 MR. HULL: Your Honor, if I may, Dan Hull for Joe
3 Biggs.

4 We can, of course, do what your Honor wants. I
5 could put -- tell you right now a couple of things that
6 don't need to be under seal that might shortcut this a
7 little bit with respect to the nature of the relationship I
8 had with Mr. Bertino. Is that fair?

9 THE COURT: If -- if there's something you feel
10 comfortable saying --

11 MR. HULL: Very comfortable.

12 THE COURT: -- on the -- on the record, then
13 that's fine.

14 MR. HULL: Sure.

15 I spent a lot of my career turning down work.
16 Work comes in all the time. We took ourselves out of the
17 Yellow Pages at one point.

18 When Mr. Bertino called --

19 THE COURT REPORTER: Can you pull the microphone
20 away from you, please, counsel?

21 MR. HULL: I apologize. This is my second
22 warning, I think.

23 THE COURT: We just can't get the distance between
24 our mouths and the microphone right. Everyone is either too
25 far or too close.

1 MR. HULL: This is a tough courtroom. It is.

2 Mr. Bertino was, I think, put in touch with me by
3 Henry Tarrio. I'm not sure. I can tell you that the idea
4 was for me to find someone who could represent him before
5 the House Committee, because there was an inquiry. And I
6 did not want to represent anybody but Mr. Tarrio.

7 However, Mr. Thaxton was someone in need. Not a
8 lot of people would do these kinds of cases. So we entered
9 into an agreement where he paid me a nominal sum for me to
10 represent him in his deposition, which I actually stopped
11 near the end, and there's some question in my mind whether
12 or not it was completed.

13 However --

14 THE COURT: Let's keep focused on Mr. --

15 MR. JAUREGUI: Judge, Jauregui on behalf of
16 Tarrio.

17 I think, if there's going to be any discussion at
18 all about my client and anything that he said, this should
19 be sealed. I don't think we should be getting into this.

20 MR. HULL: We're not going to talk about Enrique
21 anymore.

22 MR. JAUREGUI: Okay.

23 MR. HULL: So with respect to them -- the
24 transcript, I've seen parts of it. And it was done after
25 the first two depositions done by the House Committee by the

1 same people who I had a relationship with.

2 To make a long story short, certainly anytime when
3 I try to get people lawyers, it takes a while, and it
4 particularly takes a long time with Proud Boys. And so the
5 notion was that I would try to find him somebody.

6 I did not. And while I was in the course of doing
7 that, I believe there was a search and seizure of his home,
8 and I asked him to get in touch with somebody near there.
9 But he was calling a lot.

10 Mr. Bertino and I had a very short-lived
11 relationship. We were like oil and water. He found me
12 crazy and arrogant. I found him very emotional and
13 skittish. But I was never able to find a House Committee
14 lawyer for him.

15 I'm glad he was represented. I didn't read
16 anything in the transcript with respect to his relationship
17 with me that was true except for the fact that I did talk to
18 him and had a -- had an attorney-client relationship,
19 certainly would have to have had that open. But no
20 attorney-client information was exchanged, if that makes
21 sense.

22 So the attorney-client relationship was certainly
23 there for a short time, but nothing went through it.

24 THE COURT: So you think it was not a
25 prospective -- I thought of your relationship with him as a

1 prospective relationship, given that you never really -- you
2 were exploring either finding someone else or seeing if you
3 would represent him, but you never took on the
4 representation?

5 MR. HULL: No. I think definitely I did not. But
6 I think every time I agree to, like, find a lawyer for
7 somebody, I have that relationship.

8 The question is: Does anything, you know, go into
9 the conduit? And I've done it hundreds and hundreds of
10 times. And I tell them that now we do have this
11 relationship and you can tell me things, but I'll try to get
12 you -- we have an attorney-client relationship, but I will
13 try to find you a lawyer. You can get things to me and I'll
14 get things to that person.

15 And that's been a big part of my career, my
16 profession.

17 THE COURT: Okay. So you don't think I need to
18 have a colloquy -- your representation is that you did not
19 receive any confidences or secrets in the course of
20 whether -- however you want to characterize your -- these
21 preliminary discussions?

22 MR. HULL: Absolutely not. It was more just lots
23 of phone calls, very many, some fairly emotional coming from
24 his end. And it was more like social work. But he
25 eventually got an attorney other than ones that I would come

1 up with.

2 THE COURT: Let me ask the Government what their
3 view of the record is at this point.

4 MR. McCULLOUGH: So, your Honor, I think just one
5 thing that we wanted to flag for the Court is just the
6 concern about the statement that Mr. Hull made about
7 Mr. Bertino being skittish and describing this other
8 assessment of his posture.

9 Certainly it would seem to be issues that go to
10 impeachment and seem to be issues that Mr. Hull may be now
11 kind of a percipient witness to.

12 We're doing this on the fly, your Honor, I mean,
13 kind of hearing that and trying to assess what that means.
14 I think if we can -- I don't know that a short break is
15 going to resolve it, but I would ask to take a -- a brief
16 break just to assess -- and, again, let me be very clear:
17 I'm not sure that we will have any further information after
18 the break, but I do want to take -- pause for a beat, if we
19 can, please, and assess what the ramifications of that are.

20 MR. HULL: That's fair, your Honor.

21 If I may add something which I forgot. And I
22 think this might be partially --

23 THE COURT: Mr. Hull, why don't we -- I think --
24 why don't I -- I don't mean to cut you off --

25 MR. HULL: Okay.

1 THE COURT: -- but I don't necessarily want to
2 have you address this topic any more in open court than we
3 need to.

4 So why don't I have --

5 MR. HULL: I would like to mention, your Honor,
6 though, that Bertino's current counsel has represented to
7 the defense team that there was no confidential information,
8 you know, transmitted between Mr. Bertino and me. And I
9 think the Government made some overtures like that, or
10 consistent with that, in one of the pleadings it's filed.

11 Is that right?

12 THE COURT: I don't recall -- is that consistent?
13 I don't recall that, but I may be wrong.

14 MR. McCULLOUGH: Your Honor, if we can --

15 MR. HULL: Go under seal.

16 THE COURT: Mr. Hull, please.

17 MR. McCULLOUGH: Your Honor, I'd like to just also
18 move for kind of the imposition of kind of your Honor's
19 order on decorum here. I think we're getting to a point
20 where we're going to have a jury in front of us, and this
21 just -- we need to take this up a couple of levels.

22 Your Honor, we'd ask for five minutes so we can
23 consider this.

24 THE COURT: That's fine. That's fine. We
25 probably are -- we're maybe not quite there, but we're

1 coming up on a court reporter break. So let's take ten
2 minutes. We'll be back.

3 (Thereupon a recess was taken, after which the
4 following proceedings were had:)

5 MR. JAUREGUI: Judge, the Government is still
6 huddled in their office. I just wanted to let your Honor
7 know. They're working on those issues.

8 THE COURT: Okay.

9 MR. SMITH: Your Honor, I should have spoken up
10 earlier, but I feel I need to put something on the record
11 because no one else is speaking up --

12 THE COURT: Why don't you wait until the
13 Government is here.

14 MR. SMITH: Okay.

15 (Thereupon, Government counsel entered the
16 courtroom and the following proceedings were had:)

17 THE COURTROOM DEPUTY: Your Honor, we're back on
18 the record in Criminal Matter 21-175, United States of
19 America versus Ethan Nordean, et al.

20 THE COURT: All right. I see, when I took the
21 bench, we didn't have the Government with us. I don't know
22 if that means I interrupted your meeting before you had
23 reached a verdict. But the Government asked for this brief
24 pause.

25 What's the Government's view about where we are

1 here?

2 MR. McCULLOUGH: So, your Honor, I think -- your
3 Honor had kind of used -- it's kind of laid out a framework
4 in terms of kind of the way to analyze this information, and
5 you had used the term, kind of -- "secret," whether there's
6 a secret.

7 We have had a communication with Mr. Bertino's
8 attorney. We understand the facts and circumstances around
9 the communication between Mr. Bertino and Mr. Hull to have
10 taken place around the time of the execution of the search
11 warrant on Mr. Bertino's home.

12 We understand that -- from that conversation
13 that -- we understand from our conversation with
14 Mr. Bertino's current attorney that there were
15 communications that were made by Mr. Bertino or statements
16 made by Mr. Bertino during that communication that he would
17 have expected would be kept in confidence.

18 And I think the kind of issue here is that is a
19 fundamental one, whether there were communications that were
20 made that the person making them to a prospective attorney
21 believed that they were to be kept in confidence. So that's
22 kind of threshold issue one.

23 And perhaps -- well, I think that's threshold
24 issue one.

25 Second, as I noted before the break, one concern

1 that has come up, based on the colloquy here, is that Mr. --
2 based on the way that I heard it -- and I don't have the
3 benefit of the transcript, and I was not taking close
4 notes -- but based on the way that we heard it, we
5 understood Mr. Hull to be representing that the statements
6 that Mr. Bertino had made to the House Select Committee
7 about the nature of their relationship were not accurate.
8 And that gives us pause from the perspective of, as I said,
9 kind of making Mr. Hull a potential kind of witness to some
10 sort of impeachment.

11 So the idea that Mr. Hull or, frankly, any
12 counsel, now that this kind of -- these statements have been
13 made, could cross-examine Mr. Bertino on the veracity of his
14 statements with respect to Mr. Hull's prior -- their prior
15 communications about prospective representation is of
16 concern.

17 And so those are the two issues that we are
18 seeing. And I think that -- I think one issue here, as your
19 Honor had raised at the outset, is whether there needs to be
20 a second counsel involved at least with respect to anything
21 related to Mr. Bertino. The follow-on to that would be
22 whether there's anything that needs to be addressed with
23 respect to cross-examination with respect to the nature,
24 veracity and truth of any communications between Mr. Hull
25 and Mr. Bertino as they're reflected in either the House

1 transcript or -- or anywhere else.

2 That last part, I genuinely -- I think that's
3 where we're kind of sorting through.

4 So Issue No. 1, the factual issue: I don't think
5 "secret" is the right standard. I think the right standard
6 is whether there was something communicated in confidence to
7 somebody who was a prospective lawyer. The nature and
8 circumstances, the timing of that communication suggests
9 that they were. The representation that we've just received
10 from Mr. Bertino's current counsel indicates that there
11 were.

12 The second issue is this potential impeachment
13 witness that Mr. Hull may have made himself with respect to
14 the communications that Mr. -- or the testimony that
15 Mr. Bertino gave to the House Select Committee, and whether
16 that second -- well, that's it. I've laid it out.

17 THE COURT: So as to the first issue, it seems to
18 me the next step, then, is to see if Mr. Biggs and
19 Mr. Bertino would waive -- would waive. Right? That --
20 because that would cure at least the first issue. I don't
21 know whether you raised that with his attorney or not. But
22 that's -- that would be the next question to solve on that
23 front. Correct?

24 MR. McCULLOUGH: That is correct. I think that is
25 the next issue.

1 THE COURT: Okay.

2 MR. SMITH: Your Honor, I don't mean to complicate
3 this further, and I don't intend to offer any opinion, but
4 I've heard something that can't be left off of the record,
5 your Honor.

6 We called J.P. Davis, the counsel for Mr. Bertino,
7 and we asked, among other questions, Mr. Davis point-blank
8 whether they believed there were any privileged
9 communications -- I can't remember if I used the word
10 "confidence" or "privilege" -- between Mr. Hull and his
11 client.

12 He responded in two ways. The first he said is:
13 We don't believe there are any.

14 The second, your Honor, which I think is
15 particularly pertinent, is that they informed the Government
16 of this over a week before the Government's filing -- latest
17 filing related to Mr. Hull's potential conflicts.

18 So I am a little bit puzzled. I mean, granted,
19 this person -- the lawyer, J.P. Davis, was speaking on a
20 speakerphone. There was a cell phone. I'm fairly confident
21 that's what I heard him saying.

22 And now I think you're hearing from the Government
23 something that's 180 degrees from what he informed us.

24 So unless there is a new counsel or --

25 THE COURT: I don't know why his lawyer would

1 change his story like that. I agree.

2 MR. SMITH: Yeah. So --

3 THE COURT: I mean, you know, it's an open issue
4 before me right now. So I agree with you.

5 All right. So that's -- number one, it seems to
6 me, I guess, Mr. Smith, your point is right that we need to
7 get at the heart of what the truth is. I'm not saying
8 anybody is not telling the truth. But we need to get a
9 representation from his lawyer. And maybe we can -- so
10 that's number one.

11 Number two: If there is -- if, indeed, there was
12 some sort of issue here, to see if both of them will waive.
13 Right? To see if Mr. Biggs and Mr. Bertino will waive. And
14 then that issue is solved.

15 And that's Mr. -- Mr. Hull, I think -- just let me
16 finish.

17 And then the second issue you raised,
18 Mr. McCullough, it seems to me -- I don't have -- I also
19 don't recall with precision what was said. I didn't
20 necessarily -- and maybe if Mr. Hull wants to clarify what
21 he said -- I -- he may have characterized certain things.
22 I'm not sure I heard him say Mr. Bertino didn't tell the
23 truth in front of the Committee. Of course, that would --
24 if that were the case, and Mr. Hull had let that stand,
25 that's another layer to the issue.

1 But I did not -- I didn't hear that, but that
2 doesn't mean it wasn't said.

3 So, Mr. Hull, do you want to --

4 MR. HULL: I do. And I apologize. It's the third
5 notice.

6 THE COURT REPORTER: I'm sorry. Mr. Hull, for the
7 integrity of the record, I'm going to ask you to please
8 allow the judge to complete his statement before you
9 begin --

10 MR. HULL: I apologize --

11 THE COURT REPORTER: Speaking.

12 MR. HULL: -- to you both.

13 THE COURT: Also, let the court reporter finish
14 speaking before you speak, Mr. Hull.

15 MR. HULL: Can you hear me?

16 THE COURT REPORTER: Yes, sir.

17 MR. HULL: Let me first say that, to clarify the
18 transcript in case -- what I said earlier about Mr. Bertino,
19 what I said was, and what I intended to say, was that
20 Mr. Bertino, who was deposed by the same people who I had
21 been dealing with in two previous depositions and did not,
22 by that time, have the best relationship with, didn't say --
23 this is Mr. Bertino -- didn't say anything about me that was
24 true or about our interactions that was true.

25 I didn't read his whole transcript. I haven't

1 gotten to it yet. But I have seen -- it has been released.
2 I have seen the excerpts of it. It did not -- it was not
3 very flattering to me, but I think I kind of get it.

4 But no, we did not have any -- we had a
5 relationship that I've had with many different people, most
6 of whom I cannot remember the names of, where I was going to
7 try to get them somebody. And that was a protracted
8 exercise when anybody came to me and asked for Proud Boy
9 counsel. I mean, that's how I met Mr. Biggs. I was like a
10 conduit.

11 But the statements, again, were only about the
12 things that he had said in those four or five pages where he
13 mentioned Dan Hull and, as a human being, I thought I should
14 make that clear.

15 I should also make it clear that the calls I was
16 talking about that came in were calls because he wasn't
17 quite sure what to do. And I think I advised him to get
18 local counsel in that area. And I might have suggested one,
19 but he eventually came up with one.

20 Again, he was looking for somebody for the House
21 Committee. I was trying to find someone. And then this
22 search issue came up. I think it was the same day that
23 Mr. Tarrio was arrested, so there was a lot of national
24 coverage about it.

25 The other thing I would say that's consistent with

1 what Mr. Smith just said, and very inconsistent with what
2 Mr. McCullough just said, is that you have recently been
3 presented with a pleading which was filed under seal which
4 says the exact opposite of what Mr. McCullough just told you
5 with respect to whether or not there was an attorney-client
6 relationship between me and Mr. Bertino.

7 So I think that's concerning. And I think that's
8 consistent with what I was told by my colleague Mr. Smith a
9 couple of days ago.

10 I actually would go -- I actually don't believe
11 that I had no attorney-client privilege. The conversation
12 that I was -- that was reported to me two days ago was that
13 Mr. Bertino and I did not have an attorney-client
14 relationship and, two, nothing -- you know, ergo, nothing in
15 any event was exchanged that would be a confidence or a
16 secret between the two of us.

17 And just a matter of, you know, my thinking, I
18 think anytime I'm trying to get somebody a lawyer, I do
19 have -- you know, A, I do have at least a relationship; but
20 if nothing is -- you know, if it's filled with nothing, as
21 was true in this case, again, you know, there is no --
22 there's no harm, there's no conflict, and I'm still a
23 conflict-free counsel. And that has usually worked out that
24 way in the past.

25 But I wanted to make it very clear that what I

1 was, number one, complaining about with respect to his
2 veracity is what he said about me.

3 Second, that, you know, the calls that came in
4 were calls because he was in crisis, and I did the best I
5 could for him.

6 THE COURT: All right. All right, Mr. Hull. I
7 don't think we need any further --

8 MR. HULL: Do -- do you understand what I'm
9 saying? Do you have any other questions?

10 THE COURT: Yes. Yes, I do.

11 MR. McCULLOUGH: Your Honor, if I may. And --
12 sorry. I again apologize.

13 In terms of the sequence of events here that's
14 been addressed -- so I think the Government's representation
15 was that it was under the understanding that Mr. Bertino had
16 no attorney-client relationship with Mr. Hull. That
17 continues to be the case. That is our understanding. And
18 that was the prior representation that we made.

19 We made that representation based on the
20 communications that we had approximately one week ago with
21 Mr. Bertino's current counsel.

22 THE COURT: And just because -- just to, I think,
23 get where you're going, just because -- as the rule
24 contemplates, you can share a confidence or secret with
25 someone and not have a full-blown attorney-client

1 relationship with someone. That's what the rule
2 contemplates and that, at least in theory, could explain the
3 difference -- where we are here.

4 MR. McCULLOUGH: That's correct, your Honor.

5 And I think that the other thing that I would add,
6 just in terms of the sequence, is that we saw the transcript
7 of Mr. Bertino's testimony. And we then raised that for
8 Mr. Bertino's counsel. And we just noted what we saw:
9 Based on what he had said, no attorney-client relationship.
10 We wanted to say, will you just please confirm whether there
11 is any potential conflict here, because we wanted to get
12 this right.

13 And at the time, he communicated to us that he had
14 had a conversation with defense counsel, that he had not yet
15 had an opportunity to review the transcript, and that he was
16 going to talk to Mr. Bertino about it.

17 And we said: Great.

18 I think -- if we had another communication with
19 Mr. Davis in the interim, it did not relate to this at all.

20 The next communication that we had with Mr. Davis
21 was -- with respect to this issue was just now, during the
22 break.

23 THE COURT: Okay. Look, I think at the end of the
24 day -- and I'll hear from the parties what they think about
25 this. I mean, I think at the end of the day we need to

1 break right now to give you all the chance to sort of run
2 down the facts here.

3 I mean, I want to get at -- I guess it's a couple
4 of things -- to get at whatever the facts are. I'm getting
5 different representations about the state of the
6 relationship and whether anything that could fall into the
7 secrets or confidences basket was shared.

8 So we'll nail whatever the parties' positions are
9 and whatever -- you all can talk to Mr. Bertino's lawyer
10 and, you know, by the time tomorrow rolls around, I would
11 think -- you'll all be on the same page at least as to what
12 his position is and you can explore with him the possibility
13 that this conflict is waived.

14 Mr. Hull, you can explore with Mr. Biggs the
15 possibility -- whether the conflict is waived.

16 And then we can get to the other issue you
17 mentioned, Mr. McCullough. You know, it's an ancillary kind
18 of issue. I mean, it's -- it's a real thing to think about.
19 On the other hand, even if -- I mean, let's put it this way:
20 I don't think it would be proper -- whether there was an
21 attorney-client relationship, not an attorney-client
22 relationship, whether Mr. Hull made the statements today he
23 made or did not, I don't think, under any circumstances, it
24 would be proper cross-examination in the trial.

25 So we should all just think about that issue. We

1 should think about that issue. And I'll see what the
2 parties' positions on it are tomorrow.

3 The worst part of where we are right now is that,
4 given the status here, the question is what to do with the
5 jury, who are coming in tomorrow. I know. I know. Nothing
6 we can do.

7 What is the parties' positions on whether -- I
8 mean, one possibility is we're able to resolve all this in
9 the morning and we could actually begin in the afternoon.
10 You know, look, nobody wants to move forward -- we all want
11 to.

12 Is that what the parties think we should plan on?
13 Look, if it doesn't happen, it doesn't happen. But we try
14 to resolve this issue first thing tomorrow morning and be
15 prepared. Look, it doesn't really matter what we decide
16 right now anyway. They're coming in. So -- and we can't
17 turn them around at this point, given the timing.

18 So if we can -- I think the best thing is for the
19 parties to simply be prepared to go if we can resolve this.
20 And -- and if we have to put the brakes on for some other
21 reason, we will.

22 MR. HULL: Your Honor, if I may, Dan Hull for
23 Mr. Biggs.

24 I'm not sure I understand why we can't resolve
25 this issue today and open tomorrow. And it may just be me,

1 but it doesn't seem to me to be an insurmountable issue.

2 MR. McCULLOUGH: The --

3 MR. HULL: I'm not sure that -- I'm getting the
4 impression here that -- and we want no continuance. No
5 Defendant, I know, wants a continuance. And it almost seems
6 like there's been an angling to make us do that, or have his
7 Honor do that where none is appropriate and we seem to be
8 slowing down the pace of everything to a point where even I,
9 who am not suspicious of anything, is kind of wondering
10 what's going on.

11 We would like to resolve this issue if we could.
12 If we can't -- I'm not good at thinking about issues that
13 involve me. But if we can do it, I think --

14 THE COURT: So a break --

15 MR. HULL: -- it's insignificant compared to -- I
16 mean, it doesn't take that much time to resolve -- and open
17 tomorrow, full speed ahead. And we've got five, possibly
18 six, openings and we can do them -- fit them all in.

19 THE COURT: So is the idea that -- again, all I --
20 and, believe me, no one wants to go full speed ahead more
21 than I do.

22 The question is whether you think an extended
23 break now, and coming back before the end of the day, is the
24 thing that makes sense.

25 MR. SMITH: Yes, your Honor.

1 THE COURT: Government?

2 MR. McCULLOUGH: We agree, your Honor.

3 THE COURT: All right.

4 MR. McCULLOUGH: And I think -- based -- I can't
5 represent that he will remain available. But the defense
6 counsel for -- counsel, rather, for Mr. Bertino was
7 available moments ago. We believe he would be available to
8 address your Honor.

9 So we may be able to -- if your Honor would like
10 to hear directly from that counsel, that may be kind of the
11 next step here, kind of in terms of this inquiry, and then
12 we may be able to kind of resolve at least -- we will then
13 have -- or your Honor will have the facts and we'll be able
14 to kind of proceed at that point.

15 THE COURT: All right. It doesn't necessarily
16 resolve that secondary issue. So why don't we -- and I'm
17 happy to hear from -- maybe we do have to get that person on
18 the phone, although if you all speak with him jointly and
19 you all have the same representation, I'm not so sure it's
20 necessary as long as the parties are united and you're
21 representing this is what the lawyer is telling us about
22 this.

23 So why don't we do this: Why don't we just leave
24 it open-ended. I'll -- we'll be in recess. When you all
25 have had time to work through as much of this as possible,

1 we'll come back. Obviously, we can't come back -- you know,
2 the latest we would want to come back is, say, around 5:30.
3 But as soon as you feel it makes sense for me to take the
4 bench again, you can let us know and I'll do it. But --
5 that's fine. If you think that would be productive.

6 MR. PATTIS: Judge, I would like to get a ruling
7 on my motion to withdraw before the day's end, if possible.

8 THE COURT: So given -- Mr. Pattis, I know.
9 You've been patient the whole day.

10 What is the position of the parties about whether
11 I should grant Mr. Pattis's motion at the moment?

12 MR. PATTIS: Judge, to let you know, I spoke to
13 Mr. Biggs at the lunch break. He was unaware of issues that
14 have arisen. He knows what's been unfolding during the
15 week, but didn't know what had occurred overnight. I think
16 his desire is that I remain, but I've become a side issue.
17 And, you know, while I think you have the power to cure
18 this, should you decide to do so, and I'm prepared to argue
19 that, I'm -- I don't want to be in a position where I become
20 an issue in the case, and I've become one. And so, from my
21 perspective, I think the simple and elegant solution is for
22 me to say farewell.

23 THE COURT: Understood.

24 MR. PATTIS: Thank you.

25 THE COURT: So let me hear from the Government.

1 What's the Government's view? I am reluctant -- given, at
2 this moment, where we are on some of these other issues, I'm
3 reluctant to let you out of the case at this moment.

4 I understand you want the ruling. And if we
5 didn't have this roiling conflicts issue, I would have taken
6 it up first thing and gotten you out of here.

7 MR. PATTIS: You know, I've been a gentleman about
8 this, but, I mean, the fact is I am counsel for Mr. Biggs
9 right now.

10 THE COURT: Well --

11 MR. PATTIS: Well, I am, as a matter of law. And
12 you've not -- you've sidelined me, and nobody has raised the
13 issue. And that's fine.

14 But there are some Sixth Amendment issues. But,
15 you know, my view is that this is a relatively complicated
16 proceeding that can be done. I think issues arose last
17 night as between counsel that suggest irreconcilable
18 differences between Mr. Hull and I.

19 And that's not something I'd want to address in
20 open court.

21 But Mr. Hull was Mr. Biggs's counsel of choice.
22 Mr. Hull brought me in to assist. And if my assistance
23 isn't required and I've become an obstacle to the Court, I
24 think, as your officer, I'm prepared to leave. And I would
25 request permission to do so.

1 THE COURT: What's the Government's view?

2 MR. McCULLOUGH: Your Honor, our reaction is the
3 same as yours, just that there is -- at the moment, your
4 Honor may want to just decline ruling on this. The motion
5 may remain pending. But I think, while your Honor has not
6 articulated the reasons, I think that -- well, I shouldn't
7 say that. Your Honor alluded to the reason being the
8 conflicts issue. You have not expounded on that. I think
9 we share the same potential issue here that we would like to
10 just make sure is resolved.

11 THE COURT: Mr. Pattis, my anticipation would be
12 to get you a ruling by -- by the time we leave here today.

13 MR. PATTIS: Thank you, Judge.

14 THE COURT: All right.

15 MR. HULL: Dan Hull for Mr. Biggs, your Honor.

16 You just heard from Mr. Pattis -- and this has
17 been part of the problem. It's a complete falsehood.
18 Mr. Biggs has been well aware of this issue since this
19 morning. We've had a breakdown in the relationship --

20 THE COURT: Mr. Hull -- Mr. Hull, is this
21 necessary?

22 MR. HULL: Yes. It is necessary.

23 THE COURT: Why is it --

24 MR. PATTIS: If it is, Judge, then I'd ask for a
25 sealed courtroom because --

1 THE COURT: Mr. Hull --

2 MR. SMITH: I would ask --

3 THE COURT: Mr. Hull, it's not -- if -- before the
4 end of the day, if you feel you need to put something on the
5 record, we can do it. We don't need to do it now. What the
6 parties need to do is work on the other two problems that
7 will -- could prevent us from moving forward as
8 expeditiously as possible. That's what we're going to do.
9 We're going to be in recess until the parties let me know I
10 should retake the bench.

11 MR. HULL: Your Honor, I just want to point out --

12 THE COURT: Mr. Hull, I'm not recognizing you. I
13 do not want to hear you further on this.

14 MR. HULL: Your Honor --

15 THE COURT: Mr. Hull --

16 MR. HULL: -- I want to make it clear --

17 THE COURT: Mr. --

18 MR. HULL: -- that --

19 THE COURT: Mr. Hull, take your seat, sir.

20 MR. HULL: Thank you, your Honor.

21 THE COURT: We'll be in recess.

22 (Thereupon a recess was taken, after which the
23 following proceedings were had:)

24 THE COURTROOM DEPUTY: We are back on the record
25 in Criminal Matter 21-175, the United States of America

1 versus Ethan Nordean, et al.

2 THE COURT: All right. We are back. What can --
3 does either side want to tell me about where things stand
4 right now with regard to the important representations about
5 confidences or secrets, at least from the Bertino side of
6 things?

7 MR. McCULLOUGH: So the representation by
8 Mr. Bertino's counsel during a phone call that I believe
9 all -- there was a representative for all Defendants on the
10 call -- and I'm confirming that --

11 MR. HULL: That is correct.

12 MR. McCULLOUGH: -- Mr. Davis explained that he
13 did not believe that there was any attorney-client
14 relationship that had formed between Mr. Bertino and
15 Mr. Hull. However, he did acknowledge having had a
16 conversation with Mr. Smith during which he had represented
17 during that conversation that he did not know of any
18 confidential communications.

19 Subsequent to that, he was alerted to the House
20 transcript which describes -- where Mr. Bertino describes
21 reaching out to Mr. Hull on the day of the search.
22 Mr. Davis then explained that he took that opportunity to
23 speak with Mr. Bertino about that issue, and he apologized
24 profusely to defense counsel for not having remembered that
25 issue and not having covered that issue in answering defense

1 counsel's question.

2 He described that, based on his conversations with
3 Mr. Bertino, that he -- subsequent to reading the House
4 transcript, that he understood that there were confidences
5 exchanged on the day of and that he understood that there
6 were multiple -- was more than one phone call during that
7 day.

8 So it does appear that we've crossed kind of that
9 first threshold in terms of the 1.18 issue with respect to
10 confidential communications with a prospective attorney.

11 There was then a further discussion about kind of
12 what could be done about that issue. And defense counsel
13 kind of sought to look to what kind of remedies could be
14 effected here.

15 And what was explored was the ability to obtain a
16 limited waiver which would seek to wall off any examination
17 related to the day of the search. There was a discussion
18 about limiting that waiver -- the limited waiver to wall off
19 any examination by Mr. Hull.

20 There was further discussion about there would be
21 any derivative issues. Mr. Davis mentioned, "I would not
22 want" -- and I think -- it doesn't matter who he said -- but
23 he said he wouldn't want X other attorney to be able to ask
24 questions based on the information that Mr. Hull had
25 provided.

1 He indicated that he had not had that conversation
2 with Mr. Bertino about this limited waiver. He indicated
3 that he believed that Mr. Bertino would be inclined to
4 follow whatever his recommendation was on this issue and he
5 indicated that he would want to kind of evaluate the
6 language and consider and present that issue to Mr. Bertino.

7 So I think that's where we are on factual
8 representations.

9 Our view of this -- I mean, I think this is a
10 circumstance where, frankly, the devil is in the details
11 because we are talking about at least with respect to
12 Mr. Bertino some charges that he has resolved, which charges
13 arose out of the search. As your Honor knows, there's a
14 firearm charge, 922(g) charge, as part of this. So it is
15 not a kind of nothingburger issue to say: Okay. We'll just
16 take the date of search out, and everything is fine.

17 I think your Honor needs to kind of evaluate what
18 that waiver is; and obviously, Mr. Bertino needs to make a
19 knowing understanding as to what that waiver is and we need
20 to kind of have, I believe, a ruling on kind of what the
21 kind of scope of appropriate examination of Mr. Bertino is.

22 I don't think this is any kind of -- I don't think
23 this is kind of a nontrivial issue. I appreciate that
24 others may characterize it in a different way. I don't know
25 if they will. But we are talking about a case in which we

1 are -- had potential cooperators where defense has indicated
2 they intend to call into question their credibility. These
3 are real issues.

4 So the Government's view is we need to nail these
5 down and nail them down correctly before we proceed. And I
6 think that is -- that's our position.

7 THE COURT: But it sounds like you're relatively
8 optimistic that can be -- there's a pathway of doing that,
9 it sounds like, to me?

10 MR. McCULLOUGH: It certainly seems like -- your
11 Honor, yes. It certainly seems like based on the
12 representation of Mr. Davis that there is a path forward.
13 Like I said, I think that the devil's in the details here.
14 And as much as we can all kind of aspirationally hope this
15 all gets kind of resolved immediately, I think it is
16 important to get this right. I think this is the reason why
17 we raised these issues in the first instance.

18 THE COURT: All right.

19 MR. SMITH: Your Honor, we'd like to add a couple
20 of facts to Mr. McCullough's recitation of the call.

21 I would characterize Mr. Davis's demeanor as very
22 relaxed about this issue. Mr. McCullough indicated that he
23 apologized to counsel for Nordean for not having even
24 remembered that these -- for not having known that this
25 was -- these conversations took place. I'll represent that

1 when this subject was broached in the defense room, Mr. Hull
2 did not even appear to recall that he had phone calls on
3 this date and thought it was another lawyer who might have
4 been having the calls with Mr. Bertino.

5 Mr. Davis took the position that it would not
6 affect other counsel in this case even if there were
7 confidences exchanged with Mr. Hull except to the extent
8 that Mr. Hull had discussed those confidences with other
9 counsel. I can represent that he has not discussed any
10 confidences he may have exchanged with Mr. Bertino with me.
11 So that was the position of Mr. Davis.

12 THE COURT: But, Mr. Smith, just to be clear,
13 that's not what the rule -- I mean, he can have that
14 position. But that's not reflective of what the rule --
15 what it would take to satisfy the rule.

16 MR. SMITH: So, your Honor, I'm not -- the rule
17 deals with -- not with co-counsel.

18 THE COURT: Right. But my point is just whatever
19 Mr. Davis's position is is really on that -- doesn't really
20 have anything to do with anything.

21 MR. SMITH: On. I'm just -- that was one fact he
22 stated that was -- so he asked the parties to send him some
23 language tonight that would reflect the walled-off waiver on
24 the confidences subjects that Mr. McCullough referenced.
25 And he thought that he could turn around his client's

1 response pretty shortly, soon.

2 You know, his -- just his general characterization
3 of the issue was that it was not a terribly important issue.
4 That was -- so I mean, this is something that -- we're
5 talking about something where the lawyer for the witness did
6 not know about it until he indicated that the prosecution
7 actually reminded him.

8 That was one other point that he said -- I forgot
9 about this until I think he said Mr. Kenerson might have
10 reminded him that this was a subject. But then, your Honor,
11 he said that, you know, I really don't think this is -- I
12 believe my client will grant a waiver for any subject
13 outside of the two -- the confidences that were exchanged on
14 the day of the search.

15 So, your Honor, we would propose sending --
16 having the parties send Mr. Davis some language tonight and
17 seeing whether we can get a response from the witness
18 tomorrow.

19 THE COURT: Listen, I think we're all -- although
20 it may have -- there was the suggestion earlier that one
21 side or the other or me didn't want the case to move forward
22 quickly. You know, I think we are all on the same page
23 about this.

24 So, look, it sounds to me like -- then the
25 question, though, would be whether -- I guess I could just

1 get him on the phone. If you did get some sort of waiver
2 signed, I guess I haven't thought through whether the
3 parties think I would need to hear from him directly or
4 whether I could just rely on something signed. But it seems
5 to me like I probably have to have him, you know, on the
6 phone and have a colloquy with him about it.

7 Again, not -- that could be done tomorrow, if the
8 issue is resolved that quickly, you know, tomorrow morning.

9 MR. McCULLOUGH: Your Honor, I think that's right.
10 I think that you -- I think that it makes sense to receive a
11 colloquy from the attorney to -- for him to describe what
12 his understanding -- for him to communicate fully what his
13 understanding in terms of the scope of the waiver is so that
14 your Honor can fully police it. I think setting some --

15 THE COURT: Well, if it's in writing, that's a
16 better -- yes.

17 MR. McCULLOUGH: Without question. I think the
18 writing will evidence kind of what it is. But let's be
19 clear that we are not -- I mean, no one as of at least ten
20 minutes ago was putting pen to paper on this issue.

21 THE COURT: Right.

22 MR. McCULLOUGH: And it's not -- as I said, I
23 don't think it's a kind of trivial issue in terms of what
24 the scope of that waiver is. Right? Because I think, like
25 I said, at least one of the charges on which he could be

1 cross-examined relates to the day of the search. So there's
2 that.

3 Yeah. And I think the other component of this, of
4 course, is -- so that limits kind of Mr. Hull's examination
5 based on kind of anything that comes up with respect to that
6 attorney-client communication.

7 The second part of this would be -- I think as
8 your Honor was describing at the end of our last session the
9 need to restrict any cross-examination related to the
10 veracity with respect to Mr. Bertino's testimony before the
11 House as it relates to Mr. Hull. I think that that issue
12 based on what we've heard needs to be restricted and your
13 Honor could kind of need to rule on that to ensure that
14 we -- I think your Honor was inclined to kind of take that
15 out of the scope here as kind of improper and nonrelevant in
16 any event.

17 THE COURT: Right.

18 MR. JAUREGUI: Judge, Jauregui for Tarrío.

19 I just want to make sure that other defense
20 counsel are not restrained in any way in cross-examining
21 Bertino.

22 THE COURT: Well, not with regard to information
23 about -- that Mr. Bertino said about Mr. Hull in that
24 transcript. Right? I mean --

25 MR. JAUREGUI: Well, I don't know, Judge. I've

1 got to see how things develop on his direct testimony.

2 THE COURT: Well, then, if that's the case, then
3 there's a good chance -- if you all can't -- I think you all
4 should take the evening to look at the rule on impeachment
5 on collateral matters. I mean, if you can't agree on that,
6 then we might have an insurmountable problem. So I can see
7 why at that point -- you all are going to have to think
8 about that.

9 My knee-jerk reaction is I wouldn't allow it
10 anyway, so you're not dealing away something that I would
11 have allowed in the first place. Right? If none of it --
12 if we hadn't been talking about this at all, if this had
13 just come up and all of a sudden you wanted to cross-examine
14 him because you believed that something he'd said about
15 Mr. Hull was -- I wouldn't have allowed that
16 cross-examination.

17 So --

18 MR. JAUREGUI: I just don't like it when the
19 Government starts using terms of limiting a
20 cross-examination.

21 THE COURT: Sure.

22 MR. JAUREGUI: It concerns me. That's all.

23 THE COURT: I understand.

24 Look, I don't --

25 MS. HERNANDEZ: Your Honor?

1 THE COURT: I think we're probably burning more --
2 I think we're burning all of your time. If we want to get
3 this show on the road tomorrow, all of your time is best
4 spent addressing this issue and not us describing the issue
5 to me here today.

6 MS. HERNANDEZ: So, your Honor --

7 MR. HULL: Dan Hull.

8 Briefly --

9 THE COURT: Mr. Hernández asked to be heard first.

10 MS. HERNANDEZ: Sorry. The only question I would
11 have on this issue that Mr. Jauregui raised was if we needed
12 to cross-examine, couldn't we do it without mentioning
13 Mr. Hull? You know, we could avoid that particular conflict
14 as long as we didn't say, "Your attorney, Mr. Hull, was
15 there" or something like that.

16 THE COURT: Cross-examining him about information
17 he said about Mr. Hull in the transcript?

18 MS. HERNANDEZ: No. I didn't think that's what we
19 were talking about.

20 THE COURT: That is --

21 MS. HERNANDEZ: I thought we were talking about
22 cross-examining him about what he testified to at the House
23 Committee -- before the House Committee.

24 THE COURT: I don't think that's what the
25 Government is seeking. That's not what the Government

1 testified to about the substance -- about things other than
2 what we're talking about.

3 Is that right, Mr. McCullough? I mean, I don't
4 know why -- whether there's an open door to crossing him on
5 whatever he said to the Committee is not affected by
6 anything we've been discussing here today. Maybe that would
7 be proper; maybe it would not. I'm not ruling one way or
8 the other.

9 But I don't think it has anything to do with what
10 we've talked about here today.

11 MR. MCCULLOUGH: Your Honor, I think that is
12 exactly right. And I just -- but I will just point out that
13 this is -- I mean, this is where kind of the devil is in the
14 details, since we're all on the same page.

15 Here's what I would say: It does relate to his
16 House testimony insofar as he provided testimony with
17 respect to his dealings with Mr. Hull, which is a short
18 sequence. But that -- your Honor, Mr. Hull has represented
19 that what Mr. Bertino said to the House about his dealings
20 with Mr. Hull is -- and I don't remember the word he used,
21 but false, not accurate.

22 Defense counsel -- set aside whether that's
23 even -- whether we're even in the realm of what's
24 appropriate.

25 Defense counsel should not be able to then use

1 that information to cross-examine Mr. Bertino on those
2 elements of his testimony. Beyond the scope of that, his
3 description of other things that don't relate to his
4 conversations and communications and dealings with Mr. Hull,
5 that would seem to be fair game.

6 I think that's what I understand you to be saying.
7 But I want to be very clear about that, that there is a
8 cabined portion of the House testimony in which he describes
9 his interactions with Mr. Hull.

10 THE COURT: Understood.

11 It just strikes me as his interactions with
12 someone he's potentially reached out to for representation,
13 like how that would be part of this trial. It seems to
14 me -- look, that strikes me as not something that would be
15 part of our trial. And if we can all agree that that's the
16 case, then this would get much easier.

17 So I don't know. It's kind of interesting.

18 MR. HULL: Your Honor --

19 THE COURT: I understand the Government being
20 careful. On the defense side, we've got, it seems like, a
21 bunch of different takes.

22 Look, again, I think the best use of our time
23 right now is to assume we're going to open tomorrow. You
24 all try to go solve this problem. Have the folks available
25 that I'll need to talk to tomorrow, counsel and Bertino.

1 This is the same issue.

2 And then with regard to -- so I'd assume I'd have
3 to have a similar conversation with Mr. Biggs, not unlike
4 the conversation I've had with you, with other folks, about
5 confidences that your attorney might not be able to use on
6 your behalf. Similar to Mr. Thaxton -- Thaxton? Is that
7 the name? Similar to some of the other folks we've talked
8 about.

9 It would essentially be the same thing: Are you
10 comfortable, even though there might be some information
11 that Mr. Hull -- even if he had it and it was to your
12 benefit, he wouldn't be able to use it for you?

13 So I think probably, again, maybe my initial
14 reaction before was the right one: I'll let you all go and
15 do all that. We'll come back at 9:00 tomorrow. I think --
16 come back at 9:00. And, look, we'll go as fast as we can.

17 Mr. Hull? I've kept Mr. Hull waiting.

18 MR. HULL: Briefly. And I appreciate it, your
19 Honor.

20 Can you hear me okay with the microphone like
21 this?

22 THE COURT REPORTER: Yes, sir.

23 MR. HULL: First of all, the comment -- this may
24 seem intemperate, and I apologize for it -- about
25 Mr. Bertino's comments about me were not meant to raise

1 impeachment issues. In fact, I can stipulate that that
2 would never --

3 THE COURT: It doesn't matter what you meant,
4 Mr. Hull, though.

5 MR. HULL: No, no. It's not intended to be an
6 impeachment issue. It's not what it was raised for. I
7 raised it because I didn't like it. No one would.

8 The second issue is that under no circumstances
9 would I ever be doing the cross-examination of Bertino if in
10 fact that occurred from Team Biggs. And that would be -- I
11 mean, there will be at some point -- you know, I will have
12 another trial partner. That's an outlying issue. But I
13 guess the point is, Dan Hull was never going to
14 cross-examine him. And that's still the rules.

15 THE COURT: Mr. Hull, I guess I would say it's not
16 at all clear that I would admit someone in the middle of the
17 trial to join you, number one.

18 And, number two, if the cross-examination issue
19 became an issue, there is authority for me to appoint
20 someone for a limited purpose to do that cross-examination
21 if that were appropriate.

22 This is a case, of course, where you've got four
23 other Defendants. You might think whatever
24 cross-examination they could do would be sufficient and
25 there wouldn't be sort of a particularized cross for

1 Mr. Biggs's benefit that would need to be given. But --

2 MR. HULL: Your Honor, it may also be possible for
3 one -- I'm not sure which would be decided upon -- for
4 someone from the defense team to do that rather than you
5 having to appoint someone.

6 THE COURT: It may be. It may be.

7 Look, I think we're best -- unless someone
8 disagrees, I think we are best served by you all going and
9 doing -- it sounds like this is mostly an issue the
10 Government is concerned about. So you all doing your
11 homework, trying to get us to a place where in the morning
12 we have a solution. And I'll take it up, and hopefully it
13 will be one that I will agree solves the issue and we all
14 agree solves the issue. And then we'll move right ahead.

15 As I said, the jurors are coming in. So we have
16 them here. And we'll hopefully go forward as soon as we
17 resolve this.

18 Is there anything else anyone else thinks we can
19 accomplish here tonight other than me mentioning, Mr. Hull,
20 the back-and-forth we had right before we broke before,
21 that's not going to happen again with any counsel in this
22 case.

23 So everyone take note: You talk over me and
24 contempt will be coming down the line the next time any
25 exchange like that happens. It's going to be a long trial.

1 It's fair warning. I don't want to have lawyers talking
2 over me repeatedly. It won't happen anymore. I will find
3 you in contempt.

4 MR. HULL: Understood.

5 THE COURT: Anything further that either side
6 thinks --

7 Mr. Pattis, I think for one more day I may be
8 holding your motion in abeyance. Look, I am --

9 MR. PATTIS: If you're going to do that, that
10 means that there's some active possibility you'll have me
11 remain. I don't know whether Mr. Hull and I can patch
12 things up. I know that that's Mr. Biggs's desire.

13 But I think you have the authority to act. And I
14 want to -- may I take two minutes of your time, three
15 minutes?

16 THE COURT: You may take two minutes.

17 MR. PATTIS: Thank you.

18 The Connecticut trial court denied the stay this
19 afternoon that we had discussed. We're on our way to the
20 state supreme court. Certain formalities need to be
21 observed because it proceeds by way of writ of error,
22 service and whatnot. We expect to get it to that court
23 tomorrow afternoon. We expect a decision Friday.

24 Having said that, you know, I've looked at the
25 local rules. I do think you have the authority to rule to

1 permit me to come in, and it's in the following way: There
2 are a number of ways to analyze the statute or rule, as you
3 know. There's textual, structural and its policy.

4 I think that the simultaneous admission rule
5 pertains to a waiver; and that -- thus, I was able to waive
6 into this jurisdiction upon the strength of the Connecticut
7 license.

8 Once I'm here, the rule is a little less clear,
9 and once I've been here for a while, because it's in the
10 disjunctive. Structurally, you could say that that's the
11 intention. But policy, it makes no sense. And it makes no
12 sense because the purpose of the rule was to assure that I
13 could waive in. Having waived in, if I had moved here,
14 would the Court say, Well, unless I kept a Connecticut
15 office I couldn't practice here? And that would be an
16 absurd and unworkable result.

17 So from my perspective, you have the authority as
18 the bench to make a ruling of extraordinary circumstances.
19 And on Mr. Biggs's behalf, should you do so, I will remain.
20 But if you don't, you know, I won't.

21 THE COURT: Mr. Pattis, given that I'm not
22 granting your motion today, you have my commitment. I'll
23 look at that --

24 MR. PATTIS: Thank you.

25 THE COURT: -- again.

1 MS. HERNANDEZ: Your Honor, scheduling? I had a
2 question. Are we sitting on Friday? Is the Court sitting
3 on Friday? And how long?

4 THE COURT: Ms. Hernández, I announced earlier
5 this week, and nothing has changed, that we have a half --
6 that we have a half day. I think I have the first matter
7 set for 12:30. So I will have at least at this point, I
8 believe, a hard stop at 12:28.

9 MS. HERNANDEZ: Thank you.

10 THE COURT: Is that not right? I'm kidding.
11 Ms. Harris, I'm kidding about that. I know we have to stop
12 earlier.

13 Ms. Harris needs to have lunch.

14 MS. HERNANDEZ: And tomorrow, if we swear the jury
15 in and all of that, what's the Court's closing time?

16 THE COURT: You know, that would be a day when we
17 would try to go as long as possible. So if we really got up
18 and running, obviously, it's going to be between 5:30 and
19 6:00. I'm not going to -- if one Defendant -- if it's 5:40
20 and one Defendant has stopped and the next Defendant thinks
21 they're going to be going on for quite a bit, I won't start
22 the next opening.

23 MS. HERNANDEZ: Just to be clear, my understanding
24 of the Court's directions is that if this gets resolved
25 early enough tomorrow, we're going to go right into opening

1 statements. Is that what the Court just decided?

2 THE COURT: I don't know what "right into" exactly
3 means.

4 As soon as we resolve this issue to everyone's
5 satisfaction, we'll go right into closings. Whether we take
6 a ten-minute -- I mean, openings. Whether that means a
7 ten-minute break, whether that means it's after lunch, I
8 don't know.

9 MS. HERNANDEZ: Yeah.

10 THE COURT: But there will be no other delay. I
11 have to instruct them and swear them. That's it.

12 MS. HERNANDEZ: I was just wondering in terms of
13 scheduling. Is it possible that the Court will have, like,
14 the Government and three defense and then the other two the
15 following day or something like that? I'm just trying to
16 figure out what the Court is --

17 THE COURT: It is certainly possible. Yes.

18 MS. HERNANDEZ: Thank you.

19 THE COURT: Mr. McCullough, you look confused.

20 MR. McCULLOUGH: No. Your Honor, sorry. I was
21 processing. My apologies.

22 I did have two other items.

23 THE COURT: Was there anything confusing about
24 that? I only understood Ms. Hernández to be saying we might
25 not complete all the openings on one day, and that's all.

1 MR. McCULLOUGH: Correct. My understanding is we
2 should all come here tomorrow prepared to open.

3 THE COURT: Absolutely.

4 MR. McCULLOUGH: Because we may open midmorning
5 and we might get through all defense counsel, and the
6 Government should be prepared with its witness tomorrow.

7 THE COURT: Sure. Yes.

8 MR. McCULLOUGH: Correct?

9 THE COURT: Yes.

10 MR. McCULLOUGH: Yes.

11 So, your Honor, two other items: One,
12 Mr. Smith -- sorry -- Nordean had moved to exclude the
13 Government's exhibits. We'd ask that your Honor deny that
14 request or that motion. We can obviously address that more
15 fully. But the Government has provided the updated exhibit
16 list, identified all the new exhibits. I think we've all
17 had now time to kind of process all of that.

18 I'd ask for a ruling on that so that we know
19 importantly the scope of our case.

20 THE COURT: Well, let's put it this way: I want
21 to get you all out of here to go get solving this other
22 problem. It doesn't affect anything you had in your
23 opening, I think, except the video of the debate, maybe.
24 Does that seem right?

25 Let me put it this way: To the extent that we've

1 litigated the opening slides, I've ruled on all of that. I
2 will give you a ruling on this tomorrow after giving you all
3 an opportunity to be heard on it. But I think rather than
4 rule on it now, I want you all to get to this issue so that
5 we can take off tomorrow. Not take off; meaning have the
6 trial take off.

7 MR. McCULLOUGH: The only other issue is one that
8 I had raised about the prospect of having individuals who --
9 and particularly agents who might attend the opening
10 statements. And I don't know if defense has had an
11 opportunity to reflect and consider that, but that was the
12 only remaining issue I would like to advise them.

13 THE COURT: Yes. If you all could confer on that.
14 Are there a defined number of people that you all are
15 talking about or whether it's an open-ended request? Look,
16 I'd ask the parties to confer about that question, about
17 whether agents who worked on the case would be permitted in
18 the courtroom during openings.

19 MR. McCULLOUGH: It's bound -- the number is four
20 for us. That would be four agents who would be testifying
21 who would also be in the courtroom.

22 THE COURT: So, look, the Government is
23 representing that there are four agent witnesses who will be
24 testifying, they expect to testify, who they would like to
25 be present during the opening arguments. So I'd ask the

1 defense to hear from the Government -- discuss with the
2 Government who those witnesses are and whether there would
3 be an objection to them being present during the openings.
4 And we can talk about it tomorrow before the openings begin.

5 Until tomorrow at 9:00, we'll be adjourned.

6 (Proceedings concluded.)
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CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby
certify that the foregoing constitutes a true and accurate
transcript of my stenographic notes, and is a full, true,
and complete transcript of the proceedings produced to the
best of my ability.

Dated this 11th day of January, 2023.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the
District of Columbia
333 Constitution Avenue, Northwest
Washington, D.C. 20001
(202) 354-3269

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