

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. OLIVER W. WANGER, JUDGE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GARY L. ERMOIAN, DAVID SWANSON)
AND STEVEN J. JOHNSON,)
)
Defendant.)
_____)

No. 08-CR-224-OWW

MOTIONS
RULING ON FRANKS MOTION

Fresno, California

Tuesday, July 6, 2010

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

KAREN HOOVEN, RMR-CRR
Official Court Reporter
CSR No. 5816

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1 Tuesday, July 6, 2010

Fresno, California

2 2:02 p.m.

3 (Proceedings were held, testimony taken of Mr.
4 Larson, not transcribed herein.)

5 THE COURT: Anything further for Mr. Larson.

6 MR. CULLERS: No, Your Honor.

7 MS. MONTAYA: Not for Mr. Larson. I do have some
8 comments about the declaration. And I -- there are certain
9 portions of the declaration that I would ask the Court to
10 strike.

11 THE COURT: All right. Well, we are through
12 questioning Mr. Larson.

13 MR. CULLERS: Yes. He is excused.

14 MS. MONTAYA: Yes.

15 THE COURT: Thank you, Mr. Larson. You may step
16 down. You are excused.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: All right. Let me get the declaration in
19 hand. I'm going to give these exhibits to the courtroom
20 deputy.

21 MS. MONTAYA: Your Honor, I have an extra copy of Mr.
22 Larson's declaration.

23 THE COURT: I am looking for it. If you want to
24 provide me a copy, that would be helpful.

25 MS. MONTAYA: Your Honor, I believe it's attached to

1 document 459, which would be the defendant's reply.

2 THE COURT: Thank you. I've got it.

3 All right. Ms. Montoya, you may proceed.

4 MS. MONTOKYA: Thank you, Your Honor. In paragraph
5 six at the end of paragraph six, where Mr. Larson states
6 starting at the bottom of page two, "Sometime the next morning
7 I was informed that Mr. Baptista did not show up."

8 I would move to strike that as whether or not Mr.
9 Baptista showed up is not within his personal knowledge and I
10 would ask that that be stricken.

11 THE COURT: Any objection?

12 MR. BALAZS: Yes.

13 MR. FALLER: Well, yes, Your Honor, actually.

14 THE COURT: Beg your pardon?

15 MR. FALLER: Well, this is a preliminary -- a
16 preliminary matter, Your Honor. And there is much in the wire
17 tap affidavit that would not be admissible evidence in a trial
18 according to the rules of evidence. There are opinions.
19 There are -- there is hearsay.

20 Now, Mr. Larson is here to answer questions in
21 regards to whether something is -- the circumstances of his
22 knowledge as to anything. But in terms of what is to be
23 admissible in a preliminary proceeding, such as this, in the
24 same way that the wiretap affidavit can be based on many
25 things other than admissible evidence, it's our contention

1 that this is here for the weight that the Court would give it.
2 And it's within the sound discretion of the Court to give each
3 item recited by Mr. Larson the weight that it is due.

4 And I would also say that Mr. Larson is here if there
5 are inquiries as his basis of knowledge for any of these
6 facts. He can be inquired.

7 MS. MONTAYA: He does state that he doesn't recall
8 who informed him of this occurrence, so I would think
9 that -- I would ask that the Court strike that.

10 THE COURT: All right. Is the matter submitted.

11 MS. MONTAYA: Submitted.

12 MR. FALLER: Yes, Your Honor.

13 THE COURT: This proceeding is a *Franks* hearing, is
14 measuring the accuracy, the good faith, the bona fides of the
15 information that was provided by the Court to obtain wiretap
16 applications.

17 The declaration under penalty of perjury by Mr.
18 Larson has been submitted in support of the motion. And
19 assumedly in support of Mr. Ermoian. And this is a statement
20 from Mr. Larson's memory about information he was provided and
21 he does not recall who informed him of that occurrence.

22 And so even if we were to apply the rules of evidence
23 strictly, the Court would understand that this is an
24 explanation of Mr. Larson's then existing state of mind
25 explaining what action he took. And therefore, it would be an

1 exception to the hearsay rule, if not non-hearsay, as it is
2 explaining his conduct as he continued, at the time that he
3 was the undersheriff, to have contact with Mr. Baptista and
4 others concerning this report that was originated by Mr.
5 Baptista. So the objection is overruled.

6 MS. MONTAYA: Your Honor, going to paragraph ten.
7 The government would move to strike from the second sentence
8 starting, "Further, it is my understanding that Deputy Seymour
9 had to pursue Baptista in order to obtain his statement,"
10 continuing through the sentence "The report, I believe, was
11 routed to Detective Unit/Crimes Against Persons Division for
12 followup."

13 It's the government's position that this is something
14 that Mr. Larson is relaying, not based on his personal
15 knowledge and relating to the actions of others. His whole
16 purpose, the government can surmise, for putting forth this
17 declaration, is to show that he had nothing to do with this
18 investigation. And here he is offering what his understanding
19 is as to what happened at the Sheriff's Department.

20 I think that information was clearly set forth not
21 only in the T-III affidavit, but also by way of information
22 that came to the Court in regards to reports and things of
23 that nature during the course of this hearing.

24 So I would ask the Court to strike that.

25 MR. FALLER: Our position is the same, Your Honor.

1 THE COURT: All right. Is the matter submitted?

2 MS. MONTAYA: Submitted.

3 MR. FALLER: Yes.

4 THE COURT: As I understand the declaration of Mr.
5 Larson, he is, in effect, explaining what his responsibility
6 was. And is responding to an allegation by the government
7 investigators that somehow his handling of any contact with
8 Baptista was out of the ordinary or not within the chain of
9 command, or that his interaction with any officers at that
10 time was improper to the extent that it's the government's
11 theory that Mr. Larson was, in effect, minimizing or
12 marginalizing the importance of this particular crime report
13 and investigation.

14 And what I understand, taken in the overall, this
15 paragraph to be referring to is based on his memory and then
16 understanding of what had been reported to him in the ordinary
17 course of his law enforcement duties as an undersheriff, he
18 says that there was an interview, there was a detailed report
19 prepared, that it was routed to the Detective Unit/Crimes
20 Against Persons Division for followup.

21 It would be a detective sergeant's responsibility to
22 review the report and, if necessary, assign a detective for
23 the purposes of conducting further investigations. I do not
24 know if the detective was assigned to conduct any followup
25 investigation from that point forward.

1 And so what this shows is, in effect, an explanation
2 from the perspective of Mr. Larson about how he would expect
3 this matter to be handled in the ordinary course of Sheriff's
4 Department's business.

5 And this is different from what we heard in relation
6 to a civil matter. And any time property is taken one from
7 the other whether there is either a claim of title, ownership
8 or some other basis for asserting an interest in the property,
9 that that makes it a civil matter, at least in Mr. Larson's
10 experience.

11 I'm not going to comment on that because it gets into
12 law and we don't expect, other than that is a law enforcement
13 officer, Mr. Larson to know the law in the technical detail
14 that it is analyzed in the courts. Rather, his duty is to
15 make decisions as a field officer executing the law in the
16 performance of his duties.

17 And so as I read this, he says the normal practice
18 would be a report is taken, it was taken and then, based on
19 what detective sergeant who is reading the report that's been
20 submitted by the line deputy who took it, it would either be
21 referred on for followup or further investigation or something
22 else.

23 And Mr. Larson is saying he doesn't know what is
24 happening, but I read this as responsive to his, if you will,
25 defense that he didn't squash or squelch the investigation.

1 And I don't think that it contains any improper material
2 because, again, this is state of mind evidence. He's relating
3 what he understood the circumstances and conditions to be at
4 the time he was actually in communication about the incident.

5 And so the credibility of this is a separate issue.
6 But I do believe that there is no legal rule that prevents its
7 admissibility, so the objection is overruled.

8 MS. MONTOKYA: Well, just for the --

9 THE COURT: It's not being accepted for its truth,
10 rather for the purposes I've stated. What?

11 MS. MONTOKYA: It's the government's position that his
12 state of mind, since he's putting forth to the Court that he
13 had nothing to do with this investigation, other than taking
14 the initial report from the victim, that his state of mind,
15 because he didn't interfere, he didn't direct, he didn't do
16 anything with this, is pretty much irrelevant.

17 THE COURT: Well, I have explained and I will explain
18 again, because you might not have heard.

19 MS. MONTOKYA: I did hear you, Your Honor. Perhaps
20 I -- that's my thoughts on the matter.

21 THE COURT: The reason it's relevant is because he's
22 being accused of, in effect, trying to dismiss this matter as
23 one that should not have been investigated. In other words,
24 that's the charge that's being leveled against him.

25 And he's explaining that -- it turns out he had two,

1 not just one, but he had two conversations with Baptista and
2 at that point it's not the undersheriff who does the interview
3 or the followup, rather it's given to crimes against persons,
4 to a detective, a detective field officer does the interview.
5 That's referred to a sergeant who reviews it and then the
6 sergeant directs what the next step is.

7 And what Mr. Larson is saying is from his standpoint,
8 that was the end of it. He had no further involvement.
9 That's what this paragraph says. And so certainly he's
10 entitled to say that and that this is what he understood and
11 knew at the time. It either is or is not the truth, but it
12 certainly is admissible.

13 MS. MONTOKA: Going on to paragraph 11, Your Honor,
14 the government would move to strike starting at the very
15 bottom of page 4, "Lieutenant Silva," and continuing on
16 through the -- all but the last sentence. The sentence ending
17 in "any dispute between Holloway and Baptista."

18 And again, Your Honor, it's the government's position
19 that Mr. Larson is relaying hearsay information and since he
20 had nothing to do with the investigation, what he's being told
21 by another officer is not relevant and not -- certainly in
22 this case, it's not -- it should be stricken from the
23 declaration because it's just something that he was told by
24 someone else regarding an investigation he was not involved
25 in.

1 THE COURT: All right.

2 MR. FALLER: Our position is the same, Your Honor.

3 THE COURT: Is the matter submitted?

4 MR. FALLER: Yes.

5 THE COURT: This statement is first the explanation
6 of Mr. Larson that he followed up to the extent that he
7 wanted -- now we're up to, in the chain of command, to a
8 lieutenant, to confirm it had been investigated thoroughly,
9 and to provide a report to Mr. Larson, as undersheriff, of the
10 outcome.

11 He states this information, which is not accepted for
12 its truth, because it is double layer hearsay in the
13 declaration. But rather, this was the explanation given to
14 Mr. Larson. Mr. Larson adds, which is consistent with his
15 testimony today, about this debt owed Baptista, making the
16 case more or less a civil dispute, not criminal.

17 And that, again, is offered to explain how Mr.
18 Larson, as undersheriff, responded to the case. And it's not
19 admissible for the truth, but it certainly is admissible to
20 explain his participation or lack of it in the investigation.

21 And he's now explaining the basis for his decision,
22 which he is entirely entitled to do since it is the suggestion
23 that somehow he was responsible for this investigation and
24 that he, in effect, called it off. So the objection is
25 overruled.

1 MS. MONTROYA: Paragraph 14, Your Honor, I would move
2 to strike that in its entirety. I think that Mr. Larson's
3 comments on the affidavit and the information that he's
4 reviewed in the motions pleadings and his comments on the
5 motions pleadings probably are relevant. The Court can make
6 the determination if they're misleading or inaccurate.

7 THE COURT: Well, these are, in effect, if you will,
8 argumentative statements. But the first part of the paragraph
9 refers to Mr. Larson's wife, who you asked about, following
10 the documents on Pacer and informing her husband as to the
11 contents of them. That isn't inadmissible, that's one of the
12 sources of his knowledge.

13 He then states that he's read the recently published
14 motion which refers to the wiretap authorization report
15 authored by Agent Elias. And that it contains "misleading and
16 outright false accounts of alleged interference by me into the
17 investigation of the October 5th, 2004 Baptista complaint."

18 And that is, if you will, a conclusion of law. It
19 doesn't say what is erroneous, what is misleading. It doesn't
20 provide the facts. This is, in effect, an argument. And so
21 on that basis, it is inadmissible. And I will accept it for
22 Mr. Larson's denial of the suggestion that he did anything
23 improper in dealing with the Baptista investigation.

24 To the extent that he perceived that he was being
25 accused of that, he apparently didn't go to law enforcement to

1 explain that or to your office, he went to the defense and
2 provided his, if you will, defense. And here it is.

3 So the Court's not accepting it for the truth,
4 recognizing that it is an argument. But that the Court will
5 give it the weight to which it's entitled and there has been
6 more factual detail added that is explanatory. These are
7 really opinions, quite frankly.

8 And so the Court sustains the objection in part, but
9 I am going to accept Mr. Larson's denial of the allegations
10 that he engaged in any kind of impropriety or misconduct in
11 the Baptista investigation.

12 MS. MONTAYA: Your Honor, in regards to paragraph 16,
13 the government asks the Court to strike or to give no weight
14 to the statement that the reader is easily misled. I don't
15 think that's a conclusion or an argument that Mr. Larson can
16 properly make in his declaration.

17 THE COURT: Well, actually it's an inaccurate
18 statement. Mr. Larson was personally involved, not in
19 conducting the investigation, but he was certainly involved in
20 the investigation. He spoke with Baptista twice.

21 MS. MONTAYA: Well, that's the government's position,
22 which --

23 THE COURT: He agrees. He says so on the stand here.

24 MS. MONTAYA: But what the government is objecting
25 to, Your Honor, is starting with the sixth line, where it

1 says, "The reader is easily misled." Again, that's argument
2 and the government would ask the Court to strike that.

3 THE COURT: It is an argument.

4 MS. MONTOKYA: Or give it no weight.

5 THE COURT: The Court is not going to be misled.

6 MS. MONTOKYA: Again, the same argument as to the last
7 sentence of paragraph 17, where Mr. Larson says that the
8 statement is erroneous, factually untrue and greatly
9 misleading, government would either ask that be stricken or
10 that the Court give it no weight.

11 MR. FALLER: I would just note, Your Honor, that
12 since Mr. Larson was the subject of those statements, that
13 perhaps he can give an opinion on whether they are erroneous
14 or factually untrue.

15 MS. MONTOKYA: But certainly --

16 THE COURT: Well, here's where we are on it.

17 "To be clear, the only time that I spoke directly
18 with Mr. Baptista, Richard Baptista, was on the early
19 morning hours of May 5, 2004. I did not speak with
20 Richard Baptista ever again."

21 We know that's not true. That was a mistake
22 apparently, maybe failed recollection.

23 "Further, as I have never met Baptista, I would not
24 be able to recognize him if I met him today."

25 That -- nothing wrong with saying that. He doesn't

1 know Mr. Baptista. Doesn't recognize him.

2 "Further, I have no knowledge and never said to
3 anyone 'the story that Baptista provided changed each
4 time.'"

5 And to the Court's understanding, Mr. Larson never
6 did say in his affidavit or to anybody else that the story Mr.
7 Baptista provided changed each time.

8 MS. MONTAYA: Your Honor, I believe in the report Mr.
9 Larson admitted he authored Government Exhibit 1, he did say
10 that Mr. Baptista's story changed.

11 THE COURT: Well, the story did change. But it
12 didn't change each time. But there are only -- there were
13 only two conversations that Mr. Larson could know of his
14 personal knowledge that he had with Baptista. And then the
15 other reports were coming in from Detective Seymore or the
16 sergeant.

17 "Therefore, this statement proffered to the Court is
18 erroneous, factually untrue and greatly misleading."

19 Well, that's an argument. And we've learned that
20 this statement under oath isn't accurate that was made by Mr.
21 Larson here, either because of a failure of recollection or
22 mistake.

23 And so the Court doesn't give any weight to the
24 argument with the legal conclusions that it's erroneous,
25 factually untrue and greatly misleading. There are

1 inaccuracies in each of the affidavits, but what we clearly
2 understand is that there were certainly a question with regard
3 to Mr. Baptista's reliability. Mr. Baptista had issues and,
4 in fact, as we know now, Mr. Holloway has admitted culpability
5 and has pled guilty to extorting Mr. Baptista over matter
6 involving an extension of credit.

7 And so in the final analysis, there's no untruth or
8 factually misleading. There was enough for probable cause to
9 authorize a wiretap. And the defendant has now pled guilty to
10 the Baptista crime, among others.

11 Next.

12 MS. MONTOKYA: Again, in paragraph 18, as it continues
13 on to page 9, where Mr. Larson makes the argument that the
14 affidavit is erroneous, factually untrue, false and greatly
15 misleading, I would ask the Court to strike the "greatly
16 misleading" or give it no weight.

17 THE COURT: All right. It's an argument. I -- I
18 have a suspicion that you never asked him. Mr. Larson, I
19 mean, if every word in this affidavit is his. And I bet you a
20 dollar to a doughnut that these words are not all his.

21 MS. MONTOKYA: Well, I'm confident they're not,
22 because if you look at -- I think it's -- I can't remember
23 which paragraph it is, he states that, you know, he -- that
24 this was drafted by someone else. He looked at it, made
25 changes, reviewed it for accuracy and then signed it. So

1 he's, in effect, adopting all of the information obtained in
2 the affidavit.

3 THE COURT: Yes.

4 MS. MONTAYA: I believe it's paragraph 20.

5 THE COURT: I don't need the two lines on the top of
6 the page because they're not helpful to the Court. It's an
7 argument. So I'm not going to consider them.

8 Next.

9 MS. MONTAYA: Your Honor, I would ask the Court to
10 strike paragraph 22 where Mr. Glickman is reading transcripts
11 of a bail hearing to Mr. Larson and Mr. Larson is commenting
12 on the testimony of witnesses.

13 I mean, the facts speak for themselves. Mr. Larson
14 has testified to one thing. There is contrary information and
15 the Court's is responsibility to compare and contrast and
16 determine what information will be taken into consideration.

17 MR. BALAZS: Your Honor, he's doing more than just
18 commenting on witnesses. He's -- what he's saying in
19 paragraph 23 is the information above there is untrue. And
20 that he never made any type of recommendation or gave a direct
21 order. That's the second paragraph of 23. It's actually a
22 factual response to --

23 THE COURT: He's, right.

24 MR. BALAZS: -- paragraph 22. So it's entirely
25 appropriate.

1 THE COURT: Mr. Larson is responding specifically to
2 the Court's questions to Mr. Bunch when Mr. Bunch was asked,
3 "Did you talk to the sheriff's deputy who investigated the
4 case relative to recommending any action? Did he express to
5 you his opinion?"

6 And this is about the deputy who investigated. Mr.
7 Bunch says he believed it happened.

8 And then the Court asked, did he believe that any
9 violation of criminal law of California, or any other
10 jurisdiction had occurred?

11 "The Witness: Yes.

12 "Did he state any reason why he did not then make a
13 recommendation that the case be reviewed by a
14 prosecutor?"

15 And then Mr. Bunch said, "It was the recommendation of
16 the assistant sheriff at the time."

17 The Court asked: "What recommendation?"

18 The witness says, "That the case would go no further.
19 Which was Myron Larson."

20 So then -- so there's nothing to strike there.
21 That's simply what Mr. Bunch testified to in court.

22 And so now Mr. Larson responds saying that, one, Mr.
23 Bunch testifies that Deputy Seymour told him that Mr. Larson
24 in some way stated inferred or implied communicated to Deputy
25 Seymour that the case would go no further. And Mr. Larson

1 simply says, "I never made any type of recommendation or gave
2 a direct order as to the direction or the outcome of the
3 Baptista investigation."

4 So there's nothing wrong with that. That's stating
5 what he did or didn't do. And it's a direct response to what
6 Mr. Bunch says in his testimony in this hearing.

7 The next sentence is "It is my understanding and
8 belief, as related to me by Lieutenant Jim Silva,
9 that Deputy Seymore did not believe that Richard
10 Baptista was honest and truthful." He believed,
11 meaning that was Lieutenant Silva, "that Deputy
12 Seymore believed Baptista to be a drug addict and/or
13 an alcoholic and that Deputy Seymore did not believe
14 that a crime had been committed by Robert Holloway.
15 I cannot believe, and find it preposterous and
16 incredulous, and would be shocked and amazed, that it
17 would be true that Deputy Seymore told Investigator
18 Kirk Bunch that I recommended, or had influenced, or
19 gave a direct order, as to the course or outcome of
20 the Baptista investigation, and/or that I somehow
21 caused the Baptista investigation to go no further."

22 So it's the witness simply repeating. And those are
23 expressions of indignation that are argumentative in form.
24 But again, it's the witness' expression of his, if you will,
25 view that he in no way influenced the investigation. And

1 that's all there is to it.

2 MS. MONTROYA: But it's almost him rendering an
3 opinion for the Court by way of his declaration as to what
4 Deputy Seymore believed when, in fact, he never spoke to
5 Deputy Seymore and that information came through Lieutenant
6 Silva. So I just think it's improper and should be stricken
7 or given no weight whatsoever.

8 THE COURT: Well, there are two things that have
9 happened that we now know. One of them is that in this
10 investigation, there was a -- if you will, I'm going to call
11 it local policy that crimes against property, where there are
12 ownership issues or debt issues, can never be crimes against
13 persons. And I guess I'll have to now express my opinion --

14 MS. MONTROYA: Well, and also --

15 THE COURT: Even for a law enforcement officer,
16 that's an unbelievable statement. It's as simple as that.
17 And I could give you 100 examples, but I'm sure you don't have
18 time and this isn't law school. Anymore.

19 MS. MONTROYA: But I -- and I agree with the comment
20 of the Court.

21 THE COURT: And so what Mr. Larson is entitled to do,
22 however, is he's entitled to, in effect, defend himself. And
23 candidly, it's the author who deserves the blame here.
24 Instead of, you know, being Sergeant Joe Friday and just
25 giving us the facts, we got to have all this argumentative

1 righteous indignation type of language that is categorically
2 of no assistance to the Court, it's just more words to read,
3 quite frankly, and you know how that goes.

4 So I am not giving weight to the arguments and
5 improper opinions. I am giving weight to Mr. Larson's denials
6 and I've listened carefully to his testimony. And I am
7 weighing that in the balance.

8 The second thing that's happened -- that's the first.
9 The second thing that's happened is that we know the Baptista
10 incident was a crime. We know there was extortion. And we
11 know he was in fear. And that his property was taken by force
12 and fear.

13 And Mr. Holloway has accepted criminal liability and
14 full responsibility, at least in terms of being convicted of a
15 felony, for it. And then we'll hear what he does when we get
16 to sentencing, about the further acceptance of responsibility
17 for the criminal conduct.

18 And so what the Court's response to this is that I
19 think it -- if you want to know what the Court's
20 interpretation of it is, it shows that Mr. Larson was not as,
21 if you will, involved, nor did he have the level of
22 understanding of what was going on in the Baptista case,
23 because, candidly, he asked that it be investigated and he
24 followed up to see that there was an investigation conducted.

25 And that's about what it provides for the Court by

1 way of explanation. And based on what Mr. Bunch was saying,
2 could Agent Elias have believed that this was something that
3 would justify a wiretap, the answer is categorically yes. And
4 a wiretap was authorized.

5 MS. MONTOKYA: I don't have any other portions that I
6 would be seeking the Court to strike. So those are my
7 comments on as far as striking portions of the declaration.

8 THE COURT: Thank you. Those are my rulings.

9 All right. Did you want to present some other
10 comment concerning the testimony?

11 MS. MONTOKYA: Well, the testimony, in addition to the
12 call that the government played and the report that was
13 prepared by Mr. Larson, shows that his declaration is
14 inaccurate and he also sought to paint Mr. Holloway as not a
15 very close friend. That he was someone he considered an
16 acquaintance. And by virtue of that telephone conversation, I
17 think it shows that he and Mr. Holloway were, in fact, closer
18 than he wants the Court to believe.

19 And he took issue with the fact that he was described
20 as a long-time acquaintance of Mr. Holloway in the affidavit.
21 And I think that based on everything the Court has heard, that
22 that is not an inaccurate statement such as the Court can
23 describe malicious intent to the affiant regarding that
24 statement.

25 Additionally, perhaps we're quibbling over a term,

1 but for someone to take a statement from someone, that's a
2 personal involvement. And while Mr. Larson seeks to distance
3 himself from the investigation, he called a victim of a crime
4 the minute that he received the information from a parole
5 officer.

6 And then made steps to contact Mr. Baptista and
7 personally talk to him, which, again, the law enforcement
8 officer in the affidavit stating it's somewhat unusual for
9 this to be personally investigated by a person in Mr. Larson's
10 position. And the Court can draw its own conclusions from
11 that statement.

12 But it remains that there was personal contact with
13 this investigation, not only by way of Mr. Larson following up
14 with Lieutenant Silva and such, but also by personally calling
15 the victim and taking a statement from the victim. And then
16 apparently recontacting the victim later that day.

17 During the course of the telephone conversation that
18 Mr. -- that Mr. Larson had with Mr. Holloway, I think it
19 becomes clear Mr. Larson's bias towards this investigation and
20 also law enforcement involved in the investigation,
21 specifically Mr. -- Investigator Bunch and Investigator
22 Jacobson, by way of his comments.

23 And also he stated that he did not discuss law
24 enforcement matters with Mr. Holloway and that's clearly not
25 true, because not only did he discuss the -- what he believed

1 and stated to be a criminal grand jury investigation with Mr.
2 Holloway involving his wife, but also he went on to discuss
3 what is obstruction by Mr. Holloway by trying to thwart law
4 enforcement who is trying to contact the mechanic, Danny
5 Dugranrut, in order to take into custody property that he
6 would have with him, meaning his Hells Angels vest and things
7 of that nature. And Mr. Larson is clearly discussing that
8 portion of the investigation with Mr. Holloway.

9 So as a whole, the government's position is that Mr.
10 Larson is biased. That there is certain items that are
11 within -- or certain statements that are within the affidavit
12 that are, in fact, true, that Mr. Larson seeks to show are not
13 true. And as a whole, there is nothing that can be said was
14 put into the affidavit either with knowledge of falsity or
15 with willful disregard.

16 And, again, finally, we would ask the Court to deny
17 the motion to suppress the wire based on everything that the
18 Court has heard, not only in today's hearing, but over the
19 course of many months by way of witnesses and declarations and
20 things of that nature.

21 THE COURT: Thank you very much, Ms. Montoya.

22 Mr. Balazs.

23 MR. BALAZS: Your Honor, I think overall Mr. Larson
24 was very credible. And the gist of the paragraph that was
25 complained of in the *Franks* reply is false. And it mentions a

1 number of different things. And it kind of builds up to the
2 conclusion that Larson closed the case without arresting
3 anyone or submitting the case to the Stanislaus County DA for
4 the filing of any charges.

5 And it kind of suggests that it's the whole theme of
6 the affidavit that Mr. Holloway had these connections in law
7 enforcement and that he used them improperly to close
8 investigations or to impair the investigations.

9 And I think if you -- Mr. Larson's testimony was the
10 exact opposite. He did take two phone calls with Mr. Baptista
11 the first day. But after that, the investigation was
12 conducted by other people in the office. He had no say in how
13 the determination was made as to the investigation. He asked
14 that it be investigated fully. And the decision was based on
15 evidentiary issues and credibility problems with Mr. Baptista.

16 And the way the affidavit is written in that it
17 states that Mr. Larson had several -- spoke to Baptista
18 several times about the incident. That's not true. When it
19 says that -- it uses the words that Mr. Baptista -- I mean,
20 Mr. Larson was involved in a routine investigation and that
21 it's uncommon, not standard operating procedure, where he
22 really wasn't involved in the routine investigation. He took
23 the first two phone calls, had two phone calls with Mr.
24 Baptista on the initial day, eight hours apart, and then
25 referred it to someone else.

1 So I think, overall, his testimony was credible and
2 the information in that paragraph was false and it was either
3 intentionally or recklessly false.

4 And the one final argument, not really on today's
5 testimony, but I just want to make this argument for the
6 record.

7 Because based on the testimony yesterday -- or last
8 week of Agent Elias, this is the first time, the Court
9 remembers, that we found out that Agent Elias was not the
10 person who drafted the wiretap affidavit. I think that the
11 way -- because it was drafted by another agent in the office
12 who left, and then Agent Elias signed the affidavit
13 suggesting -- it's -- I think it's misleading to the Court
14 that he was the person who drafted it.

15 And I talked to Mr. Faller, who is a long-time
16 attorney at the US Attorney's Office. And I think he told me
17 he had never heard of an affidavit being submitted to the
18 Court that way, where one agent would draft it and then it
19 would be signed by another person. And I think that in those
20 cases it is misleading and deceptive and that the warrant
21 should be invalidated on that basis as well.

22 THE COURT: Thank you very much.

23 MR. FALLER: Your Honor, everybody in this case has
24 biases. On the defense side, on the law enforcement side,
25 private citizens like Mr. Larson. There are people that have

1 opinions about just about everything in this case. Even the
2 law enforcement officers, I think, can be said to have biases
3 in regards to Mr. Holloway, who was the -- certainly the
4 number one target in this.

5 But the problem is with law enforcement officers,
6 even though they can have those biases, unlike private
7 citizens, they're not supposed to act according to them.
8 They're supposed to act according to the facts as they are
9 presented. They are supposed to follow the evidence where it
10 leads and not attempt to craft it in a way that gives the
11 Court, or any other body attempting to weight the facts and
12 the evidence, an inaccurate view of what took place.

13 And that's what has happened here. Because if you
14 look at the paragraphs in the wiretap affidavit that talk
15 about the Baptista incident and the involvement of then
16 Undersheriff Larson, what is clear is that the facts that are
17 being recited are to -- in an attempt to persuade the reader
18 that Mr. Larson corruptly interfered with a criminal
19 investigation.

20 And actually, if the things stated in the affidavit
21 are true, that he actually committed crimes in doing so.
22 Because those would be crimes, trying to dissuade a witness.
23 Trying to interfere with the submission of a case to the
24 district attorney's office. Those would be crimes.

25 And it was portrayed in those passages that this was

1 basically done on behalf of Bob Holloway. And this was part
2 of the justification for the issuance of the wiretap order and
3 a showing of necessity as to why other types of investigation
4 would not be successful if they were instituted. And there's
5 been much talk by everyone, and certainly the Court has
6 rendered its own opinions, concerning Agent Cefalu.

7 But again, what becomes increasingly troubling is
8 that regardless of what one's personal opinions of Agent
9 Cefalu may be, it was clear in the testimony that was
10 presented, that much of it presented by the other agents in
11 trying to explain what had happened during the prior
12 investigation and why it had been described as it was in the
13 wiretap affidavit, were at least extremely suspect. And one
14 interpretation is that it was outright false.

15 I keep coming back to -- and then when you -- when
16 you overlay that with the fact that Agent Elias was not the
17 author of the affidavit. And there are instances, I'm sure
18 the Court has found, when there can actually be co-affiants,
19 when two people have written different parts of an affidavit
20 and have different things to provide to the Court as far as
21 the probable cause is concerned.

22 And that is a -- that is a disclosure to the Court
23 that more than one person has been responsible for drafting
24 and attesting to what the Court is relying on. And that was
25 not done here. And the only person that swore to anything was

1 Agent Elias. And it was clear that he was not the author.

2 I do understand the difference between author and
3 affiant. But at the same time, the fact that he was only an
4 editor and not an author in any respects presents a situation
5 that is something that, in my view, the Court should have been
6 told.

7 So the Court can at least make an inquiry. So that
8 the Court can at least be able to satisfy itself that the
9 person who is attesting and swearing to the facts in the
10 affidavit actually has competent information and has been
11 someone that actually produced the product.

12 Because I am sure that even though there is no record
13 of it, that in the Court's mind, when Agent Elias swore to the
14 affidavit, that the assumption was, as it would have been with
15 anybody, that he was the author of it as well as the person
16 who was the affiant.

17 I'd like to bring up one other fact about the
18 Baptista incident. And I know the Court is -- has mentioned a
19 couple of times. And that is that it turned out to -- I think
20 the Court's words had been criminal conduct, that Mr. Holloway
21 accepted responsibility for. That is true. Obviously.

22 THE COURT: Yes. We don't charge that to anybody in
23 the investigation stage because nobody knew.

24 MR. FALLER: That's correct. And -- but what I am
25 saying is that what's important -- and just highlighting,

1 what's important is what the knowledge of the people was at
2 the time that the affidavit was created.

3 THE COURT: That's right. We don't use --

4 MR. FALLER: It's kind of like a search warrant,
5 well, we found the stuff.

6 THE COURT: We don't use the 20/20 vision of
7 hindsight.

8 MR. FALLER: Exactly.

9 THE COURT: No law enforcement officer is ever held
10 to that standard.

11 MR. FALLER: I understand that and I just wanted to
12 point that out. Because what supposedly Agent Elias and the
13 people giving him information are relating is the facts as
14 they were known at the time that the affidavit was created.

15 And at the time that the affidavit was created, there
16 was an overall impression given that, through Undersheriff
17 Larson, that Mr. Holloway had influence would have gone on in
18 that investigation. I submit to the Court that is not true.

19 This is a very unusual situation where we have had
20 testimony on opposite sides of issues by active and sworn law
21 enforcement officers, which both can't be correct. Where the
22 in retrospect things that are stated here have turned out not
23 to be as represented to the Court.

24 It's -- it's our view that when there is so much
25 uncertainty concerning the factual accuracy of what was given

1 to the Court in the first instance, that under the totalities
2 of that circumstance, the government should not be allowed to
3 benefit from those things that were portrayed to the Court as
4 one way, but have turned out to be the other.

5 And there is a point at which, regardless of
6 technical legal standards, that there is -- there is a line
7 which should not be crossed in terms of the government being
8 able to benefit from things that were done in, at best, sloppy
9 and reckless manner and, at worst, an outright duplicitous
10 manner.

11 Because I would submit to the Court that the
12 information that was given to Elias about the Larson incident
13 smacks of intentional representation from the investigators
14 that were -- that were relating them information. And it was
15 all done for a particular purpose. It was all done to get Bob
16 Holloway. Ultimately. And I don't think anybody can really
17 dispute the fact that that was the point of the exercise.

18 Now, whether that was -- there were legal means to do
19 that is another -- is another discussion. But that was the
20 point of the exercise. And far too many people in this were
21 willing to go to inappropriate lengths to make that happen.
22 Again, everybody has biases. Everybody has motivations that
23 may or may not be appropriate. But when it comes to law
24 enforcement, those biases must be set aside and they must deal
25 with the facts as they found them.

1 In this situation, they did not deal with the facts
2 as they found them. They attempted to fashion them into
3 something else to reach the end result.

4 And in that respect, Your Honor, they went beyond the
5 line of candor with the Court in that affidavit and it should
6 be set aside and the wiretap evidence that was derived
7 therefrom should be suppressed.

8 THE COURT: Thank you very much. Would you like
9 government to reply?

10 MS. MONTAYA: Yes, Your Honor. Regarding law
11 enforcement biases, I would be shocked if there was an
12 affidavit that was submitted to the Court where the officers
13 did not believe that the person who was the target of the
14 investigation was committing a crime.

15 And to say that they have such a bias that they
16 manufactured evidence where none existed, I think, is just not
17 borne out by the evidence.

18 What I find personally troubling about Mr. Cefalu is
19 the fact that he's allowed to make the bald assertion
20 regarding perjury committed by officers and the wiretap
21 affidavit when, in fact, the man had never even read the
22 wiretap affidavit. And so I think that we've all discussed at
23 great length his testimony and what it means to this.

24 But where Mr. Faller's troubled by what law
25 enforcement is doing, I'm troubled by what Cefalu did as it

1 related to this investigation. Not only while he was involved
2 in it, but after he was involved in it.

3 Again, when -- I think that Mr. -- Special Agent
4 Elias made it perfectly clear that he read the affidavit, he
5 adopted the affidavit, he edited the affidavit and that he was
6 satisfied that the information contained in the affidavit what
7 was true and correct, based on his knowledge of the
8 investigation, his direct participation in the investigation
9 and the daily briefings that he and other officers had
10 regarding the facts and such of this investigation.

11 And directing the Court to paragraph I on page ten,
12 it does state that information is to be received from other
13 law enforcement officers. And there really is nothing that
14 was brought out by way of testimony that Mr. -- that Special
15 Agent Elias put anything in the affidavit that he thought was
16 false.

17 Regarding the Baptista incident, I mean, we've kind
18 of beat that like a dead horse. But the bottom line is that
19 there was information that was left out of the affidavit that
20 was certainly beneficial to the position of law enforcement
21 that this incident did, in fact, occur. And we went over that
22 at the last hearing.

23 Again, I would ask the Court to deny -- it's the
24 government's understanding that the Court, at the last
25 hearing, ruled that even if taking out that particular portion

1 of the affidavit, that there was certainly enough information
2 contained in the affidavit to support the issuance of the
3 order authorizing the interceptions in this matter. And I
4 would ask the Court to deny this motion.

5 THE COURT: All right. Thank you very much.

6 Is the matter submitted?

7 MS. MONTOKA: Submitted.

8 MR. BALAZS: Yes, Your Honor.

9 MR. FALLER: Yes, Your Honor.

10 THE COURT: The Court intends that its decision now,
11 it will issue further findings, but that it be supplemented by
12 all my previous findings that have been oral. There hasn't
13 been time, due to the pendency of this and other cases, to do
14 complete findings in a written statement of decision.

15 That I have intended that my oral findings all be
16 incorporated and there have been, I believe, at least four or
17 five prior times at which I have made findings that relate to
18 the issues raised by this affidavit.

19 And let me start with the suggestion that Agent
20 Elias, as an affiant with the personal knowledge he described,
21 the attendance at briefings and his presentation of the
22 information to the court was either misleading or improper.

23 The Court recognizes that law enforcement officers
24 are entitled to rely on not only hearsay, but the reports of
25 other law enforcement officers. They must have a reasonable

1 belief in the reliability and the accuracy of what they
2 present. They must be in good faith in not presenting
3 something that they know to be false or that they believe is
4 questionable or inaccurate. And if there are reservations
5 that are required to make the statement not misleading and law
6 enforcement has the information, they have a duty to provide
7 it.

8 And here, the agent who had been the primary author
9 of the affidavit and the predecessor case agent was
10 transferring to another office and Agent Elias picked up the
11 responsibility and assumed the duties for the wiretap
12 application and that process.

13 The Court believes that he was an integral part of
14 the investigation from June of '06 -- actually, I believe he
15 started as early as May of '06, if not earlier. And was in
16 daily briefings with the submitting officers. He was
17 receiving information from confidential witnesses. Some
18 informants. From many other law enforcement agencies. Local
19 law enforcement agencies.

20 And I have taken the specific pinpoint and targeted
21 alleged infirmities in this affidavit, including the incident
22 that we have referred to as the Baptista incident, and I've
23 excised them, and I've analyzed this affidavit without any of
24 the objected to information in it. And there's overwhelming
25 support for the issuance of the wiretap, putting out all of

1 the local information that is now apparently the subject of
2 these motions.

3 But let's face reality, because the Court sat through
4 a trial and heard what the relationship of these individuals
5 inter se is. Mr. Holloway was a deputy sheriff for a number
6 of years. He was apparently very popular then. He continues
7 to be very popular with a segment of the population in the
8 Stanislaus County area, including Denair, Turlock and the
9 environs.

10 His wife was a 25 to 26 year employee of the
11 Stanislaus County Sheriff's Office. She worked both for
12 Captain DeLeon and she worked for Undersheriff Larson for
13 many, many years. And, by all accounts, she was a good
14 employee. Nobody terminated her. Nobody questioned her job
15 skills.

16 And so what the Court understands is that there is an
17 understandable basis for the relationships that exist between,
18 if you will, the Holloways, the Larsons, the DeLeons and
19 others that we have heard about. And I think that the truth
20 lies somewhere in between what has attempted to be represented
21 by both sides.

22 Certainly you don't think that Undersheriff Larson
23 could deny that he was a friend of Bob Holloway's. DeLeon
24 tried very hard to distance himself from Mr. Holloway during
25 his trial, but I'm sure he was a friend to Mr. Holloway as

1 well. Certainly the phone conversations, the exhibition in
2 the street between Mr. DeLeon and Mr. Holloway showed that,
3 showed that familiarity, the continuing contact, whether we
4 call it socializing or just simply social discourse.

5 There continues to be communication of a friendly
6 nature. And you don't have to be a pal, you don't have to be
7 a best friend, you don't have to be even a friend who shares
8 time in each other's homes or goes to dinner or social or
9 cultural events to be friends.

10 What that does create an appearance of and what it
11 did raise here was putting aside all the specific details, a
12 continuing communication between senior officers of the
13 Stanislaus County Sheriff's Office, most now retired, and Mr.
14 Holloway during times that were relevant.

15 Because what this affidavit establishes is this. Mr.
16 Holloway is, if you will, a pied piper. He is someone who has
17 a lifestyle that is of his choosing. He chooses to do
18 business with and associate with outlaw motorcycle gangs.

19 And just like David Daniel Martel stood in this Court
20 and when I said to him, "You are a Hells Angel" and he said
21 proudly, "I am a Hells Angel. And I'll always be a Hells
22 Angel." And what that stands for is we start with the word
23 "outlaw." They profess it. They are the few. They are
24 outside the morays and the standards of society. They commit
25 crimes. And that is the Hells Angel way. That is what they

1 stand for. That is who they are. And they're very proud of
2 it.

3 And so Mr. Holloway was a great source of irritation
4 to local law enforcement because he chose to do business with,
5 to engage in criminal conspiracy with, to engage in extortion
6 with Hells Angels members. He had a very well known, very
7 violent Hells Angel who was his chief mechanic, his best
8 mechanic, Dugranrut.

9 And there is no question that when they are in the
10 process of executing a task force search warrant on
11 Dugranrut's house, Dugranrut has the ability, through Mr.
12 Holloway, who picks up the phone, calls Captain DeLeon, who
13 was then an active officer in the service of the Stanislaus
14 County Sheriff's Office, and says, "he just needs a little
15 time to get things together."

16 And when, in the history of law enforcement, do the
17 crooks get to tell the cops, "I just need a little more time
18 to get rid of the patch and get rid of the evidence, and then
19 you can come in and execute the search warrant. And if you
20 want me to surrender, we'll arrange for that too."

21 But at any rate, what we have is a relationship where
22 Holloway felt he had the access and the ability to communicate
23 with then senior officers in the Stanislaus County Sheriff's
24 Office. And his business was the subject of constant
25 scrutiny.

1 Now, the admissible part of this wiretap is there are
2 a dozen stolen bikes, exported of stolen merchandise,
3 receiving of stolen property incidents that are reported by
4 either the confidential witness, one or two or others that
5 show that there was trafficking in chopped, stolen,
6 disassembled, refabricated motorcycles, motorcycle parts.

7 That there was extortion involved in the arrangements
8 that Mr. Holloway had with outlaw motorcycle clubs to
9 encourage the purchase by prospects through the clubs of
10 motorcycles from him. And then if the bikes were not paid
11 for, Mr. Holloway either himself or through others, would then
12 threaten and/or extort the non-payors, the debtors, into
13 paying their obligations.

14 That -- which in a 126-page affidavit, there's nobody
15 who says any of that is false or that that's contrived or that
16 that is misinterpreted.

17 And the suggestion that for the Court to be presented
18 with information that Mr. Holloway, who parties with Hells
19 Angels, who supports Hells Angels, there was a homicide
20 committed in his business, he was acquitted of that.

21 But nonetheless, the individuals who are Hells Angel
22 members, the Court generalizes, but I might be able to take
23 judicial notice of, although I'm not, these individuals live
24 violent lifestyles. That is in the nature of the kinds of
25 activities that they engage in.

1 And so what we have in this affidavit is, even
2 accepting everything that the defense says is true, none of
3 this was knowingly false to Agent Elias. And if we look at
4 the alleged discrepancies or differences between the bunch
5 affidavit and the Larson affidavit testimony, I believe we
6 have at least three material inaccuracies in Mr. Larson's
7 affidavit that were revealed by his testimony today. Does
8 that make him a wrongdoer? If he misrecollects or, in his
9 zeal to defend himself, he's inaccurate? Again, we accept the
10 human condition.

11 And given that he had been accused by Bunch, he
12 didn't go to law enforcement and didn't offer his version to
13 law enforcement. He offered his version to the defense, who
14 he obviously felt more comfortable with because he believed
15 that the defense had the more accurate information. Again,
16 the truth lies somewhere in between.

17 But the Court does not find that either it is
18 reckless disregard or that there is knowingly false
19 information presented with the intent to deceive the Court.

20 Rather, if we want to go to the Baptista incident and
21 analyze it for what it is, Baptista presented with a
22 complaint. His motorcycle had been taken by Mr. Holloway. He
23 had been forced to sign a paper by Mr. Holloway that, in
24 effect, authorized Holloway to take the bike.

25 He said he was afraid of Holloway. He never changed

1 that statement. And he said he didn't want to prosecute. He
2 didn't want to pursue the case because he was afraid of
3 Holloway.

4 Well, certainly, there were pros and cons in that
5 case. We have a decision made at either the sergeant or the
6 lieutenant level that the case is not going to be prosecuted.
7 And with the hindsight of 20/20 vision, given that his friends
8 and family said he was an alcoholic, that he took drugs, that
9 he was paranoid, that he had other problems, the sheriff chose
10 not to present that to the DA. Is that usual? Well, again,
11 we don't have any testimony on that.

12 And so what the Court understands ordinarily is that
13 if somebody has stated on more than two occasions that they've
14 been extorted, that their property has been taken and that
15 they're afraid of someone, usually the prosecutor exercises
16 discretion whether or not to decide that case is unmakeable
17 and unwinnable.

18 Here, it was decided at the law enforcement level.
19 And two members of the law enforcement agency involved, or at
20 least the district attorney's office, of a related law
21 enforcement agency in the same county said the way this case
22 was handled is unusual. Turns out that now that we have the
23 whole story, not what they had, and they didn't have the whole
24 story because they weren't talking to Undersheriff Larson,
25 they didn't know. But what it looked like to them was that

1 Holloway gets another pass.

2 And so could they have presented that as they did?
3 The Court sees that it was justified. There were inaccuracies
4 in their affidavits just like there were inaccuracies today in
5 the testimony.

6 And in the final analysis, they had cause to believe
7 that Mr. Holloway had special access to command level people
8 in the Stanislaus County Sheriff's Office. And that in some
9 of the incidents that are reported in the affidavit, that it
10 made a difference.

11 Well, in the final analysis, in the case of Mr.
12 Baptista, what was the appearance and what was the information
13 in possession of law enforcement as opposed to what is the
14 truth? If we'll ever know the truth.

15 And in the final analysis, the Court doesn't find,
16 with a 20/20 perfection of hindsight, that the officers
17 shouldn't have presented that claim to either the Court or the
18 District Attorney.

19 And that there are two sides to the story. And that
20 there are good reasons for not prosecuting Mr. Baptista just
21 like a zealous prosecutor might have said there are good
22 reasons to prosecute.

23 And so in the final analysis, the Court doesn't find
24 that there is, again, *Franks* type misconduct in presenting
25 that to the Court, but excise it and don't consider it at all.

1 There's a mountain of evidence in this affidavit,
2 which I chronicled most of last time. But I will refer to
3 some additional areas. And remember that in the analysis, the
4 pen registers were showing contact between Mr. Holloway at
5 crucial times and former law enforcement or existing law
6 enforcement senior officials, which certainly, given
7 Holloway's activities, the lifestyle and the activities that
8 he conducted at his business and other places would raise
9 concern for any law enforcement officer.

10 The affidavit reviewed the drug trafficking
11 activities of Picchi and Picchi's close relationship with
12 Holloway. Picchi's wife, who was a known drug addict,
13 although I don't believe that that is in this affidavit. But
14 the activities of Dugranrut, Kelly Brenton, James Copple, Ray
15 Heffington, Dan Martel, Buddy Taylor, all of whom -- of course
16 Dugranrut is dead. But those charged in this case,
17 Heffington, Martel, Sotelo and many others all have pled
18 guilty, engaged in the trafficking in stolen motorcycle parts,
19 to the extortion count, as did -- I'm looking for his
20 name -- what -- who was the president of the other club who
21 pled guilty?

22 MR. CULLERS: Ray Heffington.

23 MS. MONTAYA: Mike Orozco.

24 THE COURT: Orozco. Yeah. Mr. Orozco. Who admitted
25 his extortion of the purchaser of a bike. Reference to the

1 activities of Gary Lavenduskey, Michael Pleasant. Known
2 active Hells Angels. Gene Serrano, Bobby Garcia, Angelo
3 Jacobo.

4 There was constant communication between Mr.
5 Holloway, those individuals, activities in Mr. Holloway's
6 business where those people work being observed. Either at
7 parties, Hells Angels parties, some sponsored by Mr. Holloway,
8 or at the business.

9 We have the -- one of the CW's, who went to, in 2007,
10 Dugranrut's residence to, in effect, pay him to refabricate a
11 bike out of stolen parts. And there is nothing infirm -- that
12 was a consensual recording on one side.

13 There was additionally discussions between Brent
14 Holloway concerning fabrication of a bike and financial
15 arrangements and how the motorcycle -- this is Bob Holloway
16 who was directly involved in the conversation -- could be put
17 together. And an engine case, a frame and other parts which
18 would be untraceable, and which would not be identified as
19 stolen could be fabricated.

20 There is the Long Beach, the port of Long Beach
21 offloading of motorcycles that were sent to Japan. There is a
22 stolen motorcycle frame, a triple tree, that was in June of
23 2007 involving, again, Dugranrut and Kelly Brenton concerning
24 a motorcycle.

25 There is additionally, in May of 2007, concerning a

1 Bill Litt, who had another motorcycle that had issues where
2 Holloway is reported to have told Litt not to notify the CHP,
3 not to tell the CHP or anyone where he purchased the
4 motorcycle. And that Holloway would buy Litt another set of
5 engine cases to replace ones that were apparently seized by
6 the CHP because they were reported as stolen or at least the
7 motorcycle had an illegal VIN.

8 There are many additional circumstances that fully
9 justify the issuance of the authorization for these wiretaps.
10 And so the Court finds that when we look at Agent Cefalu,
11 Cefalu may have been a good agent at one time. He apparently
12 rendered service that is noteworthy. He had reached the point
13 in his relationship with his agency where he was no longer
14 able to cooperate with task force members from other agencies.
15 At least that's what his conduct demonstrated.

16 The reason he was removed from participation of the
17 task force is he couldn't get along with anybody except his
18 two undercover agents that were working.

19 But as to everybody else from other agencies, he was
20 insulting, he was profane, he was difficult and the Court
21 doesn't find that his information or knowledge, which could
22 not have been helpful after March of 2006, was more than 20
23 months removed when this wiretap affidavit was presented.

24 The case had moved far beyond Cefalu. The case
25 involved much more than Cefalu was focused on. And there was,

1 as the Court has identified in the affidavit, a series of
2 other crimes, circumstances and events that Cefalu didn't even
3 have any knowledge of and wasn't looking into, that made his
4 limited knowledge and limited participation one that does not
5 cause the Court to give any weight to his testimony. His
6 testimony is so colored by his bias, which is absolute and
7 complete, based on his express statements in lawsuits.

8 The Court hasn't visited his website, but the Court
9 has received reports in these proceedings about his websites,
10 his criticism of his fellow officers, his supervisors and
11 others in the DEA, making it testimony that is simply
12 unhelpful and so colored by bias.

13 And there are two noteworthy examples of bias that
14 are overwhelming. The first, as has been stated in this
15 proceeding, he criticized and calls false every aspect of the
16 wiretap affidavit. He never read the wiretap affidavit. And
17 he hasn't got the slightest idea of what's going on with three
18 quarters of the investigation. So not only is he reckless,
19 not only is he incompetent, but he does a disservice to the
20 agency that he continues to be employed by.

21 And the Court finds he is simply unworthy of belief.

22 The second aspect that the Court has in previous
23 hearings noted, and that is that there is no question that
24 Agent Cefalu has stated in open court his aversion for
25 wiretaps. The fact that he never has sought or obtained a

1 wiretap.

2 That he has such a bias when it comes to wiretap that
3 he, the Court believes, evidenced an unwillingness to consider
4 the use of wiretaps in law enforcement if he is involved. If
5 he is either the agent in charge or a participating agent
6 where he would be required to do the work because, of course,
7 the work to obtain a wiretap is monumental.

8 The requirements of the law that must be met in terms
9 of the showing of necessity and of the documentation and
10 corroboration requirements are so stringent that it takes, as
11 it did in this case, many, many months to put together the
12 information.

13 But in the final analysis, the Court believes that
14 this was an FBI managed investigation as it pertains to the
15 wiretaps. That the agent had personal knowledge and, through
16 law enforcement sources, information obtained where he heard
17 these officers' report, he heard these officers provide
18 explanations. He viewed evidence, he viewed reports, hundreds
19 and hundreds of pages of reports that provide the probable
20 cause facts.

21 And the Court is well satisfied that this wiretap
22 application could be presented by Agent Elias. That the
23 alleged failure to further investigate or failure to further
24 ascertain inaccuracies, there were not facts before Agent
25 Elias that gave him either actual or constructive notice that

1 further investigation was required. His activities were being
2 overseen by at least one full-time Assistant United States
3 Attorney, who was assigned to the case.

4 And for all of these reasons and the reasons
5 previously stated in my oral statement of decision the motion
6 to suppress the wiretaps and the recorded conversations is
7 denied.

8 Now, I believe, since we are not going to address
9 today the subject of the claims of attorney/client and
10 attorney/agent privilege, we'll do that on the 12th with the
11 rest of the motions including the motions in limine.

12 Is there anything further today?

13 MR. FALLER: Your Honor, there is one other matter
14 regarding the scheduling that I've discussed with Mr. Balazs
15 and the US Attorney's Office. And also with Mr. Forkner when
16 he has been here.

17 Obviously, with the pleas of the other defendants,
18 this is a much different case than it was a month ago. And as
19 we are preparing and as we are moving through the evidence and
20 material that we are receiving from the government -- and I'm
21 not casting aspersions, they've been very helpful when they
22 give something to try and point out how it relates to a
23 particular defendant.

24 We are, in many respects, overwhelmed as we are
25 trying to get prepared for this matter. It's my request, and

1 I discussed it with Mr. Balazs and also Mr. Forkner, if we
2 could just get some additional time. Not only taken into
3 consideration this huge personal event I've got that's going
4 to take place the week of the 31st, which I must say has
5 become a much bigger deal than I ever anticipated. If --

6 MR. BALAZS: Tell the Court what that is.

7 MR. FALLER: Well, my only child is getting married.
8 And it's becoming an event of weeks' proportion rather than
9 days' proportion. I see the chuckles on the other side of the
10 room and I'll take those in good humor. I assume they are
11 deliberate.

12 It would be our request if we could possibly begin
13 the trial on August 13th rather than July 20th. It would be,
14 I believe, beneficial to the manner in which the case can be
15 presented. It would be more efficiently done so. And I don't
16 believe anybody would be prejudiced by it.

17 I specifically talked to Mr. Forkner about that also.
18 I know the Court had quite a bit of time blocked out for it
19 when it was going to be a much huger case. And I think that
20 will still put us in the window.

21 THE CLERK: August 13th is a Friday.

22 MR. FALLER: I'm sorry.

23 MR. CULLERS: August 10th?

24 MR. FALLER: August 10th.

25 MR. CULLERS: Is that the Ninth Circuit conference?

1 THE COURT: The Ninth Circuit conference is the week
2 of the 16th. And the only day I would be here in that week is
3 Friday.

4 THE CLERK: We have two trials set the 24th and two
5 on the 31st.

6 THE COURT: Two trials set on the 24th and two trials
7 set on the 31st.

8 THE CLERK: August 3rd?

9 MR. FALLER: Well, how about August 9th? I mean, I'm
10 at the point of begging for anything I can get. I -- you
11 know, I'm sorry, I can't. I will not be able to be ready by
12 the 3rd. But the 10th would -- if I could get the 10th or the
13 17th, I would be eternally grateful.

14 MS. MONTAYA: I have one of the trials on the 31st
15 that I'm ever hopeful will settle. But I don't have any
16 information I can give the Court as to whether or not it will
17 settle. On August 31st.

18 MR. FALLER: When is the 9th circuit conference
19 again?

20 THE COURT: The 16th.

21 MR. FALLER: So the Court will be dark pretty much
22 that entire week.

23 THE COURT: The Friday is -- will be, you know, a
24 regular day. But Monday through Thursday, we will not be
25 here.

1 MR. CULLERS: We could start on the 10th, Your Honor,
2 go until the 13th. I don't know if you want to give the jury
3 a week off or take some evidence on the 20th when you're back.

4 MR. FALLER: I don't really think it's going to be
5 two full weeks.

6 MR. CULLERS: Well, I don't know what Mr. --

7 MR. BALAZS: It's a little bit hard to say. I know
8 we now have expert witness notices for, I think, five experts
9 for both sides. And Mr. Forkner has told me that he intends
10 to call a number of witnesses. So I think it will be more
11 than just a three-day trial.

12 MR. FALLER: Oh, I agree with that.

13 MR. BALAZS: How long it will go, it's a little bit
14 hard to say.

15 THE COURT: Well, what's the government's position?

16 MR. CULLERS: Well, Mr. Faller did speak to us before
17 court. And given his situation, you know, obviously we want
18 to accommodate him as much as we can. And our position was
19 that that would be okay. But then I didn't realize about the
20 Ninth Circuit conference, which throws a monkey wrench into
21 it. But if we want to start on the 10th and resume against on
22 the 24th, I don't know if that's -- I just can't go into
23 September because I have a trial in September.

24 THE COURT: Right. What I'm wondering is this. Can
25 we get -- can we start any time earlier than the 10th?

1 MR. CULLERS: Do you want to pick a jury?

2 THE COURT: We can pick a jury on the Friday?

3 MR. FALLER: Yeah. On the 6th? Yes. Yes. I could
4 pick a jury on the 6th.

5 THE COURT: All right. It seems to me that that
6 would be the best logistically.

7 MR. CULLERS: We have a -- I'm sorry, Your Honor, the
8 problem is our subpoenas, everybody is coming in.

9 THE COURT: Right. I know.

10 MR. CULLERS: And has blocked off this time. Our
11 witnesses have. So I'm assuming this is okay for our
12 witnesses in terms of vacations and everything else. But --

13 MR. FALLER: Right. Obviously I would make any
14 accommodations necessary for that. I realize that this is
15 something that I am asking for.

16 MS. MONTAYA: And perhaps we can do some checking
17 between now and the 12th to see if --

18 THE COURT: To see what the situation is with your
19 witnesses. All right. We'll address this again on the 12th,
20 because we had done that -- we had structured our whole court
21 calendar to be available for this trial.

22 MR. FALLER: I understand, Your Honor. And believe
23 me, I understand the accommodation I am asking for. I do not
24 do this lightly.

25 MR. CULLERS: So we can maybe just tell witnesses

1 tentatively that we're thinking of moving the trial to the
2 10th and just see if that week is good.

3 THE COURT: And what I would try to do is maybe move
4 the calendar on the 9th of August so we would have a trial
5 day.

6 MR. CULLERS: Oh, I see.

7 THE COURT: A full week of trial, five days.

8 MR. CULLERS: Oh, okay. Or we could pick a jury on
9 the 6th and just start up on the 10th. We could do that too.
10 Which would save time. That way on the 10th it would just be
11 witnesses and evidence going straight through.

12 THE COURT: Yes. If we had jury selection, opening
13 statements on the 6th.

14 MR. CULLERS: Yes. We might be able to do that or
15 something. That's a Friday. All right. We can check with
16 our witnesses and we can let counsel know. So we'll have an
17 idea.

18 MR. FALLER: We'll communicate between now --

19 THE COURT: Yes. We'll address this on the 12th.

20 MR. FALLER: Thank you very much.

21 MR. CULLERS: Thank you.

22 THE COURT: All right. We are in recess.

23 (The proceedings were concluded at 3:37 p.m.)
24
25

1 I, KAREN HOOVEN, Official Reporter, do hereby certify
2 that the foregoing transcript as true and correct.

3
4 DATED: 08/04/2010

/s/ Karen Hooven
KAREN HOOVEN, RMR-CRR

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