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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
vs. ) CRIMINAL CASE NO. CCB-17-106  
 )  
WAYNE EARL JENKINS, )  
DANIEL THOMAS HERSL, ) MOTIONS HEARING  
and )  
MARCUS ROOSEVELT TAYLOR, )  
Defendants. )  
\_\_\_\_\_ )

Tuesday, December 19, 2017  
Courtroom 1A  
Baltimore, Maryland

**BEFORE: THE HONORABLE CATHERINE C. BLAKE, JUDGE**

For the Plaintiff:

Leo Wise, Esquire  
Derek Hines, Esquire  
Assistant United States Attorneys

For the Defendant, Daniel Hersl:

William Purpura, Esquire

For the Defendant, Wayne Jenkins:

Steven Levin, Esquire

For the Defendant, Marcus Taylor:

Jenifer Wicks, Esquire

Also Present:

John Siracki, Task Force Operator  
Thomas Rafter, Esquire

\_\_\_\_\_  
Reported by:

Nadine M. Gazic, RMR, CRR  
Federal Official Court Reporter  
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Baltimore, Maryland 21201  
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**T A B L E O F C O N T E N T S**

**Motions Hearing**

<b>WITNESS</b>	<b>DIRECT</b>	<b>CROSS</b>	<b>REDIRECT</b>	<b>RECROSS</b>
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Matthew Vilcek

By Mr. Hines: 4

By Ms. Wicks: 10

**PROCEEDINGS****(2:38 p.m.)**

**THE COURT:** Would you like to call the case?

**MR. WISE:** Thank you, Your Honor. The case is United States of America versus Jenkins, Hersl and Taylor. Criminal Number CCB-17-106. Assistant United States Attorney Leo Wise and Derek Hines and with us at counsel table is task force officer John Siracki and we're here this afternoon for a motions hearing.

**THE COURT:** All right, thank you.

**MR. PURPURA:** Judge Blake, good afternoon. William Purpura. I'm joined at trial table with Thomas Rafter. Mr. Rafter is a member of this Bar and he hopes to be a member of the CJA panel and he's looking for some experience, so he's second chair to me in this trial. We're here to represent Daniel Hersl.

**THE COURT:** All right, glad to have both of you, and Mr. Hersl.

**MR. LEVIN:** Good afternoon, Your Honor. Steven Levin on behalf of Wayne Jenkins who is standing to my right.

**THE COURT:** All right, thank you.

**MS. WICKS:** Good afternoon, Your Honor. Jenifer Wicks on behalf of Mr. Taylor who is standing to my right.

**THE COURT:** Glad to have all of you. You may be seated, please.

1           So we are here for a motions hearing. I know there are a  
2           number of issues that have been raised. It appears to me  
3           there's only one that requires the taking of testimony which  
4           would be the Motion to Suppress statement filed on behalf of  
5           Mr. Taylor. So ordinarily we would go ahead and proceed by  
6           hearing the motion that requires evidence to begin with, but  
7           unless anybody has any other plan, let's go ahead and hear the  
8           Motion to Suppress. This is Mr. Taylor's motion number 6, I  
9           believe, Motion to Suppress statement in evidence.

10           **MR. HINES:** Your Honor, Special Agent Matthew Vilcek  
11           took the custodial statement, so we'd like to call him as a  
12           witness.

13           **THE COURT:** All right.

14           **THE CLERK:** Please remain standing and raise your  
15           right hand.

16           **(Witness sworn.)**

17           **THE CLERK:** Thank you, you may be seated. Please  
18           speak clearly into the microphone. Please state your name and  
19           spell your name for the record.

20           **THE WITNESS:** Matthew J. Vilcek. V-i-l-c-e-k.

21           **THE CLERK:** Thank you.

22           **D I R E C T   E X A M I N A T I O N**

23           **BY MR. HINES:**

24           Q. Mr. Vilcek, where do you work?

25           A. I'm a special agent with the Federal Bureau of

1 Investigation.

2 Q. How long have you been with the FBI?

3 A. I just passed 18 years.

4 Q. And what kinds of cases do you predominantly work now?

5 A. I worked a number of different cases in the Baltimore  
6 division, including public corruption. Most of my time has  
7 been spent working in violent crimes against children matters.

8 **MR. HINES:** Sorry, Your Honor, just having some  
9 technical difficulties.

10 **BY MR. HINES:**

11 Q. Special Agent Vilcek, did you participate or assist in  
12 the interviews of Baltimore Police Department officers on  
13 March 1, 2017?

14 A. Yes, sir.

15 Q. What was your role on that day?

16 A. I was one of the agents selected to be an interviewer and  
17 I interviewed Marcus Taylor on that date.

18 Q. And can you describe or summarize your interactions with  
19 Mr. Taylor before the interview began officially?

20 A. The arrest operation occurred prior to my involvement. I  
21 believe a tactical team had taken custody of Mr. Taylor and he  
22 was ushered into a room within the Internal Affairs Bureau at  
23 the Baltimore City Police Department. He had been placed into  
24 a separate room pending availability of an interview room that  
25 was properly outfitted with video recording equipment.

1 Q. Did you engage in any substantive conversations with  
2 Detective Taylor prior to him being placed in an interview  
3 room?

4 A. Nothing substantive. It was communicated to me that he  
5 was experiencing slight health issues, that he had been  
6 examined --

7 **MS. WICKS:** Objection, nonresponsive.

8 **THE COURT:** Overruled.

9 A. And we had just made sure that he was feeling well. We  
10 had communicated to him that we could take him to the  
11 restroom, we could provide him with water if he needed it.  
12 And I believe we did both of those things during that time and  
13 explained to him that we were just waiting for a room to  
14 become available.

15 Q. And why was the Internal Affairs Office used to interview  
16 Detective Taylor and other folks on this day?

17 A. It was a tactic. It was a place where police officers  
18 routinely respond for training or for inquiries. They were  
19 required to remove their firearm upon entering the building.  
20 It was a matter of safety, so I believe this is why that place  
21 was selected.

22 Q. And I'm showing you what's been marked as Government's  
23 Exhibit 1. Do you recognize Government's Exhibit 1?

24 A. Yes, sir.

25 Q. What is Government's Exhibit 1?

1 A. It's a document that contains the criminal case number,  
2 indicates the pretrial motions and contains a description of  
3 each of the items listed as exhibits.

4 Q. Flip to the next tab, that's actually --

5 A. Oh, number one -- this is a transcript of the audio  
6 recording involving Mr. Taylor.

7 Q. Okay. And have you reviewed that transcript of the audio  
8 recording?

9 A. I have, up to minute 9:40, I believe.

10 Q. And is that transcript a fair and accurate summary of the  
11 first approximately nine minutes of the interview of Mr.  
12 Taylor?

13 A. Yes, sir.

14 Q. Did you make any threats to Mr. Taylor during those first  
15 nine minutes?

16 A. Not at all.

17 Q. Did the interview continue after those nine minutes?

18 A. Yes, sir.

19 Q. Were any threats made against Mr. Taylor to induce his  
20 statements?

21 A. No.

22 Q. During those first nine minutes did you read Mr. Taylor  
23 his Miranda rights?

24 A. I did.

25 Q. And can you find on there where you read him his Miranda

1 rights on the transcription?

2 A. It's in the vicinity -- the counter number reading is 6  
3 minutes and 46 seconds. It followed the reading showing Mr.  
4 Taylor the charges against him, the charging document and then  
5 we went on to read him the Miranda form.

6 Q. And can you read -- starting with the bold -- before we  
7 ask you any questions, what you said?

8 A. Before we ask you any questions you must  
9 understand your rights. The matter under  
10 investigation is criminal in nature and  
11 constitutes one or more violations of law. You  
12 are not being compelled to provide information  
13 regarding your official duties pursuant to an  
14 agency disciplinary investigation or proceeding by  
15 your employer. You have the right to remain  
16 silent. Anything you say can be used against you  
17 in court. You have the right to talk to a lawyer  
18 for advice before we ask you any questions. You  
19 have the right to have a lawyer present with you  
20 during questioning. If you cannot afford a  
21 lawyer, one will be appointed for you before any  
22 questioning if you wish and if you decide to  
23 answer any questions now without a lawyer present,  
24 you have the right to stop answering at any time.

25 The consent form portion of the form that reads --



1 That I've read this statement of my rights and I  
2 understand what my rights are and at this time I'm  
3 willing to answer questions without a lawyer  
4 present. So if you're willing to do that, you  
5 want to speak with us, initial each line up here  
6 that you understand and we'll make this possible  
7 for you and then you can just sign. So if you  
8 could just -- and start initial here and then just  
9 each line down below.

10 Q. And does Mr. Taylor acknowledge his Miranda rights?

11 A. He does.

12 Q. Does he waive his Miranda rights?

13 A. He did. He initialed each line of the form and then  
14 signed it.

15 Q. And you can turn to Exhibit 2? Do you recognize Exhibit  
16 2?

17 A. I do.

18 Q. What is Exhibit 2?

19 A. It's the warning and advice of rights to provide  
20 information on a voluntary basis.

21 Q. And are those in the left hand column, what are those  
22 initials?

23 A. Those are Mr. Taylor's initials.

24 Q. And where it says "signed," whose signature is that?

25 A. Marcus Taylor.

1 Q. And you witnessed him sign this consent form?

2 A. I did.

3 **MR. HINES:** Your Honor, no further questions on  
4 direct.

5 **THE COURT:** All right, thank you.

6 **MS. WICKS:** May I, Your Honor?

7 **THE COURT:** Ms. Wicks? Of course.

8 **C R O S S - E X A M I N A T I O N**

9 **BY MS. WICKS:**

10 Q. Good afternoon, Agent.

11 A. Good afternoon, ma'am.

12 Q. So your first dealing with Mr. Taylor was on March 1st of  
13 this year?

14 A. Correct.

15 Q. Okay. And as part of this tactic that the team was  
16 using, someone from Baltimore City Police Department contacted  
17 Mr. Taylor the day before, correct?

18 A. It's my understanding, yes.

19 Q. Okay. It's your understanding. You weren't present for  
20 that conversation, correct?

21 A. Correct.

22 Q. You were told what occurred during that conversation?

23 A. We were advised that they would be arriving on that date  
24 for what they thought was a meeting at Internal Affairs.

25 Q. Okay. So you were not told what occurred during that

1 conversation, correct?

2 A. No.

3 Q. Okay. And were you made aware that Mr. Taylor asked if  
4 he needed a lawyer for that interview?

5 A. Can you repeat the question?

6 Q. Were you made aware that Mr. Taylor during that phone  
7 conversation asked if he needed a lawyer for the interview  
8 that was being conducted at the Internal Affairs Office on  
9 March 1st?

10 A. No.

11 Q. Were you aware why he was told to respond to that  
12 location?

13 A. It was our understanding that -- and I had been involved  
14 in operations like this in the past --

15 Q. Well, I'm not asking you about the past. I'm asking  
16 about this particular day.

17 A. That he was being brought there under some sort of rouse  
18 to have some sort of meeting at Internal Affairs and that he  
19 was going to be arrested on that day.

20 Q. Okay. And you testified that this tactic was being used  
21 because it's your understanding that the IA office was a place  
22 where Baltimore police officers would respond for training and  
23 inquiries, correct?

24 A. Correct.

25 Q. And so that was information that you were told by the

1 Baltimore Police Department about why officers would respond  
2 to that building, correct?

3 A. This is what I know operationally from past experience as  
4 well as in dealings with this case.

5 Q. Okay. So from your past experience you know that  
6 training occurs in that building?

7 A. It is my understanding that it could be training, it  
8 could be for an inquiry, it could be for a number of reasons.  
9 Really why they were going there was not of my interest, just  
10 the fact that they were going to be there and what my role  
11 was.

12 Q. Okay. And so since that wasn't your interest, you didn't  
13 inquire as to what he was told in the telephone conversation,  
14 correct?

15 A. Correct.

16 Q. And now you -- Court's indulgence. Actually, if the  
17 Government has number one? Do you have number one up there,  
18 sir?

19 A. I do, ma'am.

20 Q. Okay. In the transcript that we just looked at on page 1  
21 actually, the third line that is you speaking, there's a long  
22 paragraph -- then apparently Mr. Taylor interrupts you -- then  
23 you finish your paragraph so-to-speak, he agrees that you all  
24 hadn't had conversations specifically about the case and you  
25 indicated, we've talked about procedural things, right?

1 A. Correct.

2 Q. That's what you said that day, correct?

3 A. Correct.

4 Q. And so when you testified today about substance, you did  
5 talk to him about his condition on that day, correct?

6 **THE COURT:** I'm confused by the question.

7 **MS. WICKS:** I'm sorry. I'll just start over.

8 **BY MS. WICKS:**

9 Q. Before the recorder is turned on, outside of the room did  
10 you have conversations with him?

11 A. Yes.

12 Q. Or was it someone else that had conversations with him  
13 about his condition that day?

14 A. Both.

15 Q. Okay. And when other people had conversations with him  
16 about his condition that day, were you present when Mr. Taylor  
17 was responding?

18 A. No, ma'am.

19 Q. Okay. So again, this is information -- there's  
20 apparently part of this information that you were present for  
21 but there's part of this information that you learned from  
22 other people, correct?

23 A. Correct.

24 Q. Okay. And that morning, Mr. Taylor was having a hard  
25 time dealing with what was going on, correct?

1 A. I don't know if I could describe it as a hard time. What  
2 was communicated to me was that he was having some sort of  
3 medical issue, I believe somewhat similar to an asthmatic  
4 reaction, that he was treated and that when I had arrived,  
5 that the matter had been resolved.

6 Q. Okay. So he received medical attention that morning at  
7 that Internal Affairs Office, correct?

8 A. What I was told, yes.

9 Q. What you were told. And you were told that he was  
10 cleared by medical staff, correct?

11 A. That there was no longer an issue, correct.

12 Q. Because you wouldn't have interviewed him if there had  
13 been an issue, right?

14 A. Correct.

15 Q. And based on the information that you received from other  
16 people and what you observed, you then proceeded to speak with  
17 him and then eventually at about 6 minutes your testimony --  
18 there's I'll agree some of this is people leaving the room --  
19 but at about a little over 6 minutes you read him his rights,  
20 correct?

21 A. Yes, ma'am.

22 Q. And when you were interviewing him, were there other --  
23 were there other -- other than Mr. Taylor, were there other  
24 people that worked for the Baltimore Police Department present  
25 either in the room or watching what was occurring?

1 A. I don't know exactly who was watching. I can assume that  
2 they maybe were, but as far as in the room with me there was  
3 one other special agent and Mr. Taylor.

4 Q. Okay. And you also testified that the procedure when  
5 officers come to that building is that there's a place where  
6 they put up their guns, correct?

7 A. That was my understanding, yes.

8 Q. Okay. And did you learn from any source that day that  
9 Mr. Taylor had left his gun in the car?

10 A. I don't recall that.

11 Q. Okay. Did you receive information that he was unarmed by  
12 the time he got into the room with you?

13 A. That was the pre-planning in our communications for the  
14 operation prior to that event happening, that was the plan for  
15 that to happen. Our SWAT team was involved with the arrest of  
16 these individuals. I spent ten years on the SWAT team, so I  
17 had a fair understanding that he would be unarmed when we  
18 showed up, yes.

19 Q. Okay, but part of the planning here is you didn't know  
20 what was said to him the day before and what he said, correct?

21 A. Correct.

22 Q. Okay. And -- Court's indulgence. Now, when the -- there  
23 were IA officers that were aware at least the day before that  
24 Mr. Taylor and other officers were being asked to come to that  
25 building on March 1st, correct?

1 A. We have officers on the task force in our office, so yes.

2 Q. Okay. Well there was a certain -- because of the  
3 circumstances of this investigation, there was limited  
4 information that Baltimore police -- Baltimore Police  
5 Department had about what was happening on March 1st, correct?

6 A. That would be logical, yes.

7 Q. Okay. And that's what happened on March 1st, correct,  
8 and the dates coming up to March 1st?

9 A. Regarding who knew what at that time, I'm not privy to  
10 that information. All I know is that typically in these types  
11 of investigations, obviously due to the sensitivity,  
12 information is kept close hold, both by the FBI and the  
13 Baltimore City Police Department.

14 Q. So do you know -- the person that contacted Mr. Taylor to  
15 tell him to come to the office on March 1st, was that person  
16 aware that Mr. Taylor was getting arrested?

17 A. I don't know.

18 Q. Or was he part of the -- was he being tricked as well?

19 A. I don't know who called him on that day.

20 Q. Was that part of the plan for the day?

21 A. It was our understanding that they were to respond to  
22 that facility for some purpose.

23 Q. Okay. And you don't know if the person that contacted  
24 him to tell him to come, if that person was aware or not that  
25 Mr. Taylor was actually being arrested when he came there,



1 correct?

2 A. I don't know who the person is, no, ma'am.

3 Q. Okay, thank you. No further questions, Your Honor.

4 **THE COURT:** Okay. Any further questions, Mr. Hines?

5 **MR. HINES:** No, Your Honor. We offer the transcript  
6 as a timesaving device. We also have the video of  
7 approximately three hours if it's of any interest to the  
8 Court, however otherwise we'll rest.

9 **THE COURT:** I think Government Exhibit 1, the  
10 transcript and 2, the warning of advice of rights are  
11 sufficient for this.

12 Okay, thank you. You can step down. Ms. Wicks, do you  
13 plan on calling any witnesses or presenting any evidence on  
14 this motion?

15 **MS. WICKS:** No, Your Honor. We are not calling any  
16 witnesses or presenting evidence and I'd submit.

17 **THE COURT:** And you'll submit on your papers?

18 **MS. WICKS:** Yes.

19 **THE COURT:** Okay. Anything you want to say, Mr.  
20 Hines?

21 **MR. HINES:** No, Your Honor.

22 **THE COURT:** Okay. All right, somebody else want to  
23 say anything? No? Okay.

24 Okay, well this is a Motion to Suppress statements  
25 and I appreciate that it is a motion that needs to be brought

1 and be heard in advance of the trial, but the record in front  
2 of me now shows absolutely no reason to suppress the statement  
3 made by Mr. Taylor on March 1, 2017. It appears that he was  
4 properly advised of his Miranda rights, understood them,  
5 acknowledged them.

6 It appears that whatever medical condition he may have  
7 been suffering from, breathing or asthma, something of that  
8 nature, had been resolved. He was offered a restroom, a drink  
9 of water, all those sorts of things. There's no evidence of  
10 any threat or promise being made to him, so there's no  
11 coercion. There's no overbearing of his will. So the  
12 statement is voluntary in a constitutional sense as well as  
13 being taken in compliance with Miranda, so I will be denying  
14 that motion.

15 Okay, Ms. Wicks, do you want to be -- there are a number  
16 of motions that you filed on behalf of Mr. Taylor  
17 additionally. Would you like to be heard on those?

18 **MS. WICKS:** Your Honor, I think one, for example,  
19 208 I didn't quite understand the Government's response, but  
20 the purpose of that is clearly not to waste the Court's time.  
21 I know other counsel filed similar motions.

22 **THE COURT:** Well, let me -- let me get them -- let's  
23 just maybe just go down the list and then I won't miss any.  
24 I've got a motion for bill of particulars.

25 **MS. WICKS:** I'm submitting on that one.

1           **THE COURT:** All right, number 205. And on that I  
2 will deny. It appears to me that there is sufficient detail  
3 in the superseding indictment when combined with the discovery  
4 to make a bill of particulars not required in this instance.

5           Let's see, the Motion to Dismiss counts 1, 2, 3 and 4,  
6 that is based on the -- you've challenged to the RICO statute?

7           **MS. WICKS:** Well, so I'm submitting on Counts 1 and  
8 2. 3 and 4 really deal with Hersl's motions and I know Mr.  
9 Purpura has argument, so I am asking to join those and those  
10 deal with my Counts 3 and 4.

11           **THE COURT:** Okay, all right. I understand that  
12 then, thank you. I'll deny it as to Counts 1 and 2. I don't  
13 think there's any infirmities in the RICO statute itself.  
14 We'll defer and I'll understand that you're adopting the  
15 argument on behalf of Mr. Hersl as far as Counts 3 and 4.  
16 We'll get to that.

17           Then there was a Motion to Exclude evidence intrinsic to  
18 the charged criminal acts but not charged in the indictment.  
19 I will tell you how I understood that and you can correct me  
20 if I'm wrong. It's essentially a 404(b), but you're  
21 anticipating the possibility that something you might think of  
22 as 404(b) would be labeled intrinsic and therefore admissible  
23 by the Government and you want to head that off.

24           **MS. WICKS:** I do.

25           **THE COURT:** Okay. So I understand because there's

1 also essentially a 404(b) motion I believe on behalf of Mr.  
2 Hersl which would be -- that's document number 226. Your is  
3 207. My understanding is the Government's response there is  
4 that it's premature, that if there is going to be 404(b)  
5 evidence it would be contained in the Jencks which is not due  
6 to be turned over until two weeks before trial.

7 **MR. WISE:** Your Honor, so our position is that there  
8 will be additional information in the Jencks as one would  
9 expect. Whether one characterizes that as 404(b) or  
10 intrinsic, it's just there's simply going to be more and  
11 that's what's been agreed to by the parties that that would be  
12 produced two weeks before trial. So we think it's not ripe.

13 **THE COURT:** But other than what may be contained in  
14 the Jencks which is going to be provided two weeks before  
15 trial, you are not sitting there thinking to yourself that you  
16 have additional 404(b) evidence that you're just not  
17 disclosing yet?

18 **MR. WISE:** That's right, exactly.

19 **THE COURT:** All right, it will be in the Jencks. So  
20 we can argue about it if we need to when we see what's in the  
21 Jencks. All right, so we'll defer on 404(b) issues.

22 **MR. PURPURA:** Judge?

23 **THE COURT:** Yes.

24 **MR. PURPURA:** Respectfully on the 404(b) issue,  
25 obviously there's a discovery agreement which has been signed

1 in this case, but this case in particular as to Mr. Hersl  
2 there was an original indictment, now a superseding  
3 indictment. Some of the overt acts, some of the charged  
4 substantive acts have changed. And it's really a due process  
5 consideration at this point. We have to be prepared for trial  
6 so we're asking as 404(b) says, reasonable notice. And I  
7 certainly think that now three weeks out or three-and-a-half  
8 weeks out with Christmas and New Years coming up is reasonable  
9 notice. There's no reason, good reason for the Government to  
10 hold back whether they think it's intrinsic or whether it's  
11 404(b), these particular acts to identify them so we can be  
12 prepared.

13 This is going to be multiple trials in one trial, at  
14 least six or seven different thefts and who knows what else  
15 there may be in this case. So it's multiple acts and it's  
16 very difficult to be prepared unless we have some notice. And  
17 it's just a basic due process consideration, reasonableness,  
18 three weeks out, holidays coming up. It's reasonable today.  
19 There's no threat to security. There's no threat to  
20 witnesses. That's what we're asking for, thank you.

21 **MR. WISE:** We would disagree with the last  
22 statement, Your Honor. Witnesses are very fearful in this  
23 case of the fact that they will be testifying against police  
24 officers. Almost to a person the witnesses have said that.  
25 And so we agreed on a Jencks deadline, agreed on it. That's

1 what the arrangement we came to that's two weeks in advance  
2 and that will be the Jencks, both grand jury material and 302s  
3 will be the vehicle that additional information will be  
4 provided in. And I'm always reluctant to characterize because  
5 it is inevitably used against me later, you know, something  
6 that defense counsel might characterize as 404(b) we would not  
7 necessarily agree with something that we think is squarely  
8 within the four corners of the indictment, they may say is  
9 not, but the place where -- the vehicle that comes in is in  
10 the Jencks material and then if there are issues as Your Honor  
11 has said that need to be addressed through motions in limine  
12 or something, the schedule contemplates that.

13 **MR. PURPURA:** Your Honor, so I can be abundantly  
14 clear, I'm not asking for early Jencks. What I'm asking for  
15 are dates of incidents and claimed incidents. That's it. So  
16 give me a date in 2015 or way back in 2014 or 2016 as to what  
17 particular incident. I don't need anything more than that,  
18 but we have to have some sort of notice to be prepared. And  
19 that's not unreasonable in this case.

20 **MR. WISE:** I think the issue is, Your Honor, that  
21 there are certain information that once disclosed will make it  
22 clear who was talking to us and what they are talking about.  
23 And so that's why we've produced Rule 16 discovery in the form  
24 of incident reports and statements of probable cause and  
25 property receipts and evidence like that, but we will produce

1 testimonial evidence on the Jencks schedule.

2 If the purpose of all this is notice, I think there's  
3 been abundant notice. It was a detailed original indictment,  
4 a detailed superseding indictment with specific names, with  
5 specific dates. And the purpose of an indictment is simply to  
6 put the defendant on notice. So that we think has happened in  
7 spades here. We even have used initials of people. We didn't  
8 say "victim one," so these are all people that the defendants  
9 interacted with. We even gave them initials so there's no --  
10 there's really no surprise here and they can track those  
11 initials back to the incident reports and the statements of  
12 probable cause. And we did all that deliberately so that we  
13 could give them maximum information and notice while at the  
14 same time, respecting the concerns that the witnesses have.

15 **THE COURT:** Okay.

16 **MR. PURPURA:** Judge Blake, I don't want to keep on  
17 jumping up and down like a Jack in the Box, but as in my  
18 404(b) motion I stated and as I mentioned to the Court  
19 earlier, the Government has changed and at least it appears --

20 **THE COURT:** --to your benefit.

21 **MR. PURPURA:** Well, I'm not sure. If they're not  
22 going to use those acts they alleged in the first indictment  
23 that's fine. But what happens now two weeks out of trial to  
24 say now I get notice that, you know those acts we had in there  
25 before, some of the substantive acts and some of the overt

1 acts, we find those to be intrinsic even though we didn't  
2 charge them. We're going to use them. And I'm saying that's  
3 kind of late notice for that and that's all.

4 **THE COURT:** Whatever that was, you're on notice of  
5 it because you knew it was there to begin with and now it's  
6 out.

7 I'm going to -- I will repeat my ruling, I am deferring  
8 on the 404(b). I think you have an agreement for two weeks of  
9 Jencks. I think there are valid witness concerns. That will  
10 not certainly preclude you, Mr. Purpura or anyone else from  
11 letting me know if there is something in the Jencks production  
12 that is so unexpected and therefore prejudicial and hard for  
13 you to meet in advance. I expect I will hear from you at that  
14 point if that sort of situation arises.

15 **MR. PURPURA:** Thank you, you will.

16 **THE COURT:** All right. Let's see. Continuing or  
17 going now to the other pretrial motions filed on behalf of Mr.  
18 Hersl, there is a motion to dismiss Count 5 as duplicitous,  
19 that was ECF number 203. Do you want to be heard on that?

20 **MR. PURPURA:** I do, Your Honor. And just prior to  
21 that, I would as I did file a motion to join just for the  
22 record, I am joining Ms. Wicks or Mr. Taylor's motion as to  
23 the RICO statute.

24 **THE COURT:** Sure, okay, yes, I'm sorry. You did,  
25 number 202 is your motion to adopt and that also 208 was Ms.



1 Wicks's motion to adopt on behalf of her client.

2 So, to the extent applicable to the other defendants,  
3 that's fine.

4 **MR. PURPURA:** Your Honor, if I may, obviously you've  
5 received our writings on this and I've reviewed the  
6 Government's writing, their response and basically I think  
7 probably the simple stupid formula works on this particular  
8 count, duplicitous indictment charges more than one offense in  
9 a single count.

10 I read the Government's response and respectfully, I  
11 think that misses the point completely. The Government in  
12 their response seizes upon the robbery element of 1951. The  
13 cases they cite in support of that all deal with the attack  
14 pretrial on the robbery by threat of force and violence  
15 portion of 1951, that the language would be duplicitous in  
16 that particular portion of the robbery through threat or  
17 violence. It does not, it does not address the other two  
18 separate crimes in 1951 which is extortion by force and/or  
19 extortion by color of law.

20 And they do cite, the one case they do cite is the *Morgan*  
21 case. The *Morgan* case comes out of the Eastern District of  
22 Michigan. And just to show my point, I did obtain the  
23 indictment which I've marked as Defense Exhibit 1 at this  
24 point of the *Morgan* case and I'll put it on the overhead. Now  
25 again, this is a 1951 robbery indictment. And strangely

1 enough, you're going to see it's identical to the way that we  
2 file 1951 Hobbs Act robbery by force or threat of force in  
3 this district as well as probably every other district in the  
4 United States.

5 The important part comes right here where it says, Mr.  
6 Morgan did unlawfully take cash and store merchandise from the  
7 presence of a store employee and against her will by means of  
8 actual and threatened force, violence and fear of injury.

9 Now, all that the case in Morgan was that the lawyers  
10 pretrial was suggesting that this is duplicitous because  
11 there's multiple ways to achieve the force. And under *Johnson*  
12 therefore they're attacking it. That's not what we're doing  
13 in this case, completely. We are completely satisfied that  
14 that robbery by force or threat of force in itself is not  
15 duplicitous.

16 And it goes on to say that Otis Lee Morgan, junior robbed  
17 the employee at gunpoint. So clearly the defendant is on  
18 notice that it's a robbery through force and threat of force.  
19 Clearly the grand jury had -- at least a majority of the grand  
20 jurors found that in this particular case there's probable  
21 cause for a robbery through force or threat of force.

22 Our indictments in this district are the same for Hobbs  
23 Act robbery by force or threat of force. This is Defense  
24 Exhibit number 2 coming from a recent case before Judge  
25 Bennett where it says, the defendants -- and I'll get down to

1 the important part -- the defendants did unlawfully take and  
2 obtain money and property from the person and presence of an  
3 employee at the Liberty Gas Station at the employee's will by  
4 means of actual and threatened force, violence and fear of  
5 injury, immediate and future, to the employee by threatening  
6 serious physical injury and death to said employee.

7 Clearly we know what the grand jury decided. Clearly we  
8 know what the elements are and what crime the defendant is  
9 going to defend against in this particular case, in that case.

10 Now, what we have here for the first time that I've seen  
11 and the Court can set me straight, would be our Count 5. And  
12 our Count 5 sets out three separate and distinct crimes.  
13 Archive 5 cites the entire 1951 statute. It says that  
14 approximately \$20,000 against such -- was taken against such  
15 person's will by means of actual and threatened force of  
16 violence and fear of injury, immediate and future.

17 So we have the first crime, that's the taking through  
18 force and threat of force. And then we have the second crime  
19 which is the extortion by force. And it goes on to say, and  
20 with their consent induced by wrongful use of actual and  
21 threatened force -- that's the second crime completely  
22 different elements than the first crime in 1951. And then the  
23 third substantive crime is under color of official right. So  
24 you have literally, 1951, does have three separate and  
25 distinct crimes with separate and distinct elements in the

1 crimes.

2 And if that's not sufficient, in the Government's own  
3 response on page 19 to a different issue, they put down on  
4 page 19, they give you the Sand and Siffert jury instruction.  
5 And lo and behold, Sand and Siffert have three separate jury  
6 instructions for the 1951 Hobbs Act robbery because there are  
7 three distinct crimes with three distinct elements in the  
8 1951.

9 So, what I'm saying respectfully is that based on what I  
10 consider the muddled and confusing indictment submitted to the  
11 grand jury, we are -- first, the defendant has a Fifth  
12 Amendment right to a grand jury, to have his probable cause  
13 before a grand jury on this type of case. So we know the  
14 Fifth Amendment. As much as the grand jury has been watered  
15 down, this would be to completely dilute any purpose of a  
16 grand jury, because we have absolutely no basis to have any  
17 confidence whatsoever when an improper, duplicitous indictment  
18 is submitted to a grand jury that sufficient numbers of grand  
19 jurors could have found validity in any one of the three  
20 separate and distinct crimes charged in 1951, whether it was  
21 by force, whether it was by consent or whether it was by  
22 consent through official act. That's the Fifth Amendment.

23 The defendant himself now three weeks from trial has a  
24 Fourth Amendment due process right to be informed of the  
25 Government's theory of this case. So a Fourth Amendment is

1 implicated. We do not know whether their theory is a robbery  
2 by force or threat of force, an extortion by force or threat  
3 of force and/or by color of officers, since he was a police  
4 officer when these thefts took place.

5 So, I'm asking the Court and I think the Court, this is  
6 just abundantly clear that this is a classic duplicitous  
7 indictment. We know from the cases the Government cited, that  
8 the *Morgan* case they cited what the indictment said and that  
9 wasn't duplicitous. They just misread the argument. We know  
10 from the indictments that we present here in Hobbs Act robbery  
11 how Hobbs Act robberies are charged either an extortion and/or  
12 a robbery itself and we know from Sand and Siffert that  
13 there's three separate instructions because there's three  
14 separate crimes and you don't want to confuse them as one.

15 So, for those reasons I'm asking the Court to dismiss  
16 Count 5. It should be dismissed. Now the remedy would be the  
17 Government could possibly re-file, perhaps, perhaps not since  
18 we have a short time before trial, but that would be a remedy  
19 because I'm not sure the Court can deal with prejudice at this  
20 point, but since the trial is so close the Court could, with  
21 prejudice, grant the dismissal.

22 It has an effect as well on Count 6, which is the handgun  
23 violation. Because here as the Government almost, almost  
24 consents to but not quite there, they consent that if it is  
25 Hobbs Act robbery under the color of law, that perhaps that's

1 not a crime of violence.

2 **THE COURT:** That's not even one of the robbery,  
3 that's not even a robbery charge at that point, that's the  
4 extortion with consent under official right.

5 **MR. PURPURA:** Right, so we don't know and then Count  
6 6 would go as well. So that's where we are. Maybe I'm just  
7 misreading things, but it seems like I said, simple stupid  
8 where we are on this particular count. And I have tried to  
9 rectify with some -- I haven't hidden my defense in this case.  
10 This is where I am, where are you? Here's the facts. Tell me  
11 what you have. But that's also for another motion. Thank  
12 you, Judge.

13 **THE COURT:** Thank you. Before I turn to the  
14 Government, does anybody else want to be heard in -- I know  
15 people are joining in to the extent it applies to them. Any  
16 additional argument?

17 **MR. LEVIN:** No, thank you, Your Honor. I think Mr.  
18 Purpura articulated it beautifully.

19 **THE COURT:** Okay.

20 **MS. WICKS:** No, thank you, Your Honor.

21 **THE COURT:** Mr. Wise?

22 **MR. WISE:** Thank you, Your Honor. The defendant's  
23 Fourth Amendment or Fifth Amendment argument as he  
24 characterizes it ignores the Supreme Court's decisions in  
25 *Hamling* and *Costello* that a valid -- an indictment that is

1 valid on its face is sufficient to proceed to trial. The  
2 argument that there's some due process or Fifth Amendment  
3 issue to enable a defendant to look behind the indictment and  
4 invade the deliberations of the grand jury is simply not  
5 supported and in fact they offer no authority for that  
6 proposition. And the Supreme Court has said just the  
7 opposite.

8 Again, in *Costello*, the Supreme Court said an indictment  
9 constituted by a legal and unbiased grand jury if valid on its  
10 face is enough to call for the trial on the merits. And in  
11 *Hamling* the Court said, it defined that phrase valid on its  
12 face as it is generally sufficient that indictments set forth  
13 the offense in the words of the statute itself.

14 Now, Mr. Purpura calls the indictment muddled, but the  
15 indictment word for word tracks the language of the statute  
16 that the Congress passed. And that is certainly sufficient to  
17 put Mr. Hersl on notice as to the charges against him.

18 The Fourth Circuit has said and again, this is a common  
19 -- this is a common phenomenon in cases that involve statutes  
20 like this that it is settled that a charging document must  
21 allege conjunctively the disjunctive components of an  
22 underlying statute. And that's what the Congress did with the  
23 Hobbs Act. It provided three alternative --

24 **THE COURT:** Let me just ask you, Mr. Wise, I mean,  
25 that would be true generally in any Hobbs Act robbery that we

1 normally see. That is not normally how indictments are  
2 brought. I mean, I'm not sure that it's a requirement. If it  
3 were a requirement that every one of the three ways of  
4 violating the Hobbs Act were it had to be included in the  
5 indictment there would have been a lot of dismissed  
6 indictments by now in this district. I don't think it has to  
7 be.

8 **MR. WISE:** It's not a requirement, but where there  
9 are facts that a jury could find satisfied any one of the  
10 three variants -- we'll use that word -- then it is  
11 appropriate to charge it in the way that it has been charged.  
12 Obviously the difference between Hobbs Act robbery and  
13 extortion is principally one of consent. And the difference  
14 between extortion, violent extortion and extortion under color  
15 of official right is violence.

16 There will be facts presented to a jury that a jury could  
17 conclude and we'll submit a special verdict on this as we've  
18 said, that violence was applied and Hobbs Act robbery was made  
19 out. That violence was applied, but there was consent given  
20 and again, these are police officers. And so these are  
21 factual issues that a jury will have to decide that when a  
22 police officer shows up to execute a search warrant, when a  
23 police officer pulls you over, violence is present, but there  
24 is also in a number of these instances, an element that  
25 potentially a jury could find is consent, that the victim



1 didn't put up enough of a fight and so that even though they  
2 may have run or they were -- they put up some degree of what  
3 would be normally understood as resisting, they ultimately  
4 consented.

5 And then there are other instances where they may find  
6 that there was consent simply because of the presentation of  
7 official right. The presentation of authority. And those are  
8 all factual issues that will be really for the jury to decide  
9 and they'll get a unanimity instruction and we'll even submit  
10 a special verdict so it's clear as to these Hobbs Act counts  
11 what they have concluded. But we think the facts of this case  
12 warrant presenting those three versions that the Congress  
13 drafted of the statute.

14 **THE COURT:** Okay.

15 **MR. PURPURA:** Your Honor, briefly again, I believe  
16 again the Government is missing the point. The indictment  
17 here, Count 5 of the indictment on its face is invalid. The  
18 Court cannot retroactively give a jury verdict form which is  
19 going to cure an indictment on its face which we have  
20 absolutely no confidence in that the grand jurors could have  
21 agreed to these mutually inconsistent offenses. The elements  
22 are completely inconsistent in the three.

23 The proper way this indictment should have been presented  
24 to the grand jury in order to have any Fifth Amendment  
25 validity in a grand jury proceeding would have been if the

1 Government believes they can show these three things, present  
2 it, three separate counts to the grand jury. One for robbery  
3 through force or threat of force, one through extortion, force  
4 or threat of force, and one as far as through official acts in  
5 a public position. They didn't do that. They submitted and  
6 again, in what I term to be a muddled indictment and we can  
7 have absolutely no confidence. So if you don't have a valid  
8 indictment, then you just don't have it.

9 **THE COURT:** How would having it in three separate  
10 counts be better or more fair to the client? I mean, wouldn't  
11 I be looking at some sort of multiplicitas objection?

12 **MR. PURPURA:** If we're going right back to what the  
13 grand jury was presented with, that's what I'm suggesting,  
14 that the grand jury is presented with a single count which has  
15 three separate crimes. The defendant has an absolute right to  
16 know which crimes the grand jury had a conclusion of probable  
17 cause on. He does not know that from this indictment based on  
18 the way the three separate crimes are charged in one single  
19 count. What I believe is that quite frankly, when this was  
20 submitted to the grand jury before anyone pled or anything  
21 else, the Government really didn't know what they had. They  
22 didn't know if it was a Hobbs Act robbery by force or threat  
23 of force. They didn't know if it was an extortion. They  
24 didn't know exactly what they had, so they just submitted the  
25 whole thing to the grand jury. You just can't have any

1 confidence.

2 **THE COURT:** What case are you relying on for my  
3 going back in to how the grand jury might have voted or what  
4 they found probable cause on?

5 **MR. PURPURA:** That you can only if it's valid on its  
6 face and on the face of this indictment, this count, it cannot  
7 be valid because you have three separate and distinct crimes  
8 charged. There are multiple statutes we have. And if you  
9 look at the sex statutes which charge multiple ways that a  
10 particular statute can be violated and they're all separate  
11 and distinct because they're separate crimes. And all the  
12 indictments in those they just don't charge a statute as take  
13 your pick, it's broken down as to what it is.

14 **THE COURT:** And which of the cases that you cite,  
15 what do you think is close to supporting your argument on  
16 this?

17 **MR. PURPURA:** Quite frankly, I haven't really found  
18 anything on this particular -- I have not seen this statute  
19 cited in that way before. The cases that I gave to the Court  
20 for the Fourth Circuit, what is duplicitous. So if this is  
21 not duplicitous, I don't know what is. Fourth Circuit says if  
22 it's duplicitous on its face it's not a valid indictment.  
23 It's not a valid count.

24 And I can, the one case I did cite -- and that's in  
25 paragraph 3 and that is a *United States v. Burns* 990 F.2d 1426

1 at 1438 *Fourth Circuit*. Duplicitous indictment charges more  
2 than one offense in a single count. So obviously we recognize  
3 that counts can be duplicitous and clearly that any reading of  
4 this count shows that it is duplicitous.

5 **THE COURT:** Would you -- are you saying you would  
6 agree on behalf of your client that if the indictment charged  
7 three separate offenses occurring on July 8, 2016 against your  
8 client, both Hobbs Act -- well all three, Hobbs Act robbery in  
9 one count, extortion in the second count and extortion by  
10 consent in the third count that would be okay?

11 **MR. PURPURA:** I'm not sure. I don't believe so.  
12 Again, I go back to -- the Government who brings this case,  
13 you bring the case, you're going to present a case to a grand  
14 jury, you know what the defendant did when you bring that case  
15 to the grand jury. That's their responsibility. It's not  
16 just to throw a hodgepodge out there. Can you image what the  
17 instructions were in this case to the grand jury? I can't  
18 because we know under color of law they can't get a 924(c) and  
19 they got it in the sixth count. Did they tell them that was  
20 also a crime of violence? So that's -- that's my argument.

21 **THE COURT:** Okay, thank you. Anything else on this  
22 motion?

23 **MR. WISE:** No, Your Honor, thank you.

24 **THE COURT:** I'm going to defer ruling on that for  
25 now.

1           **MR. LEVIN:** Your Honor, just to be clear we have  
2 adopted that motion.

3           **THE COURT:** Yes.

4           **MR. LEVIN:** And that argument would be relevant to  
5 Counts 3, 4, 5 and 6 for us.

6           **THE COURT:** For your client, yes. Okay. I know  
7 this is related, but not identical, the next one is number  
8 203, motion to dismiss Count 6 for failure to state a claim.

9           **MR. PURPURA:** Your Honor, I'll make that easy.  
10 We'll submit on that. We'll preserve it, we'll submit upon  
11 that.

12           **THE COURT:** Okay.

13           **MR. PURPURA:** You did hear my argument how it does  
14 tie back into Count 5, so that is an issue but aside from that  
15 we'll just submit. Count 6, correct.

16           **THE COURT:** Right, my understanding on Count 6 is  
17 part of what the Government is saying there, assuming for the  
18 moment that Count 5 is not duplicitous, is not invalid on its  
19 face, that what we really have is a post trial motion rather  
20 than a pretrial motion. I think Judge Ellis down in the  
21 Eastern District went that way and that seemed to me to be  
22 where I would be going as far as Count 6 and Count 4.

23           **MR. PURPURA:** I'm not disagreeing with that. Thank  
24 you.

25           **THE COURT:** Okay. Does anybody else want to be

1 heard to the extent that the motion to dismiss Count 6 which  
2 would also apply to I believe Count 4, the 924(c) claims?  
3 Does anybody want to be heard differently on that?

4 **MR. LEVIN:** No, thank you.

5 **MS. WICKS:** No, I'd submit on that as well, Your  
6 Honor.

7 **THE COURT:** Okay, all right. Thank you then I think  
8 we'll -- I'm deferring on the motion about Count 5 and 3 being  
9 duplicitous, but Counts 4 and 6 will survive for post trial  
10 motions if those counts in the indictment are not dismissed.

11 Motion for release of Brady materials. Your number 224,  
12 Mr. Purpura?

13 **MR. PURPURA:** Judge, you know, I'll tell you this is  
14 the first time I filed a Brady motion since I've been  
15 practicing in federal court over 30 years. I think they're  
16 extraordinary motions normally. Normally we receive all the  
17 information that we believe we're entitled to, especially in  
18 this particular district, but in this case I don't think that  
19 I have. Because I don't believe the Government understands, I  
20 don't believe the Government agrees with the legality of the  
21 defense which I proposed from the beginning of this particular  
22 case.

23 I can tell the Court as I mentioned earlier, I've given  
24 the Government in numerous e-mails and discussions the theory  
25 of the case as the way I see it, that Detective Hersl while on

1 the gun task force and prior to being on that particular gun  
2 task force has been engaged in Baltimore City, ridding the  
3 city with guns. If you look at the records from 2013, 2014,  
4 2015, 2016, there's been hundreds and hundreds of guns which  
5 he's personally taken off the street. And what we have here  
6 from 2014 through 2016 is a handful, maybe five, maybe six  
7 incidents out of all those hundreds and we consider those  
8 incidents not to be good conduct, not to be -- they are  
9 crimes, but the crimes would be a theft crime and not a  
10 robbery and/or an extortion type of crime.

11 As the Court knows that the RICO predicate that some of  
12 the predicates, there's many, but the ones charged here in  
13 this particular case would be the fraud which is the overtime  
14 fraud and either the Hobbs Act robbery extortion or the Hobbs  
15 Act robbery would be predicates of theft, it's not a predicate  
16 to the RICO in itself. His conduct which he's admitted to is  
17 of theft on these multiple occasions. The robbery itself is  
18 taking away the goods of another through force and/or threat  
19 of force. In all of these incidents and that's where the  
20 Brady comes in in this particular request, we believe that the  
21 evidence will show and the Government has evidence that the  
22 incidents involving Detective Hersl were lawful, probable  
23 cause arrests.

24 I'm not going to get to the point where you shouldn't go  
25 into his subjective whether he intended or not to intend to,

1 but on the face, every single one -- and we normally don't.  
2 You know, we don't go into the subject of intent of a police  
3 officer.

4 **THE COURT:** Not for Fourth Amendment issues. This  
5 is a little different.

6 **MR. PURPURA:** But setting that aside, that's not the  
7 thrust of the argument. But the probable cause, there was  
8 probable cause in all of these particular events, the five or  
9 six that may involve Mr. Hersl, that once a probable cause  
10 arrest is made as I believe the evidence will show, that the  
11 guns were seized, that narcotics were seized and that money  
12 was seized. That once these items are seized, they are still  
13 in the lawful custody of the police officer. And then at that  
14 point if the officer as in this particular case converts a  
15 portion of that money to his own personal use as in one case  
16 and perhaps \$200 or \$150, that is a theft. There's no  
17 question about it. It's a theft that has been charged a theft  
18 in multiple Baltimore City cases in the past history. It's a  
19 theft which should be tried in Baltimore City Circuit Court.  
20 It's a theft to which Mr. Hersl readily admits his bad conduct  
21 and what he's done in this these particular cases. And it's  
22 no different as the Government suggests -- there's no  
23 attenuation because it's not temporal, that if Mr. Hersl then  
24 turned the money into the evidence control and then took the  
25 money from evidence control, it would still be a robbery under



1 the Government's theory. That's not true, because it's not --  
2 it's not.

3 **THE COURT:** I don't think so, but --

4 **MR. PURPURA:** It's not the temporal issue, but it's  
5 no different then because once you have lawful custody, lawful  
6 custody of the money, your duty is to turn it all in. If you  
7 don't turn it all in, that's a theft of those proceeds. It's  
8 a theft of money which now belongs to Baltimore City as much  
9 as it still belongs to the person he seized it from.

10 **THE COURT:** Suppose, going back to intent for a  
11 moment, that there were proof that a jury could find it was  
12 part of the plan from the beginning that your client was going  
13 to go to a particular location with or without, but let's say  
14 with a valid search or arrest warrant, but part of the normal  
15 operating procedure was to take a portion of whatever was  
16 there even though he had no right to it?

17 **MR. PURPURA:** I hear the Court's argument.  
18 Factually from what I've received in this case, that's not  
19 going to occur. I've reviewed both Gondo's testimony and  
20 Shropshire trial and I've reviewed Mr. Rayam's testimony and I  
21 didn't get that flavor whatsoever. That's why I'm making this  
22 Brady motion because I believe what they will testify to  
23 unless -- I know the Government wouldn't couch them  
24 differently, but I believe they would testify that they were  
25 committing lawful probable cause arrests. As a matter of

1 fact, Rayam when he testified in Shropshire and I have the  
2 testimony here, he testified that once he stopped someone for  
3 a good arrest, he probably gave him a break on the charging  
4 document and charged him with a lesser charge if he took some  
5 of their money. So I don't see that scenario.

6 Now, if that scenario existed for the record alone, I'm  
7 not going to agree with the Court because I believe the Red  
8 Analysis may come in that you can't go behind the subjective  
9 intent of a police officer if there's on its face, probable  
10 cause. But intellectually I understand what the Court is  
11 saying to me.

12 But what I'm saying to the Court for purposes of Brady in  
13 this case is it is a jury question. We could have a Court  
14 question too because as you know we can take a Court trial as  
15 well, but that we are -- if it's Brady -- if it's there and  
16 that's our theory, then give it to us, that's all. If they  
17 said that, give it to us. So we know in the clear and I'll  
18 just do this and I'll sit down -- that we know that there were  
19 robberies. And some of these gentlemen did commit real  
20 robberies where you know that in Shropshire in the testimony  
21 on page 147, this is when Rayam -- at first what Rayam  
22 intended to do -- this is with Gondo, they intended to go into  
23 the Anderson house to commit a burglary if you recall, because  
24 they didn't think anyone was home. That's a burglary, not  
25 even a robbery. So they went into the house and lo and

1 behold, what Rayam says, I pulled out my gun to startle her  
2 and I was trying to scare her. And I know I gave her some  
3 orders like, just don't move. And I could have even said,  
4 I'll kill ya and where is the money.

5 Now on its face we know that's a robbery. When they  
6 pled, he can plead to it, that's a robbery, a distinct robbery  
7 which they did and this is when they were not acting as police  
8 officers.

9 What I'm suggesting in my Brady motion that the  
10 Government has and I've tried -- I apologize.

11 **THE COURT:** No, go ahead.

12 **MR. PURPURA:** I've talked to -- some of the police  
13 officers I've been able to talk to. They really don't want to  
14 talk to me because they're afraid who knows what's been  
15 happening. They can still be charged even if they believe  
16 they didn't do things. I was able to at least in one  
17 conversation with Detective Clewl. Detective Clewl was on the  
18 -- I can say names now, can't I? The H case. What's their  
19 initials? July 8, 2015 Westminster incident, the one  
20 involving bringing the people back to Carroll County where the  
21 search occurred.

22 **THE COURT:** Um-hum.

23 **MR. PURPURA:** Detective Clewl from what I've learned  
24 from him would be that he thought it was a legitimate police  
25 operation. He thought the affidavit was valid. He's the one

1 that called in just off of vacation, Detective Hersl who came  
2 from vacation the day before, knew nothing about the  
3 investigation, called him in at that time to conduct  
4 surveillance and then the arrest of the Hamiltons and then it  
5 goes on.

6 So that's information I was able to glean. The  
7 Government had that information well before I was able to  
8 eventually talk to this particular detective.

9 So what I'm asking the Court is that you know what my  
10 theory of defense is. I think it's a viable theory of defense  
11 here. It's going to be a jury question in this particular  
12 case. Even at best if they intended in advance, whether there  
13 is intent or not intent, whether it's a legitimate probable  
14 cause. It is not going on the street and taking money from a  
15 citizen who is doing nothing at all wrong. Detective Hersl is  
16 not walking up to John Blow who is doing nothing at all wrong.  
17 On all these incidents, it's a person who's out there, dealing  
18 drugs, with a gun who is being arrested.

19 And subsequent to that, out of the hundreds there's a few  
20 bad ones which involve the theft of those proceeds before they  
21 made it to inventory.

22 **THE COURT:** So, the information that you're looking  
23 for would be Brady, if I agree that you have a valid theory of  
24 defense.

25 **MR. PURPURA:** That's right. And something that's

1 going to go to the jury. If I generate a jury question,  
2 that's a valid theory --

3 **THE COURT:** But what is the jury question exactly?

4 **MR. PURPURA:** At worst case it would be, did the  
5 officers act originally with the intent to arrest the person  
6 to steal from him or did the officers have probable cause and  
7 their intent was to arrest the person and subsequent to that,  
8 subsequent to the arrest, the money was taken. That's the  
9 jury question.

10 **THE COURT:** Okay.

11 **MR. PURPURA:** Yes, that -- did I articulate it?

12 **THE COURT:** You did. I'm not sure that I agree with  
13 you, but I believe I understand your theory.

14 **MR. PURPURA:** All right, well --

15 **THE COURT:** It's -- we have a course of events.  
16 Whether or not they go in with an initially valid warrant, if  
17 they go in and use that valid warrant in a way to induce,  
18 wrongfully induce consent of people to turn over property  
19 which is not actually going to be given to the Baltimore  
20 Police evidence department, it's going to be taken for their  
21 own purposes. I'm not sure why that is not extortion.

22 **MR. PURPURA:** I like the sound of extortion more  
23 than robbery.

24 **THE COURT:** Okay, well it's called extortion.

25 **MR. PURPURA:** Right, but let me --

1           **THE COURT:** By wrongful use or threat of force,  
2 violence or fear.

3           **MR. PURPURA:** But here's why it's not. And what you  
4 have to -- and why I believe I can generate -- why it  
5 generates a question for the trier of fact, as I articulated  
6 when I first started, there are hundreds of arrests involving  
7 Detective Hersl. Of those hundreds, there's just a handful.  
8 So if you tried to show intent that he's predisposed to do  
9 this, you would show a lot more than the very few I believe in  
10 this limited, over these three years that the Government is  
11 going to present it.

12           So if there is, again, a probable cause -- a basis for  
13 the arrest, and here's the jury determination. Do you believe  
14 that Detective Hersl was arresting SS or HT because he  
15 intended to take money from him or do you believe that  
16 Detective Hersl was arresting SS and/or HT because he had  
17 probable cause and was acting under authority and color of law  
18 at that time? And if so, when he takes the property, takes  
19 the property for purpose of bringing that property -- now he's  
20 not using force at that time because he has lawful authority  
21 to take that property -- every arrest of a police officer  
22 meets the definition of a robbery. But we give police  
23 officers the authority to use their force to stop a person and  
24 take the wrongful proceeds from that person. And so it really  
25 comes down to the criminal mens rea of the defendant and

1 that's why it's a generated jury question.

2 If these are fabricated probable cause which we have,  
3 it's been in the paper, there's a lot of things like that,  
4 then you don't -- you don't have that. You don't have it. We  
5 can go that step. But here if I generate and the evidence  
6 generates this, I'm entitled to it, that's why I'm entitled  
7 for a practical matter to the Brady information which I'm  
8 requesting.

9 **THE COURT:** Okay, thank you.

10 **MR. PURPURA:** Let me see if there's anything else  
11 that I wanted. That's it, thank you.

12 **THE COURT:** Anything else either defense counsel  
13 want to say on that point?

14 **MR. LEVIN:** No, thank you.

15 **MS. WICKS:** No, thank you, Your Honor.

16 **THE COURT:** Mr. Wise?

17 **MR. WISE:** Thank you, Your Honor. So Mr. Purpura  
18 said that any time a police officer seized property, that that  
19 could be charged as a robbery which of course is not the case  
20 because the --

21 **THE COURT:** Well, that's not really what he said. I  
22 mean --

23 **MR. WISE:** Well, I'm trying to understand this  
24 probable cause defense.

25 **THE COURT:** The theory as I understand it is that

1 he's saying essentially that you charged the wrong crime.  
2 That if the officer had probable cause to make the arrest and  
3 take the property and did so and it all would have been lawful  
4 had he only taken it down to the Baltimore Police Headquarters  
5 and put it in evidence control and done what he was supposed  
6 to, that then he would not have committed a crime. And what  
7 he I believe is saying is that if the officer goes in there  
8 with probable cause, has the right to take the property from  
9 the person to begin with, the fact that he later steals some  
10 of it, doesn't turn it over to evidence control, does not  
11 amount to robbery or extortion.

12 **MR. WISE:** And I think that's really the difference.  
13 There is no "later" in these cases. The property -- the  
14 intent for the Maryland robbery statute is the intent at the  
15 time of the taking. And so in the case of HT which is  
16 racketeering act 4 on November 27, 2015, then Detective Hersl  
17 detained this man, took \$530 from him, put part of it in his  
18 pocket and then turned \$216, put the other \$216 into an  
19 evidence envelope and sent it downtown.

20 So the intent at the time of the taking is what makes  
21 this a robbery. He didn't -- and this is the case I think  
22 they want to defend, but they don't have. He didn't send \$530  
23 down to the evidence control unit and then sneak in later that  
24 night and cut open the bag and take out everything but the  
25 \$216.



1           And it's the same fact pattern for racketeering act 5  
2           which was the very next day when he stopped AS, took \$500 from  
3           him and only submitted \$218. And it's the same -- there is  
4           the same temporal issue in all five of the specific robbery  
5           episodes that are alleged against Mr. Hersl. The money at the  
6           time of the taking is put in Mr. Hersl's pocket, his vest, a  
7           bag. It is never submitted.

8           So is there probable cause to make an arrest to seize  
9           some portion? There may be, although there will be testimony  
10          by a number of these victims that they were not engaged in the  
11          conduct that Detective Hersl asserted they were in the  
12          statements of probable cause and he's even admitted in at  
13          least one of those instances that the statement of probable  
14          cause is a fabrication. But probable cause doesn't give him  
15          authority to put money in his pocket. It gives him authority  
16          to submit money to the evidence control unit to seize it on  
17          behalf of the police power vested in the State. And that's  
18          really why every seizure cannot be charged as a robbery. That  
19          was the inartful point I was trying to make. Because at the  
20          time of the taking, the intent is to submit it. And in this  
21          case, on each occasion, he submitted some of it and he kept  
22          some of it. So even if there is valid probable cause, it's no  
23          defense to the portion that he took for himself at the same  
24          time.

25                   **THE COURT:** And just asking the follow-up on

1 something you said that you mentioned a statement of probable  
2 cause. For these particular acts, number 4 and number 5,  
3 whatever they are, if there is a statement of probable cause  
4 warrant, whatever, that goes along with that event, has that  
5 been turned over?

6 **MR. WISE:** Anything we have like that we've turned  
7 over. If there's an incident report usually in each episode  
8 although not always -- they weren't great about their  
9 paperwork believe it or not -- the statement of probable  
10 cause. Warrants have been incredibly difficult to track down.  
11 The city courts are not easy places to navigate to find  
12 warrants. Where we have warrants we've turned them over.  
13 Candidly there's a lot of problems with these warrants that  
14 all of the co-defendants will testify about. So even the  
15 question of whether there is probable cause -- and I'm very  
16 reluctant to concede that that's something a trial jury should  
17 even be deciding. I mean, these are incredibly difficult.  
18 Whether probable cause exists is something we reserve to trial  
19 judges in pretrial settings precisely because these are  
20 nuanced and difficult questions of law.

21 And so we're not conceding that that's even an  
22 appropriate defense. He can certainly argue about what his  
23 state of mind was, but the idea that there was a complete  
24 defense to a robbery charge if there is probable cause we  
25 think is legally inaccurate. Because intent to rob can

1 certainly coexist with intent to seize some percentage of  
2 those funds for the state, for the sovereign pursuant to what  
3 he believes is his authority to do it because of probable  
4 cause or what he thinks he saw or what an informant told him,  
5 but, you know, none of that acts as a complete defense to  
6 these charges. None of them magically turns them into thefts.  
7 And I'm sort of astonished to hear that the defense is going  
8 to say that these are thefts, but not robberies. As Your  
9 Honor pointed out they are then -- I don't know how that's a  
10 defense to their extortions, either violent extortions or  
11 extortions under color of official right at the very least,  
12 but I guess we'll have to wait and see.

13 **THE COURT:** Yup.

14 **MR. PURPURA:** Last word, if I may?

15 **THE COURT:** Sure.

16 **MR. PURPURA:** Thanks. The issue of probable cause  
17 in any civil case involving a police officer is decided by the  
18 jury itself. Whether the police officer was acting with the  
19 proper authority and probable cause is a jury question. And  
20 the jury is instructed on that and they make that  
21 determination. In this particular case, and --

22 **THE COURT:** I don't necessarily agree with you, but  
23 that's fine.

24 **MR. PURPURA:** In this particular case I think we are  
25 both equally astounded at each other. What I see here is a

1 generated -- if the facts come out the way I'm suggesting, a  
2 generated jury question. The Government is arguing it's  
3 either some sort of robbery, some sort of extortion, extortion  
4 A or extortion B. The way I believe the facts will show in  
5 this particular case is that Detective Hersl was acting  
6 appropriately when he committed a really -- when he arrested  
7 someone, that he had probable cause to make that arrest, that  
8 he has the authority at that point -- and this is a question  
9 of intent -- he has the authority at that point to seize the  
10 drugs, the guns and the money. And then after when he has  
11 lawful at that point still because they're all connected  
12 together and that's what happens, and then they go down to the  
13 inventory. If he decides at that point that I'm only going to  
14 turn in 50 of the 300, then that is a theft, a conversion of  
15 what should be at that point seized money, lawfully seized.  
16 And that I believe is the question the jury must make in this  
17 particular case.

18 **THE COURT:** Okay, thank you. I am going to defer on  
19 that one, the Brady along with the duplicitous one.

20 There is your next one, number 225, the motion in limine  
21 to preclude the Government and its witnesses to referring to  
22 alleged acts as robberies. And by that you mean they can't  
23 say that they thought they were committing a robbery?

24 **MR. PURPURA:** Yeah. Let's take a look at it for a  
25 second. And in my motion I think it was Mr. Wise that had,

1 you know, I think it was Rayam on the witness stand and used  
2 the word "robbery" "robbery" "robbery" "robbery" 15 times when  
3 going through the acts. Some of the acts as I pointed out and  
4 showed on the overhead are clear robberies that these  
5 gentlemen committed. And some as I'm suggesting would be  
6 conversions/thefts of monies that were properly seized at that  
7 point and not robberies. And here's the simple point. The  
8 607 allows either party to impeach credibility. The only  
9 reason that the Government would put Gondo and Rayam up there  
10 and ask them about their prior bad acts under 608 and/or 609  
11 normally is to kind of blunt the sting of cross-examination  
12 because then we get into it, didn't you do this -- well that's  
13 not the case here in this particular case. That's not what  
14 cross is all about in this particular case. But what they're  
15 able to do -- so it has a limited purpose normally. And so  
16 what they're able to do by classifying everything as a  
17 robbery, robbery, robbery is to take away from the province of  
18 the jury, the legal conclusion. Because in this particular  
19 case whether there is a robbery or not a robbery as in the  
20 theft, that's a conclusion that the jury is going to draw.

21 If you look at the plea agreements of all the defendants  
22 that have pled so far, the elements are spelled out and the  
23 elements that are spelled out are for the RICO statute, not  
24 for the robbery portion, just RICO itself, what it takes to  
25 commit a RICO, not the force and threat of force. The only

1 reference to robbery is in the calculation of the guidelines.

2 And there's a lot of reasons why people will agree to a  
3 plea agreement other than the fact that they agree that their  
4 acts constitute a robbery. And that would be lo and behold  
5 what happened here. If you don't plead now, the Government is  
6 going to file a 924(c). One 924(c) against you or two 924(c)s  
7 against you. So your delay if you would have pled to  
8 robberies even though intelligently you can't come to grips or  
9 legally you can't come to grips with the fact that it's a  
10 robbery, you're now stuck with one or now two 924(c)s.

11 So I'm just not asking the Government to -- they can talk  
12 about the acts. I did this, I did that, but the conclusion  
13 that their particular act was a robbery in this particular  
14 case under this fact situation is a legal conclusion for the  
15 jury to draw and not for the defendants to draw. We  
16 inarticulately use "robbery" often on the street. If there's  
17 a burglary in the house, we call it a robbery. If there's a  
18 housebreaking, we call it a robbery. If somebody takes  
19 something from you we call it a robbery. And everything has a  
20 different category or different things or different elements.  
21 If they didn't, we wouldn't be here. We wouldn't be going to  
22 trial because we haven't denied what we've done. Thank you.

23 **THE COURT:** Okay, anybody want to add anything?

24 **MR. LEVIN:** No thank you, Your Honor.

25 **THE COURT:** Government?

1           **MR. WISE:** Your Honor, Mr. Purpura says what we  
2 characterize as robberies. Five criminal defendants have  
3 stood up in front of Your Honor, one sergeant, four former  
4 detectives and admitted they committed robberies. They have  
5 had competent counsel. They have lengthy statements of facts  
6 where they make admissions concerning their conduct. It's not  
7 simply as Mr. Purpura says in the calculation of guidelines.  
8 They admit they use force. They admit they restrained people.  
9 What they -- when they talk about -- when Detective Rayam,  
10 former Detective Rayam testified, he used the word "robberies"  
11 because that's what in his mind he did. It's not us  
12 characterizing it.

13           And so the ultimate issue for the jury is, is that what  
14 Mr. Hersl did? The question of what Mr. Rayam and Mr. Gondo  
15 and Mr. Hendrix and Mr. Taylor -- and Mr. Ward did are  
16 settled. And so the idea that they can't -- we have to  
17 construct some, you know, magic words for them to describe  
18 what they did, I think is frankly sort of preposterous. And  
19 the Court routinely presides over trials where co-defendants  
20 will testify and they will describe what they did. They're  
21 charged with possession with intent to distribute or  
22 conspiracy to distribute and they tell the jury, that's what I  
23 did and here's how I did it and they use the language in the  
24 statute. And then again the question is, is the defendant on  
25 trial guilty of that offense? And the Court instructs the

1 jury that they have to make individualized findings of guilt  
2 and we proceed.

3 I've never seen a trial where we couldn't use the words  
4 that the defendants -- that the co-defendants would use to  
5 describe their conduct that they were charged with or that  
6 they pled to and I think it would be extraordinarily  
7 unnecessary.

8 **THE COURT:** Okay.

9 **MS. WICKS:** Your Honor, just to correct the record I  
10 think Mr. Wise -- I've said the wrong name before apparently  
11 and he just said Taylor when --

12 **MR. WISE:** I said Ward. I said Ward. I corrected  
13 myself.

14 **THE COURT:** He did, yeah. Thank you, to be clear.

15 **MR. PURPURA:** Last word, Judge. I don't have to  
16 tell you, you know that the threat of a 924(c), we know what  
17 that does. We know how that can induce pleas. Look, I'm not  
18 going to go to school and tell you what the other lawyers have  
19 told me people have come in here and bit their tongue when  
20 they talked about robberies when they know factually what they  
21 really are, but they were not therefore charged with a 924(c)  
22 and two 924(c)s gives you at least 30 years and then the  
23 robberies on top of that. So everyone knows what it is.

24 But be that as it may, in this particular case, it's  
25 different than just about any other case that we've tried



1 because the essence of this case is whether the actions of  
2 Detective Hersl which may have coincided with Rayam and Gondo  
3 are a robbery, a robbery as for the jury to make that  
4 determination, not for them. And we're not asking not to use  
5 those acts. You can use those acts, just say did you do such  
6 and such, you take money? Is money missing? Tell us your  
7 participation. That's it.

8 **THE COURT:** Okay. All right, well I'm not going to  
9 impose a blanket prohibition on referring to these things as  
10 robberies. Some of them probably were. And in any event,  
11 there are defendants who believe that that's what they pled  
12 guilty to.

13 On the other hand, I certainly think that I can ask the  
14 Government to be restrained and careful about that and not use  
15 that word unnecessarily and I will approach it in the way that  
16 we customarily do when there's a person that is a co-defendant  
17 that has been charged in the conspiracy and is admitting to  
18 guilt of the same thing that other people are charged with is  
19 to provide a limiting instruction and make it clear that  
20 whatever somebody else pled to is not dispositive for the  
21 people that are on trial and the jury has to make an  
22 individual determination as to them.

23 So I'm denying, but with a caution. The motion in limine  
24 to preclude the reference to these prior acts as robberies.

25 I think that is it except for the most recently

1 filed motion relating to the trial date which I would like to  
2 discuss with counsel in chambers. Is there any other open  
3 motion?

4 **MR. WISE:** There isn't a motion, Your Honor, I just  
5 wanted to briefly put on the record: I had a conversation  
6 with defense counsel on two issues that I think we've  
7 resolved, I just --

8 **THE COURT:** Okay.

9 **MR. WISE:** -- I just thought would be important to  
10 make sure. I think we will likely file a motion in limine  
11 asking the Court to take judicial notice of the fact that the  
12 Baltimore Police Department is a legal entity and from other  
13 cases where legal entities have been charged, that's the  
14 mechanism that is the preferred route. So I've mentioned that  
15 to defense counsel. I would just mention that that's -- I  
16 don't know that everyone consented, but no one told me we'll  
17 object, you have to call some witness to say the Baltimore  
18 Police Department is a legal entity, so we anticipate doing  
19 that.

20 On a related issue, the overtime -- the evidence of  
21 overtime fraud in this case will be for several different  
22 kinds. There will be things like travel records that show  
23 people being out of the state or even out of the country at  
24 certain times when they were claiming overtime. There will be  
25 testimony obviously from co-defendants. There will also be

1       though information through a law enforcement witness, most  
2       likely Special Agent Jensen, where she compared the overtime  
3       records to the location of the defendants based on their cell  
4       phone. And it's our view that that's not -- that what she did  
5       is not expert analysis. It didn't involve any special tools  
6       like in a bank robbery where precise location is critical. It  
7       was simply comparing the location of the defendant's phone,  
8       let's say on a morning it's sitting at a tower near their  
9       house in Middle River and meanwhile the overtime slip says  
10      they've been working downtown since 8:30 or something. We  
11      raised that issue with defense to say we don't think this is  
12      expert testimony. We frankly could get an expert and have  
13      someone qualified that way, but we think it's actually -- that  
14      that comparison exercise is something a law enforcement  
15      officer would do.

16               We could file a motion in limine to that end, but I think  
17      from what I've heard from defense counsel, we're in agreement  
18      that we need not tender an expert for that kind of testimony.  
19      And I just wanted to put that, sort of put that out there.  
20      And I think that's it from us at this time.

21               **MR. PURPURA:** Your Honor, just --

22               **THE COURT:** Sure.

23               **MR. PURPURA:** I may not object to that, but I'm  
24      letting the Government know that I may argue that in close or  
25      another time even in cross-examining whoever they put on the

1 stand that they're not an expert and they really don't know  
2 these things and maybe should know these things and may go  
3 into a panoply of issues involving cell towers.

4 **MR. WISE:** I mean, sure. What we can do then is we  
5 can notice an expert and we can either call that person in  
6 rebuttal if that's the kind of -- if that's the kind of cross  
7 that is -- that's conducted with the agent who compared the  
8 location of the cell phone to the overtime records that were  
9 submitted.

10 **THE COURT:** Okay. I see Mr. Purpura nodding, that  
11 would be fine.

12 **MR. WISE:** Okay, we'll do that. Thank you.

13 **MS. WICKS:** Your Honor, I just -- I don't think the  
14 Court had made a decision and I'm just otherwise submitting on  
15 the record as to 211 and 212.

16 **THE COURT:** I'm sorry, I'm sorry, yes.

17 **MS. WICKS:** I think we just skipped -- I mean, not  
18 that there's a problem, but we skipped some things.

19 **THE COURT:** We did skip a few things. You're  
20 submitting?

21 **MS. WICKS:** I'm submitting on 211 and 212.

22 **THE COURT:** 211 which I'm denying and 212 being  
23 excluding hearsay from alleged co-conspirators which I'm also  
24 denying. Of course, subject to what the jury will be  
25 instructed, there are certain things that the Government will

1 have to show that statements were made in the course of the  
2 conspiracy and furtherance of the conspiracy and so forth, but  
3 I'm not excluding it in advance. That's 211 and 212.

4 **MS. WICKS:** Then 209 I'm also submitting. I think  
5 -- I'll have further discussions with the Government, but the  
6 transcripts that I've gotten so far, there's definitely -- I  
7 think it depends on -- clearly there's a huge volume of  
8 transcripts and information, so if they let me know, if we get  
9 to that point what ones, there definitely will be transcripts  
10 that I believe the defense takes issue with.

11 **THE COURT:** All right, you'll continue to discuss  
12 that. I'm not going to rule on that one then. That's number  
13 209. Okay, anything else?

14 **MR. PURPURA:** Thank you, Your Honor.

15 **THE COURT:** Okay, thank you all. See you upstairs  
16 in chambers in a few minutes.

17 **THE CLERK:** All rise. This Honorable Court is now  
18 adjourned.

19 **(Proceeding concluded.)**  
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1 CERTIFICATE OF OFFICIAL REPORTER  
2  
3  
4

5 I, Nadine M. Gazic, Registered Merit Reporter, in  
6 and for the United States District Court for the District of  
7 Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that  
8 the foregoing is a true and correct transcript of the  
9 stenographically-reported proceedings held in the  
10 above-entitled matter and that the transcript page format is  
11 in conformance with the regulations of the Judicial Conference  
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13  
14 Dated this 4th day of January, 2018.

15  
16 Nadine M. Gazic, RMR, CRR

17 NADINE M. GAZIC RMR, CRR

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