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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

UNITED STATES OF AMERICA,  
Plaintiff,

**COPY**

vs.

NO. 2:03-CR-00347-JCM-PAL

DANIEL CHAPMAN, et al.,

MOTION TO DISMISS  
INDICTMENT

Defendants.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, FEBRUARY 27, 2006

9:00 A.M.

APPEARANCES:

For the Plaintiff: ERIC JOHNSON, AUSA  
ROBERT ELLMAN, AUSA  
STEVE MYHRE, AUSA  
KIMBERLY FRAYN, AUSA

For the Defendant Daniel Chapman: STANLEY HUNTERTON, ESQ.

For the Defendant Herbert Jacobi: MARANDA FRITZ, ESQ.

For the Defendant Sean Flanagan: JAMES SANDERS, ESQ.

Reported by: Joy Hinck, CCR 275  
Official Federal Court Reporter

JOY HINCK, CCR 275  
LAS VEGAS, NEVADA (702)384-3188

1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 27, 2006

2 9:00 A.M.

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4 P R O C E E D I N G S

5  
6 THE CLERK: This is the time set for  
7 the hearing of Defendants Daniel Chapman, Sean  
8 Flanagan, and Herbert Jacobi's joint motion to  
9 dismiss indictment, Criminal Case Number  
10 2:03-CR-0347-JCM, United States of America versus  
11 Daniel Chapman, et al. Counsel, please note your  
12 appearance for the record.

13 THE COURT: Mr. Johnson?

14 MR. JOHNSON: Your Honor, Eric  
15 Johnson, Robert Ellman --

16 MR. ELLMAN: Good morning, your Honor.

17 MR. JOHNSON: -- chief of our  
18 appellate section, Steve Myhre --

19 MR. MYHRE: Good morning, your Honor.

20 MR. JOHNSON: -- who is our first  
21 assistant --

22 MS. FRAYN: Good morning, your Honor.

23 MR. JOHNSON: -- and Kimberly Frayn  
24 for the United States. Mr. Damm is starting a  
25 trial in a separate court this morning.

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1 THE COURT: All right. Mr. Hunterton?

2 MR. HUNTERTON: Stan Hunterton for the  
3 Defendant Chapman who is present, your Honor.

4 THE COURT: All right. Ms. Fritz?

5 MS. FRITZ: Maranda Fritz for Mr.  
6 Jacobi, your Honor. Good morning, your Honor.

7 THE COURT: Good morning.

8 MR. SANDERS: Good morning, your  
9 Honor. Jim Sanders on behalf of Defendant  
10 Flanagan who is also present.

11 THE COURT: Thank you. All right,  
12 this is the time set for the hearing on the  
13 defendants' motion to dismiss the indictment.  
14 I've reviewed the file and I'm prepared to hear  
15 whatever arguments you may have.

16 Mr. Hunterton?

17 MR. HUNTERTON: Thank you, your  
18 Honor. I will be brief. We all know what the  
19 issues are. The fact that the government has  
20 changed faces does not change the facts. It does  
21 not matter whether the government appears through  
22 Mr. Damm, or through Mr. Johnson, or anyone else.  
23 It is the government and it was a governmental  
24 responsibility that was lapsed here.

25 Yesterday I reread the

1 transcript of the morning of February 7th, and I  
2 really don't have anything of substance to add  
3 concerning the materiality of the omissions, the  
4 seriousness of the documents that were not turned  
5 over to us, how they related to the witnesses who  
6 were yet to come and who had already come and  
7 gone. I can't improve very much on the trial  
8 exhibit that I gave your Honor that morning or on  
9 the listed of exhibits that we have filed with the  
10 motion that applies.

11                   What I can do to the extent it  
12 may be helpful to the Court is bring some further  
13 perspective to the enormity of the government's  
14 failure here. In the twenty days that have  
15 transpired since the day your Honor over our  
16 objection and request for dismissal ordered the at  
17 least intermediate step of a mistrial, two very  
18 important things have or have not happened. The  
19 government has completely failed to come forward  
20 with any explanation as to why they so  
21 negligently, deliberately, lazily -- whatever the  
22 adverb or adjective is -- ignore their  
23 constitutional responsibilities.

24                   And as I said in my reply, I  
25 don't know, and I'm not going to take up the

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1 Court's time arguing whether they owe us an  
2 explanation or not, but they darn sure owe this  
3 Court one. This Court exercises supervisory  
4 responsibility over the conduct in and around this  
5 courtroom. It is the core of what makes this  
6 process work. If the defendants are free to do  
7 what they want contemptuously of the Court, then  
8 we don't have a Court system. If defense counsel  
9 are free to do contemptuously what they want, we  
10 don't have a court system.

11 And if the people at this  
12 table, the government, the representatives of  
13 the government, are free to do contemptuously  
14 whatever they want, including ignoring their  
15 responsibilities to the Court and ignoring  
16 their responsibilities to the defendants and  
17 defense counsel, we do not have a court system.  
18 That's the thing that hasn't happened in twenty  
19 days. There has been no explanation. Perhaps Mr.  
20 Johnson will favor the Court with one this  
21 morning, perhaps not.

22 The other thing that's happened  
23 which I wanted to bring to the Court's attention  
24 just again for the perspective on this, we've all  
25 been in these situations as a prosecutor, defense

1 attorney, judge, where some number of documents  
2 that should have been turned over -- and it's  
3 usually a small number, a couple of pages -- are  
4 turned over. That certainly wasn't the case  
5 here. We are in excess of six hundred pages.  
6 And, frankly, who knows how much more.

7                   In the twenty days since your  
8 Honor declared a mistrial, I have had -- I don't  
9 know how many, but let's say a dozen or more --  
10 phone calls, visits from former colleagues of mine  
11 in law enforcement, defense counsel other than my  
12 colleagues here in this case, and more than a  
13 couple of judges who have said, Stan, what  
14 happened in that securities fraud trial before  
15 Judge Mahan? And I have said, I have no idea.  
16 And every one of them which must represent  
17 hundreds and probably more, although we wouldn't  
18 like to think so, hundreds of years of experience  
19 collectively as prosecutors, defense attorneys,  
20 and judges, have just shook their head and said, I  
21 never heard anything like it. And no one has.

22                   If this case is not dismissed,  
23 then the government has been allowed to degrade  
24 its level of conduct to a point which I  
25 respectfully submit should be unacceptable to this

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1 Court because we are all creatures of habit. We  
2 are all actors who act in consequence of  
3 consequence not unlike children. When you do  
4 something bad, if nothing bad happens, you do it  
5 again, and then you do something worse. And,  
6 believe me, word will spread through the United  
7 States Attorney's Office that Brady and Giglio  
8 don't really matter anymore.

9 You know what Greg Damm got away  
10 with? In the third week of trial, he gave over  
11 six hundred pages of documents which were due to  
12 the defendants before trial. After mistrial, we  
13 had to start again. Nobody was found in  
14 contempt. The case was not dismissed. The  
15 defendants are forced to go through it again.  
16 It's either that lesson that comes off the bench  
17 today or the lesson that this kind of behavior  
18 does have consequence.

19 Thank you.

20 THE COURT: All right. Ms. Fritz?

21 MS. FRITZ: Thank you, your Honor.

22 THE COURT: Yes, ma'am.

23 MS. FRITZ: I know your Honor is aware  
24 that since we left here all of us on this side of  
25 the room, and I do mean all of us, have spent



1 circuit. I've never seen anything like it. I've  
2 never seen the government put forth a brief on so  
3 precise an issue as is before this Court and  
4 ignore the leading case, the leading Ninth Circuit  
5 decision.

6 And so the government takes the  
7 position, well, we're going to ignore the entire  
8 pattern of conduct that the defendants have put  
9 forth now. We're going to pretend like it never  
10 happened. And we, the government, are going to  
11 assume that your Honor is going to let us do  
12 that. We, the government, have decided we're  
13 going to ignore everything but the Giglio issue.  
14 The government then goes the next step of  
15 minimizing or attempting to minimize that in  
16 a way that I think should be extraordinarily  
17 troubling to the Court.

18 I'm going to quote from the  
19 government's brief. Here's what they say  
20 happened with respect to Giglio, "There were  
21 some potential violations of Giglio." That's  
22 from the government's brief. With respect to  
23 everything else that had happened that the Court  
24 witnessed during those weeks that we were here,  
25 said the government, we choose not to even

1 acknowledge it.

2                   Having minimized what happened  
3 with respect to Giglio and absolutely ignored  
4 everything else that occurred in this courtroom,  
5 having offered to the Court absolutely no  
6 explanation for whether it was deliberate or  
7 whether it truly was the product of any  
8 comprehensible incompetence, the government then  
9 says, well, clearly there was no flagrant  
10 misconduct. Well, that's a very easy statement  
11 when you have on your own decided to ignore the  
12 pattern of conduct and kept out of the courtroom  
13 the one and only individual who actually knows  
14 what happened here and could have offered to the  
15 Court some explanation.

16                   And so says the government,  
17 well, since we're ignoring what the defendants  
18 have described as having happened, we going to  
19 say, no, it's not flagrant. The government also  
20 takes the position that it cannot be sanctionable  
21 by way of dismissal of the indictment because,  
22 says the government, that would apply only to  
23 intentional constitutional violations. For that  
24 proposition the government flat out miscites the  
25 Kearns case and works so hard to ignore everything

1 the Ninth Circuit said in the leading case. And I  
2 keep calling it the leading case because I can't  
3 for the life of me figure out how to pronounce  
4 it. I could spell it.

5 THE COURT: Why don't you spell it for  
6 the court reporter?

7 MS. FRITZ: K-O-J-A-Y-A-N, or I'll  
8 just call it Kojeian (phonetic) -- nope, I'm going  
9 to keep calling it the leading case. The Ninth  
10 Circuit couldn't have been clearer in that case  
11 about what can't be tolerated and about the power  
12 that this Court has because at the end of the day  
13 that's what the government is saying. The  
14 government is saying, your Honor, we, the  
15 government, are telling you, you don't have the  
16 power to do what your Honor stated when we left it  
17 was inclined to do. That's the position that  
18 they're taking.

19 Well, as a matter of law, that's  
20 flat wrong. This Court plainly has the  
21 supervisory power to do it, and so the only issue  
22 that remains is whether or not the facts of this  
23 case support dismissal, and I couldn't agree more  
24 with Mr. Hunterton. This is something that any of  
25 us have ever seen before, and you can read every

1 case on this issue, and you will not find anything  
2 that approaches the level of conduct that we saw  
3 in this case starting from the first day and  
4 continuing right on to the point where the Court  
5 declared the mistrial and where we all knew that  
6 we had come together to waste our time and to put  
7 the defendants through a process that was  
8 agonizing at best.

9                   And then we got the government's  
10 response, and I believe that the brief filed by  
11 the government really is -- it's more than the  
12 last straw -- but that brief supports what this  
13 Court had stated was its inclination in the  
14 first place. That brief is not an acceptance  
15 of responsibility for what happened. That brief  
16 doesn't even acknowledge what happened. That  
17 brief goes the additional step of saying that  
18 the hundreds of pages of Agent Payne's notes that  
19 were turned over to the defense after the trial  
20 had started isn't Jencks material, point blank  
21 isn't Jencks material, and again includes for the  
22 Court a misleading citation to support that  
23 proposition.

24                   So your Honor is now head on  
25 confronted with the fact that even under all of

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1 these circumstances, after everything that's  
2 happened, the government thinks that it can ignore  
3 the pattern of conduct, ignore the leading  
4 decision, and come to this Court saying that that  
5 was not Jencks material that had to be provided.

6           When I went to look up the  
7 definition of flagrant, it seemed so entirely  
8 suited to this case. The definition of flagrant  
9 ended up according to the dictionary being conduct  
10 which was conspicuously bad or so glaring as to  
11 constitute, or appear to constitute, a flouting of  
12 law or morality. And that word stuck in my head.  
13 This case is a flouting. It's a flouting. It's a  
14 good word. Whether it was intentional, the  
15 government's offered no explanation for anything  
16 that happened. It ignores so much of what  
17 happened and then tries to brush aside the Giglio.

18           So was it intentional? Looking  
19 into Greg Damm's mind or Michael Payne's, we have  
20 no idea, but the case law even as cited in the  
21 government's brief makes absolutely clear, and the  
22 language from the Fayhe (phonetic) case makes  
23 clear that where an individual where the  
24 government acts with a reckless disregard for the  
25 constitutional rights of the defendant, that is

1 under the law willfulness and, therefore, this  
2 case goes beyond any claim that it is not willful  
3 because this Court saw unquestionably that at a  
4 bare minimum this was again at best a reckless  
5 disregard for weeks of the rights of the  
6 defendants.

7                   So those are the circumstances  
8 that we have. It is flagrant misconduct. It is  
9 willful misconduct under the law. It was a  
10 pattern of misconduct and the prejudice that has  
11 been experienced by the defendants is so palpable  
12 whether one looks at it in terms of the concept  
13 even the horrific thought of a retrial of this  
14 case, or whether you look at it from a personal  
15 point of view, whether you look at the damage the  
16 government has done to each and every one of these  
17 individuals in terms of their personal lives, in  
18 terms of their ability now to come back and defend  
19 the case, the government has done enormous damage  
20 whether it wants to recognize it or not.

21                   And that brings us finally to  
22 what the Court is going to communicate through its  
23 decision. The Court has been put in an incredibly  
24 lousy position here by the government. And now  
25 the government wants to say, oh, no, you can't

1 dismiss the case, that would be a bad thing.  
2 Well, if these facts, if this combination of  
3 circumstances, does not warrant the sanction of  
4 dismissal, then what does? This is it. They can  
5 cite law for the fact that it is a rare case in  
6 which dismissal is warranted, and this is it.

7 This is the case in which it  
8 went on day after day after day. This is a case  
9 unlike the other ones that they've cited that  
10 involved weeks of trial, weeks of trial, years of  
11 preparation for trial, not like those other cases  
12 that involved a heroin bag. How long do you think  
13 that trial was? A day? Two? That's what they  
14 would rely on. This is the pattern of conduct.  
15 This is the prejudice. This is the case, and if  
16 it is not this case, then as Mr. Hunterton said,  
17 the message the Court has communicated is anything  
18 goes.

19 THE COURT: Thank you. Mr. Sanders?

20 MR. SANDERS: Thank you, your Honor.

21 THE COURT: Yes, sir.

22 MR. SANDERS: I'm not going to repeat  
23 what the other counsel have argued. I join in  
24 their arguments.

25 THE COURT: Thank you. And I

1 understand that.

2 MR. SANDERS: I just want to make a  
3 couple of points. You know, this is one of these  
4 cases when I think about the conduct, I think  
5 about the rap sheets. The government ran the rap  
6 sheets for its witnesses the first couple of days  
7 of this trial, and they didn't give them to us.  
8 They were thinking about the rap sheets. They  
9 were thinking about the issue, but they didn't  
10 give that information to the defendants.  
11 Consciously somebody made the decision that the  
12 rap sheets were important and equally consciously  
13 somebody made a decision that they weren't going  
14 to give them to us. That's a significant  
15 problem.

16 What's the remedy for something  
17 like this? We talk about it in our briefs, and I  
18 just want to say it out loud. If this Court  
19 doesn't dismiss the indictment, who is punished?  
20 Well, it's the defendants. For the government's  
21 conduct, we're punished. We go to trial again if  
22 a retrial is ordered. We've spent twelve days  
23 here in this courtroom. We're going to spend ten  
24 or twenty days in the courtroom in a retrial for  
25 nothing that we did wrong, for conduct that the

1 government engaged in. That's not the right  
2 result here, your Honor.

3 The government would be rewarded  
4 if this indictment is not dismissed. And,  
5 frankly, the government doesn't deserve to be  
6 rewarded for its conduct. A sanction needs to be  
7 imposed, and the only sanction that's appropriate  
8 here, the only meaningful sanction, is to dismiss  
9 the indictment. The defendants have been  
10 prejudiced by this conduct. They should not be  
11 prejudiced by having to go through another trial  
12 based on the government's conduct. This  
13 indictment should be dismissed.

14 Thank you.

15 THE COURT: All right. Thank you.

16 Mr. Johnson?

17 MR. JOHNSON: Your Honor, a key issue  
18 I guess is in terms of this argument is where are  
19 we focusing in terms of what we're trying to do  
20 here today. At the time of the hearing on  
21 February 7th, we came in, Mr. Damm, and said that  
22 there were documents that we are turning over that  
23 we can't find record that we had not turned over  
24 before, and as a consequence were providing these  
25 materials out of an abundance of caution to make

1 sure that everything and anything that we can find  
2 in the files is being provided to the defendants.

3 There was admission that either  
4 they had not been turned over, or if they had been  
5 turned over, we did not have a record supporting  
6 that they had been turned over. And we apologized  
7 for bringing those materials into the court at  
8 that point in time, and the Court decided based  
9 upon defendants' motions that they would be  
10 prejudiced by going forward with the trial at that  
11 point to order a mistrial finding that in the case  
12 of Mr. Damm and Ms. Frayn that the failure on the  
13 part of the government to provide those materials  
14 was unintentional.

15 THE COURT: No, no, no, no, no, no.  
16 Oh, absolutely not. No, no. I said I refuse to  
17 find that it was intentional.

18 MR. JOHNSON: All right. I'm --

19 THE COURT: But, no, I didn't say it  
20 was not -- there's a difference between  
21 unintentional -- I'm sorry -- between not  
22 intentional and not unintentional. I found the  
23 government's conduct was not intentional but I  
24 don't think it was not unintentional either.

25 MR. JOHNSON: And I guess in terms of

1 that distinction, your Honor, I think the main  
2 point, though, still is is that there was a  
3 failure on the part of the government that the  
4 government did not intend to --

5 THE COURT: Absolutely, and I said I  
6 refuse to believe that.

7 MR. JOHNSON: -- cause or to violate  
8 the Brady or -- or -- or --

9 THE COURT: I refuse to believe that  
10 that the government would intentionally withhold  
11 documents. That's what I said, and I stand by  
12 that.

13 MR. JOHNSON: And I appreciate that,  
14 your Honor.

15 THE COURT: But that doesn't mean that  
16 it was not unintentional.

17 MR. JOHNSON: And I understand I  
18 think where the Court is leaning with that  
19 opinion. The end result, though, I think comes  
20 down to the same is that the prosecutor made  
21 mistakes. And whether we say that they were  
22 intentional or unintentional, the point in terms  
23 of what he was doing by making the mistakes was he  
24 was not trying to violate Brady, Giglio, or  
25 anything of the defendants' rights.

1                   If we were wanting to -- if he  
2 was wanting to not disclose material to the  
3 defendants, there was no reason for him to provide  
4 any of that material on the morning of the 6th or  
5 7th. If he was not trying to hide rap sheets or  
6 criminal convictions, there wasn't any reason for  
7 him to bring those issues up during  
8 cross-examination as he did during trial.

9                   The end result, your Honor, and  
10 one thing I want to convey and make sure we are  
11 all working on is the government acknowledges that  
12 these materials, the six hundred and fifty pages  
13 of documents, are all materials that we should  
14 have turned over, we expect our prosecutors to  
15 turn over, and Mr. Damm I think in large part  
16 acknowledges all those materials are materials  
17 that should have been turned over. He believes  
18 some of them were.

19                   We don't have records to justify  
20 it, but the clear thing that I want to make, and  
21 this office wants to make, is that we expect our  
22 prosecutors to turn these kinds of materials over  
23 to the defense as a part of our general discovery  
24 practice in trying cases before this Court. Make  
25 no doubt or exception in that regard, but why do

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1 we do that, your Honor? And the reason we do it  
2 is the kind of materials that we are talking about  
3 here with the six hundred and fifty pages are the  
4 kinds of things that really in reality make little  
5 or no difference, the defense already knows about,  
6 or are available to them through a variety of  
7 sources.

8                   What we are talking about with  
9 this packet is several -- is hundreds -- or one or  
10 two hundred pages of indictments that were a  
11 public record and available, plea agreements for  
12 individuals that should have been turned over, but  
13 it would be hard to say that the defendants did  
14 not know were cooperating with the government.  
15 Rap sheets, fifty or sixty pages of which show no  
16 conviction or no arrests on the part of the  
17 defendants.

18                   And so that's why I say when we  
19 talk in terms of this material, it should be  
20 provided. Why? Because in all reality the  
21 defendants knew, had reason to know, could have  
22 found, or were very much aware of what was in  
23 there. It had no impact. So I want to step back,  
24 though, for a second. We acknowledge this  
25 material should have been turned over. The issue

1 that we perceived at the time that we left on  
2 February 7th was, what is the appropriate remedy  
3 for the failure to provide those documents in view  
4 of the Court's need at that point in time to grant  
5 a mistrial?

6 And that's what we tried to  
7 focus on in terms of our filing papers in this  
8 case and in terms of our arguments to the Court in  
9 our briefing. The fact is that the Ninth Circuit  
10 and all the circuit courts hold that dismissal is  
11 the most extreme penalty that can be brought or  
12 extreme action that a court can take and should be  
13 done in a very limited circumstance in which the  
14 government's conduct was flagrant in which  
15 substantial prejudice resulted to the defendants.

16 It is our position, your Honor,  
17 here that in view of the fact that Mr. Damm in  
18 acting in this case did not act intentionally,  
19 that his conduct does not rise to the level of  
20 being flagrant. We're not going to deny that  
21 there was a large number of documents that were  
22 turned over, but in terms of looking at the actual  
23 prejudice that the defendants have pointed out in  
24 their filing paper, their initial brief, or at  
25 their oral arguments, very little is demonstrated

1 in terms of significant prejudice to the  
2 defendants that could not be corrected by having a  
3 new trial in this case.

4 In the filing papers that were  
5 laid out, they listed nine areas in which they  
6 said that they felt there were some level of  
7 government misconduct, one of the areas being Mr.  
8 Payne's Jencks materials. We would suggest, your  
9 Honor, and we still stand by our filing, that the  
10 rough notes of Mr. Payne are not Jencks material.  
11 They are only Jencks material if they contain  
12 substantially verbatim recitals of what was said  
13 by defendants.

14 We agree we have an obligation  
15 under United States versus Harris and other Ninth  
16 Circuit law to maintain those materials and that  
17 they could be Jencks material if they contain  
18 substantially verbatim recitals, but in this case  
19 we don't believe that would be the result. We  
20 provided those materials again out of an abundance  
21 of caution. The actual reports that were written  
22 and based on those rough notes have been provided  
23 to the defendants substantially before this trial  
24 had occurred prior I think almost a year before  
25 when this trial was coming up to an earlier trial

1 setting.

2                   And significantly nowhere in any  
3 of the documents or arguments is there anything  
4 noted as to specific notes of Mr. Payne which the  
5 defendants felt constituted actual substantial  
6 verbatim recitals of material and which weren't  
7 available to them and noted in prior typewritten  
8 reports that were provided to the defendants.

9                   Your Honor, the other points,  
10 the rap sheets of Mr. Eslick's, Mr. Damm brought  
11 out his one -- the one arrest from 1957. The  
12 Court at a side bar had excluded it. Again while  
13 that should have been provided to defendants ahead  
14 of time, the fact is it was provided before he  
15 left the stand, and if we were trying to hide  
16 that, it wouldn't have been raised at all in cross  
17 or redirect.

18                   The other information concerning  
19 some arrests by a couple of the government  
20 witnesses, those things, your Honor, are things  
21 that should have been provided again to the  
22 defendant, but the level of prejudice to them and  
23 their inability to deal with them at trial is  
24 being corrected by having a retrial in this case.  
25 Other things that are noted in there concerning

1 testimony that the government raised from  
2 different witnesses which they found to be  
3 inconsistent with previous interviews, they had  
4 those interviews and cross-examined those  
5 witnesses in regard to that.

6           There's nothing in terms of  
7 misconduct there simply because our witnesses  
8 testify inconsistent to interview reports as long  
9 as those interview reports are provided to the  
10 defense and they have them available to  
11 cross-examine them to test whether the testimony  
12 in the court should be given credence or  
13 credibility by the jury. Those reports were  
14 provided and were used by the defendants in terms  
15 of dealing with these supposed inconsistencies  
16 with prior reports and interviews that were taken  
17 by the agents.

18           Your Honor, this is a situation  
19 where a very serious mistake in terms of discovery  
20 obligations was made by the United States. There  
21 is nothing to suggest this is in any way an  
22 institutionalized problem in the U.S. Attorney's  
23 Office. The fact of the matter is this office, as  
24 denoted hopefully by the presence of the appellate  
25 chief and the first assistant, took this matter

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1 extremely seriously. That's why this matter has  
2 been handled since that point in time by the  
3 appellate chief and myself in terms of details and  
4 has been overseen directly by the first assistant  
5 in this office.

6 Why? Because we want to make  
7 sure that future discovery in this case is done  
8 right and there are no errors. And, two, we want  
9 to make sure that no one else in our office  
10 engages or has this problem in the future. Your  
11 Honor, historically if you look in terms of the  
12 office as far as its compliance with its  
13 obligations -- I'm not saying there has never been  
14 mistakes, there have been mistakes -- but I think  
15 that on a whole, the office has given no sign in  
16 terms of any type of institutionalized problem in  
17 terms of dealing with these issues and it will not  
18 in the future in terms of what this Court does  
19 today.

20 I think that the Court needs to  
21 look at it in terms of what happened. Mr. Damm  
22 made a serious mistake. If the Court believes  
23 certain action needs to be taken against Mr. Damm  
24 in terms of his conduct, that is a matter that the  
25 Court should consider and ponder. If the Court

1 believes other remedies need to be brought or  
2 structured in terms of dealing with this issue,  
3 those are things that the Court should consider  
4 and ponder.

5 But the dismissal, your Honor,  
6 is the most extreme remedy, and it should only be  
7 done when the conduct is flagrant and the  
8 prejudice is substantial in the sense that it  
9 cannot be fixed by a new trial in the case. And  
10 in this circumstance, your Honor, essentially all  
11 the prejudice that the defendants raise can be  
12 dealt with by providing the materials that were  
13 failed to be provided in a timely fashion in the  
14 first trial that was set and went to trial in  
15 January.

16 Your Honor, I think an example  
17 of this situation comes up in the case of the  
18 United States versus McCoy (phonetic) which was  
19 another situation that arose in this district  
20 approximately ten years ago when at the beginning  
21 of trial a witness testified certain Jencks  
22 material was not provided, and the court allowed  
23 the government to go on but specifically ordered a  
24 review of the file and found that -- didn't find  
25 any other Jencks material.

1                   Other witnesses testified and,  
2 lo and behold, after approximately two or three  
3 other witnesses, additional reports were found.  
4 Everyone agreed that there was a Jencks violation  
5 in that case. The court ordered a mistrial, the  
6 government to provide the materials to the  
7 defendants. The district court in deciding what  
8 kind of sanctions to take against the government  
9 decided also in the new trial to preclude the  
10 government from calling those witnesses whose  
11 Jencks materials had not been provided.

12                   The government appealed the  
13 district court's action in that case, and the  
14 Ninth Circuit reversed holding that the mistrial  
15 did work a substantial penalty upon the government  
16 in terms of its action in ensuring that its  
17 compliance in the future will be understood and  
18 heeded. And, too, that the mistrial remedied the  
19 problem in regard to the failure to provide the  
20 Jencks material in a timely fashion to the  
21 defendants.

22                   In that opinion, your Honor, the  
23 court of appeals noted that the government failed  
24 to live up to its discovery responsibilities under  
25 the Jencks Act, and we expect the government to do

1 better than that. On the other hand, we recognize  
2 that the government is not a being with ichor in  
3 its veins nor is it a being from a more advanced  
4 planet. It's a conglomeration of human beings.  
5 Thus, by definition it is imperfect for humans are  
6 neither beasts nor angels. In this case the court  
7 determined the imperfection was not due to  
8 intentional wrongdoing or bad faith.

9                   Your Honor, that is the  
10 situation that we have here in that Mr. Damm made  
11 mistakes. He did not act intentionally to violate  
12 Brady or Giglio. He did not act intentionally to  
13 deny the defendants any materials that they were  
14 entitled. Mistakes were made. We are seeking to  
15 remedy those mistakes. We have taken actions to  
16 remedy those mistakes, and we will continue in  
17 view of this circumstance to take action and  
18 ensure, not only that in this case, but in other  
19 cases there is not a failure like we had here in  
20 terms of providing discovery materials which, your  
21 Honor, for all practical purposes were materials  
22 that were publicly available, known to the  
23 defendants, should have been known to the  
24 defendants, are of very limited material value.

25                   To the extent that the

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1 defendants can show any prejudice in this case as  
2 they have in their papers here to the degree that  
3 there is any prejudice and it was material, the  
4 new trial that the Court has ordered will remedy  
5 the prejudice that was worked upon those  
6 defendants and allow them to have the materials  
7 and to use those materials in their examination of  
8 the case.

9 Your Honor, in terms of the  
10 issue that somehow this works a benefit to the  
11 government, in case after case courts have noted  
12 that mistrial is a penalty upon the government. I  
13 assure you no one in the government wants go back  
14 and have to do this trial again. There's  
15 disadvantages both in terms of resources, there's  
16 disadvantages in terms of witnesses' memories  
17 failing, there's disadvantages in terms of just  
18 the passage of time.

19 We did not ask for a mistrial  
20 because we believed that whatever prejudice was  
21 worked by the documents that were provided to the  
22 defendants on February 7th was not so great that  
23 it could not be worked out prior to the end of  
24 trial. Defendants said that it was. The Court  
25 found that the defendants had made a showing of

1 prejudice in justifying a mistrial, but the  
2 government did not want the mistrial, and the  
3 government does not view the mistrial in this case  
4 as a gift to it in any sort or sense of the word.

5           The government views this as a  
6 serious reflection upon its professionalism which  
7 it takes very, very seriously. The government  
8 views this as a failure in terms of the effective  
9 use of its resources, and the government  
10 appreciates the time and expense to the Court, and  
11 to the juries, and to the defendants in this case,  
12 but a mistrial is the appropriate remedy in this  
13 case by the fact that it corrects whatever error  
14 the government made and resolves the prejudice to  
15 any degree that it exists to the defendants. And  
16 that is what we are asking the Court to do in this  
17 case is to order a mistrial.

18           Does the Court have any  
19 questions for the government?

20           THE COURT: No, sir. Thank you.

21           All right, reply, Mr.  
22 Hunterton?

23           MR. HUNTERTON: Thank you, Judge.

24           During the confirmation hearings  
25 by the United States Senate of now Supreme Court

1 Judge Clarence Thomas several years ago, we all  
2 recall issues of sexual harassment raised, and the  
3 tone deaf quality of the older white male United  
4 States Senators to that issue came to be embodied  
5 in a phrase that's been in public discourse now  
6 since that time, used often, and needs to be used  
7 here today. They just don't get it. They just  
8 don't get it.

9                   They have no appreciation for  
10 the enormity of what they have done to the dignity  
11 of this Court and the rights of these defendants.  
12 I tried United States versus McCoy as one of two  
13 defense counsel, so I'll tell you what actually  
14 happened. We caught them playing hide the ball  
15 with one IRS interview. Judge Pro was as firm and  
16 demonstrative with the government as you were the  
17 evening of the 6th, Monday, when at 4:00 you said,  
18 we'll adjourn for the day, and I want you to go  
19 through the files and have all of this material in  
20 Mr. Hunteerton's office by 5:00. Judge Pro was  
21 just that firm.

22                   We didn't get anything in that  
23 case. Another witness or two goes by, and we  
24 catch them again absolutely flatfooted. But what  
25 we caught was one interview of a page-and-a-half.

1 That's what the notes constituted that they had  
2 again neglected to turn over to us. Now, we had  
3 the same sort of dissembling in that case that we  
4 have here. Still, after he spoke for twenty some  
5 minutes, no explanation. And before Judge Pro in  
6 United States versus McCoy, we had an  
7 explanation.

8 Well, it was the revenue agent  
9 of the IRS who did this interview, not the special  
10 agent, and we didn't know that the law applied to  
11 revenue agents. Well, nobody bought that, but at  
12 least they had an explanation. One interview of a  
13 page-and-a-half and Judge Pro declared a mistrial,  
14 and as Mr. Johnson properly noted, said not only  
15 am I declaring a mistrial, but the penance, the  
16 punishment, for this is that with respect to these  
17 two witnesses -- and they were, you know, two of  
18 the government's most important witnesses -- I am  
19 suppressing their testimony at the retrial.

20 Now, the reason we didn't bring  
21 this up in our pleadings is because it doesn't  
22 matter in this case because the government  
23 appealed that. Well, that's terrible. You can't  
24 take away our witnesses as a punishment. Now, Mr.  
25 Johnson has volunteered some kind of punishment be

1 heaped on Mr. Damm's head. That's nice of him in  
2 the absence of Mr. Damm, but the punishment needs  
3 to be heaped on the government's head.

4 And Judge Pro tried that in  
5 United States versus McCoy, but you know what the  
6 government did? They went to the Ninth Circuit  
7 and said, that's not fair. And the Ninth Circuit  
8 agreed and said, no, there will be a retrial and  
9 there will be no suppression of the testimony of  
10 the two key witnesses. So the government will  
11 find a way to weasel around any sort of sanction,  
12 such as Judge Pro tried to fashion, short of  
13 dismissal.

14 Now, that one I don't think they  
15 can get around, but again for a sense of  
16 proportion, Judge, in United States versus McCoy,  
17 the trigger event for the mistrial was a single  
18 interview of a page-and-a-half. I was there.  
19 They handed it to me. This is in excess of six  
20 hundred pages and the remedy cannot possibly be  
21 the same.

22 It would be to compare the McCoy  
23 SNAFU with what happened in this case is to say, I  
24 have a weapon and it's a .38 caliber handgun, or I  
25 have a weapon, it's the Nellis Air Force Wing.

1 You know, and what happened in McCoy was -- I mean  
2 a .38 caliber revolver compared to the Nellis Air  
3 Force Wing, which is what happened in this case.

4 THE COURT: All right. Ms. Fritz?

5 MS. FRITZ: I'm going to respond to  
6 the points -- some of the points that were made by  
7 Mr. Johnson. Even now in front of us, who were  
8 participants in the trial, Mr. Johnson is telling  
9 your Honor that the Giglio was somehow not  
10 significant material and continuing the effort to  
11 minimize it. That simply is not the case. You  
12 will find no decision in which there has been any  
13 flouting of this magnitude and the material was  
14 significant.

15 And Mr. Johnson who was not  
16 here, I understand that, does not understand that  
17 much of it was material we would have never had  
18 any access to. We would have never had knowledge  
19 of but for the fact that this Court made  
20 abundantly clear that afternoon how it viewed the  
21 government's conduct. The material was  
22 important. It was not information that we  
23 otherwise had access to, and Mr. Johnson's effort  
24 to simply minimize it and brush it aside is  
25 inappropriate at the least.

1                   Mr. Johnson wants this Court to  
2 accept the notion that the supervisory powers of  
3 the Court are available only when the conduct is  
4 flagrant in the sense of being intentional. Again  
5 I ask that the Court not accept that invitation.  
6 This circuit has used this concept of flagrant  
7 misconduct quite specifically. The Ninth Circuit  
8 knows how to say the word "intentional." It knows  
9 that word, and it knows to use it when it means  
10 intentional.

11                   Flagrant has a different  
12 meaning. This case goes beyond is certainly well  
13 within flagrant, it goes beyond that, but as I  
14 pointed out earlier, while I would ask that the  
15 Court not buy into the notion that there can be no  
16 sanction of dismissal unless the conduct was  
17 intentional and the defense is able to demonstrate  
18 that. In any event, as I pointed out earlier,  
19 this goes well beyond the concept of reckless  
20 disregard which is willfulness under the law.

21                   To Mr. Johnson's contention that  
22 mistrial is a sanction and his effort to persuade  
23 the Court that the government would view it as a  
24 sanction, I'm sorry, but if your Honor were not to  
25 dismiss this case, this side of the courtroom goes

1 back to their offices, claps each other on the  
2 back for a moment, they go back to their desks.  
3 They say, whew, and they keep going. That's it.

4 AUSA Damm is not here today, and  
5 Mr. Johnson won't even acknowledge to this Court  
6 that Mr. Damm has in any way been admonished or  
7 penalized. To the contrary, Mr. Johnson comes in  
8 here and says nonchalantly to the Court, Mr. Damm  
9 is in another courtroom trying another case.  
10 That's how seriously this was taken.

11 If your Honor does not dismiss  
12 the indictment, there is a sigh of relief on this  
13 side of the courtroom and there is a message that  
14 conduct, which is more extensive than anything we  
15 have seen in any case, does not result in a  
16 sanction that truly is meaningful, and if your  
17 Honor on the other hand allows the mistrial, I  
18 think your Honor has a very real sense of the  
19 damage that it would do to all of those who are on  
20 the other side of the courtroom and the unfairness  
21 that would result.

22 THE COURT: Okay. Mr. Sanders?

23 MR. SANDERS: I don't have anything  
24 additional, your Honor.

25 THE COURT: All right. Thank you.

1 All right, as several of the  
2 attorneys have said, you know, you have been  
3 through all of the court decisions on these  
4 issues, and I think we all have until it is coming  
5 out of our ears. I haven't been able to find any  
6 case that's like this one, and it may be that we  
7 can't -- you know, that my research skills are  
8 somewhat limited, or that I have got my brain  
9 trust sitting here in the jury box today, and if  
10 they can't find it, I don't think it exists. I  
11 just have never found anything like this before.

12 There are other cases. The  
13 cases, though, aren't -- they're some helpful, but  
14 some not. The case that -- there's a case out of  
15 the Central District of California, United States  
16 versus Leung, 351 F.Supp.2d 992, Central District  
17 of California, 2005, which involved a plea  
18 agreement which precluded the witness from  
19 communicating with the defendant's attorney. And  
20 the government claims that unlike that case here,  
21 it readily owned up to its shortcomings and made a  
22 heartfelt apology.

23 What the government ignores is  
24 that for over two weeks of trial, the prosecutor  
25 consistently claimed that he had disclosed the

1 required material to the defendants prior to  
2 trial. In other words, this is not the first this  
3 -- Mr. Haynes wasn't the first witness where this  
4 issue came up. It came up earlier in the trial,  
5 and the defendants would say I don't think we got  
6 that material on him.

7                   Yeah, we turned it over to  
8 them. And I accepted that, I accepted Mr. Damm's  
9 statement as an officer of the Court and overruled  
10 the objection on several occasions. I don't  
11 remember if it was three or four. Mr. Haynes was  
12 the third or fourth, and the defendants will  
13 remember better than I do, and probably be able to  
14 tell me, yeah, he was the fourth, or whatever he  
15 was, but he certainly wasn't the first defendant  
16 where the question came up, I don't think we got  
17 material on him. Yep, we turned it over to them,  
18 your Honor. You did? All right, objection  
19 overruled, defendants go back and look at your  
20 material.

21                   On that day -- was that  
22 Tuesday? That was Tuesday, dark Tuesday, or  
23 whatever you want to call it. Only after I  
24 excoriated the Assistant U.S. Attorney in the  
25 strongest terms did he then offer an apology to

1 the Court, not a heartfelt apology, but simply a  
2 response to me. And finally I said, be quiet and  
3 listen to me because he was just saying, yeah, I'm  
4 sorry, I'm sorry, I'm sorry, and not really  
5 meaning it.

6 I stated I think the following  
7 day that the government's conduct was not  
8 intentional, and I cling to that. I don't think  
9 that the government acted intentionally. The  
10 government I think today tries to argue that  
11 flagrancy and intentional -- being flagrant and  
12 intentional are somehow the same and, of course,  
13 they aren't. As I said to Mr. Johnson, I found  
14 that the government did not act intentionally. I  
15 did not find that the government acted  
16 unintentionally.

17 And I think that's -- that may  
18 be the McCoy case. I wasn't involved in that, Mr.  
19 Hunterton, and I don't know, but where you've got  
20 a case where here's ten pages we didn't turn over  
21 or, oh, we forgot to turn over the one interview  
22 note from Agent A, or whatever, the government may  
23 have acted unintentionally. Here I don't think  
24 the government acted intentionally, or I don't  
25 think the government acted unintentionally

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1                   Then we had an endless chain of  
2 dupes I call them who testified at first that they  
3 did not own any stock, they did not invest with  
4 Peter Berney, they do not have any stock with  
5 Peter Berney, then they testified that when  
6 confronted with statements that they had signed or  
7 stock certificates, oh, yeah, I guess did own some  
8 shares.

9                   And then here they were fifty  
10 thousand five hundred -- not five hundred thousand  
11 -- but fifty thousand, a hundred thousand, or  
12 whatever, significant shares of stocks. Oh, I  
13 guess I did. Were you ever an officer or  
14 director? No, I never was. Well, what about  
15 this? Oh, yeah, I see my signature. I guess I  
16 was an officer or director. And then finally they  
17 said, you know what? I just signed whatever Peter  
18 Berney put in front of me.

19                   So we heard from a number of  
20 these witnesses, so finally I cut the government  
21 off and said no more of the willing dupes, we've  
22 had enough of that because the testimony is simply  
23 cumulative, but in two-and-a-half weeks we heard  
24 lots of evidence about Peter Berney, about Ansell,  
25 about Potter, Doug Ansell creating the program

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1 that you could cut and paste signatures with even,  
2 which may call into question any signatures in  
3 this case, I don't know.

4 But in two-and-a-half weeks we  
5 heard lots of evidence against Peter Berney,  
6 against Potter, against Ansell, but we didn't hear  
7 anything against these defendants. As you know, I  
8 teach a course in trial advocacy out at the  
9 university, and all the literature in that field  
10 and all the studies advise attorneys start your  
11 case with your strongest witnesses to cement your  
12 position in the jury's mind. Either the  
13 government had no evidence against these  
14 defendants or it decided to turn that on its head  
15 and start out with its weakest witnesses because  
16 that's what we heard again, and again, and again.

17 Now, how does this prejudice the  
18 defendants, this failure to turn over documents?  
19 Now, just one example. When Peter Berney fled the  
20 country, he arranged for \$650,000.00 to be  
21 delivered to these defendants, and these funds  
22 were to be used for the support of his wife and  
23 children. What did the attorneys do? They  
24 divided it up among themselves and claimed it as a  
25 retainer. What really reprehensible behavior on

1 the part of these defendants. And then it's  
2 almost like the first half of a football game  
3 because then we get to cross-examination.

4 And then one of the defendants'  
5 attorneys -- I think it was Mr. Hunterton, but  
6 maybe not -- one of the defendants' attorneys  
7 confronted Berney with the statements that he'd  
8 made when he first returned to this country in  
9 interviews with the government. And in those  
10 statements Berney admitted that the funds were  
11 transferred to the defendants as a retainer. He  
12 said that on several occasions.

13 If this case were to be retried,  
14 the government and its witness will not make that  
15 mistake again, and that's the advantage that the  
16 government gains by its actions here. It gets a  
17 chance to try out its case identifying any problem  
18 area and then correct those problems in a retrial,  
19 and that's an advantage the government should not  
20 be permitted to enjoy.

21 Now, I have to think that Peter  
22 Berney was supposed to be a strong witness against  
23 the defendants. Maybe I'm wrong, and that's just  
24 my opinion, but I guarantee you next time he would  
25 be a stronger witness. That would be true of all

1 of them. They would all be better witnesses. The  
2 government here did not just fail to turn over  
3 some documents. It cannot identify what documents  
4 it disclosed and what documents it did not  
5 disclose. The evening of the last day of  
6 testimony provided -- I was thinking it was five  
7 hundred pages, Mr. Hunterton, was that right? --  
8 to your office and then four hundred the following  
9 morning, am I wrong with that?

10 MR. HUNTERTON: I had the count wrong  
11 Tuesday morning. The actual count is somewhere  
12 north of six hundred.

13 THE COURT: Okay.

14 MR. HUNTERTON: Between six and seven  
15 hundred.

16 THE COURT: So it's more than six  
17 hundred pages, so it's not some slight oversight,  
18 but it strikes at the very heart of the  
19 government's obligation. It subverts the due  
20 process rights that the defendants are guaranteed  
21 by the Constitution.

22 And now I come back, come full  
23 circle back, to the Leung case where the court  
24 found that the defendant had -- I'm sorry -- that  
25 the government had engaged in willful misconduct

1 including affirmative misrepresentation to the  
2 court and deprived the defendant there of the  
3 Sixth Amendment right to confront adverse  
4 witnesses. I think that happened here.

5 Also, it's a violation of their  
6 due process rights. And, three, it chilled the  
7 prospect of ever effectively interviewing the  
8 witness in question, and the court concluded no  
9 other sanction short of dismissal could remedy the  
10 harm done. So that's the order of the Court, it  
11 will be dismissed. The motion is granted.

12 MR. JOHNSON: Your Honor, one thing  
13 before you leave. If the government chooses to  
14 take this on appeal, would the Court accept us to  
15 file a set of the six hundred and fifty pages of  
16 documents that was provided to the Court -- or to  
17 defendants on February 6th and 7th?

18 THE COURT: What was the question?  
19 Would you expect me to?

20 MR. JOHNSON: Well, can we put into  
21 the record the -- officially put into the record  
22 the six hundred and fifty pages of documents?

23 THE COURT: I expected that to have  
24 been done already, Mr. Johnson, frankly. I  
25 thought you would have done that right away, but

1 that's fine.

2 MR. JOHNSON: I'm not sure if you  
3 introduced -- I thought that we -- we weren't sure  
4 if Mr. Hunterton introduced it that morning, but  
5 if we're wrong on that and Mr. Hunterton says that  
6 he didn't, we would like to have that as part of  
7 the record.

8 THE COURT: That's fine. You can put  
9 those into the record. All right?

10 MR. JOHNSON: Thank you, your Honor.

11 THE COURT: Thank you.

12

13

14 (Whereupon, the proceedings concluded.)

15

16

17

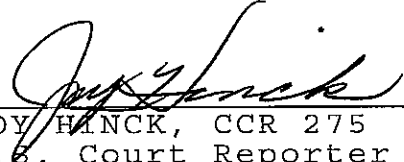
18 I hereby certify that pursuant to Section 753,  
19 Title 28, United States Code, the foregoing  
20 is a true and correct transcript of the  
21 stenographically reported proceedings held  
22 in the above-entitled matter.

21

22

Date: March 1, 2006

23

  
JOY HINCK, CCR 275  
U.S. Court Reporter

24

25

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