IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	CASE NO. 2:16-CR-46-GMN-PAL
	)	
Plaintiff,	)	LAS VEGAS, NEVADA
	)	DECEMBER 20, 2017
vs.	)	8:30 A.M.
	)	COURTROOM 7C
CLIVEN D. BUNDY (1),	)	
RYAN C. BUNDY (2),	)	JURY TRIAL, DAY 16
AMMON E. BUNDY (3),	)	
RYAN W. PAYNE (4),	)	
	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GLORIA M. NAVARRO,
UNITED STATES DISTRICT CHIEF JUDGE

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(continued next page)

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Proceedings reported by machine shorthand. Transcript produced by computer-aided transcription.

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LAS VEGAS, NEVADA; WEDNESDAY, DECEMBER 20, 2017; 8:30 A.M.

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P R O C E E D I N G S

THE COURT: Thank you. You may be seated.

COURTROOM ADMINISTRATOR: This is the time set for Jury Trial, Day 16, in Case No. 2:16-cr-46-GMN-PAL, United States of America versus Cliven Bundy, Ryan Bundy, Ammon Bundy, and Ryan Payne.

Counsel, please make your appearances for the record.

MR. MYHRE: Good morning, Your Honor. Steven Myhre, Nadia Ahmed, and Dan Schiess on behalf of the United States.

THE COURT: Good morning.

MR. WHIPPLE: Good morning, Your Honor. Bret Whipple on behalf of Mr. Cliven Bundy.

THE COURT: Good morning.

MR. RYAN BUNDY: Good morning. Ryan C., madam, of the Bundy family here by special appearance, with Maysoun Fletcher assisting.

THE COURT: Good morning.

MR. HILL: Good morning, Your Honor. Dan Hill along with Morgan Philpot on behalf of Ammon Bundy.

THE COURT: Good morning.

MS. WEKSLER: Good morning, Your Honor. Brenda Weksler and Ryan Norwood on behalf of Mr. Payne.

THE COURT: Good morning.

The Court has received all of the documents regarding the motion, response, replies, sur-reply, and response to sur-reply. And the Court is going to be providing its decision orally to save time rather than trying to perfect a written order.

I do want to just make a preliminary note that, as always, please remember that it is not appropriate to express your opinion either verbally or through body language. This is a courtroom and not a sporting event, and any disrespectful or distracting, inappropriate outbursts or body language will be justification for the Court's security officers or the marshals to remove you from the courtroom and you may not be able to reenter the courtroom.

All right. Well, there is two different sets of motions. The first one is Defendant Ammon Bundy's second motion for mistrial, which is No. 2856, and also Mr. Payne's motion to dismiss, which is No. 2883 and 2906.

(Court conferring with court reporter.)

THE COURT: All right. If the folks in the back row, if you can't hear me at any point, please raise your hand because I'm being told that the microphone is coming in and out.

All right. So first let's begin with the Brady legal standard. Under Brady, prosecutors are responsible for disclosing evidence that is both, number one, favorable to the accused and, number two, material either to guilt or to

punishment. And this is based on the United States versus Bagley, B-A-G-L-E-Y. Evidence is material if there is a reasonable probability that the disclosure of the evidence would have changed the outcome of the case. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Because the definitions of materiality as applied to appellate review are not appropriate in the pretextual pretrial discovery context, the Court does rely on the plain meaning of the evidence favorable to the accused, as discussed in Brady. The meaning of favorable is not difficult to determine in the Brady context. Favorable evidence is that which relates to guilt or punishment and which tends to help the defense by either bolstering the defense case or by impeaching prosecution witnesses, and this is pursuant to Giglio.

The Court notes that, again, in the pretrial context it would be inappropriate to suppress evidence because it seems insufficient to alter a jury's verdict. And, further, the government, where doubt exists as to the usefulness of the evidence, is to resolve such doubts in favor of full disclosure. And this is pursuant to U.S. v. Van Brandy, citing Goldberg.

Thus, the government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, citing United States v. Sudikoff, which is a Central California case.

Brady asks the question whether the evidence is favorable -- whether evidence is useful, favorable, or tends to negate the guilt or mitigate the offense. These are semantic distinctions without difference in a pretextual context -- in pretrial context. And I'm citing United States v. Acosta, a District of Nevada case.

Therefore, when determining whether the prosecution has violated its pretrial or trial obligations, as opposed to post trial, the Court evaluates whether the evidence is favorable to the defense, whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses, and the evidence need not be admissible so long as it is reasonably likely to lead to discoverable evidence. And this is citing U.S. v. Price.

The failure to turn over such evidence violates due process, citing Wearry v. Cain. Wearry is W-E-A-R-R-Y, versus Cain, C-A-I-N, 2016 U.S. Supreme Court case.

Someone has a cell phone on. Please turn it off. Thank you. Nope, it's back on. All right. Thank you.

The prosecutor's duty to disclose material evidence favorable to the defense is applicable, even though there has been no request by the accused, and it encompasses impeachment evidence as well as exculpatory evidence, citing Strickler v. Greene.

In the case of the late disclosure of favorable

evidence, the Court looks at whether the evidence was revealed in time for the defendant to make use of it, citing Bielanski v. County of Kane. And Bielanski is spelled B-I-E-L-A-N-S-K-I.

Brady evidence can be handed over on the eve of trial or even during trial so long as the defendant is able to use it to his or her advantage, citing United States v. Warren, W-A-R-R-E-N.

For claims under Brady, the prosecutor's personal knowledge does not define the limits of constitutional liability. Brady imposes a duty on prosecutors to learn of material exculpatory and impeachment evidence in the possession of other agencies as well. Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutors themselves, citing Youngblood v. West Virginia, which is quoting Kyles v. Whitley, and also Browning v. Baker.

The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant, citing United States v. Bryan, B-R-Y-A-N, Ninth Circuit case.

Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by

keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain information on material unless he asks for them. And this is citing United States v. Blanco, B-L-A-N-C-O.

So the Brady violation has three elements. The first is that there must be evidence that is favorable to the defense either because it is exculpatory, helps bolster the defense, or impeach. Number two, the Government must have willfully or inadvertently failed to produce the evidence and, three, the suppression must have prejudiced the defendant. And prejudice exists when the government's evidentiary suppression undermines confidence in the outcome of the trial. This is citing Milke v. Ryan, M-I-L-K-E, v. Ryan, Ninth Circuit case (2013).

So the Court is now going to address each piece of untimely evidence individually and discuss whether or not a Brady violation has been found. First, I'm grouping together the information relating to the surveillance camera. So there are two specific articles here. First is the FBI Law Enforcement Operation Order, specifically on page 7, and there's also an FBI 302 report prepared by the FBI about an interview with Egbert.

The Court does find that this information is favorable to the accused and potentially exculpatory. It does bolster the defense and is useful to rebut the Government's theory. The

evidence of a surveillance camera, its location, the proximity to the home, and that its intended purpose was to surveil the Bundy home as opposed to incidentally viewing the Bundy home, this information potentially rebuts the allegations of the defendants' deceit which is repeated in the superseding indictment numerous times, including the conspiracy count as an overt act in allegations number 59, 84, 88, and 92 regarding false representations that were alleged about the Bundys being surrounded, about the BLM pointing guns at them, and using snipers.

The Court does find that this information was provided untimely and should have been provided by October 1st, which is 30 days before trial. The Law Enforcement Operation Order is dated March 28th, 2014, and was available prior to the discovery deadline of October 1st.

Now, the Court also finds that the disclosure was willful. And, remember, it doesn't matter for this purpose whether it's willful or inadvertent, but the Court does analyze that and wants to provide that information to the parties. The Court does find that it was a willful disclosure/suppression of this potentially exculpatory, favorable, and material information because all of the documents were prepared by the FBI. The operation order was prepared by the FBI on March 28th of 2014, and the FBI 302 report about the interview with Egbert was prepared by the FBI. And it reveals that the FBI SWAT team

placed the surveillance camera, repaired it, relocated it, and that the FBI monitored the live feed from the camera.

Also, the U.S. Attorney's Office was aware of the camera, at least the latest information based on the Ryan Bundy interview, and did not follow-up or provide any information about the reports or the recording that was created. "The recording" being the notes; not a video recording in the sense of a tape that can be replayed. But this information that was created from the camera view was not provided. And, further, the Government falsely represented that the camera view of the Bundy home was incidental and not intentional, and claimed that the defendants' request for the information was a fantastic fishing expedition.

As to the prejudice, the Court does find that this suppression has undermined the confidence in the outcome of the case; that the Defense represents that they would have proposed different jury questions for voir dire; and they would have exercised their peremptory challenges differently; and provided a stronger opening statement. The Court notes that Ammon Bundy did not provide an opening statement so that would not apply to him, but the other defendants did.

(Court conferring with court reporter.)

THE COURT: The next group is the BLM, and I have in quotations which I realize you can't see, snipers. Whether or not they're snipers or not, whether they're called snippers,

technically snipers, or not is not the material question here. The claims made on the -- in the superseding indictment about the defendants falsely representing snipers is the question and whether or not there were individuals who could have reasonably appeared to be snipers whether or not, in fact, they were.

So here we have the FBI 302 about BLM Special Agent Delmolino, and the FBI prepared it. That was prepared by FBI Agent Willis and drafted March 3rd of 2015, but not provided to the Defense until November of 2017. There was also new 302s provided recently on December 15th of 2017. Again, these 302s are created by the FBI. The first one is a February 9th, 2015, 302 about BLM Special Agent Felix observing the LPOP and then a May 14, 2014, 302 report created by the FBI about BLM Racker and whether or not he was assigned to an LPOP, Listening Post Observation Post.

(Court reporter clarification.)

THE COURT: I'm sorry. The parties use these acronyms, and now I have picked them up. And I apologize that I'm using letters instead of words.

So the Court does find that this information provided in those documents is favorable to the accused and potentially exculpatory. It does bolster the defense and is useful to rebut the Government's theory. For example, the March 3rd, 2015, 302 prepared by the FBI provides information regarding BLM individuals wearing tactical gear, not plain clothes, carrying

AR-15s assigned to the LPOP on April 5th and 6th of 2014, which bolsters the defense because it potentially rebuts the indictment's allegations of overt acts, including false pretextual misrepresentations that the Government claims the Defense made about snipers, Government snipers, isolating the Bundy family and defendants using deceit and deception to normally recruit gunmen.

This information was provided untimely. Should have been provided by October 1st, 30 days before trial. And the Court does find that the suppression was a willful failure to disclose because the FBI created these documents. They were aware of the evidence and chose not to disclose it. And they were not provided until 11/7/17. And the AUSA, in fact, was present during the March 3rd, 2015, interview documented by FBI Agent Willis.

And as to the FBI 302 dated February 9th of 2015 about Felix and the March 14th, 2014, FBI report about Racker, these were newly provided December 15th of 2017, far after the October 1st deadline, despite the fact they were created much earlier.

The Court does find that there is prejudice; that the suppression has undermined the confidence in the outcome of the trial; that the Defense represents that they would have proposed different questions for the jury voir dire, exercised their challenges differently, and provided a stronger opening statement. This suppression prevented the Defense from using

the information about these snipers or alleged snipers or appearance of snipers in their opening arguments. And it is useful to rebut elements in the indictment. Therefore, the Court finds that this information does undermine the outcome of the case in favor of the Defense.

The next group is the unredacted FBI TOC log. The Court does find that this is favorable information, potentially exculpatory. It bolsters the defense and is useful to rebut the Government's theory. More specifically, it provides information about the family being surveilled by a camera, and specifically lists three log entries using the word "snipers," including snipers being inserted and that they were on standby.

This information, had it been timely provided, would have been potentially useful to the Defense to rebut the indictment's overt acts, specifically the allegations regarding false pretextual misrepresentations being made by defendants about Government snipers isolating the Bundy family. This should have been provided by October 1st, which was 30 days before trial, but it was not.

The Court does find that the suppression was willful. It was a failure to disclose the information knowing that this information existed, again, because the Government claims that it was an inadvertent failure to disclose because the report was kept on a thumb drive inside the TOC vehicle and was not turned over to the prosecution team. So the "prosecution team" being

the U.S. attorneys, the prosecutors.

However, the law is clear that the Government is still responsible for information from the investigative agencies, in this case the FBI. The FBI created the documents, was aware of the evidence, chose not to disclose it. It was not provided until November 17th of 2017. And the Court finds further evidence of willfulness in the fact that the FBI 302 about Brunk that was created by FBI Agent Pratt on April 14th of 2014 mentions a BLM sniper, but then 10 months later in February, February 6th of 2015, the FBI -- Agent Willis drafted a new report, a new 302 report, to clarify that Brunk had never said he was a spotter for the sniper. And the AUSAs, the prosecutors, were present at this later interview which was documented specifically to be held for the purpose of clarifying the earlier interview answers and whether or not the word "sniper" had been used.

This coupled with the Government's strong insistence in prior trials that no snipers existed justifies the Court's conclusion that the nondisclosure was willful.

The Court also finds that there was prejudice and that the suppression does now undermine the confidence in the outcome of the trial. The Defense represents they would have proposed different voir dire questions, exercised their challenges differently, and provided a stronger opening statement. In fact, the Defense specifically -- and I'm not going to quote,

but specifically notes which potential jurors provided specific answers that would have been viewed and weighted differently by the Defense and how they would have exercised their challenges differently. Likewise, the Defense states that it would have created a stronger opening statement with this information had it been timely provided.

The suppression did prevent the Defense from using the information about the snipers in the opening statement and rebutting elements of the indictment, and the information, the Court finds, does undermine the outcome of the case in favor of the Defense.

Also part of the sniper allegations is an FBI 302 prepared regarding Delmolino. This one is dated November 20th of 2017, and the Court does not find this to be Brady. There's also maps created during the interview, and because they were created during the interview on the 20th and provided immediately thereafter, the Court does not find those to be Brady information that was untimely provided.

There were, however, maps provided on December 15th of 2017. These are maps that were in existence for dates in question. These do appear to be Brady information. They do appear to have been withheld willfully and they do prejudice the Defense.

Likewise, there's a 302 about Swanson that was prepared by the FBI. It's dated November 20th of 2017. It clarifies the

role that was assigned to Swanson and that it was different from that that was reflected originally in the organizational chart. And the Court does not find this to be Brady information.

Moving on now to the subject of threat assessments. There was a threat assessment that was provided. However, there are numerous other threat assessment reports that were not provided. We have the 2012 FBI BAU Threat Assessment; also 2012 Southern Nevada Counterterrorism Threat Assessment; the third one is the March 24th, 2014, FBI order; fourth, we have the Gold Butte Impoundment Risk Assessment; and the BLM OLES Threat Assessment.

The Court does find that these provide information that is favorable to the accused and potentially exculpatory. The information does bolster the defense and is useful to rebut the Government's theory.

Specifically, turning first to the 2012 FBI BAU Threat Assessment. That document provided favorable information about the Bundys' desire for a nonviolent resolution. The 2012 Southern Nevada Counterterrorism Threat Assessment noted that the BLM antagonizes the Bundy family, giving the community an unfavorable opinion of the Federal Government, and that they are trying to provoke a conflict, and that the likelihood of violence from Cliven Bundy is minimal.

The March 24th, 2014, FBI order relies on the 2012 assessment that the Bundy family was not violent, but if backed

into a corner, they could be.

And the Gold Butte Impoundment Risk Assessment lists a strategic communication plan to allow the BLM and the NPS, the National Park Service, to educate the public and get ahead of negative publicity. The failure of the BLM to implement this plan bolsters the Defense theory that even if the information received by Mr. Payne from the Bundy media campaign was incorrect, that no alternative information was available for him to discover the truth directly from the Government.

And, finally, the undated BLM OLES Threat Assessment drafted between 2011 and 2012 discusses the nonviolent nature of the Bundy family, quote, Will probably get in your face, but not get into a shootout, end quote.

All of this information undermines the Government theory and the witness testimony about whether the Bundys actually posed a threat in relation to the 2012 and 2014 cattle impoundment operations and whether the BLM acted reasonably. It is both exculpatory evidence and potentially impeachment information, and it was not provided before October 30th of 2017.

The Court does find that there was a willful failure to disclose the information. Most, if not all, of this information was in the possession of the FBI. It was difficult to understand why this -- these would not be seen as material by the Government since it was referenced in the 2014 FBI BAU that

was timely disclosed. Therefore, this information was in the hands of the FBI, even when it's not authored by the FBI, because it's mentioned by the FBI in its own report.

Regardless, these documents also were requested by the defendants in an e-mail dated July 5th, 2017, and later again during trial and after the testimony by Ms. Rugwell. And the Government's response was that this information was not material.

The Court also finds that there's prejudice and that the suppression has undermined the confidence in the outcome of the trial. The defendant does represent that this information would have been used to cross-examine Ms. Rugwell; that there would have been proposed different questions for the jury voir dire; the exercise of the peremptory challenges would have been completed differently; and this also provides a stronger opening statement that they were prevented from giving, using information about snipers in their opening arguments and rebutting elements of the indictment. And this information does undermine the outcome of the case in favor of the Defense.

Next we have the Internal Affairs information. This was information that originally was misidentified as being an OIG report. This was information that came to light through another document wherein in a meeting it is memorialized that someone had requested -- well, that someone had noted that there was a prior OIG report that made reference to specific

information. And the Government has found, in fact, that it was not an OIG report; that it was an Internal Affairs document based on an allegation provided.

The Court does find that this information in the Internal Affairs report is favorable to the accused; that it is potentially exculpatory; it does bolster the defense; and is useful to rebut the Government's theory. This particular information -- Internal Affairs report documents that Special-Agent-In-Charge Dan Love requested for the FBI to place a surveillance camera. The report allegedly also suggests that there was no documented injury to the tortoises by grazing, and this information would have been useful to potentially impeach Ms. Rugwell who testified that there had been a detrimental impact on the desert tortoise habitat.

The Court also finds that this information was willfully suppressed, despite representations by the Government that this report was an urban legend and a shiny object to distract the Court. The report does exist. Now, the Court does note that the Government did provide the information, did locate it, despite the fact that it was misnamed. The Government, however, did know right away that it was misidentified by Dan Love as an OIG report, which has not been explained, and it did not explain how Dan Love knew about the Internal Affairs report.

This information, the Court finds, was available to the Government, and even if it was inadvertently suppressed, it

would still meet the Brady standard.

The report was 500 pages long and not disclosed until December 8th of 2017. The Court does find that there is prejudice to the Defense due to the late and untimely disclosure. The suppression has now undermined the confidence in the outcome of the trial for the same reasons previously stated.

So, in summary, the Defense provides in their document, which is a response to the sur-reply, No. 3027, a table of evidence that was produced between December 12th and December 15th of 2017. Also they represent that since October 10th of 2017 the Defense has received 3,300 pages of discovery, and even excluding the OIG reports which amount to approximately 2,000 pages, that the Defense has still had to review over 1,000 pages.

The Court does find that there are numerous other documents which were provided timely such as the 302 created by FBI Special Agent Gavin. This is dated November 10th of 2017 and was provided as soon as created. The same for the 302 created by the FBI regarding BLM Special Agent Scott Swanson. That report is dated November 20th, 2017, and was provided as soon as created. Also there is a 302 by the FBI regarding BLM Special Agent Delmolino. That document is dated November 20th of 2017 and was provided as soon as it was created. And there are also FBI notes that were created in preparation for the

testimony of Mary Jo Rugwell, and these are Jencks material.

There still seems to be outstanding discovery. I noted, trying to match up from the different documents, that the name of the individual who prepared the TOC log which was requested on November 13th and again on November 14th of 2017 does not appear to have been provided. Also information regarding the other BLM officers assigned to do security in a car south of the Bundy house is mentioned by the FBI's 302 about Special Agent Swanson, that information does not appear to be provided.

But I understand that during this break information has been provided by the Government to the Defense. So it might be that we are not keeping up with how many --

MS. WEKSLER: Judge, so that the record is clear, that information has been provided.

THE COURT: Thank you. That was what I was -- as I was going through, I was thinking, Well, maybe it has been by now, but I didn't have proof of that yet. So I wanted to make note of it. So thank you for that representation.

So, the effect of this suppressed information. The suppressed evidence is considered collectively; not item by item. I did consider it item by item or subject by subject so that I could better under -- better understand and interpret and analyze whether it was Brady and whether it was timely provided. In determining its materiality pursuant to Kyles v. Whitley, we

do look at it collectively and I did try to group them.

The Defense represents that since October 10th of 2017 they have been provided this 3,300 pages of discovery; not all of it qualifies as Brady or Giglio information. However, the Government's failure to timely disclose the evidence reviewed by the Court is prejudicial in light of the information's importance to the Defense strategy. And the Court does find that there have been multiple Brady violations.

So in fashioning a remedy for these Brady violations, the Court does consider a number of different options. First of all, allowing the defendant to recall the Government witnesses that have already testified so that they have the opportunity to impeach these witnesses with newly-disclosed information.

The Court is worried about the jury's memory and the jury's confusion as a result of the recalling witnesses, but recalling of witness would be an appropriate remedy. However, the remedy would not cure the prejudice claimed by the defendants regarding the jury voir dire questions that were not asked, the peremptory challenges that would have been exercised differently, and the strength of the opening statements which could have been more unequivocal. Therefore, recalling the prior witnesses is an impractical remedy and not sufficient to cure the prejudice.

The second remedy that the Court analyzed is a continuance to allow the defendants time to review all of this

newly-discovered evidence. Again, the continuance would likely not be sufficient of a remedy. The continuance would most likely require a new jury to be empanelled as a result of the delay and the length of this particular trial as opposed to in other trial situations where a continuance would be more appropriate.

In this case the jury was pre-vetted for a particular amount of time, and they were amenable to making themselves available for this amount of time. We gave them specific parameters and calendar dates. Therefore, a continuance would effectively lead to a mistrial. Furthermore, this does not suffice to cure the prejudice claimed by the defendants regarding the voir dire questions, the peremptory challenges, and the opening statements.

The last option that the Court looks at is the mistrial option. And the mistrial could be in this case declared both because of the Brady violations because they are constitutional due process violations, but also the manifest necessity exception applies whenever the judge believes to a high degree that a new trial is needed. And I am quoting from Chapman.

Based on evidence presented in the record and the information determined to be a Brady violation, the Court does regrettably believe that a mistrial in this case is the most suitable and the only remedy that is available. In this case the Court does find that a fair trial at this point is

impossible with this particular jury and that a mistrial is required to at least a high degree of necessity, quoting Arizona v. Washington. And it is hereby ordered that the defendants' request for a mistrial is granted based on manifest necessity.

The joinders to the motion, to Motion No. 2856, are granted to the extent that they are requesting the same relief. For example, Motion for Joinder 2865 is granted. There is a Joinder No. 2907 which requests other information in addition to the mistrial, and so that inform -- that request is not granted, but to the extent that the joinder in 2907 asks for the same relief, then the joinder's relief is granted. Also, there's a Motion for Joinder No. 2925 that is granted.

There is a joinder to 2609, which is Joinder No. 2924, and that is granted. And then there's a Motion for Joinder No. 2916 which also supplements and provides new information. So 2916 is granted to the extent that it requests the same remedy as 2609; but not otherwise.

So the Court is going to call the jury back in at 1 o'clock, which is when they are scheduled to be here and ...

(Court conferring with courtroom administrator.)

THE COURT: Okay. So the jury is here now. So I will call them in and advise them of the mistrial, thank them for -- not right now, though.

COURTROOM ADMINISTRATOR: Okay.

THE COURT: Sorry.

And thank them for their service, but first I want to set the timeline here. So I do need briefing on whether the mistrial should be with or without prejudice. I am going to set a calendar call and a trial date because the Speedy Trial Act does require that a mistrial [sic] be held within 70 days of the declaration of a mistrial. So I will set a calendar call and a trial date.

Aaron, do you have that?

COURTROOM ADMINISTRATOR: Yes, Your Honor. Calendar call will be Thursday, February 15th, 2018, at 9 a.m. in this courtroom, 7C. And trial will be Monday, February 26th, 2018, at 8:30 a.m., also in this courtroom, 7C. And all trial documents will be due Thursday, February 8th, 2018.

THE COURT: All right. So the trial is scheduled to begin Monday, February 26th, 2018, at 8 a.m.

COURTROOM ADMINISTRATOR: 8:30 a.m., Your Honor.

THE COURT: I'm sorry. 8:30 a.m. And calendar call will be February 15th at 9 a.m.

COURTROOM ADMINISTRATOR: Correct, Your Honor.

THE COURT: And then the parties will be given a week to address whether the mistrial should be with or without prejudice.

Aaron, do you have a date for that?

COURTROOM ADMINISTRATOR: I do, Your Honor. For the response, that would be December 29th, 2017.

THE COURT: All right. So end of business, 5 p.m., December 29th, 2017. I just need -- not having response, reply, sur-reply back and forth. Just tell me everything you want me to know before 5 p.m. December 29th, 2017, regarding the legal standard I should use, the information I should consider, how I should consider it, interpret it, analyze it, evaluate it, what the results should or shouldn't be, any information that you want to provide to that effect.

MS. WEKSLER: Your Honor, what I would request is given -- I mean, the way that I'm reading the Court's ruling is that it's following the Chapman model to decide whether dismissal should be appropriate or not. The Court mentioned it in terms of mistrial with prejudice which would be essentially the same thing as dismissal with prejudice in this case. Because the Court needs to find whether the Government has acted with flagrant misconduct, and that is in fact the standard, we believe that a certain number of evidentiary hearings need to take place because that would inform the Court's decision regarding dismissal in this case.

So we would request in addition to the briefing schedule that's been set out for -- or excuse me -- in addition to the calendar call and trial dates that have been set out, a schedule for evidentiary hearings and briefing on a specific number of matters that have -- some of which have been briefed; some of which have not. Specifically, we have disclosures that

have taken place regarding the Wooten memo, regarding a variety of different things. Some of which have been briefed; some have not, which I think would inform the flagrant misconduct prong that the Court has to analyze in terms of dismissal.

THE COURT: All right. Well, that information can be provided in the brief that's due December 29th, 2017. I am also going to set a hearing.

Aaron, do you have that date?

COURTROOM ADMINISTRATOR: I do, Your Honor. That will be Monday, January 8th, 2018, at 9 a.m. in this courtroom, 7C.

THE COURT: So Monday, January 8th, 2018, is the date set for the Court to provide its either order in regards to whether or not the mistrial should be with or without prejudice or to conduct any other hearing, whether it be an evidentiary hearing or oral argument hearing. And the Court will advise the parties as soon as it receives the briefs so that it can provide information to the jury -- to the parties so the parties can be prepared if we need to extend the hearing date from January 8th to a different date depending on what the Court determines. Then we can also do that as well and consider other dates as availability for witnesses, if witnesses need to be called. That is not the inclination of the Court at this point.

The Court is aware that there is information that needs to be provided about the conduct, and that's why I did go into more detail on whether or not the Court found willful

suppression as opposed to inadvertent suppression. As Brady makes clear, and it's all the line of cases, in determining whether or not there is a Brady violation, it doesn't matter whether the suppression was willful or inadvertent. But I did make those findings because I think that it does help to clarify the next step of whether or not the mistrial should be with or without prejudice.

Mr. Schiess?

MR. SCHIESS: Your Honor, the Court in its order has described or stated a couple of items that the Court relied upon, one, the maps that were disclosed on December 15th. We have not had a chance to respond to those. So I'm wondering -- as well as the Court referred to the OIG/Internal Affairs record. What I'd like to do is just to make sure that those are part of the record so that we can use those in part with the response, if that's permissible from the Court.

THE COURT: When you say you want to make sure that they're part of the record, and you're asking for my permission to do what?

MR. SCHIESS: I just want a clarification that when we file our response or our discussion to the Court that we're able to refer to these items as part of the basis for the analysis. So to make sure that we -- that they're at least lodged in the record so that we can address them.

THE COURT: Well, you have the right to file on the

docket anything that you wish to file. But that brings up another issue that I also wanted to address, which is that of how much information is being filed under seal, probably under an abundance of caution because of the protective order filed in this case which was filed in order to protect individuals who had been receiving threats and who the Government represented and the Court believed were in danger of receiving more threats if the information was made publicly available. There had already been many instances on public media about information regarding these individuals, and the Court did find that it was appropriate and necessary to grant that protective order.

However, I think that there is much more information that is being filed under seal than need be. I understand that because this has been a flurry of information that's being provided that it's quicker and easier and safer to just file everything under seal. So I appreciate that, that you're being careful and erring on the side of caution. But now that we have more time, now that we've -- you have the Court's ruling, I am going to ask you to go back and look at those documents that have been filed under seal and refile them publicly with whatever redactions need to be made more specifically.

Some of these documents were very long. So, again, I understand why they were filed completely under seal in order to make the deadline and not accidently divulge something. But the practice of this Court has always been that if you need to file

something under seal, you file it under seal, and then the part that doesn't need to be under seal is filed publicly with whatever redactions are necessary. So sometimes it's names of children, some -- and this is both in criminal cases and civil cases. You file a redacted and an unredacted copy. The redacted copy is filed publicly, and the unredacted copy is filed under seal so everyone can see the entirety of the document.

So I'm going to ask the parties to go back and look at those and refile as many of them as possible without redaction, but some of those still may need some redaction and so that those redactions need to be made. If there is a question as to whether a redaction should or shouldn't be made, the parties should be able to get-together and discuss it, and if not, then the Court will address it.

There is a pending motion by an intervenor that the Court did provide standing to file a motion to intervene. Did you set a hearing date for that yet, Aaron?

COURTROOM ADMINISTRATOR: Your Honor, we did discuss setting that at the exact same time as the current hearing of January 8th. Did you still want to do that or should we do that separately?

THE COURT: I think we can still do that. Is that a 9 a.m.?

COURTROOM ADMINISTRATOR: Yes, Your Honor. And, Your

Honor, does that ruling also grant the Document No. 3018 which is the request for hearing made by the intervenors?

THE COURT: Yes. So that request for a hearing by the intervenors is granted, and the hearing date will be the same, January 8th of 2018 at 9 a.m. If that hearing date changes for any reason because of documentation provided by the defendant and the Government in response to the question of whether or not the mistrial should be with or without prejudice, we'll still keep that hearing date for the intervenors' motion. So, regardless, we'll still have a hearing on January 8th at 9 a.m.

All right. Mr. Ryan Bundy?

MR. RYAN BUNDY: Yes, I find it appropriate at this time to modify the conditions of release; that all of the defendants be released on their own recognizance without electronic monitoring, only signing a promise to appear. In the light of the Government's misconduct, and there's not been any shown here by the Defense, that I think that conditions should be changed. Mr. Cliven Bundy should be released. I also believe that this greatly affects the outcome of the previous trials and that also Todd Engel and Greg Burleson should also be released, as well as Jerry Delemus.

THE COURT: All right. Well, I appreciate your request and I anticipated as such. Unfortunately, the Pretrial Office is not aware of my ruling nor is anyone. You are all the first ones to hear it. I even saw another judge in the elevator

today, and that judge does not know my ruling either. So the Pretrial Office does not have this information, has not had the opportunity to determine whether or not your request is appropriate, but -- so I -- I believe that the correct course here is for you to make that request of the Pretrial Office. If they agree, they can submit it in writing for me to approve. If they disagree, then we can set it for a hearing to determine whether it is appropriate or not.

The point that I want to make clear here is that the Court is not determining or making a finding in any way that the information that was suppressed is, in fact, exculpatory or that the defendants are, in fact, not guilty or that any of the allegations in the superseding indictment are completely false. That is not the Court's position. It's not my technical position. It's not a factual decision for the Court to make. It's for the jury to make.

To try to put it as simply as possible, the Defense has a right to information so that it can provide it to the -- to the jury so that the jury can decide what the facts are, who to believe, who not to believe, how much weight to give the evidence, what really happened, was it a crime or not. So I am not making any decisions by finding that this information is helpful and potentially exculpatory or potentially useful. I believe it's very useful and very material, but that does not mean that I am making a finding that all the allegations are

rebutted or that the jury would have believed this new helpful information or not. So the weight of the evidence has not changed in my mind as to -- in regards to this particular hearing as opposed to in the past.

So we'll go ahead now -- Aaron, you can go ahead and bring in the jury. And we'll advise them of the change in circumstance and thank them.

COURTROOM ADMINISTRATOR: All rise.

(Whereupon jury enters the courtroom at 9:28 a.m.)

THE COURT: All right. Everyone may be seated.

We're joined by the jury and we welcome them back. Good morning, ladies and gentlemen. We do appreciate you being here. We appreciate your patience with us. There are things that have come up, as I'm sure you assumed that there was a continuance for some reason. And that reason being that we do have more information that has been made available to the parties. The Court has provided continuances to determine whether they can have sufficient time to review that information incorporated into the case, whether there are any other problems that have arisen because of the information being provided later than expected. And the Court has found that it is not possible for us to go forward with the case having -- the parties having received all of this information at this time.

So I apologize that I have had to declare a mistrial, which means that we will not be going forward with this

particular jury, with you all, for this case. It has been a treat to have you all on this case. We have other issues with jurors once in a while, and we haven't had any with you, even though I think we found out on the first day that there was about five smokers on this jury, which is sometimes a problem, but didn't even turn out to be. You all have been very patient, very cooperative, with all of the different doors and passages and getting in and out of here to the smoking section, and being kept in that little room for such a long period of time while we talked about important things here in court.

And we really appreciate you setting aside so much of your time to be available for this trial. We gave you the timeline. We asked you to reschedule your life, your home life, your work life, your duties and responsibilities so that you could be here. Some of you had to rearrange your work schedules, your work shifts, so that you could be available for this trial. And we cannot thank you enough for making that sacrifice to be able to provide the parties with a fair jury so that they could have their decision and their case resolved.

So I do appreciate you very much. All of the parties appreciate you very much. We are going to be considering other issues before we decide whether to empanel another jury.

In the past, the order that I have provided to you was that you were not to discuss this case with anyone nor permit anyone to discuss it with you. You are now relieved of that

requirement which means that you may discuss this case with each other, with others. You may allow others to discuss it with you, but it's important to note that you are not required to discuss it with anyone if you don't want to. So if anyone asks you any questions that you don't want to answer, that's fine. Judge said I don't have to answer any questions I don't want to.

If you do want to answer questions, if you do want to speak to your spouses, your work colleagues, your kids, your neighbors about your experience, you are free to do so, but not -- but you're not required to do so. All right?

So we'll go ahead and stand for the jury so they may go back in the jury room and collect their things and --

MR. RYAN BUNDY: Madam?

THE COURT: Yes.

MR. RYAN BUNDY: I would just like to personally thank them if you would allow me.

Jury, thank you for being here. I just want you to know that I appreciate your time and your service. Thank you.

THE COURT: As do all of the individuals here appreciate your service. The parties will be available to speak with you if you would like to speak with them and -- and if they want to speak with you, but you're not required to do so. We'll make that available.

All right. So thank you very much.

A JUROR: Merry Christmas.

THE COURT: Merry Christmas.

MR. RYAN BUNDY: Merry Christmas.

(Whereupon jury leaves the courtroom at 9:33 a.m.)

THE COURT: All right. So the Court's in recess until Monday, January 8th, at 9 a.m.

MR. RYAN BUNDY: Madam, may ...

(Court conferring with courtroom administrator.)

MR. RYAN BUNDY: Madam, may I suggest ...

THE COURT: I'm not going to take any more information at this time. You can provide the briefs.

MR. RYAN BUNDY: Thank you.

(Whereupon the proceedings concluded at 9:34 a.m.)

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COURT REPORTER'S CERTIFICATE

I, PATRICIA L. GANCI, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: December 20, 2017.

/s/ **Patricia L. Ganci**

Patricia L. Ganci, RMR, CRR

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