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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BRIANNA BOE, et al., *
*
Plaintiffs, * 2:22-cv-00184-LCB
* November 2, 2023
vs. * Montgomery, Alabama
* 10:00 a.m.
STEVE MARSHALL, et al., *
*
Defendants. *

SEALED

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LILES C. BURKE
UNITED STATES DISTRICT JUDGE

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified
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P R O C E E D I N G S

THE COURT: Good morning, ladies and gentlemen. Please be seated.

All right. Do I have anybody in the courtroom who is not a party or an attorney who is counsel of record in this courtroom?

All right. I'm going to take up a matter for a few minutes that is not related to the merits of this case. And so I'm going to close the courtroom except for just parties and attorneys of record. And so if you would step out, we will bring you back in just in a few minutes.

MR. BUCK: So, Your Honor, we represent one of the attorneys in the underlying Vague proceeding. Is that --

THE COURT: You count. You get to stay.

MR. BUCK: Okay. That's what we wanted to know.

THE COURT: I'm just making sure we don't have anybody else who is outside this case.

And tell me your names again.

MR. BUCK: Your Honor, Brannon Buck and Christopher Driver. We represent Kathleen Hartnett.

THE COURT: Got it.

I certainly know you, Mr. Buck. I just wanted to get that on the record to keep everything clean.

MR. BUCK: Thank you, Your Honor.

THE COURT: All right, ladies and gentlemen, let me

1 say this: It seems like we've got some fundamental
2 misunderstandings in this case about where we are.

3 A three-judge panel has done an inquiry. They have found
4 that certain attorneys in this case, their actions constituted
5 misconduct.

6 I have a flurry of filings in this case that seem to be
7 turning the heat up in this matter.

8 As Judge Proctor said when he kicked off the three-judge
9 panel, it was not his intent to destroy anybody's career, and
10 neither is it my intent to do that. But, you know, everybody
11 seems to be just turning the heat up. And if that's what we
12 want to do, hey, you know, attorneys have to decide their own
13 strategy, and they can do that, and that's fine.

14 Later today, I want to have a discussion with the
15 attorneys about how this case is going to proceed.

16 But let me clear up a few what I would call -- apparently
17 there are misunderstandings out there, based on the motions
18 that I'm seeing, and the notice of appeal, and those sorts of
19 things. So let's talk through those real quick.

20 There seems to be some question about what the intent of
21 the three-judge panel was. And so, y'all, there's just 14
22 federal judges in this state.

23 The three judges who served on that panel are my
24 colleagues. I promise you that if I did anything that was
25 outside of their intent, my cell phone would blow up within

1 one minute. That has not happened.

2 I talked to the chief judge of the three-judge panel just
3 to make sure that there was no daylight between what the intent
4 of the panel was and what I'm doing. And so, for the record,
5 let me say what Judge Proctor told me.

6 The first is, the three-judge panel's order said, The
7 Clerk is directed to serve a copy of this final report on the
8 Honorable Liles C. Burke, United States District Judge for the
9 Northern District of Alabama, so he may proceed as appropriate.

10 Judge Proctor said, This is not our case. This is your
11 case. We have closed our case. We have instructed the Clerk
12 to serve you so that you may proceed as appropriate.

13 And he said, Judge Burke, proceed as appropriate means
14 it's up to you to decide all matters. We have done our work.
15 We made findings of fact, and we have delivered them to you.
16 There is nothing left for this panel to do.

17 Now, there seems to be an additional question of, well,
18 you know, Judge Burke can't act in this case, and why have the
19 findings of fact been filed into this case. I'll tell you why.

20 The panel made findings of fact that attorneys in this
21 case had committed misconduct. So I'm filing it in my case,
22 and I will proceed as appropriate.

23 Again, it is not my intention to knock anybody's head off.
24 And we're going to talk about that. But I would like to see
25 the temperature come down.

1 The second issue. Been talking a lot about work product.
2 I certainly don't see anything in this order that is work
3 product from the three-judge panel. And I have given it a
4 solid read.

5 Even if there were something in there that were work
6 product -- which I certainly don't see -- the Eleventh Circuit
7 is very clear that you can't hide behind work product if you
8 have committed misconduct. So I'm uncertain as to why we're
9 there.

10 Let me read a statement from the three-judge panel about
11 what their intent was about work product. I asked Judge
12 Proctor to talk to the three judges. This is what they've
13 asked me to put on the record today.

14 The panel was constituted for a limited purpose,
15 investigating concerns raised by Judge Burke in his April 18th,
16 2022, order in Walker. This inquiry was handled in a wholly
17 separate proceeding than the three civil cases -- that being
18 Ladinsky, Walker, and Eknes-Tucker.

19 The panel opened a miscellaneous case in the Middle
20 District -- 22-mc-3977. All filings and proceedings in that
21 miscellaneous case were maintained separate and apart from the
22 litigation of those civil cases before Judge Burke.

23 When work-product objections were asserted in the
24 miscellaneous case, the panel viewed those assertions as
25 counsel's efforts to avoid any waiver of work-product privilege

1 in the ongoing civil action Eknes-Tucker.

2 Similarly, the panel understood that counsel were seeking
3 to ensure that there would not be any obligation to disclose
4 any such information in the Eknes-Tucker action. So when those
5 objections were made, the panel treated the objections as
6 preserving the argument that there was no obligation to
7 disclose materials or testimony in Eknes-Tucker.

8 Having said that, the panel was very clear that the
9 attorneys were expected to answer the panel's questions in the
10 miscellaneous case. And counsel clearly indicated that they
11 were not hiding behind any work-product objection, nor refusing
12 to answer the panel's questions. The discussion about any
13 work-product material, though, would not operate as any type of
14 waiver in Eknes-Tucker.

15 Although the panel included within its final report
16 information about the lawyers' actions and their communications
17 related to the issues before the panel -- specifically, their
18 purported attempts to manipulate the random selection process
19 in the middle and northern districts to have a case assigned to
20 a particular judge or to avoid a particular judge. The panel
21 took care not to reveal or discuss in its report any
22 work-product information related to matters connected to the
23 claims or issues that are being litigated by the parties in
24 Eknes-Tucker.

25 Rather, the evidence referenced in the panel's report is

1 directly relevant to the lawyers' conduct in this matter, not
2 any of the merits issues in any of those cases.

3 Now, lastly, I know in some of the filings -- I think the
4 notice of appeal there's the issue of, well, the panel did not
5 find that the lawyers acted in bad faith, and so the Court is
6 without power to go forward. There's nothing left to do here.

7 Judge Proctor has discussed this with the panel. Here's
8 what he reports to me: He said, look, Judge, we were -- our
9 job was to make findings of fact, and findings of fact only.
10 The rest was up to you.

11 A finding of bad faith is a mixed finding of law and fact.
12 Therefore, the panel thought it was better for you, for this
13 Court to decide whether or not bad faith existed based on your
14 report. We didn't find that bad faith didn't exist. It just
15 was not for us to decide because that involved a standard of
16 law.

17 Now, let me say this: All of the things that are in this
18 notice of appeal -- we're going to take this up -- I would say
19 might properly have been filed before me.

20 What do I do with this panel report? Well, we're going to
21 talk about that. I want to sit down with the attorneys and say
22 what's the roadmap forward here? What are the next steps? I
23 can envision that there are four, or five, or ten ways that we
24 could proceed with this.

25 Obviously, the things that are in that notice of appeal in

1 the miscellaneous case could well properly have been filed
2 before me to determine, as part of motion practice.

3 These findings of fact that have been delivered to me are
4 just that -- they're findings of fact. They're for my
5 consideration.

6 I don't know that I am necessarily bound or not bound by
7 them. I also don't know that I, you know, cannot proceed to
8 take additional inquiry, based on the findings of fact that
9 they have given me.

10 The last thing I will say: Just as acceptance of
11 responsibility goes a heck of a long way in a criminal case,
12 and you get points for that, it goes a heck of a long way with
13 me.

14 I am not interested in career-ending action today. I
15 believe we're all honorable attorneys. And I would just say
16 let's think about that as we roadmap this forward.

17 All right. I think that clears up my opening remarks.
18 Let's get to the matters at hand.

19 Let's take up the motion for the Court to take judicial
20 notice.

21 Mr. Ragsdale, I guess I would ask you before we start:
22 Has anything I said in my opening remarks affected your filing?

23 MR. RAGSDALE: It certainly affected my argument that
24 I was about to make.

25 Your Honor, obviously -- I'm sorry. Barry Ragsdale here

1 on behalf three of the lawyers in Walker.

2 Our concern, Judge, we didn't know that there was
3 communication obviously going on between you and the panel.
4 And we didn't know whether you had access to the transcripts.
5 I now do know that.

6 And so our intent was merely to make sure that the Court
7 was aware of what we were told by the panel as we went through
8 those proceedings. Meant no disrespect. Certainly didn't mean
9 to imply that you weren't keeping up with things, or anything
10 like that.

11 And certainly your words today are taken to heart.

12 So as a consequence, Your Honor, I don't know that there's
13 a need for you to take judicial notice now because you've told
14 us that you know what was going on, and you have talked with
15 Judge Proctor.

16 THE COURT: All right. Fair enough.

17 And so does that -- would you say that that motion is moot
18 at this point?

19 MR. RAGSDALE: I think so.

20 THE COURT: Okay. Fair enough.

21 All right.

22 MR. RAGSDALE: Is that all you have for me, Your
23 Honor?

24 THE COURT: That's all I have.

25 MR. RAGSDALE: Thank you.

1 THE COURT: Thank you.

2 All right. Why don't we take up the motions to stay? Who
3 wants to be heard on that?

4 MR. KING: Your Honor, Chris King. I represent
5 Ms. Eagan and Mr. Doss. If I could speak.

6 THE COURT: Come forward, sir.

7 MR. KING: Thank you, Your Honor.

8 And if I could start by telling you how much I and my
9 partners appreciate the Court's remarks this morning. And we
10 take them to heart, and we hear you --

11 THE COURT: Thank you.

12 MR. KING: -- Your Honor.

13 And to answer the Court's questions about the notice of
14 appeal. The only reason we did it on behalf of Ms. Eagan and
15 Mr. Doss was a concern about a waiver.

16 That -- you know, that case was closed. And we were very
17 concerned that if we let the time run before we were before
18 Your Honor, that -- and then there was a need for an appellate
19 review down the road, they would say, oh, you should have
20 complained about what happened with the panel as a result of
21 that case.

22 The Eleventh Circuit may find that it's not ripe. But we
23 were -- you know, it's better to file it and have it dismissed
24 than to not file it and have the Eleventh Circuit say we were
25 late.

1 THE COURT: Right. Understood.

2 MR. KING: So that was our explanation, at least for
3 that.

4 And I agree with you. And this sort of ties in to the
5 motion to stay. We make two arguments in our motion in the
6 alternative.

7 The first is because of that appeal, to the extent the
8 Court uses or doesn't use the panel's report, we think it makes
9 sense to see what the Eleventh Circuit says about that report.

10 And that's just a judicial economy issue. And --

11 THE COURT: And I'll just interrupt you briefly.

12 I understand. Everybody has to represent their client.
13 I'm not working any trial strategy up here. And I am not
14 sitting in judgment of any trial strategy. You have got to do
15 what you think is in the best interest of your client. So I
16 don't want you to take what I have said today as any judgment.

17 I just thought we had some misconception I needed to clear
18 up.

19 MR. KING: Yes, sir. And we appreciate it.

20 You know, we lawyers are all so paranoid about waiving
21 appellate rights. And so that drives a lot of our thinking
22 there.

23 THE COURT: So I will throw a couple of things at you.

24 The first is, you know, is there any thought that that
25 case should be actually consolidated with this one?

1 I believe what may happen is, even though that case is
2 closed, it could wind up going ahead and being reassigned at
3 this point, you know, depending on where this is going. Unless
4 we're all in agreement that we're going to move forward on
5 these issues in this case, that's certainly my intent.

6 Do you have any thoughts on that issue?

7 MR. KING: I will give you my personal preference. I
8 don't mean to speak for any other person.

9 My personal preference is to let it all flow -- if we can
10 solve the concern about waiving any appellate rights --

11 THE COURT: Right.

12 MR. KING: -- I think that would be great, because the
13 problem -- as the Court indicated, you know, this may be a
14 process that doesn't need to be appealed at the end.

15 And so, but if there were a way to make sure that there
16 was no waiver of our -- the issues, with respect to the panel's
17 findings, that would be my personal preference; that we just
18 let Your Honor play this out in the way you see fit, and that
19 we still have our rights that haven't been waived.

20 THE COURT: Gotcha. So how would that work? Would
21 you withdraw your notice of appeal until a final order if we
22 did that? Or how does that work procedurally?

23 MR. KING: Well, I have never done it.

24 THE COURT: Right.

25 MR. KING: So we got -- I think there should be a way

1 to do it. If there were some reopening of that case so -- you
2 know, what scares me, Your Honor, frankly, is that case closed
3 every time -- you know, that caption case closed, that makes me
4 worry about the Eleventh Circuit and what they're going to do.

5 I would think if there were a way -- kind of thinking out
6 loud -- for the panel to reopen it for purposes of
7 consolidating it with this case so that it remain alive, you
8 know, then we could probably satisfy ourselves that we could
9 withdraw the --

10 THE COURT: So maybe have the panel reopen it and
11 reassign it to me?

12 MR. KING: Yes, sir. That's -- if there's a way to do
13 that. I know it's a miscellaneous action. And I have to be
14 frank. In my 41 years, I have never dealt with one before.

15 THE COURT: Right.

16 MR. KING: So I'm not sure. But I'm just thinking out
17 loud. I think there would be a way to do that.

18 THE COURT: Got it. Got it.

19 MR. KING: So, Your Honor, if we were to do that, I
20 think, then, that takes us to the second prong of our motion.

21 If the appeal were to go away so we're no longer waiting
22 on that, then the second prong of our motion requests that the
23 Court deal with the merits of the case and hold this over until
24 the end because -- and we cited some law where it's not a
25 required practice.

1 The Court can hear the sanctions when it wants to hear the
2 sanctions. But the Cunningham case that we cited discusses the
3 wisdom of getting the merits done, and then having this
4 collateral matter dealt with later.

5 Now, part of me doesn't want to argue that. Because all
6 of these lawyers, this is -- as you would expect, it's been
7 very, very difficult for all the lawyers. It's been a personal
8 nightmare for them. And I know how sorry they are that this
9 ever happened.

10 And they can tell you that themselves. And I don't intend
11 to -- you know, I don't mean to speak for them.

12 But part of me, you know, wants to get it behind these
13 lawyers -- my partners.

14 But, you know, the other part is that, if you look at
15 Cunningham, dealing with this in the middle of the case is a
16 distraction. It might slow the other case down. And it --
17 also, if something bad were to happen to these lawyers, which I
18 hope and pray it doesn't, and I -- then they would not have the
19 right to appeal right away. And so this would hang over them.

20 And, you know, the practical effect of this really is not
21 only professional embarrassment, Your Honor, but it's pro hac
22 applications, for instance. You know, there are a lot of
23 implications to any sanction these days.

24 And so it's extremely important not only personally to
25 them, but professionally. So part of me wants to get it behind

1 them.

2 But then I don't want something hanging over them for a
3 long period of time. That was the second prong of the motion
4 to stay.

5 And I don't know what the Court's thoughts are. If I can
6 answer any other questions about that.

7 THE COURT: My general thoughts are this -- and
8 obviously, I have not heard all the argument in this. And
9 that's really what today is about.

10 My general thoughts are that this is, you know, apparently
11 I would say a non-final order. It's a finding of fact with no
12 action taken on it.

13 You know, depending on what motion practice I have, I
14 think there's the possibility there could be additional facts
15 in this case.

16 I certainly respect the work of the panel. I have no
17 reason to think that their findings of fact aren't the findings
18 of fact I should go with.

19 But also, you know, I understand that y'all may want to do
20 some motion practice in front of me regarding that, regarding
21 the panel's findings. And some or all of you, you know, may
22 have some thoughts on that.

23 So, you know, so I would say we've got non-final findings
24 of fact until I make them final. And yet, you know, we --
25 obviously, the next step would be to decide, you know, what, if

1 anything, do we do about those findings of fact. And then at
2 that point, certainly I would think it becomes appealable.

3 But right now, I don't know that there's anything to
4 appeal from, it would appear to me, based on current status of
5 the law.

6 MR. KING: I hear you. And I tend to agree with you.
7 We're just scared not to in the current posture.

8 THE COURT: I got it. I got it.

9 MR. KING: And so, but, Your Honor -- and the final
10 thing I will say, unless the Court has other questions is this:
11 There's a tension about the temperature. We want to keep the
12 temperature low. And we have tried to do that and will do that
13 at the same time, of course, dealing with waiver issues. And
14 so that's always the balance.

15 But we want the Court to know that we appreciate the
16 Court's consideration. We appreciate the position the Court's
17 been put in, with the receipt of this report. And we do trust
18 the Court to give our clients justice.

19 THE COURT: Absolutely. I appreciate your remarks.

20 MR. RAGSDALE: May I be heard?

21 THE COURT: Absolutely.

22 MR. RAGSDALE: I'm afraid I'm going to do exactly what
23 you told me not to do.

24 THE COURT: Okay.

25 MR. RAGSDALE: I think if the panel would have stopped

1 with findings of fact, we would be exactly where you say we
2 are. But they didn't. They made legal conclusions of
3 misconduct.

4 When they went the step further, it's just like what Your
5 Honor said -- a finding of subjective bad faith is a mixed
6 question of law and fact. And that's why they didn't make it.

7 But they did make a finding expressly of ten instances of
8 what they call misconduct, which are legal conclusions, not
9 factual conclusions.

10 And that's frankly what caused us to feel like we had to
11 appeal. Because there were legal final conclusions in a closed
12 case.

13 Now, if what the Court is telling us -- and I -- I'm not
14 trying to put, obviously, words in the Court's mouth -- is that
15 you are not going to defer to those findings of misconduct,
16 that you're going to revisit that and see whether or not it
17 really was misconduct, then I think the approach that you have
18 discussed with Mr. King makes perfect sense.

19 But already we have seen, for example, Your Honor, the
20 notion argued by both the State and elsewhere, that because
21 there's a finding of misconduct, there's automatically a waiver
22 of the work-product doctrine, and --

23 THE COURT: Let me address that.

24 MR. RAGSDALE: Okay.

25 THE COURT: And I should have addressed this on the

1 front end.

2 So, look, here's how I view this. I obviously have these
3 findings from the panel. And I know the State's position. But
4 all of those things can be addressed at a later time.

5 To the extent that, you know -- I know you have a concern
6 that, you know, these findings could go to the merits of the
7 case and all that. I don't think this does or does not open
8 the door to that.

9 I would just say that, you know, when we get to that issue
10 before we have a trial, I think that's limine practice, you
11 know. Hey, can we use this, can we not use it. And, you know,
12 so I don't view that question as decided right now one way or
13 the other.

14 MR. RAGSDALE: So, at this point, you don't believe
15 there's been a finding of misconduct that is binding on you or
16 that you would defer to.

17 THE COURT: No. That's not what I'm saying.

18 Let me say this: I have no reason to think that the
19 panel's findings are not good findings that I should go with.
20 I have no reason to think that.

21 I'm just saying I've been presented with them. And I
22 believe that the attorneys in this case ought to have the
23 opportunity to make arguments to me, much as what I saw in the
24 notice of appeal to the Eleventh Circuit.

25 I think everybody ought to have the right to bring that to

1 me before I say, yes, these are the final findings of fact.

2 MR. RAGSDALE: Then, in that instance -- I mean, all
3 I'd ask, Your Honor, is that you put yourself in our
4 position --

5 THE COURT: Right.

6 MR. RAGSDALE: -- which is a final decision, which is
7 the language that's used in 1291 for appeals --

8 THE COURT: Right.

9 MR. RAGSDALE: -- by this three-judge panel that
10 reached what appeared to us to be legal conclusions.

11 THE COURT: Again, I guess we're spit-balling here,
12 but --

13 MR. RAGSDALE: Yeah.

14 THE COURT: -- you want me to enter an order that says
15 these are not final at this point? Does that help you?

16 MR. RAGSDALE: I think it would. Although, Your
17 Honor, we're in uncharted territory.

18 THE COURT: We are. I don't think there's been a
19 three-judge panel in the history of this circuit on an issue
20 like this. And I agree we are in uncharted territory, you
21 know.

22 I think -- I'm not going to put myself in a box here, but
23 I think there's an argument to be made that the panel's
24 findings are much like a magistrate judge's report and
25 recommendation. I'm not going to say they're perfectly

1 aligned, but there's a thought process there. And so -- well,
2 let's address that.

3 I know counsel for Ms. Eagan and Mr. Doss kind of charted
4 a path, hey, you know, if we can -- if we all agree there are
5 further things to do, and maybe reopen this case, then we don't
6 need to appeal this, at least at this stage.

7 Maybe I'd ask you to come back around the podium with
8 Mr. Ragsdale, and let's talk this through just a second.

9 MR. RAGSDALE: He may not want to stand next to me. I
10 don't know, Judge.

11 THE COURT: He may not.

12 You have heard what Mr. Ragsdale has suggested here. And
13 I think what I hear him saying is, you know, if the Court
14 issued an order, at least at this point, to say, hey, this is a
15 non-final order, does that change anything with you?

16 MR. KING: We are spit-balling, Your Honor.

17 But my view is that that order coming from the panel, as
18 opposed to Your Honor, or maybe both, would be a good thing.

19 I think maybe reopened by the panel -- and I'm looking at
20 Barry because we haven't talked about any of this. But a
21 reopen by the panel, the -- an order that it's not final, and
22 it's being transferred to you for further proceedings -- which
23 is kind of what they said in the order, anyway. It would at
24 least make me less concerned about waiver.

25 Of course, the problem is the Eleventh Circuit can do what

1 the Eleventh Circuit does, no matter what.

2 THE COURT: Absolutely.

3 MR. KING: So we are --

4 THE COURT: I'm not short circuiting your appeal, if
5 that's what you want to do. I'm just saying --

6 MR. KING: Don't want to do it.

7 THE COURT: Right. Right.

8 MR. KING: Don't want to do it.

9 THE COURT: Right.

10 MR. RAGSDALE: We agree on that.

11 THE COURT: Well, this may be something that we take a
12 break and talk about further.

13 So anything else you want to add on this, Mr. Ragsdale?

14 MR. RAGSDALE: The only thing I would add, Your
15 Honor -- and I sound like a broken record on this, and I'm
16 sorry.

17 But I do think it's worth repeating that my clients are
18 not counsel in this case, have never been counsel in this case.
19 Were never counsel in Ladinsky. They filed the case, and
20 five days later, dismissed it. And that's all they did.

21 So to the extent it has some effect on your view of -- not
22 your view. That's not fair. But on counsel in this case or
23 the parties in this case, that's not my clients.

24 THE COURT: Understood.

25 MR. RAGSDALE: Okay.

1 THE COURT: Understood.

2 So nobody wants to say anything else about the motion to
3 stay? Is that...

4 MR. KING: No, sir.

5 I mean, if the Court says that let's try a way around --
6 let's try to get everybody comfortable so we can dismiss our
7 notice of appeal, we would then request a scheduling order that
8 sort of sets out a process. And we would like that to happen,
9 as we've argued, at the end of the case on the merits to avoid
10 the distraction. But we can talk about that, you know, at the
11 Court's convenience, but that would be -- as we see the
12 sequencing, you know.

13 For instance, we may well bring an expert witness or two,
14 if this is -- you know, if there's going to be further hearing.
15 The Court may just decide to do something without that
16 rigmarole. And we understand that, as well.

17 But, you know, we would like to discuss a schedule, if we
18 can get ourselves comfortable, with respect to the notice of
19 appeal.

20 THE COURT: No. I got it.

21 And, look, I want everybody to understand. There are a
22 lot of judges who, presented with this order, you guys would
23 just get a show cause order motion -- I mean, order in the mail
24 for 10 days out. I have not done that.

25 MR. KING: You haven't, Your Honor.

1 MR. RAGSDALE: And I personally appreciate it. And I
2 think others do, as well, Your Honor.

3 And let me also say, I also think the approach that you
4 brought to the bench this morning is exactly what we needed in
5 this case.

6 THE COURT: All right. Anybody else want to be heard
7 on this motion to stay? I know the State will.

8 Who's going to speak for the State?

9 MR. DAVIS: Good morning, Judge. Jim Davis for the
10 State for the defense.

11 THE COURT: Good morning.

12 MR. DAVIS: Judge, our priority is working with
13 Ms. Eagan and Mr. Doss and their colleagues, and getting the
14 case ready for trial, for decision. And defending the
15 constitutionality of the law.

16 So what happens next, and when Your Honor chooses to do
17 it, we do not take a position on that. We ask only that the
18 Court consider which options would best make it possible for
19 the lawyers here to get this case ready for you to decide the
20 constitutional issues.

21 THE COURT: Got it. All right. All right. Fair
22 enough.

23 All right. We still have, looks like to me, two filings
24 that are under seal. One is the sealed brief in support of
25 emergency motion to stay, dissemination of the sealed final

1 report by Esseks, Charles, and Faulks.

2 Mr. Ragsdale, I mean, has anything that we have talked
3 about this morning solved that issue? Or where does that
4 stand?

5 MR. RAGSDALE: First, Your Honor, we served a copy on
6 the State of that brief in its entirety.

7 THE COURT: All right.

8 MR. RAGSDALE: If this Court's made a ruling that
9 there's no -- may I approach?

10 THE COURT: Sure. No. No. Come around.

11 MR. RAGSDALE: I have two problems, or maybe I have 99
12 problems. But the two I want to talk about are not only the
13 work product, which I understand you have indicated you don't
14 think there's work product, and we obviously recognize that.

15 But, Your Honor, as we tried to point out, the panel went
16 to great lengths to keep us from sharing the information -- not
17 keep us from -- I'm not trying to make it sound nefarious. But
18 they put very strict restrictions on the dissemination of the
19 transcripts, of what occurred in the hearings, on the evidence
20 that was presented, the declarations. I mean, we were
21 repeatedly told we could not share that with anybody, and in
22 some instances, not even with our own client.

23 So as a consequence, although I am always fearful of
24 running afoul of a judge's orders, I was concerned that taking
25 that information, putting it in a brief, and then filing it on

1 the public record violated the panel's directions to me. And I
2 have no more interest in making three of them mad as I do
3 making you mad.

4 And so that was our reason for why things were filed under
5 seal was because we had been directed by those three judges not
6 to disclose any of that information.

7 THE COURT: And all of that could have properly been
8 put in a motion to file under seal before it was filed under
9 seal.

10 MR. RAGSDALE: Absolutely, Your Honor. Bud I would,
11 in my defense, only say things were moving at a pretty fast
12 pace at that point.

13 THE COURT: Understood. Understood.

14 MR. RAGSDALE: And I apologize to this Court for not
15 following those proper procedures early on and continuing to do
16 that. And I have tried to rectify my mistakes as best I can.

17 We've certainly made sure that we have served everything
18 on the State. They have now seen all of those filings. Our
19 last filing, obviously, we did not put under seal.

20 And, again, Your Honor, that was not to try to hide
21 anything from anybody other than the fact that I felt like I
22 remained under a court order from three federal judges telling
23 me I could not disclose that information.

24 THE COURT: Understood.

25 You know, and I would say this: The panel's work is

1 different from my work. You know, they opened an inquiry not
2 regarding the merits of this action, but the circumstances
3 under which it was filed, and other cases were dismissed. And,
4 you know, they operated under that rule.

5 I'm certain they didn't know what they would find. They
6 didn't know what, if any, work product might come out in the
7 process of this. They didn't know what, if any, information
8 they might get.

9 And so I'm certain that they -- they set these rules up,
10 you know, basically to protect the inquiry because they didn't
11 know where they were headed from the onset.

12 But now I also have a different job. Now I do have
13 findings of fact. They've been given to me to proceed.
14 They're in this case.

15 And so, you know, from my end, if this were just a regular
16 case, if I had, you know, entered into an inquiry as to
17 whether, you know, misconduct or sanctionable action had taken,
18 it would have been in this case. It wouldn't have been in a
19 separate case. Every person who was a party, including the
20 State, you know, would have a right to respond to any motion
21 practice, and all that.

22 And, so I don't want to create a situation where the State
23 is cut out, or other parties are cut out just because the panel
24 did its work, you know, for administrative purposes under a
25 separate case number.

1 And so, you know, my belief, unless somebody convinces me
2 otherwise, my belief is that all filings regarding this now,
3 you know, should go to all parties, and all parties should have
4 a right to respond.

5 Any thoughts on that?

6 MR. RAGSDALE: I absolutely agree with you, Your
7 Honor.

8 There are two filings that still remain under seal by us,
9 as you pointed out. One of which was filed under seal at your
10 direction. We can unseal that, obviously, at your direction,
11 as well. And then we will file the brief on the record, as
12 well, if that's the Court's preference.

13 And, again, Your Honor, I promise you, I was not trying to
14 flaunt your rules. I was trying to figure out which judge was
15 going to get madder at me.

16 THE COURT: I'm glad to hear you say that.

17 MR. RAGSDALE: Okay.

18 THE COURT: All right. So that seems like that solves
19 that emergency motion to stay. We'll just enter an order
20 unsealing that based on what you've said.

21 And then the notice of supplemental authority is the same;
22 is that correct?

23 MR. BOWDRE: I'm sorry, Your Honor. Are you talking
24 about the notice that we filed?

25 THE COURT: Yes.

1 MR. BOWDRE: Yes, Your Honor. May I approach?

2 THE COURT: Yes.

3 MR. BOWDRE: The notice of supplemental authority that
4 we filed, we filed under seal. It regards the WPATH documents
5 that we received in discovery.

6 We think that -- and those documents were produced to us
7 under the Court's protective order. They were marked as
8 confidential and attorneys' eyes only. We thought that those
9 documents clearly fall within that protective order. And so to
10 bring that to the Court's attention, we filed it under seal
11 pursuant to that protective order.

12 THE COURT: Let me turn this -- is there anybody who
13 thinks that that should not remain under seal? Or is everybody
14 good with that remaining under seal?

15 All right. It looks like that stays under seal.

16 MR. BOWDRE: Thank you, Your Honor.

17 THE COURT: All right. Let's take up this motion
18 regarding Admiral Levine.

19 Mr. Bowdre, are you going to argue that?

20 MR. BOWDRE: Yes, Your Honor.

21 THE COURT: All right.

22 MR. BOWDRE: Barrett Bowdre for the State defendants.

23 I don't think I have too much to add to this besides what
24 we've already put in our briefing and in our notice of
25 supplemental authority.

1 I think that notice really emphasizes the importance of
2 making Admiral Levine a custodian in this case. We think it is
3 clear that the Admiral has highly relevant documents that go
4 directly to the issues in this case. And we also think it's
5 clear that we're likely not to get those same documents
6 elsewhere; that at the very least, the proposed custodian from
7 HHS, who is a lawyer, who is on Admiral Levine's staff -- that
8 lawyer left in May or June. So at the very least, we have
9 documents from then that I don't think there is a single
10 custodian for.

11 But even were that not the case, I think it's clear that
12 Admiral Levine as HHS's, you know, most outspoken advocate of
13 these treatments for children, and a person that we know is
14 working on these issues, we think it's obvious that the Admiral
15 has highly relevant documents that we are entitled to.

16 I don't think I have much more to add. If the Court has
17 any questions, I'm happy to answer them.

18 THE COURT: Well, I guess I would say this: So if I'm
19 boiling this down, I know you want Admiral Levine to be a
20 custodian. But I think the bottom line is you just really want
21 your search terms to be done with her correspondence; is that
22 correct?

23 MR. BOWDRE: Yes, Your Honor.

24 THE COURT: So is it of any consequence whether or not
25 she's a custodian if you get your search terms?

1 MR. BOWDRE: Well, we want the search terms of the
2 Admiral's e-mails.

3 THE COURT: Right.

4 MR. BOWDRE: And so that is the part that makes the
5 Admiral a custodian. Like right now, my understanding is that
6 HHS is not searching Admiral Levine's --

7 THE COURT: I guess what I'm saying is, obviously, you
8 know, Admiral Levine is an important person, has a big job to
9 do.

10 You know, is the desire that she has to be the one to do
11 this; or is it that, you know, this deputy to her that already
12 is a custodian could do that search?

13 MR. BOWDRE: Your Honor, I think if the deputy had
14 complete access to the Admiral's files and that custodian
15 record was the exact same, our position would be different.

16 But my understanding is that the Admiral has an e-mail
17 address, the deputy -- or the former lawyer has an e-mail
18 address, and that they're not coextensive, that the lawyer
19 Calsyn does not have access to all of the Admiral's e-mails.

20 There are e-mails that the Admiral has both sent and
21 certainly received that HHS has indicated that their proposed
22 custodian does not have access to. And, so, therefore, they
23 would not be searching.

24 THE COURT: All right. Well, let's hear from the
25 government on this.

1 Any reason he can't have his search terms on the Admiral's
2 e-mails?

3 MS. MURPHY: Good morning, Your Honor. Amie Murphy
4 for the United States.

5 Yes. The reason why HHS chose Deputy Assistant Secretary
6 Maura Calsyn as the custodian is because her e-mails are
7 substantially the same as Admiral Levine's.

8 The two of -- those two officials worked closely together.
9 In fact, they've been working together since they were
10 officials in the state of Pennsylvania.

11 And Ms. Calsyn -- the way that Admiral Levine operates,
12 she doesn't send a lot of e-mails. She doesn't work through
13 written work product.

14 She started her practice as a treating physician.

15 And so even today, when she receives an e-mail, or she
16 sends an e-mail, it goes through Ms. Calsyn. Ms. Calsyn is
17 either CC'd on the e-mail, or Admiral Levine will forward
18 something to her.

19 And so that's why HHS chose her -- chose Ms. Calsyn as the
20 custodian is because she does have -- and it's unclear to me
21 why the State feels that she doesn't -- Ms. Calsyn does have
22 access to Admiral Levine's e-mails.

23 And so our position is it's wholly unnecessary to
24 specifically search the records of a high-ranking official
25 simply because of defendants' speculation.

1 THE COURT: So, look, the State's brief is pretty
2 compelling. Admiral Levine is not just a bystander. She is a
3 very important person in the United States Government.

4 She has chosen -- and that's fine -- but to put herself
5 squarely in the middle of this issue with speeches. She is on
6 the board of the very authority that all parties agree --
7 WPATH -- that their guidelines, you know, are the gold standard
8 that will decide -- that will help decide this case one way or
9 the other.

10 She's obviously in a position that, you know, she can ask
11 for rulings and authority to go out from her organization.

12 Tell me how -- tell me how what she has wouldn't likely be
13 able to produce relevant evidence.

14 MS. MURPHY: I understand that point, Your Honor.

15 And, you know, what I would say to that is the
16 determination on who to make a custodian is not based on the
17 person's credentials alone. In fact, it's based on who is the
18 person who is most likely to have --

19 THE COURT: I'm not so worried about who is the
20 custodian, as long as the State gets their search terms and the
21 e-mails they want.

22 MS. MURPHY: Correct, Your Honor, and --

23 THE COURT: Can her deputy, who is already, you know,
24 designated by you as a custodian, produce to them the same
25 thing to them as if Admiral Levine herself did it?

1 MS. MURPHY: It's our position that that's already
2 been in place. We produced -- I can't say the number, because
3 I don't know off the top of my head.

4 THE COURT: There seems to be a dispute whether we are
5 going to use the State's preferred terms that they're using in
6 the other searches, or whether they're using the FOIA terms.

7 MS. MURPHY: Oh, I think the dispute is actually over
8 whose records are going to be searched, as I understand it.
9 And so the search terms are the same.

10 We have already agreed on a set of search terms. And the
11 question is whether -- whether or not they're going to be run
12 through Ms. Calsyn's files, or they're going to be run -- which
13 they already have been -- or whether they'll also be run
14 through Ms. Levine's files.

15 THE COURT: So if Ms. Calsyn -- is that right?

16 MS. MURPHY: Yes.

17 THE COURT: I know you're saying, well, they're
18 substantially the same. That's not the same, substantially the
19 same. But, I mean, what are we afraid of here? Why can't we
20 run these terms through her e-mails, too?

21 MS. MURPHY: Your Honor, as I understand HHS's
22 position on this, it's pretty much unprecedented to search the
23 e-mails of a high-ranking government official. And it's simply
24 the time, the effort, and the level of review that those
25 documents will need go through.

1 THE COURT: Well, I understand if there's a privilege
2 issue, or anything like that, I am certain you would assert it,
3 if you found something that you thought was covered by that; is
4 that right?

5 MS. MURPHY: That's correct, Your Honor.

6 THE COURT: All right. And, look, you know, I'm just
7 asking the question here -- can we get the State this
8 information. But, you know, Admiral Levine doesn't have to be
9 the person to sit down and do this. If somebody else can do
10 that, I don't want to burden her with that. Again, she has got
11 a big job to do.

12 But, you know, is there a way -- I am going to take a
13 break in a minute and let everybody talk and settle in as we --
14 maybe this is something you could talk to Mr. Bowdre about. I
15 think you've got a fair idea of where I'm headed right now.

16 MS. MURPHY: Yes, Your Honor.

17 THE COURT: All right. All right. Anything else you
18 want to tell me?

19 MS. MURPHY: Your Honor, one thing that we put on the
20 table back when this motion was initially filed, was that we
21 offered to produce e-mails that were already compiled in
22 response to a FOIA request.

23 Now, that -- the truth is, the search terms are different,
24 but they're substantially the same. Many of the same search
25 terms that the government proposed and agreed on with the State

1 are included in that FOIA request -- WPATH, transgender. Those
2 are on there.

3 The difference is those documents have already been
4 compiled, and so the burden is far less than running the
5 State's preferred search terms into her files.

6 And so I just --

7 THE COURT: I thought you said y'all had agreed on
8 search terms. This doesn't sound like you have an agreement on
9 search terms.

10 MS. MURPHY: We did. Maybe I'm not explaining it
11 correctly.

12 We agreed on search terms to use for each of the
13 custodians in the case. There's nine custodians. And we have
14 agreed search terms for that.

15 The State wants those search terms to be used for Admiral
16 Levine's files.

17 There was also, when we initially said that we didn't feel
18 that it was necessary to run those search terms through her
19 files, we offered a compromised position, which was to produce
20 files that were in response to a FOIA request. It was Admiral
21 Levine's e-mails in response to a FOIA request. Similar, but
22 different search terms.

23 The difference is these documents have already been
24 compiled, and reviewed, and are, as I understand it, pretty
25 much ready to go. So the difference is it would eliminate the

1 burden if we took that option.

2 THE COURT: I understand.

3 You know, if the shoe were on the other foot -- and it's
4 not -- but if it were, you know, I don't want to put the State
5 in the position of, you know, the person with the discovery
6 that's sought gets to determine the terms under which it will
7 be provided.

8 I don't think the request is unreasonable.

9 MS. MURPHY: Thank you, Your Honor.

10 THE COURT: Absolutely. Absolutely.

11 But, again, let me just say, you know, I do not want to
12 burden Admiral Levine with this. And I think if the two of you
13 talk, we can find a way to accomplish their discovery without
14 it being any burden at all to her, much less a substantial
15 burden. I think we can do this through subordinates, and she
16 won't have to spend any time on it at all.

17 MS. MURPHY: Thank you, Your Honor.

18 THE COURT: All right. Do we have any additional
19 motions that we need to take up today?

20 MR. BOWDRE: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. BOWDRE: I think there are two other things that
23 we would like to talk with you about.

24 One is the HHS's notice that it's going to be two months
25 late in producing discovery.

1 And then the other is our motion to stay the Court's
2 preliminary injunction.

3 I will start with the schedule.

4 So, as you know, when the parties proposed and this Court
5 entered the scheduling order in June --

6 THE COURT: Let me just help you on the preliminary
7 injunction order.

8 That's the Eleventh Circuit's business. They've issued --
9 they've issued their ruling. For whatever reason, they have
10 not issued a mandate. That's up to them.

11 And, so, you know, if the Eleventh Circuit decides that
12 they want to issue a mandate on this case, and make that order
13 final and permanent, that will act. But I have no intention of
14 doing anything at this time with that order. That's fully in
15 the Eleventh Circuit hands, and that's up to them.

16 MR. BOWDRE: Yes, Your Honor.

17 And just to clarify, though. We are not asking you to
18 vacate the preliminary injunction, but to stay it, which we
19 think the Court has jurisdiction to do.

20 I understand if the Court doesn't want to do that, we
21 would just ask that the Court deny the order quickly so we can
22 pursue an appeal, if necessary.

23 THE COURT: Understood.

24 MR. BOWDRE: Back to HHS.

25 The schedule that this Court entered was a tight schedule,

1 but it depended on each phase being completed before the next
2 phase could take place.

3 So HHS was to produce all of its discovery to us by
4 October 20th. So then we had just a little over a month to
5 review that discovery with our experts, and then for those
6 experts to write their supplemental reports, which are due
7 December 1.

8 And then that gave the plaintiffs just over a month to
9 review those before their rebuttal reports were due. And then
10 there are a few weeks for final depositions before discovery
11 closed.

12 When HHS said that it's not going to be able to complete
13 discovery until December 15 -- two months later, and two weeks
14 after our supplemental reports are due -- that really throws a
15 wrench into things.

16 And I would also just point out that the discovery that is
17 delayed is from the National Institutes of Health, which is the
18 subdivision within HHS that is funding and overseeing the
19 ongoing studies into the safety and efficacy of these
20 transitioning treatments for children. So we think that
21 discovery is actually very important for our experts to be able
22 to review and opine on in the supplemental report.

23 So, obviously, we want to get to trial --

24 THE COURT: What's the solution?

25 MR. BOWDRE: I think reluctantly, and very

1 frustratingly for defendants, I think the solution is to kick
2 everything back by two months -- so adjust the schedule.

3 Because we think -- you know, we want to get to trial. We
4 want to vindicate the State's law. But we also need the
5 discovery to do that.

6 THE COURT: So move the trial?

7 MR. BOWDRE: Yes, Your Honor.

8 THE COURT: I had come to generally the same
9 conclusion myself.

10 MR. BOWDRE: One other --

11 THE COURT: Let me say something else about your
12 motion for me to vacate my preliminary injunction.

13 I mean, I'm not really sure why you filed that. You know,
14 that's the Eleventh Circuit's business.

15 Why do you think they haven't issued a mandate?

16 MR. BOWDRE: Well, Your Honor, I think there's a
17 difference between a stay and vacating the injunction. I just
18 want to be very clear that the mandate goes to whether this
19 Court has jurisdiction to vacate the injunction. And the
20 answer to that is clear, that it doesn't.

21 The mandate has nothing to do with whether this Court can
22 stay the injunction. And courts do that all the time.

23 THE COURT: I understand that.

24 MR. BOWDRE: Okay.

25 THE COURT: But you're asking me to get in front of

1 them. You are asking me to get out in front of them.

2 This is their business. They have issued an order, but
3 they have not issued a mandate. And I don't know what that
4 means.

5 Does it mean they're going to hear it *en banc*? Does it
6 mean the order might change? Does it mean it might not change?

7 But you are asking me to second guess them really, aren't
8 you?

9 MR. BOWDRE: No, Your Honor, I don't think so. I
10 think we are asking you to recognize that, as of right now, all
11 of the Eleventh Circuit is bound by the precedential decision
12 that the Court issued.

13 And so that is why, for instance, the Georgia district
14 court stayed its injunction that it had issued in light of the
15 Court's ruling. And so we just thought it would be very odd
16 that if that is proper for the Georgia district court to stay
17 its injunction in light of that ruling, the same effect should
18 take place here.

19 THE COURT: So let's get in the "what about" business.
20 So, then, I vacate my order based on this opinion, and a
21 new opinion comes out *en banc* that says something entirely
22 different.

23 MR. BOWDRE: If that's the case, Your Honor, then we
24 follow the new opinion.

25 The point is we follow the precedent as it exists today.

1 And the precedent as it exists today shows that we are likely
2 to succeed on the merits.

3 THE COURT: All right.

4 MR. BOWDRE: And, again --

5 THE COURT: I think we have covered it.

6 MR. BOWDRE: Yes, Your Honor.

7 THE COURT: All right. Anybody think that we don't
8 need to set this trial out a little bit further?

9 MS. EAGAN: Judge, Melody Eagan. From our
10 perspective, that is acceptable to us.

11 THE COURT: Okay. All right.

12 MS. MURPHY: Your Honor, Amie Murphy on behalf of the
13 United States.

14 I just want to correct the record very quickly, if I may.

15 THE COURT: Yes.

16 MS. MURPHY: Your Honor, defendants approached us last
17 week with the request to agree to change the scheduling order.
18 We gave it some thought in our office. We spoke with HHS.

19 Although HHS believes that they can complete the
20 production by mid November, we informed the defendants that we
21 were not opposed to an extension of the discovery schedule.

22 So I'm not sure why they made a motion here today. But we
23 said that we would agree to it.

24 THE COURT: Got it. Got it. Thank you.

25 Well, while I've got everybody, let's see what the

1 calendar says.

2 How do the first two weeks of July look for everybody?

3 MR. BOWDRE: I believe that would be fine with the
4 State defendants, Your Honor.

5 THE COURT: My wife is going to be very put out about
6 this.

7 MS. EAGAN: Your Honor, from our perspective -- from
8 our calendars, it's fine. But as a wife, who might have family
9 vacations planned --

10 THE COURT: Absolutely.

11 MS. EAGAN: But from our perspective, that works for
12 our calendars.

13 THE COURT: So the unexpected continues to happen in
14 this case, it seems, at every turn on a myriad of issues. And
15 I don't think it's impossible that another one -- another turn
16 could happen.

17 Do we want to make look at August the 1st, and keep
18 everybody's calendar intact and not risk having another
19 continuance?

20 MR. BOWDRE: Your Honor, either one would be fine with
21 us, Your Honor.

22 THE COURT: Got it.

23 MS. EAGAN: Your Honor, from our perspective, that is
24 fine.

25 THE COURT: Got it.

1 MR. CHEEK: Your Honor, I hate to put a cog in the
2 wheel, but I do have a vacation I have planned for over a year,
3 paid deposit, been planning for years that week.

4 THE COURT: We won't mess you up. Tell me what the
5 dates of that are.

6 MR. CHEEK: August 1st through the 4th.

7 THE COURT: Where are you going?

8 MR. CHEEK: Grand Canyon, sir.

9 THE COURT: Excellent. Excellent.

10 All right. Let's see.

11 You come home the 4th? Or you leave the 4th?

12 MR. CHEEK: We're hoping to do a cross country, but
13 anything after the 12th forward is --

14 THE COURT: All right. Well, if we started it on
15 Monday, August the 12th, does that work with everybody?

16 MR. BOWDRE: Yes, Your Honor.

17 MS. EAGAN: Yes, Your Honor, for private plaintiffs.

18 MR. CHEEK: It works for the United States, Your
19 Honor.

20 THE COURT: All right. Then it's set for trial --
21 reset for trial on August the 12th. That will certainly give
22 us some more room. And if we do have any other discovery
23 issues, we will have some breathing room to work through them.

24 Why don't we take a ten-minute break. Let me let the
25 attorneys for the respondents and what was originally the

1 miscellaneous matter talk about procedure, and what we ought to
2 do. I would like to have a game plan, get Judge Proctor and
3 the panel on the phone today, and figure out what the best way
4 is to go forward.

5 I would love to see an agreement by everybody as to what
6 that looks like. Let the State and the government talk about a
7 way to accomplish these e-mails with as little or no burden to
8 Admiral Levine, as possible.

9 And then we'll reconvene in 10, 15 minutes.

10 (Recess.)

11 THE COURT: Please sit down.

12 All right. Mr. Bowdre, have you talked with the
13 government?

14 MR. BOWDRE: Yes, Your Honor.

15 THE COURT: And what's the status of that?

16 MR. BOWDRE: I think we have reached an agreement.
17 And I will defer to my friend from the government to explain
18 that.

19 THE COURT: All right. If you want to come to the
20 podium and state the agreement, that would be fantastic.

21 MS. MURPHY: Thank you, Your Honor.

22 Your Honor, I believe we have seen the writing on the wall
23 here. So HHS has agreed to just produce the documents, you
24 know, according to the search terms that we have agreed upon
25 with the State.

1 We simply request that Your Honor enter an order stating
2 that their motion is granted, or what have you, simply because,
3 you know, Admiral Levine is a public official. And we simply
4 don't want to, you know, set the precedent that something like
5 this is sort of routine.

6 THE COURT: Understood.

7 MS. MURPHY: And so we would appreciate that.

8 THE COURT: I appreciate your agreement.

9 All right. Let's see. And have we worked out our
10 thoughts maybe on the miscellaneous case?

11 MR. KING: Your Honor, as you might expect, with that
12 many lawyers in one room, there was -- let me say I think so,
13 but I certainly want to invite anyone else that wants to add
14 something or say something differently to this.

15 THE COURT: Understood.

16 And I know I don't have a notice of appeal from
17 Mr. Segall, but I do have a pending motion.

18 Is Mr. Segall or anybody with his firm here today?

19 MR. RAGSDALE: Shannon is here, right?

20 MR. KING: I'm sorry. Chris King for Ms. Eagan and
21 Mr. Doss.

22 MR. RAGSDALE: And I'm Barry Ragsdale.

23 THE COURT: All right.

24 MS. HOLLIDAY: Shannon Holliday. I'm here for
25 Mr. Orr, Mr. McCoy, Ms. Levi and Mr. Minter.

1 THE COURT: Got it.

2 All right. Who wants to summarize our thoughts on all of
3 this?

4 MR. KING: Well, I'll start.

5 MR. RAGSDALE: And I will correct him.

6 MR. KING: And I will be corrected, which is fine.

7 Your Honor, what we're thinking might work is to have the
8 panel, if they're willing, amend the order to call it a
9 preliminary order, as opposed to a final order. Then say
10 something like this at the end -- and we just scribbled
11 something down -- This action is not final. Judge Burke may
12 take such additional process as he deems appropriate in his
13 review of these findings.

14 And then have them issue an order reopening the case and
15 transferring it to Your Honor.

16 THE COURT: So a couple of thoughts about that.

17 I think that's probably all doable. I have already called
18 Judge Proctor -- but I couldn't get him on the telephone --
19 just to apprise him of what I thought.

20 I am trying not to -- you know, the panel basically came
21 in at a time when I was dealing with the merits of this case.
22 And they did their work separately. And that, honestly, was a
23 gift to me, because I didn't have two tracks going at the same
24 time.

25 But I'm trying not to burden them with going back to them

1 every two or three days with what about this, what about that,
2 because I have, obviously -- from what I had to read into the
3 record earlier, I have already had to go back to them on two or
4 three issues for clarity.

5 Does it change anybody's opinion on this if they just
6 reopen the case, reassign it to me, and then let me enter such
7 an order, as opposed to them?

8 MR. KING: That probably works. I don't like it quite
9 as much personally, just because I feel like the optics -- the
10 Eleventh Circuit is -- you know, they said what they said. And
11 I think it would be great -- if that's all we can get, that's
12 all we can get.

13 But I think from my perspective, I do prefer that the
14 panel do it. And then the Court, obviously, belts and
15 suspenders could pile on in some way.

16 THE COURT: Well, I will ask that question. I am just
17 trying not to work them to death, because every time I call
18 with a question, they have to get on a conference call, and
19 then, you know, have agreed language, and all that sort of
20 stuff. So I'm just trying not to wear them out here.

21 Okay. So, then, is everybody in agreement, then, we would
22 do that, y'all would basically withdraw your appeal. And then,
23 you know, depending on what my final order, if any, says, you
24 know, take it up at that time? Is that where we're headed with
25 this?

1 MR. KING: Yes, sir.

2 THE COURT: Got it. Got it.

3 MR. ROGERS: Your Honor -- I'm sorry. Bruce Rogers
4 for Michael Shortnacy, one of the respondents.

5 I am not able to say we are in agreement. I have a
6 hierarchy I have to talk to. And I was trying to do that. And
7 I have not been able to complete that process.

8 THE COURT: All right. Do you have any thoughts on
9 where that might wind up?

10 MR. ROGERS: I don't want to be an outlier, but I have
11 to have some conversations.

12 Michael Shortnacy, we think it was a mistake that he is in
13 the group that has been accused of misconduct. On the spectrum
14 of responsibility and action, he's way at the far end. That
15 may be a motion practice in front of Your Honor. But we have
16 concerns about that.

17 I just need -- I've got to talk to certain people that
18 give me my marching orders.

19 THE COURT: I understand. I understand.

20 Well, let me drill down just a little further. What's
21 your recommendation going to be to them?

22 MR. ROGERS: I don't know yet.

23 THE COURT: Don't know. Got it.

24 MR. ROGERS: I had a five-minute breakout. We had a
25 group discussion. You have heard what Mr. King, my colleague

1 and who I have great respect for, has said. I had a brief
2 discussion with my client. I tried to get the internal partner
3 at the King and Spalding firm on the phone. I had them, and
4 then I was told to come back in the courtroom.

5 So I need -- I'm not trying to burden Your Honor --

6 THE COURT: Oh, no. I understand.

7 MR. ROGERS: -- but I have got to -- I can't say that
8 we agree yet.

9 THE COURT: And, look. I'm not trying to get anybody
10 to withdraw their notice of appeal.

11 I think what I am trying to do is make your lives a little
12 easier until we get further down the road. And you don't have
13 to brief these issues right this second. And we will see, you
14 know, how this all eventually plays out.

15 So, you know, to the extent anybody needs to continue with
16 their appeal, that's fine. You know, I view that as one track.
17 And I -- you know, this is obviously another one.

18 MR. ROGERS: Thank you for that and thank you for the
19 courtesy of letting me do a little more due diligence so I can
20 make sure I have input before I say whether we agree or not.

21 THE COURT: Absolutely. Absolutely.

22 All right.

23 MR. BUCK: Your Honor, Brannon Buck on behalf of
24 Kathleen Hartnett.

25 There are several of us, if not all of us here, who had

1 clients, lawyer clients who have either been expressly
2 discharged by the panel, or who were not identified in the
3 group of persons that the misconduct label was attached to.

4 Those folks would obviously feel much better if we were
5 able to get some kind of formal order, or dismissal, or
6 discharge of them. In light of the fact that this is -- this
7 report, which I am not objecting to, is going to continue to
8 have life.

9 And so I just wanted to present to Your Honor would it be
10 possible for the lawyers to get together and maybe present the
11 Court with a proposed order or a list of names that we believe
12 were dismissed or discharged through that inquiry?

13 THE COURT: Hey, I am an old state court judge. I
14 love a proposed order.

15 MR. BUCK: Okay. Perfect. I mean, I don't want to
16 speak for everybody, but I think we could probably get together
17 and submit something to Your Honor for your consideration.

18 THE COURT: I think that's fine.

19 And, you know, obviously, if your name is not in this
20 order, then there's -- nothing's going to go forward, anyway.
21 So I see no reason not to make that clear, to the extent it's
22 not.

23 MR. BUCK: Great.

24 And, so, Your Honor, one last sort of housekeeping
25 question. Some of us -- my client Kathleen Hartnett has never

1 been counsel in the Boe or Eknes-Tucker case.

2 If the plan is, I guess is to transfer the Vague
3 proceeding to Your Honor, will -- is your -- is your sort of
4 vision that further proceedings will be done under that
5 miscellaneous case number going forward if it's transferred to
6 you?

7 THE COURT: You know, I kind of -- I kind of view the
8 Vague case as that was where the panel was doing its work and
9 I'm doing my work in this case.

10 So maybe I've not thought that clearly all the way down
11 the line.

12 You know, just as a practical matter, if, in fact, a
13 lawyer commits misconduct, whether it's in this case or not, or
14 even in a dismissed case, I continue to have jurisdiction to
15 operate over that lawyer, whether in the case or not, whether
16 the case is dismissed or not.

17 And so I kind of view that as, you know, we can do it this
18 way, we can do it that way, we can do it this way, but they're
19 all okay.

20 You got any thoughts on that?

21 MR. BUCK: Well, Your Honor, I -- it may be that some
22 of the lawyers who are involved in the Boe case that continues
23 would rather the proceedings be done in a separate -- in the
24 separate miscellaneous proceeding and not attached to the
25 merits case.

1 THE COURT: And then what do I do with the State?

2 MR. BUCK: Well, Your Honor, they were excluded from
3 the panel's inquiry thus far, so I guess the question for the
4 Court would be whether they are now allowed to participate or
5 not in whatever further process transpires.

6 THE COURT: Somebody would have to show me some
7 gigantic precedent that says a party can rightly be excluded
8 from misconduct that occurs in their case.

9 You know, if this were -- again, if I had just done this
10 in my -- in this case, as opposed to the panel doing it in a
11 miscellaneous case, the State would certainly have, I think,
12 every right to be involved. There's certainly an argument to
13 be made -- a good argument -- that if the panel's findings are
14 correct, that the State would be an aggrieved party of that
15 conduct, not just the Court. So I would think they would have
16 a right to be heard.

17 Do you have any thoughts?

18 MR. BUCK: Some of my co-counsel may, Your Honor. I
19 really don't. I mean, I don't see that that's -- I see that
20 that's probably within your discretion as to how you choose to
21 proceed with that.

22 THE COURT: Got it. But I mean, that's certainly
23 something I am willing to talk through.

24 And that leads me to the next thing. You know, what I
25 would like to do is sit down with just the attorneys on the

1 record, though, but just sit down at a table and let's just
2 talk, okay, where do we think this ought to go from here?
3 What's the best process?

4 I suspect that won't be a five-minute conversation. And
5 so I'm just wondering do we want to take a lunch break and come
6 back? Is that going to destroy anybody's schedule?

7 MR. DOSS: Your Honor, I have a hearing in bankruptcy
8 court in the northern district at 1:00 o'clock that I can
9 participate by phone on.

10 THE COURT: Got it. Got it.

11 And I will say this: Really, what I want to do is really
12 just talk to counsel for the respondents who are named. I
13 think you would be fine to go on to that hearing, if you wanted
14 to.

15 I really just want to kind of talk about, you know, hey,
16 what does everybody think we ought to do? What's our next
17 step? Does anybody disagree about what the next step? You may
18 have already talked about those things.

19 So I will leave that to you. To the extent you think you
20 need to be there, go. To the extent you want to do it by
21 telephone and stay here, you are certainly welcome to do that.

22 MR. DOSS: Thank you, Your Honor.

23 MR. KING: Judge, we obviously defer to the Court and
24 its staff.

25 I have an obligation that I will reschedule this

1 afternoon, if the Court wants lunch. But, you know, I learned
2 a long time ago not to tell the Court when it should break,
3 but --

4 THE COURT: Understood.

5 Well, I hate for us to sit down and at 1:30 we're still
6 talking --

7 MR. KING: I understand.

8 THE COURT: -- about this, you know.

9 Why don't we take a quick lunch. Let's be back in, you
10 know, an hour --

11 MR. KING: Yes, sir.

12 THE COURT: -- and we will get started quick.

13 And then, you know -- this afternoon will go as long or as
14 short as y'all want. I just want everybody's input.

15 MR. KING: Yes, sir.

16 THE COURT: I certainly have my ideas about what the
17 next steps are, but I want to hear that from y'all, as well.

18 MR. KING: Yes, sir.

19 THE COURT: So, and obviously, the State will be
20 included in those conversations, as well.

21 So, all right.

22 MR. CHEEK: Judge, this is Jason Cheek.

23 May I ask -- do you expect the United States to appear and
24 participate in that?

25 THE COURT: I think that's at your leisure.

1 MR. CHEEK: Okay.

2 THE COURT: You know, to the extent you want to be
3 involved, you are a party.

4 MR. CHEEK: Okay.

5 THE COURT: And so to the extent you don't want to be
6 involved, I just leave that up to you. Just know that you have
7 a full right to participate.

8 MR. CHEEK: Thank you, Your Honor.

9 THE COURT: Right.

10 But, you know, to the extent -- hey, we don't have an
11 opinion, I get that, you know.

12 I do have that motion to stay, Ms. Holliday, I think that
13 you and Mr. Segall filed. Do you want to address that?

14 MS. HOLLIDAY: It's just a joinder, the motion to stay
15 that Mr. -- that was filed on behalf of Mr. Doss and Ms. Eagan.

16 THE COURT: Okay.

17 MS. HOLLIDAY: So it's the same arguments.

18 We just think that it's a burden on the Court and on the
19 parties to do the proceedings related to sanctions while the
20 merits are ongoing and having -- having this hanging over --
21 sanctions could have very serious effects. And having it
22 hanging over folks' heads and not -- and having them not able
23 to appeal it is a real problem because this case could last for
24 a long time.

25 THE COURT: Are you in agreement with the other

1 attorneys that, you know, as to basically what they see as the
2 way forward, as far as not doing an appeal right now, but
3 waiting until this is more ripe? Or no?

4 MS. HOLLIDAY: Yes. I am. I have -- we have four
5 clients. There's one whose feelings I am reading between the
6 lines in saying I am in agreement. But I'm 98 percent sure
7 that that would be his position, as well, that it would be
8 fine, if there is a way forward to make that -- the panel's
9 decision un-final at this point and move it to this case.

10 I think everybody on my roster will be okay with that.

11 THE COURT: Got it.

12 All right. Well, I hate to drag this day out, and I
13 certainly don't mean to impact everybody's schedule. But, you
14 know, obviously these are serious and important matters, and I
15 know it will probably give all of us a little more peace if we
16 go ahead and map this out instead of putting this off to a
17 later day.

18 So I will see everybody back here at 1:00. And we will
19 see what everybody thinks.

20 (Recess.)

21 (In chambers:)

22 THE COURT: All right. Back on the record.

23 Really I just want to sit around just informally with
24 everybody, and let's just kind of talk through what everybody
25 thinks are the next steps. And y'all may have already talked,

1 and everybody has a uniform game plan or suggestions, or you
2 may not have them.

3 But have y'all had discussions yourselves?

4 MR. RAGSDALE: We have talked, yes.

5 THE COURT: All right.

6 MR. RAGSDALE: And speaking for all of us is a little
7 bit hard, but --

8 THE COURT: I understand.

9 MR. RAGSDALE: -- I think at least our position is we
10 would like the opportunity fairly quickly to brief the legal
11 issues --

12 THE COURT: Okay.

13 MR. RAGSDALE: -- to you.

14 THE COURT: That makes sense to me.

15 MR. RAGSDALE: Okay. You know, we think, obviously,
16 we have to figure out how we have got to get Vague directly in
17 front of you, however we do that.

18 THE COURT: Right.

19 MR. RAGSDALE: And that may be more your call than
20 ours. But once we do that, we would like the opportunity to
21 brief the various charges of misconduct in the final report,
22 and make our legal arguments by why we don't believe that is,
23 A, misconduct, or, B, worthy of a sanction.

24 THE COURT: Okay. All right. And then depending on
25 what I do there, let's say the case moves forward. What do you

1 see there?

2 MR. RAGSDALE: I am going to let Chris take that.

3 MR. KING: So what I see is that the Court go ahead
4 and handle the underlying case.

5 THE COURT: Uh-huh.

6 MR. KING: And then if it moves forward from there,
7 there's a couple of cases in the Eleventh Circuit that really
8 set forth a process for sanctions that is sort of a multi-step
9 process. And --

10 THE COURT: And what are those two cases?

11 MR. KING: They're Shaygan and Finkelstein.

12 THE COURT: Okay.

13 MR. KING: And what I would like to do is, I can send
14 the Court -- we can send the Court a short brief on that --

15 THE COURT: That would be great.

16 MR. KING: -- as well, and say, here are the steps.

17 I mean, we're hoping that step one, obviously, the Court
18 finds that it being reassigned back to the Court was sufficient
19 remedy.

20 We really hope the Court finds that there was no
21 misconduct. But -- or that the -- that what has already
22 occurred was a sufficient remedy.

23 But we can send the Court sort of the next steps. Those
24 two cases sort of lay it out, especially the Shaygan case.

25 THE COURT: Okay.

1 MR. KING: It lays out our process. And that's what
2 we would propose.

3 But, again, we would propose it happen after the case on
4 the merits. And the reason for that is, if the Court were to
5 enter a sanction, the attorneys are hung with it until they can
6 get an appeal. And they can't appeal the sanction award until
7 the Boe case becomes final.

8 THE COURT: Understood.

9 Ms. Holliday?

10 MS. HOLLIDAY: I, on at least the behalf of two of my
11 clients -- Jennifer Levi and Shannon Minter -- they want me to
12 convey to you that what's in the panel report, as to what they
13 did, the actual acts, not the conclusions drawn about what they
14 intended to do, or what the legal conclusions drawn --

15 THE COURT: Right.

16 MS. HOLLIDAY: -- they agree with those as being
17 accurate. And they want me to tell you they defer to you as to
18 how you will proceed going forward.

19 THE COURT: Okay.

20 MS. HOLLIDAY: I also have two other clients. And I
21 think they're, you know, also in sort of -- in keeping -- I
22 think they're probably in keeping with the kind of
23 proceedings -- procedures that we're talking about right now.

24 THE COURT: All right.

25 All right. And what would Mr. Shortnacy's preference be?

1 MR. ROGERS: Bruce Rogers for Mr. Shortnacy, who is
2 here in the conference room, Your Honor.

3 We will go along with the process of consolidation,
4 provided our appeal is preserved and not waived.

5 THE COURT: Got it.

6 MR. ROGERS: And we would follow the process, I think,
7 that was outlined earlier.

8 THE COURT: All right.

9 MR. ROGERS: And thank you to Your Honor for giving me
10 an opportunity to look at that.

11 And I think I would further say, Your Honor, the
12 evaluation of you as a judge that was thought to be correct was
13 dead wrong. And Your Honor has proceeded in the underlying
14 case with great patience and insight. And the Eleventh Circuit
15 was dead wrong, with respect to your preliminary injunction.

16 THE COURT: They haven't issued a mandate yet. We
17 will see what happens. Who knows.

18 MR. ROGERS: One can hope.

19 THE COURT: We will see what happens.

20 Thank you. Thank you for that.

21 One thing I would also add is, you know, again, everybody
22 has their own position that they have to take, want to take.
23 And I'm not giving anybody legal advice. But, you know, it's
24 also never too early just to say I did it, I'm sorry, good
25 Lord, you know, in the haste and rush of this, I made a

1 terrible, terrible decision.

2 Is anybody in the position that they want to do that?
3 Because I think you probably get extra credit if that's the
4 position you take right now.

5 MR. PRATER: Your Honor, on behalf of Ms. Eagan and
6 Mr. Doss, who I have known and admired professionally and
7 personally for decades --

8 THE COURT: Right.

9 MR. PRATER: -- they welcome what Your Honor said at
10 the start of today's proceeding. I personally appreciate what
11 you said and what you said just now.

12 And they do look forward to an opportunity to having a
13 conversation with Your Honor about those very things.

14 THE COURT: Gotcha. All right.

15 MR. PRATER: Whenever Your Honor think it's
16 appropriate, they welcome that.

17 THE COURT: Fair enough. Fair enough. Good to hear.

18 MS. HOLLIDAY: Your Honor, Shannon Minter, Jennifer
19 Levi, and Scott McCoy, my clients are in a position to do what
20 you just suggested, yes.

21 THE COURT: Understood.

22 Is that something that they would want to do now? Or
23 would they want the motion practice to play out?

24 MS. HOLLIDAY: I, quite frankly, think that they're
25 willing to do it now, but I'm not sure I can say it right this

1 second.

2 THE COURT: Understood.

3 MS. HOLLIDAY: But we had a very serious conversation
4 about that, just not a lot of time and a lot of, you know,
5 but -- time to flesh it out. But I have, you know, definitely
6 learned from particularly -- well, Scott's here and can speak
7 for himself -- but from Shannon Minter and Jennifer Levi, that
8 they do want to get this behind them, and go ahead and go
9 forward with whatever's going to happen.

10 They're willing to say to you, you know, essentially, we
11 did not intend to do anything wrong, but what we did, we did
12 do. And those facts about what happened, you know, are facts
13 that actually happened. And, you know, sorry that was
14 perceived in a way that that looked like judge shopping. And
15 ready to take whatever consequences you're -- you think are
16 appropriate.

17 I think they are in that position. But they also said to
18 me on the phone, also defer to you as to what the proceedings
19 should be. So, you know, I think they're ready, the three of
20 them.

21 Mr. Orr is in a little bit different position because his
22 involvement was pretty marginal. And I had only about
23 three minutes to talk to him.

24 THE COURT: Right. Right.

25 MR. KING: Your Honor, if we could backtrack back to

1 us. Ms. Eagan and Mr. Doss will be pleased to have a
2 discussion today. They're here.

3 And they don't -- the less time that passes -- and I know
4 all of our clients aren't here. But they're here.

5 THE COURT: Right.

6 MR. KING: And they would be pleased to have a
7 discussion with the Court today.

8 THE COURT: Okay.

9 MS. HOLLIDAY: And I can reach my other two clients by
10 phone, if you wish.

11 THE COURT: Okay. All right.

12 All right. To the extent we do that, are those
13 discussions that everybody thinks should occur with everybody
14 in the room? Or myself, and their counsel, and that person,
15 and the court reporter?

16 MR. RAGSDALE: I personally don't think anybody other
17 than those individuals need to be present with you.

18 MR. BUCK: And, Your Honor, for those of us who don't
19 have clients here today, but may be able to raise them on the
20 phone, you know, for Ms. Hartnett -- I mean, I believe when she
21 was in front of the panel, I recall her saying repeatedly she
22 deeply regrets, you know, what's transpired as a result of
23 their actions. And I have no doubt that she would be more than
24 willing to, you know, express those views again.

25 THE COURT: Got it.

1 MR. BUCK: And my question to you was going to be it
2 sounds like some of this may happen today, was going to be what
3 forum do you envision that occurring in? I mean, is that --

4 THE COURT: Honestly, that's why I am here with y'all
5 right now. Whatever we do, I want to do it the right way.

6 And so I don't want there to be any surprises, anybody
7 jump out of the shadows. That's -- I welcome your thoughts on
8 what that would look like.

9 MR. KING: Judge, do you contemplate having it
10 reported by the court reporter?

11 I say that because the lawyers and all of us is going to
12 start worrying about waiver and -- but I don't want to -- I
13 don't want an apology to be half an apology, you know what I
14 mean?

15 THE COURT: Right. Right. No, no. I understand. I
16 hadn't thought about that.

17 I think whatever we do has to be on the record --

18 MR. KING: Okay.

19 THE COURT: -- you know. Now, what we do with it once
20 it's on the record, I think is something that we could all have
21 further discussion about. But I think it does have to be on
22 the record.

23 MR. KING: If you will just permit us to make the
24 lawyer disclaimers before they start talking, then that's fine,
25 Your Honor.

1 THE COURT: Understood. Understood.

2 MR. BUCK: And, Your Honor, I think the only other
3 question would be if there's some opportunity for this to
4 happen and to -- I don't know if short circuit is the right
5 word, but to try to get this to a final conclusion sooner
6 rather than later, that maybe leaves open the question of we
7 have got this final report that we were going to, you know, be
8 transferred to Your Honor, and then restyled preliminary
9 inquiry report, or whatever we -- a language we arrived at.

10 So I guess the question would be would we still go through
11 that process of having that report sort of restyled?

12 THE COURT: Yeah. I think -- I think we have to do
13 that just to keep our record clean. I do. I do.

14 But, you know --

15 MR. BUCK: And I think the lawyers would want that.

16 THE COURT: Right. Right.

17 You know, the only thing I would say -- I don't know that
18 I'm prepared today today to do this, but I certainly in the
19 next week could make that happen. And, again, you know, we can
20 talk about that.

21 The only thing I will say is I share one thing in common
22 with U. W. Clemon, which is, if you're going to say I'm guilty,
23 then it can't be halfway. We're going to have to allocute.
24 And so that's the only thing I would say.

25 You know, to the extent that any mea culpa is halfway, I

1 don't know how far that gets. I haven't heard what anybody is
2 going to say yet, but that would be my only word of caution
3 is --

4 MS. HOLLIDAY: Can I ask you a question?

5 THE COURT: Certainly.

6 MS. HOLLIDAY: So by halfway, do you mean that the
7 lawyer would have to say -- not me, the lawyer -- the lawyers
8 who are being accused of the wrongdoing would have to say, I
9 intended to violate the random case assignment?

10 THE COURT: I think they would have to say what their
11 intentions were, not just state the conduct is accurate.

12 Okay. Well, if that was your conduct, then what were your
13 intentions?

14 MS. HOLLIDAY: Well, that's kind of a nuanced thing.
15 I mean, you do accept that's a little bit nuanced, because I
16 think for my clients they would say, you know, there were a lot
17 of factors that went into the decision.

18 THE COURT: Right. Right.

19 Well, I will say, you know, in the panel's -- in the
20 panel's findings, they quote two or three, what I might call
21 junior partners who very, very, very clearly laid out what
22 happened. And a lot of those details and statements are,
23 frankly, missing from many of your clients' accounts of what
24 happened, you know.

25 And the statements that the panel quotes -- a couple of

1 them in particular, you know, these were lawyers who were
2 junior and had every reason to tell everything they knew,
3 because they probably rightly suspected, if I tell everything I
4 know, I'm off the hook.

5 But, you know, I think you all know what your own clients'
6 statements to the panel were. And they all differed. I'm well
7 aware of that.

8 But, you know, I would say that some of the under-oath
9 testimony and statements made to the panel by some of the
10 respondents left out very critical details, you know. Again, I
11 have got affidavits from other attorneys that lay out specific
12 actions, words, and conduct of other respondents. And that --
13 those actions, words, and conduct are missing from those
14 respondents' sworn testimony to the panel.

15 So I guess that would be one thing I'm focusing on here,
16 is, you know, if everybody is going to come clean -- and I am
17 going to say this one more time. I have zero desire to end
18 anybody's career. This is not capital murder.

19 But if what occurred occurred, well, what are the
20 ramifications for us? What are the ramifications for our court
21 if you just dismiss your case and re-file it over and over
22 until you get the judge that you think might be most favorable?
23 I'm not saying that happened here, but the panel certainly
24 thinks it happened.

25 If what the panel says happened occurred, that's obviously

1 a practice that has got to be stopped for the integrity of the
2 court system. And the Eleventh Circuit has said that over and
3 over again.

4 So I've said a whole lot now. But I guess what I mean is,
5 if anybody says I did it, I did it, but it wasn't judge
6 shopping, and, you know, that's not the reason for it, that
7 needs to be really legitimate.

8 MS. HOLLIDAY: I have one more question.

9 THE COURT: Yes.

10 MS. HOLLIDAY: As a new person, I totally don't have
11 the right to ask this many questions.

12 THE COURT: No. Ask all you want. This is what
13 we're -- we're here for as long as we need to be, for everybody
14 to talk this through.

15 MS. HOLLIDAY: Is it sufficient to say that was one of
16 the reasons, but there were two or three other reasons?

17 THE COURT: Oh, I think that's legitimate. I don't
18 think everything can fall into one tiny, you know, one size
19 fits all.

20 MS. HOLLIDAY: Well, is it also legitimate to say I
21 thought Rule 41 permitted it? Because on its face, it does.
22 And so I'm just wondering if that's something you see as a half
23 guilty plea.

24 THE COURT: I don't know. I probably need to look at
25 that. And I know all the arguments about Rule 41, you know.

1 And I also recognize that different circuits have taken
2 some different positions. But I don't think that's -- you
3 know, the Eleventh Circuit very clearly has made their position
4 known on judge shopping.

5 MS. HOLLIDAY: But not in connection with Rule 41,
6 though.

7 THE COURT: Correct. Correct.

8 MS. HOLLIDAY: That's kind of the thought, is
9 that's -- that's what we're hearing -- Rule 41 seems like a
10 rule that we could use.

11 THE COURT: Right. Right.

12 But in an expansive view of Rule 41, though, you know, you
13 just dismiss, re-file, dismiss, re-file until you get the right
14 judge.

15 MS. HOLLIDAY: And there has to be a limit.

16 THE COURT: Right.

17 MR. KING: Well, the second dismissal is with
18 prejudice under the rule.

19 THE COURT: Correct. That's true.

20 MR. KING: You know, the way I read it, you get one
21 free bite --

22 THE COURT: Right.

23 MR. KING: And, Your Honor, I hear what you're saying.
24 And in light of what you're saying, I think what's best is --
25 you're contemplating something more than an apology. And

1 you're -- more of an allocution.

2 I think our clients should study their testimony before --

3 THE COURT: Agreed.

4 MR. KING: -- before they do that.

5 THE COURT: Right.

6 MR. BUCK: And a question I have as a corollary to
7 that.

8 The panel -- and I am not exactly sure that we ever got
9 clarity on this. The panel instructed the responding lawyers
10 not to be provided with and not to review anyone else's
11 testimony.

12 THE COURT: Right.

13 MR. BUCK: In light of Your Honor's comments about
14 there are some -- there's some details that come out, or some
15 facts that come out in some testimony, but not others, is it
16 appropriate now for us to allow our clients to review the full
17 record?

18 THE COURT: That's probably something else I should
19 consider, you know.

20 Again, though, the testimony I would be relying on is
21 sitting right there in the order that you already have, you
22 know?

23 MR. KING: And, Your Honor, I don't like to criticize
24 other federal judges.

25 The transcripts are better -- there's stuff in those

1 transcripts. You know, our clients testified. And there's
2 snippets in the order, for sure.

3 THE COURT: Right.

4 MR. KING: But that testimony itself, I think all the
5 clients -- because they didn't hear each other, but I did hear
6 it.

7 And the clients were remarkably -- considered they'd been
8 sequestered, they were remarkably consistent in saying it was a
9 multi-factored decision.

10 And the number one factor -- they almost all said it. The
11 number one factor was the -- they didn't understand how the
12 case made its way -- and I'm not talking about the Walker. I'm
13 talking about the Ladinsky people. They didn't understand how
14 the case made its way to Your Honor. And they didn't know how
15 to find out. Because it was not the first filed. It was the
16 second filed. Your Honor had the second filed.

17 And so the number one factor they all said is they
18 couldn't figure out how it happened. So there was a procedural
19 event that occurred that none of them in their experience had
20 ever seen.

21 THE COURT: And if they had come to the hearing that I
22 set the next day, they could have asked that question.

23 MR. KING: They could have. But it's never fun, as
24 I'm demonstrating right now, it's never fun to have to ask a
25 federal judge, Judge, what happened? How did we get here?

1 THE COURT: Right.

2 MR. KING: Because it sends a bad signal to you that
3 they don't want you.

4 THE COURT: I hear you. I hear you.

5 And, you know, I have been at this for nearly 30 years
6 myself.

7 MR. KING: Yes, sir.

8 THE COURT: And I have had plenty of cases that got
9 reassigned to other judges for reasons I didn't know, but I
10 didn't go dismiss them as a result, you know. And because --

11 MR. KING: I hear you.

12 THE COURT: -- you never know what the reason is.

13 MR. KING: I hear you.

14 And, look, you ended up handling the case. And as
15 Mr. Rogers said, you know, those lawyers prevailed. And -- so
16 just proves the point, right, that you never know.

17 THE COURT: Absolutely.

18 MR. KING: But the second factor, Your Honor. The
19 second factor that was involved is there was a competition --
20 and you see this in the transcripts -- between the Walker case
21 and the Ladinsky as to who was going to take control.

22 Our lawyers were worried about if it came here, they would
23 lose their first filed status. So there were -- there was the
24 way it got here, the fact that they were worried they would
25 lose their first filed status.

1 And every one of them honestly said they viewed Judge
2 Burke as more conservative, and they were concerned about it.
3 There's no -- it's in there. And I think they all very
4 truthfully laid all of those out.

5 Was your identity a factor? I think they would all say
6 and already have testified, yes, sir, it was. It was your
7 reputation as a conservative jurist was a factor. No question
8 about it.

9 But there were other factors, and they all combined. And
10 in their minds, rightly or wrongly, Rule 41 gives parties just
11 one shot. You can dismiss for, as the Courts have said, good
12 reason, bad reason, no reason. You can only do it once.

13 And they did that rather than come on Monday, as the Court
14 said they -- in hindsight they wish a thousand times they would
15 have done, come on Monday and said, Judge, can we just ask what
16 happened.

17 They had no idea Judge Axon was in trial, you know.

18 THE COURT: And I think you can tell from this
19 discussion today I would have answered the question.

20 MR. KING: You would have, Your Honor. Clearly, you
21 would have.

22 And if they could do this over, I assure you they would.
23 This has been a nightmare for them, as you would expect.

24 But they do want to express all of that to you. But so we
25 just need to let them study their testimony so -- since it's a

1 little cold so they can bone up on what they've testified to.

2 THE COURT: Got it.

3 All right. So let's take it the next step. Let's say
4 that I set a time those parties that -- those respondents that
5 decide that they want to come and have a conversation with the
6 Court about their conduct.

7 That obviously is going to short circuit the rest of the
8 process. What is an appropriate action by the Court, then, as
9 a result of those admissions?

10 MR. KING: Well, we would advocate that -- and there's
11 case law to support this -- the remedy for judge shopping is to
12 make sure the judge from whom the party fled hears the case,
13 which has occurred in this case.

14 And, you know, it would be our fervent hope that the Court
15 would find that the remedy was exercised in this case when the
16 case was assigned to you in spite of the re-filing, and that
17 then they could go on and proceed on the merits.

18 THE COURT: What about your clients?

19 MS. HOLLIDAY: My clients?

20 THE COURT: Uh-huh. What would their position be?
21 What would your position be?

22 MS. HOLLIDAY: They would love that, Judge.

23 THE COURT: Right.

24 MS. HOLLIDAY: First choice. But, you know, I've been
25 told they defer to you.

1 Now, I don't -- I say that, and my notes also say don't
2 want to waive any kind of procedural rights we might have. And
3 it's kind of a plea hearing situation, so...

4 THE COURT: Right. And, you know, I have to say in my
5 position, you know, I really -- I won't know what's appropriate
6 until we have that conversation, you know?

7 MS. HOLLIDAY: Right.

8 THE COURT: And I also recognize -- I think it's very
9 clear from even the panel's findings that, you know, even
10 though they found that everybody was involved, it does appear
11 that some were more involved than others.

12 And so I don't know that -- I don't know that we can or
13 can't put an equal sign between everybody who's a named
14 respondent.

15 Does anybody disagree with that?

16 MR. RAGSDALE: No. In fact -- and I have tried to be
17 quiet, but it's not in my nature.

18 But the example you give of filing a case and re-filing it
19 and re-filing it. Our clients filed one case and dismissed
20 one case. Did not re-file a case. Did not seek to go to
21 another venue. Did nothing other than filed a case, and
22 five days later dismissed it.

23 And we've tried for some time to try to find out what rule
24 that violates. I mean, part of their motivation for dismissing
25 was, obviously, the fact that you had drawn the case. But it

1 was also the fact that they knew they were competing with
2 another group of lawyers who had the first filed case. And so
3 they dismissed it and never re-filed it. I've never found a
4 case in the history of the universe where lawyers have been
5 sanctioned for that, ever.

6 And so I want my clients to come forward and tell you what
7 they did, but they didn't do what you just said; that is,
8 re-filed a case attempting to avoid a judge. They didn't.
9 They gave up and let these folks carry the water.

10 So we think it's very important that the Court not look at
11 this as one big group of lawyers. And, really, not even two
12 groups of lawyers, because lawyers had different roles,
13 obviously, to play.

14 I also have a client who's in a much different position,
15 because the panel, I think wrongfully, concluded that he lied
16 to them. We've got to be able to provide you with additional
17 facts to prove that that's not true.

18 And I will say he doesn't believe he lied to anybody. I
19 was there. I don't believe he lied to anybody, either.

20 But we've -- I've got to be able to address that because
21 that naked finding can't sit. And I don't think he's going to
22 plead guilty to something he didn't do.

23 Does that make sense?

24 THE COURT: I hear you. Yeah. Yeah. Yeah.

25 Anybody else got any more thoughts?

1 MR. ROGERS: Your Honor, Bruce Rogers on behalf of
2 Michael Shortnacy.

3 You know, group allegations of wrongdoing are problematic,
4 as Your Honor knows. And this gentleman didn't know you from
5 Adam's house cat, but he participated in a conference call with
6 counsel on that Friday afternoon.

7 The only sin he committed was raising a question of maybe
8 we should file a motion to reconsider in front of Judge Axon.
9 That didn't happen. He's now found guilty of misconduct.

10 He was on a conference call. He made those disclosures to
11 the panel. He is not a leader or decision maker, based on the
12 panel's own findings. He's not listed as one of those in
13 Ladinsky and Eknes-Tucker, and yet here he is accused in
14 wrongdoing in a group context.

15 And so if we were before Your Honor in a private session,
16 I think Michael would say to you, I'm on the phone call because
17 I'm invited to be -- in Los Angeles, California -- on Friday
18 afternoon. I haven't even appeared pro hac vice. And yet I'm
19 accused of wrongdoing because counsel, who knows the lay of the
20 land, was making some decisions. And he didn't stop it.

21 So his sin is, I quit, can't do it. That doesn't seem
22 fair, or right, or just.

23 So if you asked us to come in and admit something, we
24 would admit we were on the phone call. We testified to the
25 panel.

1 One thing we didn't do -- and I think all the lawyers will
2 agree with this. We didn't cross-examine in front of the
3 panel. We didn't stand up and point out some of the things
4 that would maybe provide more context, like what I just
5 mentioned to Your Honor about my own client. Shame on us for
6 not doing it then.

7 But the panel told us, this is not adversarial. We have
8 questions. We want information. And then we will go forward
9 from there.

10 And here we are.

11 THE COURT: And, y'all, I certainly reviewed some of
12 the transcripts, but not all. And I intend to do that as
13 quickly as I can. But as you know, they're not short, so...

14 MR. ROGERS: We do know.

15 THE COURT: And one reading is not going to get me to
16 where I should be if I'm going to, you know, accurately take a
17 look at this.

18 Anything you want to add to this?

19 MR. BUCK: Yes.

20 Your Honor, Kathleen Hartnett with the Cooley firm, who
21 was a California lawyer, who was working on this case pro bono
22 was working with Barry's clients. They were in the Walker
23 case. And they didn't re-file.

24 And so, you know, to come before you and sort of give a
25 mea culpa -- and I heed your advice and warning that it can't

1 be a half-hearted or halfway guilty plea -- it's a little
2 bit -- it's a -- that's a little bit of a quandary for the
3 Walker counsel, you know, since they didn't re-file.

4 But she has consistently said -- and the reason she has
5 not had us file a notice of appeal yet is because she said, I
6 would welcome the chance to talk to Judge Burke, and, you know,
7 explain, you know, what I did, and what we did, and why we
8 thought it was important, and that I'm sorry it's led to this.

9 And so she would be more than happy to appear before you.

10 THE COURT: Got it.

11 Well, I think one thing that I have as a takeaway today
12 is, you know, while we're briefing this, you know, you might
13 all very quickly, like maybe in the next seven days before I
14 sit down with your client, you might all want to maybe, to the
15 extent you want to, you know, brief differences in conduct
16 between your client and others, and what role you think they
17 play.

18 You know, obviously, some people were bigger decision
19 makers, some people were smaller. I don't think there's any
20 doubt about that. I don't think anybody in this room disagrees
21 with that, you know.

22 And to the degree that, you know, you want to, you're
23 welcome to include in that brief, you know, maybe what you
24 perceive as the differences in conduct between the first case
25 and the second case.

1 MR. RAGSDALE: Can I make one other problematic
2 statement?

3 THE COURT: Sure.

4 MR. RAGSDALE: It's not problematic, but it might be.

5 THE COURT: You have been making them all day long.

6 MR. RAGSDALE: I know. I've built a career on it.

7 We still have not received the transcript from the
8 separate session that was done with Judge -- or Special Master
9 Harwood on May 20th. It was a different court reporter. And
10 so the court reporter that handled all the other sessions has
11 gotten us the transcripts. That other reporter has not. It's
12 not her fault. I don't think it is. I don't think she's been
13 told to do it.

14 THE COURT: So I had a conversation with the clerk
15 here when this issue first got raised. That was why I included
16 in my order that you would have access to those transcripts.
17 But it sounds like we've just got an administrative flat tire.

18 MR. RAGSDALE: I think it's fallen through the cracks.

19 THE COURT: And what date was that?

20 MR. RAGSDALE: May 20th.

21 THE COURT: May 20th. I will get to the bottom of
22 that.

23 MR. RAGSDALE: Okay. Thank you, Your Honor.

24 MR. BUCK: So, Your Honor, it sounds like perhaps what
25 you're envisioning now is you are going to set some -- another

1 hearing when these lawyers can appear, and you would like for
2 us to submit briefs relating to their conduct in advance. Is
3 that --

4 THE COURT: You don't have to. And I am not even
5 saying I recommend it. But I'm just saying you can. You know,
6 if those are factors, you know, you can do that.

7 But, you know, no -- and I will set such a hearing, you
8 know -- I can't say I can set it in the next seven days, but I
9 could certainly have such a hearing set in two weeks, to the
10 extent that some of your clients want to go ahead and come in.

11 MS. HOLLIDAY: And you want them in person.

12 THE COURT: I do. I do.

13 And, you know -- but I assume if we do that, then we
14 would, you know, go straight to, you know, what, if any,
15 punishment, depending on what I hear.

16 Is that what you envision if we did that?

17 MR. KING: Your Honor, the Eleventh Circuit lays out
18 certain formal guidelines that have to be followed that -- so I
19 think what I would envision is the punishment the Court is
20 considering, such that we've got a decision to make as to
21 whether we say, okay, we waive these procedural requirements
22 and take our licking, or we don't.

23 THE COURT: Right.

24 MR. KING: But it's hard to do that in the abstract.

25 THE COURT: Right.

1 MR. KING: So, and I know that's cutting against your
2 allocution, you know, the blind plea theory. But, you know,
3 what I would request on behalf of Melody and Jeff was, you
4 know, let you hear from them, give us some idea of what the
5 Court is considering, and then allow us to decide whether we
6 want to request that the Court go through the formal process
7 that the Eleventh Circuit has signed off on.

8 THE COURT: Right. Right.

9 And, you know, I very frankly, you know, if I'm in a
10 criminal sentencing hearing -- and I'm not putting an equal
11 sign between this and that -- but, you know, what happens in
12 that hearing, I listen. I pay attention.

13 MR. KING: I understand.

14 THE COURT: I read the presentence report. You know,
15 what the defendant says on the record matters.

16 And, you know, people have gotten probation that I was
17 convinced I was going to send them to prison for three years,
18 and people have been sentenced to prison for twenty years when
19 I thought I was going to give them ten, because, you know,
20 advocacy by the attorney -- Judge, I want you to understand
21 this thing that you don't know, you know, acceptance of
22 responsibility, genuine, by the party -- all those matter.

23 So it's hard for me to just tell you on the front end
24 here's what I would do.

25 MR. KING: I get it.

1 THE COURT: You know?

2 MR. KING: I get it.

3 THE COURT: But, you know, for those who may be in
4 fear that I'm, you know, again, going to do something career
5 ending, that's not on the table. That's not where I'm headed
6 here, you know.

7 MR. PRATER: You are dealing with good people, Your
8 Honor. I think you know that.

9 THE COURT: I do. I do.

10 MR. PRATER: You do.

11 THE COURT: I do.

12 MS. HOLLIDAY: Can I just ask what you define as
13 career ending?

14 THE COURT: Yeah. Well, you know, taking -- probably
15 making a finding that, you know, results in the suspension of
16 your license. That would certainly be career ending.

17 For me, I'm not -- the only exception to that, of course,
18 is your one client, because that is a very problematic finding,
19 as it stands. But I'm absolutely going to let you do motion
20 practice on that issue. And I think, you know, that's
21 contemplated by these facts.

22 But, you know, I'm in the -- with what the panel says
23 about him, I don't even know that any action by me changes
24 anything, unless I change the finding of fact.

25 MR. RAGSDALE: And I think he, in particular -- I

1 think all three of my clients are going to want to come talk to
2 you. But I think he, in particular, would welcome that
3 opportunity.

4 And I will just tell you, Judge, that is an egregiously
5 wrong finding. And I need to do what I can to persuade you
6 that it is. And I think I can.

7 There are things -- and, for example, there are things --
8 there is evidence that I don't think is in the record before
9 you that we need to get in front of you.

10 And I am just going to say it's an e-mail from Judge
11 Thompson's law clerk that records the conversation that he had
12 with the law clerk. And so we want to get that in front of
13 you.

14 And I want to give this young man an opportunity also to
15 come speak to you, because I think I have said it -- it's
16 egregiously wrong.

17 THE COURT: Right. Right.

18 So without having heard anything, without knowing what
19 anybody would say, or what arguments you would make, what's on
20 the table?

21 I think a private reprimand might be a consideration,
22 depending on what I hear. I think a public reprimand by the
23 Court and admonishment could be -- could be.

24 Honestly, I think, you know, disqualification could be.
25 But I don't know that. I would have to hear and see, you know.

1 Is it possible somebody could have a monetary sanction?

2 Possible, but probably not the way I would go.

3 So, and, again, it's very clear to me that, you know,
4 there are differing levels of culpability within this -- within
5 this order, or at least it would appear to me, so...

6 Now, how many of these respondents fall into any of these
7 blocks right now? I have no idea.

8 MS. HOLLIDAY: Disqualification means in the Eleventh
9 Circuit practicing --

10 THE COURT: In this case.

11 MS. HOLLIDAY: Disqualification in this case. Got it.

12 THE COURT: Right. Right.

13 MS. HOLLIDAY: Okay.

14 THE COURT: Again, though, I could find something
15 that, you know, I don't -- I don't know what I don't know.

16 MS. HOLLIDAY: Right. And that's done from time to
17 time.

18 THE COURT: And I'm not saying I am going to
19 disqualify anybody, or that I am going to do any of those
20 things. I would just say if we're talking about what are
21 possibilities.

22 MS. HOLLIDAY: That's very helpful. Extremely
23 helpful. Thank you.

24 THE COURT: Anybody else got any thoughts?

25 MR. DAVIS: Question, Judge. We don't claim a role in

1 this, or we're not trying to make any suggestions. We want to
2 know what you're contemplating, in terms of our ability to see
3 any briefing that's presented to you, or be at least present
4 when the lawyers of the case are talking to you, Judge.

5 THE COURT: So your question is can you?

6 MR. DAVIS: Yes.

7 THE COURT: Do you want to?

8 MR. DAVIS: I don't know that.

9 THE COURT: Okay.

10 MR. DAVIS: I'm hesitant right now just to say that
11 we're okay with opposing counsel talking to the judge in our
12 case without us there, but I don't know that. It's something
13 we want to talk about.

14 I'm just asking if I could know what you are contemplating
15 at this time.

16 THE COURT: Right. Right.

17 You know, again, this, at least for the conduct that
18 happened in this case, I don't know how I can exclude the
19 State, to the extent -- to the extent you want to be included.

20 But I'm willing again, to listen to anybody's thoughts, if
21 they think there's a, you know, if there's a case out there
22 that says something different.

23 MR. RAGSDALE: This is probably a time for me to
24 repeat again that we've never been in this case.

25 THE COURT: Understood.

1 MR. RAGSDALE: We're not in this case. Our conduct is
2 not in this case.

3 THE COURT: Understood.

4 MR. RAGSDALE: Okay.

5 THE COURT: And I recognize that.

6 MR. RAGSDALE: Okay.

7 THE COURT: And that's why I say, you know, at least
8 for the folks in this case, I don't know that --

9 MR. DAVIS: We certainly want to be fair to everybody.
10 If folks think we should be excluded from the court proceeding,
11 I think it's incumbent upon them to ask you and give us a
12 chance to respond to that.

13 And we may, depending on what it is they're requesting, we
14 may be perfectly fine with that. But I would just like, before
15 it takes place, the chance to object and make our arguments.

16 THE COURT: All right. So do we want to go down the
17 line real quick on whether, at least as far as the attorneys
18 who were or are in this case, do you want to go down the line
19 real quick and see what positions are on what, if any, role the
20 State should play?

21 MR. KING: Our position is that we would hope they
22 would volunteer not to be present because it's a pretty
23 uncomfortable and personal situation. It doesn't involve the
24 merits of the case.

25 So we would hope that we wouldn't have to ask the Court to

1 order the State not to be present, but just as a matter of
2 comity and professional empathy, that they would choose not to
3 be present.

4 We don't think they need to be present. This is not an
5 issue that involves the State, in terms of -- you know, they
6 now have the final report. And we appreciate that they
7 maintained it under seal.

8 But our position would be we would hope they would agree
9 not to be present.

10 THE COURT: Well, I guess my follow up could be,
11 though, if they don't, is there any law that says --

12 MR. KING: I sure can't cite you any right now, Judge,
13 as we sit here.

14 THE COURT: Gotcha. Gotcha.

15 MR. KING: I mean, I know there is some law about the
16 confidentiality of disciplinary proceedings --

17 THE COURT: Right.

18 MR. KING: -- which this is sounding like. So, you
19 know, perhaps that law is applicable, but I'm scared to tell
20 you something without the book in front of me.

21 THE COURT: No. Understood. Understood.

22 MR. PRATER: And, Your Honor, given that you do
23 contemplate having a court reporter present, there would be a
24 record of the conversation --

25 THE COURT: Right.

1 MR. PRATER: -- if that needed at some point to be
2 provided to the State. I don't see why, but that is
3 conceivable.

4 THE COURT: It is. It is. Absolutely. Yeah. The
5 State, even if they weren't present, would have a right to see
6 the record, I would assume.

7 Ms. Holliday?

8 MS. HOLLIDAY: I think I just join in what they have
9 said.

10 THE COURT: Okay.

11 Mr. Rogers?

12 MR. ROGERS: Yes, Your Honor. Thank you.

13 Respectfully, this dilemma suggests that anything related
14 to the respondent lawyers should be delayed until the
15 underlying case is completed, and we not get into potential
16 disciplinary issues until the merits of the underlying case are
17 over.

18 So I just renew that -- I may be barking up a pretty tall
19 tree, but I renew that request to hold on any pursuit of
20 lawyers, let the case on the merits proceed, and then come back
21 to this.

22 THE COURT: All right. And I will be very honest.
23 I'm unlikely do that. I am likely --

24 MR. ROGERS: I see how tall the tree is.

25 THE COURT: Right. I'm likely to resolve this issue.

1 And however much your clients want to put this behind them and
2 close the book, I'm ready just to get back to the merits of the
3 case, too, and let's get this done with and resolved.

4 And, you know, very honestly, I can contemplate very
5 easily, if I were one of the respondents, and what, you know,
6 the past 18 months have probably been -- sleepless nights. And
7 so for their own good, I don't think they want to wait until
8 August for this to be decided.

9 MR. ROGERS: You make a fair point. The tension is
10 that they've got disclosure obligations to their clients. Now
11 their clients who are parties, now suddenly the lawyers are
12 parties to something, have been -- it just creates a lot of
13 tension. And the thought behind the stay process was stay
14 focused on the merits, not let this be a distraction.

15 But I agree with you, there's the counter balance, which
16 is let's be done with it; whatever it is, let's be done with
17 it.

18 THE COURT: If I were one of these folks, I can't
19 imagine waiting until August.

20 MR. ROGERS: Well, if the outcome is the release and
21 discharge of Michael Shortnacy, I am happy to proceed.

22 THE COURT: Well, I didn't say that.

23 MR. ROGERS: He is here, Your Honor. He's available
24 to meet with you right now.

25 THE COURT: Absolutely. No. Absolutely. Absolutely.

1 MS. HOLLIDAY: What about appealability, though, if we
2 do address this all in the next couple of weeks, and somebody's
3 disqualified that's not -- that puts in an awkward -- it puts
4 them in -- it just becomes -- the appeal becomes moot, right,
5 at the end of the case?

6 THE COURT: I would assume so. I hadn't thought that
7 step. And I'm not saying I would do that. But y'all asked me,
8 hey, you know --

9 MS. HOLLIDAY: No, no, no. I appreciate that.

10 THE COURT: -- what are all the possibilities.

11 MS. HOLLIDAY: Yeah.

12 THE COURT: And I don't -- you know, and there are
13 probably possibilities -- additional possibilities. Those
14 would just be some that could come to mind, you know?

15 MS. HOLLIDAY: There's no other possibilities. This
16 is the whole universe of possibilities. We are going to nail
17 that down right here.

18 MR. KING: So, Your Honor, I do think that sort of
19 argues for -- I know I am asking a lot of the Court -- but to
20 let us know after the Court hears from the lawyers what your
21 sort of range of thinking is.

22 Because we do have to make a decision about whether we
23 insist on these, you know, a formal hearing with the expert
24 witnesses, and blah, blah, blah.

25 THE COURT: Right.

1 MR. KING: And, obviously, it's just going to matter
2 what the Court -- they want to put it behind them. But at the
3 same time, they don't want to put something behind them that
4 causes, you know, career consequences, whether that's
5 disclosure on pro hac -- you know, every pro hac application,
6 or other disclosure obligations that that imposes upon them.

7 So I like the way it's set up, except the only amendment
8 I'd ask is to give us the right after you talk with them, to
9 let you know if we insist on a more formal process.

10 THE COURT: I see no reason that that couldn't happen.

11 MR. KING: Thank you, Your Honor.

12 THE COURT: And, look, I am going to have to sit down
13 myself and kind of take everything in that we've talked about
14 today, you know?

15 MR. KING: We are all in uncharted waters here.

16 THE COURT: Right.

17 MR. KING: So we understand that the Court is, as
18 well.

19 THE COURT: All right. Anybody else got any -- of
20 course.

21 MR. RAGSDALE: Of course. Two things.

22 One, I thought I understood you to say you would entertain
23 a brief from us in seven days, or some short period of time,
24 for us to identify why he could be culled out of this herd.

25 THE COURT: If you desire to. Now, I just said

1 seven days, because it's clear that some people want to go
2 ahead and --

3 MR. RAGSDALE: No problem.

4 THE COURT: And to the extent they do, I want to go
5 ahead and let that process begin.

6 MR. RAGSDALE: I agree. And we can do that.

7 My second, is it the Court's intent to keep the final
8 report from the panel sealed?

9 THE COURT: That is a really good question.

10 MR. RAGSDALE: See, I waited to save one for the end.

11 THE COURT: That is. I don't -- I don't -- I don't
12 foresee that that can just stay sealed.

13 They are findings of fact. I don't -- you know, as I'm
14 looking at the law, and I am willing to be -- you know,
15 somebody can convince me otherwise, you know, the -- if I'm
16 looking at -- there's a couple of U.S. Supreme Court cases.
17 And I have forgotten the name of one of them. Maybe -- is it
18 Romulus? I don't know. Anyway, this case does not seem to
19 meet that standard.

20 Now, I haven't unsealed it until now. And in talking to
21 Judge Proctor, he said, look, you know, we gave it to you
22 sealed because that's the way we started everything. But now,
23 you know, once it's yours, you can make that decision.

24 But if I am looking at the current state of the law, I
25 don't see how I keep that sealed forever. Again, I'm willing

1 to be educated here, but that doesn't look like I would have
2 the authority just to seal that forever.

3 MR. RAGSDALE: One of the cases you are referring to
4 is Romero, which is an Eleventh Circuit case. That's the law I
5 made.

6 THE COURT: Oh, really.

7 MR. RAGSDALE: Yeah. So never make law, because you
8 end up dealing with it.

9 But I would ask if the Court would indulge us to be able
10 to brief that issue. Because I think -- I think there is an
11 exception for attorney disciplinary matters. I mean, I don't
12 think this case -- the merits of this case should be sealed in
13 some fashion. But I do believe that the law allows for
14 attorney disciplinary matters to be kept confidential until
15 there's a sanction imposed.

16 And if we could have an opportunity to brief that just
17 before you make a decision about that.

18 THE COURT: Sure. Sure. Absolutely.

19 MR. BUCK: And, Your Honor, if we are going to do what
20 we talked about, which is if that is going to be -- that
21 proceeding is going to be transferred to you -- and I think we
22 talked about that would then become -- it would be sort of
23 amended to be a preliminary report of inquiry. Isn't that what
24 we talked about, I think?

25 I mean, so it seems to me that the report might change a

1 bit between now and when the Court needs to make a decision
2 about whether to unseal it; is that right?

3 THE COURT: I think it's certainly possible.

4 MR. BUCK: Okay. So it may be that we see what -- how
5 that process plays out, and then submit a brief once we know
6 what the final preliminary report of inquiry looks like once we
7 get to that stage.

8 MS. HOLLIDAY: On that sealing?

9 MR. BUCK: Yes. Before -- once -- I would say let's
10 see if there's -- how that report gets amended after --

11 THE COURT: I hear what you are saying. But here's
12 what I want to be on defense against, is, you know, when the
13 *Montgomery Advertiser*, or some like group comes and says, we
14 understand you've got a report here that may indicate lawyer
15 misconduct. You do not have the right to seal that, and we're
16 about to file suit.

17 So I do think we need to brief this right this second.

18 MR. RAGSDALE: Okay.

19 THE COURT: ASAP. Because I do need to know exactly
20 what the law is on that. That would -- that would be one heck
21 of a distraction, and a distraction that I would not want to
22 get wrong. And y'all wouldn't want me to, either.

23 So I would say let's brief this unsealing in the next
24 seven days.

25 Yes, sir, Mr. Davis?

1 MR. DAVIS: Judge, I'm sure you are going to want
2 robust briefing on that point, and you should get it. I don't
3 think we are going to be in a good position to argue the other
4 side even if we disagree with what the lawyers say about that.

5 I would want to be able for our team to maintain good
6 professional relationships with the lawyers who are involved
7 here and focus on the underlying case.

8 So if you think the Court would benefit from somebody
9 arguing the other side, I want to avoid the awkward position of
10 it being us. And I know in some cases involving disciplinary
11 matters, the Court will appoint somebody to sort of take the
12 other side for the lawyers. I'm putting that out there.

13 So we reserve the right to respond. I want, if at all
14 possible, for us to avoid that and to stay as out of these
15 proceedings as we can, if you understand.

16 THE COURT: I do. I do. And so I think what I've
17 generally been hearing from you guys today is you're just going
18 to kind of sit on the back row; is that right? Is that what
19 the State's position is? And let this play the process out? I
20 mean, what role do y'all want to play?

21 MR. DAVIS: Well, we don't want to be in the role of
22 anything akin to a prosecutor here. We want to defend our law.
23 We don't want to give up our right to be heard. Because there
24 may be something that I'm not foreseeing that comes up that we
25 need to stand up, and say, no, we need to disagree with this

1 point.

2 So I don't want to waive the ability to be heard on this.
3 We would like to avoid it as much as possible, though. And
4 that's why I might suggest that, like a court-appointed amicus
5 could say -- could brief the disclosure issues on whether a
6 report should be sealed, or some other issues that might come
7 up.

8 THE COURT: Right.

9 That does -- I hear what you are saying, but that seems to
10 add an unnecessary complication at this point if I do this.
11 And I don't want to make this terribly adversarial. But I also
12 do want to hear from the State on what you think the current
13 state of the law is.

14 You know, whether this should be sealed or unsealed, I
15 think you could brief it to me without being adversarial, just
16 say here's what we think the current state of the law is. And,
17 you know, you may agree with them, you may not. But, you know,
18 you are a party to the case.

19 MR. DAVIS: I understand.

20 THE COURT: And not only are you a party, you know, I
21 would say you could be an aggrieved party, as well.

22 And so I do want to hear from you. It doesn't have to be
23 adversarial. You don't have to, you know, be a zealot, but it
24 would be important for me to know what a party thinks the law
25 is as I'm making decisions.

1 MR. DAVIS: Understood.

2 THE COURT: Got it.

3 MR. PRATER: And, Your Honor, I would just urge you --
4 you have always been a step-by-step judge, and I have admired
5 that in how you conduct your court.

6 We've talked about steps today that include submissions
7 from the lawyers, the lawyers coming to see you. And while I
8 understand and respect your interest in doing the right thing,
9 with respect to this what may prove to be interim report being
10 unsealed, please keep a step-by-step approach in mind, and
11 let's just see how it plays out a little bit.

12 And I think we've got a good plan in place right now. I
13 think it is helpful for you to hear from us about what we see
14 the law being in that regard. But let's continue to work
15 together in figuring out how best to handle that to the benefit
16 of everybody -- the lawyers, the Court, everyone.

17 THE COURT: No, no. And I have no reason to deviate
18 from that course on this.

19 At the same time, I will tell you, you know, I almost
20 never seal my courtroom. And I get asked a lot, you know,
21 Judge, I want to exclude these witnesses, or want to exclude
22 the public. Okay. Well, what's the reason? I can't -- that's
23 not a uniform ability that I have.

24 We want you to seal this. Okay. But understand I can't
25 seal something just because I want to.

1 And so, you know, that's why I want to know the current
2 state of the law. If the law says I can't seal it, I'm going
3 to unseal it whether anybody asks me to or not. If the law
4 says I can seal it, I'm going to hear your arguments about why
5 it should stay sealed.

6 MR. PRATER: And I guess all I'm advocating right now,
7 Your Honor, is let's work together, if it's going to be
8 unsealed, on when.

9 THE COURT: Right.

10 MR. PRATER: That's --

11 THE COURT: Obviously, the first thing I want to do is
12 let y'all educate me on the law on that issue. And then we
13 will figure out.

14 MR. PRATER: Yes, sir.

15 THE COURT: If the law is you can't, let's answer the
16 question. If it's you can, then we can talk about why it
17 should or shouldn't.

18 MR. PRATER: Yes, sir.

19 MR. BUCK: Your Honor, I have a related administrative
20 question about if the -- if the case or the miscellaneous
21 proceeding is transferred to you, and there's an amendment made
22 to what is now the final report, does that replace what is on
23 the docket -- what is now filed in the docket under seal as the
24 final report? If it were amended, would it replace that? Or
25 would there be -- would they both be on the docket going

1 forward?

2 THE COURT: You know, I don't know any way to remove
3 something from the case once it's there. But it would
4 certainly, you know -- it would be just like an amended
5 judgment. It wouldn't -- it wouldn't matter. It wouldn't be
6 the -- it wouldn't be the finding of the Court if I changed
7 something in it.

8 MR. BUCK: Okay. I'm just thinking through about what
9 exactly might be unsealed, because there's one thing -- I mean,
10 from the lawyers' perspective, there's a difference between a
11 final report of inquiry being unsealed and a, you know,
12 preliminary report of inquiry being unsealed, and what that
13 might mean in the public eye.

14 That's what I'm asking.

15 THE COURT: Understood. Understood. Well, I think
16 once we brief this, we will be in a lot better position to know
17 what our options are and where we go.

18 MR. RAGSDALE: Next Friday?

19 THE COURT: Perfect.

20 MR. RAGSDALE: Okay.

21 THE COURT: If we can have them all filed by next
22 Friday, I think that would be excellent.

23 MR. KING: One more administrative thing, Your Honor.
24 I wanted to let the Court know 30 days from when the panel
25 issued its final report runs on Monday.

1 THE COURT: Okay.

2 MR. KING: I'm not positive that deadline makes a
3 difference, but I tend to think it does.

4 THE COURT: This Monday.

5 MR. KING: It's going to be easier -- yes, sir.

6 It's going to be easier to, you know, reopen for the panel
7 to do what you have requested -- or going to request them to do
8 by that Monday. I just wanted you to be aware of that 30-day
9 deadline.

10 THE COURT: Right. I don't think Judge Proctor has
11 called me back. Judge Watkins is here. I have seen him, and
12 so I intend to talk to him before I leave.

13 MR. KING: Thank you, Your Honor.

14 THE COURT: I think that will all get accomplished
15 very quickly.

16 Okay. Well, that's a lot of work in an hour and
17 10 minutes. Anything else we ought to pick up?

18 MR. ROGERS: Thank you, Your Honor. We appreciate it.

19 MR. PRATER: Thank you, Your Honor.

20 THE COURT: All right. This has been helpful.

21 And I tell you what. I know I've got a bunch of folks
22 from Birmingham, some from Montgomery, some from other places.

23 For some part of -- no substantive hearings. But, you
24 know, if we want to sit down again like this, is everybody okay
25 with doing that at the Hugo Black in Birmingham?

1 MR. ROGERS: Yes.

2 MR. RAGSDALE: Absolutely.

3 THE COURT: All right. And we can pass the pain of
4 travel around.

5 Again, I'm not going to conduct a substantive hearing
6 outside the Middle District. But to the extent that we want to
7 do another one of these at some point, that might be a good way
8 to do it.

9 Okay. Thank you all.

10

11 (Whereupon, the above proceedings were concluded at
12 2:09 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

11-05-2023

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date