

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF
ARLINGTON

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	:
IN THE MATTER OF:	:
	:
COMMONWEALTH OF VIRGINIA	:
	: CR-17000699-00
VS.	: et seq.
	:
ADIAM BERHANE	:
	:
DEFENDANT.	:
	:

Wednesday,
March 27, 2019

Arlington, Virginia

The hearing re pretrial motion
commenced at 9:46 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

APPEARANCES:

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:46 a.m.)

3 THE COURT: All right. We're here in
4 the case of Commonwealth versus Adiam Berhane.
5 Okay, Ms. Berhane is coming in.

6 All right. We have a number of
7 motions here. Is there any particular order?

8 MR. HAYWOOD: If we can get through
9 evidence probably, there's a lot of it and it's
10 sort of going to overlap. Might as well just
11 deal with it all at once if that's okay with the
12 Court.

13 MS. TINGLE: I actually disagree. I
14 think that given counsel's moving paper, in his
15 moving papers he states that the arguments to
16 dismiss are based on Sixth Amendment violation
17 and due process violation.

18 But those obviously if the Court
19 grants that remedy there will be no need for any
20 evidence. So I believe that those motions need
21 to be heard first and then we would take
22 discovery.

1 MR. HAYWOOD: Well the Sixth Amendment
2 motion to disqualify?

3 MS. TINGLE: Yes.

4 MR. HAYWOOD: Okay, well that requires
5 evidence. So it's largely going to be the same
6 evidence.

7 THE COURT: Well we'll take up that
8 motion first and to the extent that there was
9 evidence there, by the way, there was a motion
10 regarding additional counsel with Mr. Robinson.

11 After speaking with the Supreme Court
12 it is possible for him to be appointed as counsel
13 in this matter. So if he is still, you all still
14 would like to have him he is allowed to, the
15 Court can appoint him in this case.

16 MR. HAYWOOD: We would, great.

17 THE COURT: All right. That was a
18 motion that was left open from previously. But I
19 did have an opportunity to speak with the Supreme
20 Court and they have said that would be okay. All
21 right, okay. All right.

22 MR. HAYWOOD: Your Honor, I would call

1 Detective John Bamford.

2 WHEREUPON,

3 JOHN BAMFORD

4 WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE

5 DEFENDANT AND, AFTER HAVING BEEN FIRST DULY

6 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

7 DIRECT EXAMINATION

8 BY MR. HAYWOOD:

9 Q Detective Bamford, can you state your
10 name for the Court?

11 A John Bamford.

12 Q How are you employed?

13 A I'm going to move this because
14 otherwise I'm going to deafen everybody. I'm a
15 detective with Arlington County Police
16 Department.

17 Q How long have you been with Arlington
18 Police Department?

19 A Eleven years, sir.

20 Q And what do you do with the police
21 department?

22 A Currently I do our cyber

1 investigations as part of Homeland Security.

2 Q Were you involved with the case that
3 we're here for today, Commonwealth versus Adiam
4 Berhane?

5 A Yes, sir.

6 Q And in what capacity were you involved
7 with that case?

8 A The lead detective.

9 Q All right. And in the course of that
10 investigation did you collect evidence?

11 A Yes, sir.

12 Q And can you tell me what that, well
13 let's just go through it. Did you collect, as a
14 part of that case did you execute a search
15 warrant at Ms. Berhane's residence?

16 A Yes, sir.

17 Q And did you collect at that residence
18 electronic devices?

19 A Yes, sir.

20 Q Was that also believed to the
21 residence of the co-defendant in this case, Clark
22 Donat?

1 A Yes, sir.

2 Q Okay. And can you tell me
3 approximately electronic devices you found in the
4 residence?

5 A Maybe 25, 30. I mean honestly off the
6 top of my head I would say over 25. But I'm not
7 100 percent sure on that one.

8 Q And what kind of devices were there?

9 A Laptops, various media storage devices
10 so USB drives, cell phones. I think there's an
11 external hard drive. Again, there's so many
12 different residents that were hit, guessing which
13 one was just at 1700 would be difficult.

14 Q Understood. So there were devices
15 found elsewhere too?

16 A Yes, sir.

17 Q Where were those devices found?

18 A One was in her mother's house in D.C.
19 and some were in D.C. and some were at the
20 business, Caffe Aficionado.

21 Q So together with the devices found
22 outside of the residence how many total do you

1 think there were?

2 A Again, probably like 25, 30. Again,
3 it's difficult for me to take a guess right now.

4 Q And did those devices contain
5 information that you believe to be relevant to
6 this investigation?

7 A Yes, sir.

8 Q And as a result of that what was done
9 with them? Was the data that was on those
10 devices extracted or downloaded?

11 A Yes, sir. The devices were imaged,
12 yes.

13 Q What was the process for doing that?

14 A I could not speak to that. I don't do
15 the imaging myself.

16 Q Okay. But does it basically involve
17 taking all the data that's on a device and
18 getting on to, into a more manageable format?

19 A Depending on the device. Again, I
20 don't know if I can speak to that because it's
21 not something in my expertise.

22 Q Okay. Did you actually have a chance

1 though to see the product of that process?

2 A Yes, sir.

3 Q And what did that product look like?

4 A Depends on the style and the device.

5 So some come in different forms. So it's going
6 to vary depending on the device that was imaged.

7 Q What kinds of information that was
8 relevant was on that, were on those devices?

9 A Communications between Ms. Berhane and
10 others. What I would call payment cards so
11 credit cards, debit card numbers, et cetera,
12 photographs, emails, other financial
13 documentation, things like that.

14 Q And in total how much, sorry, let me
15 back up here. So from all these 25 or 30 devices
16 was data extracted from all of them?

17 A Just about. Again, I would have to go
18 back through. I mean we have a floppy disk that
19 we did not extract because nobody has a device
20 that will read it.

21 Q So in total from all of the
22 extractions that you did how much data do you

1 think you obtained?

2 A I want to say at least a terabyte if
3 not more.

4 Q What's a terabyte?

5 A It is a unit of measuring electronic
6 data. So, for example, like one byte would be
7 like one character and then a terabyte is
8 significantly more than that, expands on and on.

9 Q One byte is one character?

10 A Like, it's kind of like one piece of
11 data. So it would expand on and on. So a
12 terabyte the best way is just a large amount of
13 electronic data.

14 Q And did you, if you had to print that
15 out on paper, all that data that was on those
16 devices how much do you think there would be? Do
17 you have any idea?

18 A Somebody tried to compare it once.
19 It's a lot. I know it gets into like hundreds of
20 thousands if not millions of pages.

21 Q Okay. So also through your
22 investigation were there documents that were

1 obtained from, you know, I guess search warrant
2 from the various searches from your other
3 investigation?

4 A Yes, sir.

5 Q And the documents that you obtained,
6 were those scanned or photographed to be made
7 available for the Commonwealth's attorney?

8 A Most were scanned or photographed and
9 they were all available.

10 Q Okay. And were there other items that
11 you also located or obtained that were
12 photographed?

13 A Yes.

14 Q What kinds of other items were there?

15 A There is a large credit card embosser,
16 you know, various cards that I at least believe
17 to be fraudulently created, materials such as
18 that and other items related to that, financial
19 documents, et cetera.

20 Q Okay. So specifically with respect to
21 the credit cards there were a lot of what you
22 believe to be fraudulent credit cards?

1 A Yes, sir.

2 Q Do you have an estimate of how many
3 maybe you located?

4 A Over 100, I believe. But again, it
5 would be one of those things without having known
6 what these questions were I did not prepare.

7 Q No, I understand.

8 A I would say probably about 100.

9 Q Rough estimate is good. And you also
10 found receipts or documents related to the use of
11 credit cards?

12 A Yes, sir.

13 Q Were there a lot of those as well?

14 A Yes, sir.

15 Q Numbering in the hundreds or maybe
16 even thousands?

17 A Probably hundreds.

18 Q All right. Now in the course of your
19 work on this case did you write a police report?

20 A I did.

21 Q How long was that police report that
22 you wrote?

1 A Last time I printed it out, I believe,
2 500 pages.

3 Q And how long did it take you to
4 compile that?

5 A Up until maybe last year or somewhere
6 in 2018. So about a year and a half maybe, give
7 or take.

8 Q I just had a little lapse of
9 attention. You said 500 pages?

10 A Yes, I believe the whole thing printed
11 out takes about 500 pages.

12 Q Okay. Did you type most of that?

13 A I did.

14 Q How long do you think it took you to
15 type it all?

16 A About a year and a half because it was
17 continuing because new things would get added.
18 So about a year and a half maybe.

19 Q And in terms of the actual amount of
20 time you were typing or compiling it any guess of
21 how long it took you to put it together?

22 A I made a substantial amount of

1 overtime. But, no, I mean it was a lot. I would
2 say quite a few hours.

3 Q Are we getting into the hundreds of
4 hours probably?

5 A For the whole course of the
6 investigation, yes.

7 Q Now that, this is pretty elementary.
8 Can that document be electronically copied, or
9 those documents, the report?

10 A You mean like, what do you mean,
11 electronically?

12 Q For example, let me just ask you.
13 What form is it in now?

14 A Microsoft Word.

15 Q So the Microsoft Word documents can
16 those be like copied onto another disk?

17 A Yes.

18 Q And also can they be printed out?

19 A Yes.

20 Q It being Microsoft Word can redactions
21 be made within the document? Like could you
22 delete stuff?

1 A I mean I wouldn't delete anything from
2 the report. It's already been created. I mean,
3 it is what it is. I would personally not delete
4 anything. If you're asking if I would delete
5 anything, no, I would not.

6 Q If we had it, can we do that? It's
7 not like protected in that way?

8 A Are you asking for redaction or
9 deleted, sorry? Like I would not delete any
10 facts. If you're saying could we redact like
11 names?

12 Q Can text in a Word document be
13 deleted? That's all I'm asking.

14 A Yes, yes.

15 Q And Court's indulgence briefly. Were
16 financial records also obtained in this case?

17 A Yes, sir.

18 Q Can you tell me roughly maybe the
19 quantity of that?

20 A Somewhere between six and four years
21 from a couple different banks. So I mean,
22 probably a couple hundred thousand pages, maybe

1 100,000 pages.

2 Q Is this the most, in terms of like the
3 amount of data or documents or other things
4 obtained, is this like the largest quantity that
5 you've had in a case?

6 A That I know of or myself personally?

7 Q Yourself.

8 A Myself personally, it might be
9 comparable. I would say there may be one or two
10 other cases that are similar.

11 MR. HAYWOOD: I have no further
12 questions for this witness. Thank you.

13 THE COURT: Does the Commonwealth have
14 any questions for the witness?

15 MS. TINGLE: Perhaps I'm being a
16 little too linear this morning but I thought we
17 were arguing the Sixth Amendment motion and how
18 Ms. Eastman interfered with --

19 THE COURT: I understand. I'm going
20 to finish and then we'll see where we are.

21 MS. TINGLE: I mean I can certainly,
22 I have questions certainly for Detective Bamford

1 based on the due process violation motion which
2 involves charging. I don't know whether counsel
3 wants to recall him for that.

4 I was trying to focus on what we said
5 we were arguing. So I can ask him questions.
6 We'll be here for quite a while. So it's up to
7 the Court.

8 MR. HAYWOOD: The discovery and the
9 quality of discovery was mentioned in the Sixth
10 Amendment motion. It's pretty important in terms
11 of the allegation that was made against counsel
12 in this case.

13 So that's the reason I wanted to
14 elicit that testimony just for context.

15 THE COURT: All right. Well let me
16 just say the Court does not operate within a
17 vacuum. The Court is certainly aware that it is
18 a rather voluminous situation.

19 I am aware. And so do you have
20 anything further you wish to ask this witness
21 regarding the motion?

22 MR. HAYWOOD: No, I don't, Your Honor.

1 This is all I need from him from all of the
2 motions.

3 THE COURT: All right.

4 MS. TINGLE: For all of the motions?
5 Then I will certainly ask you some questions
6 about the due process motion.

7 THE WITNESS: Okay.

8 CROSS EXAMINATION

9 BY MS. TINGLE:

10 Q Well a couple things first about the
11 electronic devices, if I may. On those
12 electronic devices there was witness information
13 on those devices, correct?

14 A Yes.

15 Q And civilian, like witnesses meaning
16 civilians?

17 A Yes, yes, ma'am.

18 Q Victims of crime?

19 A Yes, ma'am.

20 Q And these victims of crime had their
21 names?

22 A Yes.

1 Q Their dates of birth?

2 A Yes.

3 Q Their addresses?

4 A Yes.

5 Q Bank account numbers?

6 A Yes.

7 Q All manner of information that one
8 would use as happened in this case to unlock and
9 create tools of fraud to be able to enrich the
10 Defendant, correct?

11 A Yes, ma'am.

12 Q And all of that information was all
13 over the place in these electronic documents,
14 correct?

15 A Yes, ma'am.

16 Q Saved in all different manner of ways,
17 all different manner of places?

18 A Yes, ma'am.

19 Q And when you had, when you were
20 talking about your supplement, excuse me, you
21 also met with prior counsel, Mr. Ellis, correct?

22 A Yes, ma'am.

1 Q And you also met with Mr. Robinson?

2 A Yes, ma'am.

3 Q Subsequent to Mr. Ellis getting off of
4 the case, correct?

5 A Yes.

6 Q And you provided, during those
7 meetings you provided pretty detailed
8 descriptions to both of them, did you not?

9 A Yes.

10 Q Of the nature of the case?

11 A Yes.

12 Q And you talked about, you walked
13 through for several hours, didn't you the nature
14 of the investigation?

15 A I was present. Yes, I apologize. I
16 was present with Mr. Ellis. I was not present
17 with Mr. Robinson. Sorry, it took me a second.

18 I was with Mr. Robinson during the
19 sentencing hearing for Mr. Donat where the
20 presentation was done again. He was behind me.
21 But he did step out of the courtroom at some
22 point during that proceeding.

1 I think the court had assigned him or
2 something. But with Mr. Ellis I was there the
3 whole time.

4 Q And Ms. Eastman then did that same
5 similar presentation based on your information
6 for Mr. Robinson?

7 A Yes.

8 Q Okay. And so all of the information,
9 you gave a very broad, and broad meaning scope,
10 but in depth in terms of detail information about
11 this investigation, correct?

12 A I would say so, yes.

13 Q You described all of these, you
14 described what the contents of the devices were,
15 correct?

16 A Yes.

17 Q You described how it was that this
18 fraud scheme even began?

19 A Yes.

20 Q You walked through the way that the
21 fraud was conducted?

22 A Yes.

1 Q You gave examples of where evidence
2 was found?

3 A Yes.

4 Q You gave examples of the manner in
5 which each time that the nature of the fraud
6 would change that the fraud would start with gift
7 cards, correct?

8 A Yes.

9 Q And then at some point that shifted
10 and then there were returns that were done at
11 multiple vendors, correct?

12 A Yes.

13 Q And then that also went back and
14 shifted back to gift cards, correct? At some
15 point there was a mix of both?

16 A It went from gift cards to returns.
17 It did not go back to gift cards.

18 Q Okay. So you gave examples of each of
19 those and the different types of retailers where
20 this was used?

21 A Yes.

22 Q And you in fact would use the actual

1 evidence to describe how it was that this
2 happened?

3 A Photographs. I think photographs for
4 the most part. I don't think --

5 Q Photographs of the actual evidence?

6 A Yes, yes.

7 Q You weren't giving hypotheticals?

8 A No.

9 Q You were actually walking through your
10 entire investigation, correct?

11 A Yes.

12 Q And you also, you had other
13 investigators that were there from other
14 agencies? Do you recall who else was at that, I
15 think it was Detective Munizza was at the meeting
16 from the Arlington County Police Department,
17 wasn't she?

18 A No.

19 Q Was it just you and Ms. Eastman?

20 A I believe it was mostly just me and
21 Ms. Eastman.

22 Q Okay. And so were you answering any

1 questions from counsel?

2 A I don't think I answered many
3 questions. I can't recall that part whether a
4 question was asked that I answered. I think Ms.
5 Eastman did the vast majority of the
6 presentation.

7 So I'm saying, yes, I was there with
8 it and the presentation. But I don't know if I
9 remember answering any questions.

10 Q Did you withhold any information
11 during that presentation?

12 A No.

13 Q Was there anything during that
14 presentation that you said, you know what, I'm
15 not talking about this, we're not getting into
16 this area of the investigation?

17 A No, I don't recall that at all.

18 Q Fair to say that you were an open
19 book, that this investigation was made
20 essentially an open book?

21 A Yes, ma'am.

22 Q Have you ever, with this office have

1 you ever been a part of walking through defense
2 counsel the investigation of a particular case
3 with this office?

4 A Like this?

5 Q Correct?

6 A No.

7 Q The financial records that you
8 obtained, you obtained those through subpoenas,
9 correct?

10 A Yes, ma'am.

11 Q And a lot of those were for the
12 Defendant's own financial records, correct?

13 A Yes, ma'am.

14 Q Court's indulgence. When you were
15 making the determination and so you obviously
16 testified at the preliminary hearing?

17 A Yes.

18 Q And so at the time of the preliminary
19 hearing you only testified with relation to the
20 case of Commonwealth versus Berhane, correct?

21 A Yes.

22 Q And it was your understanding that the

1 co-defendant had agreed to waive his right to a
2 preliminary hearing and enter into plea
3 negotiations with the Commonwealth?

4 A Yes, ma'am.

5 Q Were you present there when counsel,
6 for when Mr. Bugg spoke with Ms. Eastman?

7 A Yes, I was.

8 Q And so did, that type of conversation
9 didn't happen with Mr. Ellis, correct?

10 A Yes, correct.

11 Q And you, but you were there for the
12 preliminary hearing, multiple witnesses
13 testified?

14 A Yes, ma'am.

15 Q And then after that you sat down with
16 Ms. Eastman to determine how many charges were
17 going to be brought to the grand jury, correct?

18 A Yes, ma'am.

19 Q How many charges were initially
20 brought by the magistrate when you went and
21 sought warrants by the magistrate?

22 A It was four.

1 Q Did those four charges represent the
2 sum total of the investigation?

3 A No, ma'am, not at all.

4 Q Why only bring four?

5 A It was, for the most part was to limit
6 the preliminary hearing for how many witnesses we
7 would have to bring because this case has so many
8 records and so many custodians is that if we had
9 brought everything at the initial with the
10 magistrate I mean we would have 100 witness
11 prelim. I mean it would take us three weeks.

12 Q When you were looking through the
13 scope of this fraud how many potential charges
14 did you and Ms. Eastman discuss? How many
15 potential charges were available in this
16 particular case?

17 A A minimum of 1,500, I believe.

18 Q And so did Ms. Eastman and you discuss
19 how best to limit those 1,500 cases?

20 A Yes, ma'am, we did.

21 Q And in that determination did you go
22 through the entire investigation again?

1 A Yes.

2 Q And did you attempt to bring charges
3 that were most representative of those 1,500
4 potential charges?

5 A Yes, ma'am.

6 Q And did you go through to determine
7 how to best do that in a way that was not
8 punitive, I don't want to say punitive, that was
9 in a way that was not we are going to bring every
10 single possible charge we can?

11 MR. HAYWOOD: Your Honor, I'm okay
12 with the Commonwealth going into this. But this
13 is beyond the scope of the direct examination.
14 So if Ms. Tingle is going to ask questions along
15 these lines --

16 THE COURT: Well I think, I disagree.
17 I think that it is something that you kind of
18 brought up and they're just expounding upon. So
19 I don't think it's beyond the scope.

20 MR. HAYWOOD: Your Honor, I was only
21 going to ask that she not lead with witness. But
22 that's fine.

1 THE COURT: It's cross examination,
2 counsel.

3 MS. TINGLE: Cross examination is
4 actually fun when you get to do it.

5 THE COURT: Yes.

6 BY MS. TINGLE:

7 Q So when we, how did you end up landing
8 on 55 total charges?

9 A So basically I sat through the entire
10 case. We excluded everything before the coffee
11 shop opened up or the coffee shop started taking
12 credit card payments.

13 So any evidence that we found from
14 payment cards from like 2009 that were on
15 computers or email addresses we just excluded
16 those.

17 Q Were those valid charges?

18 A Yes.

19 Q Was there probable cause for those
20 charges?

21 A Yes.

22 Q Okay.

1 A So then we started at 2013. So the
2 idea being that from 2013 until the day of her
3 arrest we would find kind of representative
4 samples.

5 So, for example, some charges came
6 from before the coffee shop was officially open
7 for business per social media and Twitter. So we
8 picked some of those because that was, why would
9 that have a business at the time it was not open?

10 So we looked at those charges. Then
11 we looked at charges related to when the business
12 was open. So people whose credit cards were used
13 to purchase gift cards that were through the
14 business.

15 Then we used people whose credit cards
16 were used to purchase items that were then
17 returned where the money went into the café's
18 bank account. Then we used people whose credit
19 cards were actually found on Ms. Berhane's person
20 and we also used credit cards that were related
21 to, for example, a purchase at the Four Seasons.

22 The week before we arrested her she

1 went out to brunch and we found that credit card,
2 I believe, in a car and it was related to a
3 brunch that had occurred right before. So it was
4 trying to be representative of the entire scheme.

5 MS. TINGLE: Those are all the
6 questions I have, Judge, thank you.

7 THE COURT: All right. Any redirect?

8 REDIRECT

9 MR. HAYWOOD: Yes, Your Honor.
10 Detective Bamford, for the preliminary hearing do
11 you remember how many witnesses were actually
12 present?

13 THE WITNESS: Ten maybe. I think it
14 was ten or 11, I believe.

15 BY MR. HAYWOOD:

16 Q Do you remember how long that
17 preliminary hearing actually took, the length?

18 A An hour and a half maybe.

19 Q You discussed the meeting that you had
20 with Mr. Ellis, right?

21 A Yes, and Mr. Bugg.

22 Q How long did that meeting take?

1 A Again, maybe an hour and a half. I
2 don't remember off the top of my head.

3 Q Were there other times that you were
4 made available to meet with defense counsel and
5 answer questions about the case?

6 A I actually gave him my cell phone. I
7 think if I go back long enough I think I gave him
8 my cell phone at some point.

9 Q Okay. Were you permitted to do your
10 own independent investigative tasks for the
11 defense in this case?

12 A What do you, like if you had asked me
13 to do something?

14 Q Like if he asked you to investigate
15 something or, is that something that's in the
16 scope of your employment?

17 A I mean if it's a complaint, yes. I
18 mean I don't see why it wouldn't. I mean I don't
19 know really what you're asking.

20 Like if he comes in and says hey, are
21 you asking like if he came in with a tip like
22 hey, you need to look at this person?

1 Q I'm asking for example if we reached
2 out to you and said hey, Detective Bamford, we
3 want you to search for exculpatory evidence on
4 this drive and tell us what you find in the
5 emails that is helpful to our client. Would you
6 be able to do that for us?

7 A God, if you made my life that much
8 easier, yes.

9 Q For exculpatory information?

10 A Yes. I have no issues with that. If
11 you were able to tell me especially if you had
12 passwords because some of the devices are locked
13 or encrypted so we can't get into them. So, yes,
14 if that was provided, yes.

15 Q You would actually, we can send you
16 requests to do investigation because I would like
17 to do this if you're going to --

18 A That's perfectly fine. I see no issue
19 with that. I would need passwords though.

20 Q Okay. Did you meet separately also
21 with the Commonwealth apart from meeting with
22 defense counsel that one time?

1 A Did I meet with Ms., like the
2 Commonwealth on the case, yes, repeatedly.

3 Q How many times do you think you met?

4 A For a while it was like every day. I
5 basically took up a chair.

6 Q And how many days do you think that
7 was total?

8 A This case started November 12, 2015.
9 We are in March of 2019. I mean 150 is probably
10 a low estimate.

11 Q Okay. And did you also exchange
12 emails with the Commonwealth's attorney?

13 A Yes.

14 Q About the case?

15 A I'm sure, yes.

16 Q How many times do you think you
17 exchanged emails?

18 A A lot. I have no, I would not be able
19 to guess how many emails.

20 Q And did those sometimes relate to
21 investigative tasks, additional things they
22 wanted you to follow up on, things of that

1 nature?

2 A I'm trying to think of an example,
3 maybe. I can't think of like a concrete example.
4 It's possible.

5 But a lot of times we would
6 communicate like in person or something like that
7 about what, hey, what steps do we think we might
8 want to take.

9 So via email I don't know. I just
10 can't think of an example off the top of my head
11 so I'm not going to be able to answer that
12 question. I just can't think of an example.

13 MR. HAYWOOD: Okay. I have no further
14 questions. Thank you.

15 THE COURT: All right. Thank you,
16 thank you, Detective.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: All right. At this time
19 is he free to go or is it anticipated that he may
20 need to be called again?

21 MR. HAYWOOD: He's free to go.

22 THE COURT: All right.

1 MR. HAYWOOD: Your Honor, I would call
2 Yancey Ellis.

3 WHEREUPON,

4 YANCEY ELLIS

5 WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE
6 DEFENDANT AND, AFTER HAVING BEEN FIRST DULY
7 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. HAYWOOD:

10 Q Mr. Ellis, can you state your name for
11 the Court?

12 A Yancey Ellis.

13 Q And what do you do for a living?

14 A I am an attorney.

15 Q How long have you been an attorney?

16 A Since 2005.

17 Q And can you tell me what was the first
18 job you had after law school?

19 A I was in the United States Marine
20 Corps.

21 Q And what did you do in the Marine
22 Corps?

1 A I was a judge advocate, prosecuted
2 cases, defended cases and worked in operational
3 law as well.

4 Q And after you were in the JAG Corps,
5 well how long were you in the JAG Corps?

6 A I was in the JAG Corps, not really a
7 JAG Corps in the Marines, but I was in the Marine
8 Corps from 2006 to 2010.

9 Q And after that what did you do or
10 where did you go after that?

11 A Immediately after I got off active
12 duty I worked for a firm for about a year and
13 then I got a job with the Public Defender for the
14 City of Alexandria.

15 Q And how long were you with the Public
16 Defender for Alexandria?

17 A Until 2015.

18 Q And when you were, and what do you do
19 now?

20 A I have my own firm.

21 Q Okay. And where do you practice in
22 your own firm?

1 A Pretty much every jurisdiction in
2 Northern Virginia state and federal.

3 Q And what kind of cases do you handle?

4 A Typically any type of criminal case
5 from traffic to serious felonies.

6 Q Have you handled small cases, big
7 cases, everywhere in between?

8 A Yes.

9 Q All right. Did you also, were you
10 also involved in this case?

11 A I was.

12 MR. HAYWOOD: Court's indulgence just
13 briefly. Your Honor, may I have five minutes?

14 THE COURT: I'm sorry.

15 MR. HAYWOOD: May I have five minutes?

16 THE COURT: All right, five minutes,
17 counsel. We'll take a brief recess.

18 MR. HAYWOOD: Thank you.

19 (Whereupon, the above-entitled matter
20 went off the record at 10:14 a.m. and resumed at
21 10:23 a.m.)

22 MR. HAYWOOD: Thank you, Your Honor.

1 I appreciate that.

2 THE COURT: You're welcome.

3 BY MR. HAYWOOD:

4 Q Mr. Ellis, I just want to make clear
5 I'm only asking you questions about your
6 interactions with the Commonwealth's attorney.
7 If at any point it sounds like I'm asking
8 something that would elicit privileged
9 information about your communications with Ms.
10 Berhane it's not my intent.

11 So please ask me, let me know that I
12 need to clarify the question. Is that
13 understood?

14 A It is.

15 Q Okay. So when did you take over the
16 case for Ms. Berhane?

17 A I was hired by Ms. Berhane's family in
18 November of 2016.

19 Q And what was the posture of the case
20 when you took over?

21 A She had just been arrested.

22 Q Okay. How many counts had been

1 charged at that time?

2 A I believe it was four felony counts.

3 Q And at some point were additional
4 counts charged?

5 A Not until it reached Circuit Court.

6 Q Okay. Were you still on the case in
7 Circuit Court?

8 A I was.

9 Q And how many counts were indicted in
10 Circuit Court?

11 A Fifty-four.

12 Q And did you have a meeting at any
13 point, well did you discuss with Ms. Eastman why
14 so many counts were charged?

15 A Yes.

16 Q And prior to moving on from that, can
17 you tell me -- let me ask you first of all
18 actually before we move on to that, was there a
19 bond argument or bond motion that was filed in
20 this case?

21 A Yes.

22 Q And what was the result of that?

1 A I filed a bond motion for Ms. Berhane
2 in General District Court. It was denied. I
3 appealed that ruling to the Circuit Court and the
4 Circuit Court granted her a large secured bond.
5 I want to say it was around \$200,000 or \$250,000.

6 Q And can you tell me what happened
7 after that?

8 A With regards to the bond motion?

9 Q Yes, was it appealed?

10 A Yes. The Commonwealth requested to
11 appeal to the Court of Appeals of Virginia.

12 Q And what happened in the Court of
13 Appeals?

14 A So my memory, I believe I don't know
15 if the Commonwealth just wasn't used to filing
16 appeals but they briefed an appeal instead of
17 just filing a motion with the Court of Appeals.
18 So the petition was denied.

19 So they didn't hear the appeal and
20 denying the petition the Court of Appeals said
21 that the, did not overturn the ruling.

22 Q I'm going to show you the bond

1 documents in this case.

2 MS. TINGLE: No objection.

3 MR. HAYWOOD: Your Honor, may I
4 approach?

5 THE COURT: Yes, sir.

6 MR. HAYWOOD: These exhibits are
7 marked Defense Exhibit A, B, and C. Please tell
8 me what those are?

9 THE WITNESS: Exhibit A is the
10 Commonwealth's Notice of Appeal of Bond
11 Determination. Exhibit B is the Court of Appeals
12 per curiam decision. And Exhibit C is the
13 Commonwealth's Petition for Appeal.

14 (WHEREUPON, THE DOCUMENTS
15 REFERRED TO WERE MARKED AS
16 DEFENDANT EXHIBIT A, B AND C
17 FOR IDENTIFICATION.)

18 MR. HAYWOOD: Your Honor, I would move
19 these exhibits into evidence at this point.

20 MS. TINGLE: No objection.

21 THE COURT: All right. A, B and C
22 will be received without objection.

1 (WHEREUPON, THE DOCUMENTS
2 REFERRED TO, PREVIOUSLY
3 MARKED DEFENDANT EXHIBIT
4 A, B AND C FOR
5 IDENTIFICATION, WERE RECEIVED
6 INTO EVIDENCE.)

7 BY MR. HAYWOOD:

8 Q So the result of all of this was that,
9 was Ms. Berhane eventually released on bond?

10 A She was. Initially the Commonwealth
11 asked for a stay of the order granting her bond.
12 When I realized that they had filed a petition
13 instead of a motion I knew that it was going to
14 take a long time for the Court of Appeals to
15 decide.

16 So I came back into court and I asked
17 the Court to remove the stay. And the Court set
18 a deadline and so she was, she posted her bond at
19 the deadline.

20 Q And was there also at some point a
21 motion for return of seized property?

22 A Yes.

1 Q And can you tell me what that was?

2 A So initially many of the search
3 warrants were under seal. After they arrested
4 Ms. Berhane they executed a second search warrant
5 on her house and that was not under seal.

6 In reviewing that search warrant I
7 felt that it potentially was a general warrant.
8 The property that was directed to be seized was
9 quite vague. And so we requested to return some
10 of that property.

11 Q And were you successful in that
12 regard?

13 A No, the General District Court denied
14 that motion.

15 Q Do you know the co-defendant, was the
16 co-defendant released on bond in this case?

17 A He was not. And I don't know if they
18 ever requested bond.

19 Q Do you know if the co-defendant ever
20 challenged the seizure of his property?

21 A He did not, to my knowledge.

22 Q Now I want to move on to the charges

1 and your interactions with Ms. Eastman in this
2 case regarding the plea negotiations. Again,
3 just to reiterate I'm only asking about the
4 communications you had with opposing counsel.

5 And if any question I ask seems to
6 implicate attorney client privilege please be
7 aware of that. That's not my intent.

8 So again, how many charges were there
9 initially?

10 A To my memory I think there was 54.

11 Q And I don't think this has been said
12 explicitly for the record. But who was the
13 prosecutor initially assigned to the case?

14 A Ms. Eastman.

15 Q So, but there were four in the
16 District Court and then 54 in the Circuit Court?

17 A Correct.

18 Q Did you have any communication with
19 Ms. Eastman before the preliminary hearing?

20 A I did not.

21 Q And did she ever reach out to you to
22 extend a plea offer?

1 A She did not.

2 Q Did you ever communicate a plea offer,
3 I'm sorry, did Ms. Eastman tell you prior to the
4 preliminary hearing that there would be
5 consequences if your defendant, your client did
6 not waive preliminary hearing?

7 A She did not.

8 Q And then what happened after, with
9 respect to plea negotiations after preliminary
10 hearing, what happened? Did you meet with Ms.
11 Eastman again?

12 A Yes. So after Ms. Berhane was
13 indicted with the 54 counts we had the meeting
14 that Detective Bamford described. I believe it
15 was on May the 16th.

16 And Ms. Eastman went through her
17 visual presentation for me and co-defendant's
18 counsel, Mr. Bugg. And at that time we had
19 discussions on the plea.

20 Q Okay. And do you know what the plea
21 offer was to Mr. Donat?

22 A From what I recall in that meeting Mr.

1 Donat had been indicted with approximately ten
2 counts. And I remember Mr. Bugg asking Ms.
3 Eastman if there was any room for negotiation or
4 words to that effect.

5 And Ms. Eastman stated that she
6 indicted what she thought was representative of
7 the conduct in the case. And at that time I said
8 well I think, you know, I think my client might
9 consider a similar plea offer and I was told that
10 that wasn't possible.

11 Q Was it explained why that wasn't
12 possible?

13 A So not specifically. I asked at that
14 time and the comments that I remember are that
15 Ms. Eastman mentioned that my client had moved
16 for return of her property, that she had not
17 waived her preliminary hearing, that Mr. Donat
18 had waived his preliminary hearing and he was in
19 jail.

20 And I don't remember any other reasons
21 at that meeting. I believe she also said, and,
22 you know, this could potentially be my fault.

1 But I believe she also said that she
2 never knew that or Ms. Berhane never implied that
3 she was willing to accept a plea agreement or
4 plead guilty.

5 And I guess in my mind I thought those
6 discussions were going to happen in Circuit Court
7 because there was no way this case was going to
8 get resolved as a misdemeanor case.

9 Q Did you follow up at that meeting with
10 an email?

11 A I did. I sent Ms. Eastman, I believe,
12 a couple different emails. And I was just
13 struggling to explain to my client why she was
14 situated differently from her co-defendant.

15 And so I was trying to follow up just
16 to get some additional information on why her
17 plea was different.

18 MR. HAYWOOD: I'm going to show you an
19 exhibit. This is the email that you sent. May I
20 approach, Your Honor?

21 THE COURT: Yes, sir.

22 MR. HAYWOOD: I'm going to show you

1 the exhibit marked Exhibit D. Tell me what that
2 is.

3 (WHEREUPON, THE DOCUMENT
4 REFERRED TO WAS MARKED AS
5 DEFENDANT EXHIBIT D FOR
6 IDENTIFICATION.)

7 THE WITNESS: This, Exhibit D is an
8 email chain between Ms. Eastman and myself. It's
9 a chain that starts out with her plea offer to me
10 in writing and then my follow up emails
11 requesting just additional information on why the
12 plea was so much different.

13 MR. HAYWOOD: Your Honor, I would move
14 Exhibit D into evidence.

15 MS. TINGLE: No objection.

16 MS. EASTMAN: No objection.

17 MS. TINGLE: Do you have a copy for
18 us?

19 MR. HAYWOOD: Yes.

20 THE COURT: All right. D will be
21 received without objection.

22 (WHEREUPON, THE DOCUMENT

1 REFERRED TO, PREVIOUSLY
2 MARKED DEFENDANT EXHIBIT
3 D FOR IDENTIFICATION, WAS
4 RECEIVED INTO EVIDENCE.)

5 MR. HAYWOOD: Your Honor, I can't see
6 that email now. But in that email you were
7 asking again besides for the motion for return of
8 property and the failure to waive prelim is there
9 any additional rationale that you can provide,
10 that Ms. Eastman can provide on why she has to
11 plead to 20 charges instead of ten?

12 THE WITNESS: Correct.

13 BY MR. HAYWOOD:

14 Q Was there any rationale given other
15 than those things, than the failure to waive
16 preliminary hearing, the request for return of
17 seized property or the bond determination?

18 Were there any other grounds that were
19 cited as the reason for the higher offer to Ms.
20 Berhane than Mr. Donat?

21 A I don't believe there were in that
22 email, no.

1 Q At any other point do you recall?

2 A I think we had a conversation at one
3 point outside of the Circuit Court. And at some
4 point she had mentioned Mr. Donat's acceptance of
5 responsibility.

6 Q And was it also mentioned as maybe a
7 savings of time from a preliminary hearing?

8 A I don't recall that specifically being
9 mentioned that it was a time issue. As I recall
10 the prelim was pretty short. It was only a
11 little over an hour, hour and a half maybe.

12 Q Were you made aware of any cooperation
13 that the co-defendant had engaged in, in this
14 case?

15 A No.

16 Q And I'm specifically asking you about
17 from the Commonwealth's attorney?

18 A No, that was never mentioned to me.

19 Q Now you mentioned that you practice
20 elsewhere outside of Arlington. Can you tell me
21 the Northern Virginia jurisdictions you've
22 practiced in?

1 A Alexandria, Arlington, Fairfax,
2 Loudoun, Prince William, Stafford and Eastern
3 District of Virginia are the primary places I
4 practice.

5 Q Now you said you practice in Fairfax?

6 A Yes.

7 Q Do they technically have an open file
8 policy?

9 A For felonies, yes, I believe so.

10 Q Okay. And when you have a case with
11 them do they just give you the police reports?

12 A They do, yes. Well it varies from
13 prosecutor. But most of the time on a felony
14 case they give you copies.

15 Q Have you ever had, well let me ask
16 have you ever, you've practiced in Federal Court?

17 A Yes.

18 Q Now with respect to their discovery
19 policy what do they provide when you have a case
20 with them?

21 A Everything.

22 Q Do they make you manually copy

1 anything?

2 A No.

3 Q What about Alexandria?

4 A Alexandria provides, typically
5 provides police reports by email.

6 Q And do you have to manually copy
7 anything?

8 A No.

9 Q Outside of Arlington have you ever had
10 to engage in this practice where you have to
11 manually copy volumes of evidence that's provided
12 in discovery?

13 A No.

14 Q Can you tell me what's the most amount
15 of time you think you spent in Arlington manually
16 copying discovery in a case?

17 A Just the other day I was here for
18 about four hours. That's probably been the
19 longest.

20 Q Is there any other case where you've
21 spent more time than that?

22 A I mean in Ms. Berhane's case total I

1 had to do it over several different days because
2 I just couldn't fit it in with my schedule in one
3 day. But Ms. Berhane's case I want to say I did
4 about eight hours total.

5 Q Okay.

6 A But that was all prior to Circuit
7 Court. That was all in General District Court.

8 Q Does more than 40 hours sound like a
9 lot of time to you as an attorney?

10 A To get discovery?

11 Q Manually copying discovery?

12 A Yes.

13 Q Okay. What about 80, 85 hours? Does
14 that sound like a lot?

15 A It does, yes.

16 Q Just judging from your perspective as
17 a defense attorney would you have any concerns
18 about the diligence of an attorney who spent 40,
19 45 hours or 80 hours on manually copying
20 discovery?

21 MS. TINGLE: Your Honor, at this point
22 I really don't, with no offense to Mr. Ellis I

1 don't really see what his opinion matters in this
2 particular instance.

3 THE COURT: Sustained.

4 MR. HAYWOOD: Can you tell me how does
5 the process of sitting there and manually copying
6 discovery and taking that much time, how does
7 that affect your ability to prepare for trial?

8 THE WITNESS: It makes the discovery
9 task really time intensive. And that's just the
10 first step. After you get discovery you have to,
11 you know, understand it, typically, you know,
12 read it multiple times, research, you know, do
13 further investigation.

14 So that's kind of the first stepping
15 stone in the process of investigating your
16 client's case. And when it takes so long it just
17 delays everything else.

18 MR. HAYWOOD: I have no further
19 questions.

20 CROSS EXAMINATION

21 BY MS. TINGLE:

22 Q Good morning, Mr. Ellis.

1 A Good morning.

2 Q Do you practice in Fauquier by any
3 chance?

4 A I do not.

5 Q Okay. You know that they don't do
6 open file or I guess since you don't practice
7 there you don't know they don't do open file?

8 MR. HAYWOOD: Objection, Your Honor.
9 He said he doesn't know anything about Fauquier.

10 THE COURT: Sustained.

11 BY MS. TINGLE:

12 Q I actually asked if he practiced in
13 Fauquier. I didn't ask if he knew about their
14 practices in Fauquier.

15 A I don't know about the practice there.

16 Q You do know that the rules in
17 Virginia, the rule that applies for discovery is
18 3A:11 though, right?

19 A For misdemeanor cases. Excuse me, I'm
20 sorry, for, yes, for felony cases.

21 Q Right. And under those rules you know
22 that we actually don't have to do open file,

1 correct?

2 A Correct.

3 Q And that actually also for the General
4 District Court we only really need to provide
5 7C:5 which would just be your client's statements
6 and your client's record were we to be using it
7 down in the lower court, correct?

8 A Correct.

9 Q And so in this particular case you
10 were provided by Ms. Eastman, prior to the
11 preliminary hearing you were provided two thumb
12 drives, right?

13 A To take with me?

14 Q No, to review?

15 A No, yes, correct.

16 Q And prior to the preliminary hearing
17 you were given copies of your client's recorded
18 statement for you to take, right and they became
19 part of your case file?

20 A Yes.

21 Q And so you're also aware of the fact
22 that under 3A:11 that the vast majority of the

1 materials that you would have had access to that
2 you did have access to in Berhane, none of those
3 would be available to you, very limited of those
4 would be available to you for 3A:11, correct?

5 A I'm sorry, can you ask that one more
6 time?

7 Q There's a lot of stuff in this case,
8 right?

9 A There's a lot, yes.

10 Q And a lot of the stuff in this case is
11 not reachable under 3A:11, correct, under
12 traditional 3A:11?

13 A Well traditional 3A:11 would be
14 anything that they're going to use at trial and I
15 would get copies of it under --

16 Q Under 3A:11 does it actually say that
17 you get copies or you are allowed to inspect and
18 copy?

19 A And copy.

20 Q Right, but it doesn't actually say get
21 photocopies, right?

22 A Correct.

1 Q And you're aware that the Supreme
2 Court of Virginia, that there was a task force,
3 not bipartisan meaning Democrat and Republican
4 but bipartisan meaning prosecutors, defense
5 attorneys, law professors and a couple of judges
6 that there was a task force on 3A:11, right.
7 You're aware of that?

8 A I don't know if I'm aware there was a
9 task force.

10 Q So there was a task force on discovery
11 that involved prosecutors, defense attorneys,
12 judges and law professors.

13 MR. HAYWOOD: Objection, he said he
14 wasn't aware of that.

15 BY MS. TINGLE:

16 Q Are you aware of the fact that there
17 was, that recently in our practice as defense
18 attorneys, prosecutors, are you aware that there
19 was a move to change the rule 3A:11?

20 A Correct, yes.

21 Q And you are also aware then that the
22 rule, the proposed, did you read the proposed

1 rule change?

2 A I did when it first came out, yes.

3 Q And then you're aware of the fact that
4 even under the proposed rule change that copies
5 were not included in that proposed rule change,
6 correct?

7 A I don't recall that part.

8 Q Of police reports?

9 A I don't recall, I mean I read it. But
10 I just don't recall it sitting here.

11 Q So you do recall that police reports
12 were nothing that were part of that,
13 specifically?

14 MR. HAYWOOD: Your Honor, I object.

15 THE WITNESS: The only thing I
16 remember on the new rule was that --

17 THE COURT: Hold on one second.
18 What's your objection?

19 MR. HAYWOOD: He said he doesn't
20 remember.

21 MS. TINGLE: Actually I think he's
22 thinking through it whether he does or not.

1 THE COURT: I'll let him finish his
2 answer.

3 THE WITNESS: I believe under the new
4 rule that was supposed to go into effect this
5 year, it's been delayed now. But I believe under
6 the new rule you were allowed to inspect police
7 reports now.

8 BY MS. TINGLE:

9 Q You're allowed to inspect them. But
10 you're currently allowed to inspect under 3A:11,
11 right?

12 A Police reports?

13 Q Yes.

14 A No.

15 Q I'm sorry, not under 3A:11, excuse me.
16 Getting open file and 3A:11 confused because we
17 provide more than 3A:11 is where I'm getting
18 confused.

19 So under, for discovery so let's go
20 back to Ms. Berhane's case in particular. We're
21 talking higher level in terms of the discovery
22 rules.

1 In this particular case, in all the
2 jurisdictions you practice is it your practice to
3 not approach the prosecutor prior to preliminary
4 hearing about resolving a case?

5 A It depends. I've really never been in
6 another jurisdiction where the prosecutor didn't
7 approach me at the prelim in order to just avoid
8 having the prelim.

9 But if it's a case that's clearly
10 going to go to Circuit Court it just depends.

11 Q If it's clearly going to Circuit Court
12 in your practice there's no point to talk to the
13 prosecutor beforehand?

14 A Well again, I don't remember ever
15 having another case where the prosecutor didn't
16 make an offer at the prelim.

17 Q Okay. So you, but you aware of cases
18 where the initial charges of the magistrate do
19 not remain the only charges in a case?

20 A Of course, of course.

21 Q And so if you're not talking to a
22 prosecutor beforehand you're then aware that the

1 prosecutor may, that that initial set of charges
2 is not going to be the set of charges that you
3 land with in Circuit Court, correct?

4 A Yes.

5 Q And that has happened, I would guess
6 countless times in your career if you're not
7 talking to anybody beforehand?

8 A No.

9 Q It doesn't happen countless times?

10 A You're talking about similar to this
11 case?

12 Q No, no. You said that you don't talk
13 to prosecutors before, if you think that a case
14 is going to Circuit Court that you don't talk to
15 prosecutors beforehand. It's not your practice.

16 A I said sometimes. But I also said
17 that I never remember a case where a prosecutor
18 didn't make me some type of offer either by
19 phone, email or in person before the prelim.

20 Q But you know that so that if that
21 offer, then say that there is an offer and that
22 offer is rejected you know that you may well

1 stand in a different --

2 A Yes.

3 Q -- position in the Circuit Court?

4 A Yes.

5 Q And you are certain, you would agree
6 that the Commonwealth is not bound by the charges
7 of the magistrate, correct?

8 A No.

9 Q And that the Commonwealth is free to
10 bring whatever charges are supported by probable
11 cause?

12 A That's correct.

13 Q And you were, so once you got to
14 Circuit Court and you realized that Mr. Donat was
15 charged with ten felonies and your client had 54
16 felonies and one misdemeanor that was when you
17 first approached Ms. Eastman to talk about a
18 resolution?

19 A I didn't approach her. We did it at
20 the meeting on May 16th where it was all of us
21 together.

22 Q And so the offer to continue to

1 negotiate, that remained an outstanding offer,
2 right?

3 A What did you say?

4 Q After the preliminary hearing and
5 after your client was indicated you weren't told
6 essentially to go kick rocks, right? Not to put
7 too fine a point on it.

8 A Well what I was told was that, you
9 know, obviously Mr. Donat had been indicted with
10 ten counts. Ms. Berhane had been indicted with
11 54.

12 When I asked whether she would be
13 entitled or be offered something comparable to
14 Mr. Donat I think Ms. Eastman said something to
15 the effect of we're not going back there. And
16 then I said well what type of plea offer would
17 you make for her?

18 And she kind of thought about it for
19 a second. And she said she can plead to 20.

20 Q So there were still plea negotiations
21 going on?

22 A Yes.

1 Q So it's not that because you had a
2 preliminary hearing, you had a bond motion and
3 you had the motion to return property that it
4 was, we're not talking to you? That was not the
5 position of the Commonwealth?

6 A That was not their position, no.

7 Q And the position of the Commonwealth
8 to be willing to continue to negotiate, that
9 maintained after the preliminary, after the grand
10 jury, correct, after case setting?

11 A She didn't really negotiate anymore.
12 I was kind of told 20 was it. We had discussion
13 a little bit on maybe a double jeopardy issue on
14 a couple of the charges.

15 So it was like 19 or 20. But it
16 wasn't coming down below that.

17 Q And on that conversation about double
18 jeopardy Ms. Eastman indicated a willingness to
19 engage with you about, to hear what your position
20 was as to why that may not be a valid, why there
21 may be a legal issue there?

22 A She did.

1 Q She was not dismissive and said don't
2 talk to me about this, I don't care, I'm right,
3 correct? That was not her position.

4 A No.

5 Q Okay. So you were certainly aware at
6 the time of the bond motion that this was a fraud
7 case that was huge in terms of scope?

8 A Yes.

9 Q You were put on notice immediately
10 that that was the case?

11 A Yes.

12 MS. TINGLE: Court's indulgence,
13 Judge. Thank you, Mr. Ellis.

14 THE COURT: Any redirect?

15 REDIRECT

16 MR. HAYWOOD: Yes, Your Honor. Mr.
17 Ellis, you were asked questions about your
18 expectations by not soliciting a plea offer in
19 advance. I just want to ask that comes, at the
20 time you took this case you had been in practice
21 for quite some time. Is that correct?

22 THE WITNESS: Yes.

1 MR. HAYWOOD: You've handled plenty of
2 felony cases?

3 THE WITNESS: Yes.

4 MR. HAYWOOD: All right. Have you
5 ever in your life had someone, a prosecutor seek
6 over like 1,000 years of additional punishment
7 simply because you didn't waive preliminary
8 hearing?

9 MS. TINGLE: Objection to the -- the
10 nature of that question is in and of itself
11 offensive.

12 The idea that he is making a
13 conclusion that the Commonwealth -- he is asking
14 the Court to make the conclusion, for Mr. Ellis
15 to opine that the reason why, that whether or not
16 he has seen in his opinion that the Commonwealth
17 is trying to seek thousands of years of
18 punishment for his client for putting on a
19 preliminary hearing. That is not for Mr. Ellis
20 to answer.

21 THE COURT: I'm going to sustain it as
22 to the form of the question.

1 BY MR. HAYWOOD:

2 Q So, Mr. Ellis, with 50 additional
3 counts alleging 20 years of punishment, can you
4 do the math real quick and tell me what that
5 amounts ends up to?

6 A It was a lot. Even with the plea
7 offer for the 20 counts when I added everything
8 up and I started going over it with Ms. Berhane,
9 just the 20 counts was several hundred years.
10 And the 54, yes, I mean it could easily reach
11 1,000.

12 Q Have you ever had a prosecutor indict
13 that many more counts for that many, that much
14 more of a statutory maximum because you didn't
15 waive prelim?

16 A Again, I don't know exactly why that
17 was done in this case. But I've never been in a
18 situation where, because I had a prelim, I got to
19 Circuit Court with that many more charges.

20 Q What about in cases where you had just
21 asked for bond? You ever seen a prosecutor react
22 that way because you successfully argued a bond

1 motion?

2 MS. TINGLE: Your Honor, objection.
3 This is asking him to opine on why it was, how it
4 was Ms. Eastman was reacting. How on Earth is
5 Mr. Ellis supposed to know how Ms. Eastman is
6 reacting?

7 THE COURT: I'm sustaining the
8 objection. I'm not sure any of this is even
9 relevant at this point.

10 MR. HAYWOOD: This is a vindictive
11 prosecution motion, Your Honor.

12 THE COURT: I understand what it is.
13 I've read it.

14 MR. HAYWOOD: So we are eliciting --

15 THE COURT: Next question.

16 MR. HAYWOOD: Thank you. What about
17 with respect to seizure of property? In your
18 experience is that something that has elicited,
19 you know, additional indictments from a
20 prosecutor?

21 THE WITNESS: No.

22 MR. HAYWOOD: No further questions.

1 Thank you.

2 THE COURT: All right. Is he excused?

3 MR. HAYWOOD: Yes, he is.

4 THE COURT: Thank you, Mr. Ellis.

5 MR. HAYWOOD: Your Honor, I would call
6 James Robinson.

7 MS. TINGLE: Judge, I think that we've
8 got --

9 THE COURT: That's a problem if he's
10 --

11 MS. TINGLE: He is counsel. He can't
12 be a witness in a case where he's counsel.

13 MR. HAYWOOD: I don't think any
14 different principles apply. I think it's, the
15 case law is the same way. A prosecutor can also
16 testify on a vindictive prosecution action.

17 He's not, he was, and by the way I
18 think at this juncture he's, I don't think the
19 Court has formally appointed him.

20 THE COURT: I just did. I did, that's
21 the first thing we did.

22 MR. HAYWOOD: Well, the Court could

1 suspend the appointment until he has an
2 opportunity to talk about the facts that went
3 into this.

4 THE COURT: No. We can't go
5 backwards. I just, that's the first thing we did
6 this morning. I said that I had spoken to the
7 Supreme Court. They said it was possible and
8 that he was going to be appointed to be counsel
9 in this case.

10 MR. HAYWOOD: I don't think there's
11 any rule and I would ask the Court, the
12 Commonwealth to cite a rule or a law that
13 prohibits a defense attorney in a case from
14 testifying regarding a vindictive prosecution
15 action.

16 This, the exact same principles apply
17 to prior counsel as they do to current counsel.
18 I'm not going to be asking about any privileged
19 issues.

20 I'm going to simply be asking about
21 his interactions with opposing counsel through
22 this case and matters related to the discovery

1 process.

2 THE COURT: Sustained.

3 MS. TINGLE: You know, Judge, as a
4 matter of fact.

5 THE COURT: Go ahead.

6 MS. TINGLE: The Commonwealth
7 withdraws. There is absolutely nothing that the
8 Commonwealth has to hide from. There's nothing
9 the Commonwealth shies away from.

10 If they are going to affirmatively
11 waive on the record any potential conflict or
12 anything that Ms. Berhane could raise down the
13 road to place what will be convictions in this
14 case in jeopardy then that needs to be done.

15 There is absolutely nothing that the
16 Commonwealth is afraid of that Mr. Robinson can
17 testify about. So have at it, but that waiver
18 needs to be done for Ms. Berhane.

19 MR. HAYWOOD: But the Court made a
20 ruling and the Commonwealth says there's a legal
21 basis for this. So if that's something that's an
22 issue I think we need to talk about it.

1 And I think I'm completely right about
2 this. I've argued motions --

3 THE COURT: Well, is Ms. Berhane
4 prepared to waiver if there is something that
5 comes forward?

6 MR. HAYWOOD: There is no waiver of
7 any attorney-client privilege beyond the
8 interactions that Mr. Robinson has had with
9 opposing counsel and facts that are independent
10 of his conversations with her.

11 So that's not a waiver that's been
12 made. But I believe there's an implicit waiver
13 anytime defense counsel speaks with opposing
14 counsel.

15 So that is by opening your mouth, you
16 are waiving as to those topics. So those
17 subjects are known to the Commonwealth.

18 They can be talked about in court with
19 certain ethical limitations, but there's nothing
20 that is privileged that is only known to counsel
21 that is not known to the Commonwealth that would
22 be elicited from Mr. Robinson through his

1 testimony.

2 And again, if the Court thinks and,
3 you know, anything that I would be doing would be
4 implicating privileged information such that it
5 would open the door to additional testimony, I
6 can't take that risk, but I would need to know
7 that's the Court's ruling in advance.

8 THE COURT: If you wish to have Mr.
9 Robinson -- the Commonwealth says they have no
10 objection. The Court will allow him to testify.

11 MR. HAYWOOD: Thank you.

12 WHEREUPON,

13 JAMES ROBINSON
14 WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE
15 DEFENDANT AND, AFTER HAVING BEEN FIRST DULY
16 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

17 MR. HAYWOOD: Before I tread down this
18 path it seems that there's a dispute as to the
19 law in this matter. So I don't want, again, like
20 I just said I think it's pretty clear that, as
21 long as we stick to the information I just
22 described, it will not be opening the door to any

1 privileged information or communications with Mr.
2 Berhane.

3 If the Commonwealth disagrees or the
4 Court disagrees, I would like to know that before
5 I start asking questions.

6 MS. TINGLE: So the Court's aware --

7 MS. EASTMAN: Judge, we have no idea
8 what questions counsel is going to ask of co-
9 counsel. So it's impossible for us to say in
10 advance --

11 THE COURT: I understand and I agree.
12 I agree you can't say in advance because you
13 don't what the question is. And there could be
14 some -- I don't know either whether I would have
15 to make that ruling.

16 MR. HAYWOOD: I can proffer all of his
17 testimony, we have discussed it, if the Court
18 wishes. I think it's important, frankly, to know
19 that in advance.

20 That obviously is perilous. It's not
21 something I want to do. But I do think that the
22 Court needs the information and I think we're

1 entitled to make our record.

2 And Mr. Robinson, fortunately, is one
3 of --

4 THE COURT: I think that you can ask
5 whatever question. But whether or not it opens
6 the door is something that you may have to cross
7 that bridge when you get to it.

8 MR. HAYWOOD: I'm asking the Court as
9 a matter of law --

10 THE COURT: And I'm saying to you ask
11 your questions. I'm not, you're asking the Court
12 to make a preliminary ruling on something it
13 doesn't even know what's going on.

14 MR. HAYWOOD: Well, the Court needs,
15 this is something that's done all the time when
16 an attorney takes the stand and there's a
17 privilege, that the Court is, asks counsel and
18 asks the attorney whether there's been a waiver
19 of attorney-client privilege and that usually
20 will happen, for example, in habeas proceedings,
21 things of that nature.

22 And so there is always a preliminary

1 determination and there's an understanding of
2 what the law is. Now if I'm locking myself into
3 having, you know, Mr. Robinson talk all about
4 privileged communications I'm not going to do
5 that.

6 And I think that on that point I'm
7 entitled to get some kind of guidance. I don't
8 want to make this any more difficult than it
9 needs to be. I'm just trying to make a record
10 today.

11 MS. TINGLE: So here's the concern
12 from the Commonwealth. I'm not concerned, I
13 don't think that Mr. Robinson, I have no doubt
14 that Mr. Robinson is not going to talk about
15 attorney-client privileged information. He's a
16 good lawyer. He's not going to do that.

17 The concern though is that one of the
18 issues that counsel raises in the allegations
19 that the Commonwealth has interfered with her
20 Sixth Amendment right to counsel comes
21 specifically from the statements that the
22 Commonwealth made on May 1st that they never

1 issued a single subpoena duces tecum, that they
2 never issued a single subpoena ad testificandum,
3 that they never subpoenaed -- that they never,
4 they didn't have their witnesses identified in
5 terms of experts.

6 So those are the things that I would
7 then ask Mr. Robinson. You didn't do x, y and z.
8 It's those very statements that counsel puts in
9 the briefing, in his briefs that violated their
10 relationship and that should then dismiss the
11 cause.

12 So if I ask those questions again
13 today we are doing exactly what it was that he
14 said that we weren't supposed to do in the first
15 place. So are we not then, now creating the same
16 exact record for the violation that he claims
17 that we created on May 1st.

18 It's like we're in this sort of never-
19 ending hell circle of saying the same exact thing
20 over and over again. So I have no doubt that
21 he's going to discuss their communications with
22 one another.

1 But the basis of what the
2 Commonwealth's questions would, some of what we
3 would discuss would be the same things that we
4 were accused of before. So that is one of the
5 Commonwealth's concerns here.

6 THE COURT: What is your proffer,
7 counsel?

8 MR. HAYWOOD: So, Your Honor, Mr.
9 Robinson, if he were permitted to testify, would
10 testify about his background as an attorney,
11 where he worked, public defender, where he
12 currently works.

13 He would talk about when he
14 substituted in as counsel for Ms. Berhane that he
15 was working on the case with the Office of Public
16 Defender and with Ms. Collins. He would talk
17 about just general background of the case and
18 whether it was explained to him why Ms. Eastman
19 charged so many counts.

20 He would talk about the discovery
21 materials and what was available at the time and
22 how much, the quantity of discovery materials

1 which would be similar to what Detective Bamford,
2 slightly different to what he testified to.

3 That there was considerably more than
4 one terabyte of data. We knew that because it
5 could not be contained except on a, I think it
6 was a four-terabyte drive.

7 There wasn't -- he would talk about
8 quantity and the type of discovery materials in
9 the file such as, it would be similar to
10 Detective Bamford's testimony. There was an
11 overwhelming amount of information.

12 He would talk about what types of
13 documents there were, that there were
14 spreadsheets that had to be copied. There were
15 PDF documents that were not searchable PDFs so
16 you couldn't search because it had been OCR-ed
17 like optical character recognition.

18 He would talk about photographs, that
19 photographs are things that again, given the
20 Commonwealth's discovery policy, cannot be
21 copied. You can't get copies of those.

22 It's something that if you want a

1 version of it you have to basically draw what was
2 there or you have to come back to look at it.
3 That includes things like a gift card registry,
4 every transaction that took place, pictures and
5 emails and text messages.

6 He would also discuss the process of
7 discovery. And this is something that could be
8 streamlined because a lot of that is documented
9 in emails.

10 But there was an allegation here by
11 the Commonwealth that Mr. Robinson, Ms. Collins
12 and myself were negligent or we weren't diligent.
13 There are many emails that demonstrate that there
14 was, there were actual issues with just the, with
15 the Commonwealth even giving us discovery.

16 That the police report itself was not
17 available until April 10 of 2018. That's when it
18 was complete and it was not made available to us
19 until then which was about a month before the
20 trial.

21 That there was, on April 24th there
22 was additional information including cell site

1 analysis that a lot of these phones and storage
2 devices and laptops and things of that nature
3 were made available on a rolling basis.

4 We continued to ask for them. We
5 would talk about how a lot of times before April
6 of 2018, actually, sorry, at one point there was,
7 the discovery was only available from the
8 Commonwealth if we got, there was only one drive
9 that was on it.

10 It was the Commonwealth's drive. So
11 we would have to contact the Commonwealth in
12 advance to ask them if they could make that
13 available.

14 There was times that we would do that
15 there wouldn't be an immediate response. So the
16 day that we were planning to go, we couldn't go.
17 So we would have to ask again and then it would
18 be made available.

19 There was then a resolution to that
20 issue that was arrived at and that was that we
21 would then copy all of those materials onto our
22 own drive, and that was done.

1 That actually took a process of days.
2 So just copying electronically data from one
3 drive to another, forget about having someone
4 manually copy it, it was something like two days
5 just to get it copied.

6 That was discussed in email with
7 Detective Bamford. So that was something that
8 went on. And we talked about the things, the
9 times when, again, the discovery was not
10 available including after the drive.

11 So there was a time when, after we had
12 filed a motion, because we were just making no
13 progress with discovery, we filed a motion asking
14 the Commonwealth for copies of discovery.

15 So we had, and we had simply made that
16 request that had followed an informal request
17 that was made to the Chief Commonwealth's
18 Attorney for copies of discovery materials where
19 cases involved voluminous discovery. And that
20 request was rejected.

21 So we made it through a motion after
22 having advised the chief Commonwealth's attorney

1 that we were making that request through a
2 motion.

3 Then, after we filed that motion for
4 discovery, the drive was pulled and there was
5 actually email correspondence between Mr.
6 Robinson and Ms. Eastman about that, where she
7 said that she viewed our motion, our due process
8 motion asking for copies of discovery as a
9 violation of the discovery agreement and that's
10 why it wasn't available.

11 And there were dates when it remained
12 unavailable which was I think May 2nd, May 7th,
13 May 18th, May 21st, that there was, again that
14 explanation was made and there's an email to that
15 effect. So there were, so in addition to the, we
16 talked about the allegations that we spent
17 insufficient time doing discovery.

18 So there was an allegation by the
19 Commonwealth's attorney after reviewing discovery
20 time logs that we only spent something like 40 or
21 45 hours on it. In fact, we had spent
22 considerably more than that because when we come

1 to do discovery on something like this we usually
2 bring co-counsel or we bring interns.

3 We have a whole, in our office we have
4 a whole army of interns that we try to get
5 involved with this sort of thing. We were also
6 given 154 hours of jail recordings.

7 That was one of the few things that we
8 were given our actual own copies of. So we were
9 spending time on that trying to listen to those
10 jail calls.

11 And actually we were also given a copy
12 of our client's own statements which was lengthy
13 and we had to watch that. So the real total
14 amount of time that we had spent reviewing
15 discovery was more like 80 or 85 hours, not 42
16 hours.

17 We were not contacted about this prior
18 to Ms. Eastman filing her motion to have us
19 removed as counsel. We were not notified in any
20 way that motion was going to take place in this
21 courtroom. And the first time we heard about it
22 was in front of our client when we were here in

1 court.

2 There was also come tangential
3 information regarding Commonwealth saying that it
4 didn't object to continuances. It seems that
5 they did. Actually at one point they objected in
6 August of 2017 which was not what their motion
7 stated. And then, or their response for a motion
8 stated.

9 And in January of 2018 they actually
10 acknowledged that we had been working hard on
11 discovery but did not -- I would not say that
12 they didn't object. We were not aware of any
13 cooperation that Mr. Donat provided.

14 And let's see, is there anything else?
15 Then we would ask general questions about the
16 amount of time that we spend during the discovery
17 process, how that affects our ability to prepare
18 for trial, how long it generally takes to copy a
19 page of text and whether it would ever be
20 possible to get all the discovery in this case
21 through the Commonwealth's discovery policy.

22 So that would be my proffer of

1 information. There's actually a stack of, this
2 is exhibits labeled E through E11 which are
3 emails that I would also be, we would only rely
4 on the proffer that would be made part of the
5 proffer as well.

6 And I think that is, and then one last
7 thing. There are also photographs of the, there
8 are photographs of the discovery time logs and
9 just like not the actual photographs of all of
10 them.

11 But what it looks like and what the
12 rooms look like where we have to copy discovery.
13 So that would be our proffer.

14 THE COURT: Let me ask the
15 Commonwealth, are you willing to accept that
16 proffer?

17 MS. TINGLE: The majority of that is
18 already in all of the motions. I mean quite
19 frankly, the majority of that is just
20 regurgitating what's already been filed with the
21 Court.

22 So I don't that there's anything

1 particularly new in terms of what it was that was
2 proffered by the Court. I would like to see the
3 emails though if we've got a copy.

4 MR. HAYWOOD: I don't mind saving
5 time.

6 THE COURT: Well, the Commonwealth
7 basically is saying they, if that's what you, Mr.
8 Robinson would testify that those things are
9 already there and they're willing to accept that.

10 MR. HAYWOOD: That might be a more
11 comfortable way to do this.

12 CROSS EXAMINATION

13 BY MS. TINGLE:

14 Q I only have one question really for
15 Mr. Robinson, maybe one and a half. As the
16 negotiation, plea negotiations continued
17 throughout your, the time that you were on this
18 case, correct, that we continued to try to figure
19 out a way to fashion a resolution?

20 A There were negotiations.

21 Q And that we made it plain that we
22 were, we wanted to find a way to be able to

1 distinguish Ms. Berhane from Mr. Donat in terms
2 of the way they were situated, that was
3 consistently the theme of the Commonwealth in
4 terms of resolution, correct?

5 A Specifically it seemed as though the
6 Commonwealth insisted that in some way Ms.
7 Berhane take something more no matter what it
8 was, either additional time or additional charges
9 than Mister -- than the co-defendant.

10 Q Because the Commonwealth wanted to
11 differentiate the two because they stood in
12 different positions. That was what the
13 Commonwealth --

14 A That was just the specifics of what
15 you were saying, yes. Specifically that was the
16 distinguishment the Commonwealth wished to make,
17 yes.

18 MS. TINGLE: Okay, thank you.

19 THE COURT: All right. With that, Mr.
20 Robinson can step down.

21 MR. HAYWOOD: I'm just getting these
22 exhibits so I can pass them up, pass them to the

1 Commonwealth and to the Court.

2 MS. TINGLE: I'm going to give these
3 to the Court to get a head start.

4 MR. HAYWOOD: So that's E1 through
5 E12, I think it finishes at. Just communications
6 demonstrate diligence of counsel in trying to
7 seek discovery and supports a lot of the
8 proffered information.

9 (WHEREUPON, THE DOCUMENTS
10 REFERRED TO WERE MARKED AS
11 DEFENDANT EXHIBITS E1
12 THROUGH E12 FOR
13 IDENTIFICATION.)

14 THE COURT: All right, E1 through E6.

15 MS. TINGLE: We're still looking at
16 what they are. So I figured I would give them to
17 him.

18 THE COURT: Will be received.

19 (WHEREUPON, THE DOCUMENTS
20 REFERRED TO, PREVIOUSLY
21 MARKED DEFENDANT EXHIBITS
22 E1 THROUGH E12 FOR

1 IDENTIFICATION, WERE RECEIVED
2 INTO EVIDENCE.)

3 MR. HAYWOOD: Thank you.

4 THE COURT: And now we have E9 through
5 E, what is the number, 10, 11, E12?

6 MR. HAYWOOD: That's, I think it gets
7 just to 12. Then there is --

8 THE COURT: And then, and also F.

9 MR. HAYWOOD: And G is one, two,
10 three, four, five, six photographs just of the
11 discovery runs and the log printed out. Just for
12 the record, F is the letter from our office to
13 Ms. Stamos regarding, asking for an exception in
14 voluminous cases.

15 (WHEREUPON, THE DOCUMENTS
16 REFERRED TO WERE MARKED AS
17 DEFENDANT EXHIBITS F AND
18 G FOR IDENTIFICATION.)

19 MR. HAYWOOD: There's one also, the
20 fact that I made it for my proffer. Mr. Robinson
21 also would have disagreed with Detective Bamford
22 about the availability of him for investigative -

1 -

2 MS. TINGLE: Your Honor, objection.

3 I mean at this point this now goes in terms of
4 his objecting about what Detective Bamford,
5 Detective Bamford has been released as a witness.

6 So to ask him to --

7 MR. HAYWOOD: It's not about him.

8 It's about, it's from Mr. Robinson, what he would
9 have testified to which is just that he reached
10 out to Detective Bamford on several occasions.

11 A couple of times, Bamford was willing
12 to answer questions and several other times he
13 said he would have to talk to Commonwealth's
14 attorney. That's all.

15 MS. TINGLE: That can certainly be his
16 proffer. The Commonwealth will then also proffer
17 that Detective Bamford, as he said in his
18 testimony, made himself available.

19 THE COURT: All right. The Court,
20 goes to the weight the Court will give it.

21 MR. HAYWOOD: Thank you.

22 THE COURT: All right. And now we

1 have, this is, these photos are collectively G.
2 All right.

3 (WHEREUPON, THE DOCUMENTS
4 REFERRED TO, PREVIOUSLY
5 MARKED DEFENDANT EXHIBITS
6 F AND G FOR IDENTIFICATION,
7 WERE RECEIVED INTO EVIDENCE.)

8 MR. HAYWOOD: Your Honor, the next few
9 witnesses will be very brief. So we can wrap
10 this up quickly. I call Terry Adams.

11 WHEREUPON,

12 TERRY ADAMS
13 WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE
14 DEFENDANT AND, AFTER HAVING BEEN FIRST DULY
15 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

16 MR. HAYWOOD: May I just make --

17 THE COURT: I'm sorry, yes.

18 MR. HAYWOOD: I want to make it clear
19 for the record that E, F and G, were moved into
20 evidence and admitted into evidence by the Court.

21 THE COURT: Yes.

22 MR. HAYWOOD: Thank you, because I

1 don't think I asked.

2 THE COURT: Okay, if not, the Court
3 did receive them.

4 MR. HAYWOOD: Thank you.

5 DIRECT EXAMINATION

6 BY MR. HAYWOOD:

7 Q Mr. Adams, can you state your name for
8 the Court?

9 A Terry Adams.

10 Q How are you employed?

11 A I'm an attorney.

12 Q Where do you practice?

13 A I'm sorry.

14 Q Where is your practice based?

15 A My primary practice is here in
16 Arlington County.

17 Q How long have you been an attorney?

18 A Fourteen years.

19 Q And specifically what field do you
20 specialize in?

21 A Criminal.

22 Q And you mostly do cases here in

1 Arlington?

2 A Mostly, yes.

3 Q Where else do you go?

4 A I also practice in Alexandria, Fairfax
5 and Prince William County regularly.

6 Q Are you familiar with Arlington County
7 Commonwealth's Attorney's open file discovery
8 policy?

9 A I am.

10 Q Can you tell me what that consists of?

11 A What it consists of is three weeks
12 before, that's the stated policy, three weeks
13 before it's assigned to a prosecutor, you can
14 reach out to the prosecutor to make that file
15 available to be reviewed in their office.

16 Q And do they, are you allowed to make
17 copies of any materials?

18 A No.

19 Q Are you allowed --

20 A Not without their permission.

21 Q Okay. And in your experience do they
22 give you copies of any materials?

1 THE COURT: Let me ask right now. Is
2 most of this going to be cumulative?

3 MR. HAYWOOD: So there are certain
4 questions I didn't ask and I didn't proffer so I
5 just wanted to get those out of the way. But
6 other than that it's going to be new information.
7 But I didn't --

8 THE COURT: Well, let me just say to
9 the extent that it's cumulative, the Court has
10 heard it and I understand. But for additional
11 questions that may be pertinent why don't you
12 just get to those.

13 MR. HAYWOOD: Sure. So, well, can I
14 just make sure, I know it's in our pleadings but
15 I don't think it was made a part of evidence
16 which is the exact outlines of the Commonwealth's
17 discovery procedure and that's what I was, so
18 like the limitations, the certain, you know, that
19 sort of thing.

20 THE COURT: All right.

21 BY MR. HAYWOOD:

22 Q So let me ask you again. Actually

1 let's step back. So three weeks ahead of time,
2 you can get in touch with the prosecutor who
3 ostensibly at that time will make discovery
4 available to you?

5 A That's the stated policy, yes.

6 Q And is that --

7 A That's my understanding of it anyway.

8 Q And it's an actual file folder from
9 them that they leave out front at the
10 receptionist area?

11 A That is correct.

12 Q And so you have to contact them in
13 advance to make sure that's available?

14 A That's correct.

15 Q And once it is made available then you
16 go over to the Commonwealth's attorney's office?

17 A That is correct.

18 Q And is that between business hours,
19 during business hours?

20 A Strictly between business hours.

21 Q Okay. I think it's 8:30 to 5:00. Is
22 that right?

1 A 8:30 to 5:00, correct.

2 Q And then at 5:00 can you stay any
3 later than that?

4 A No, you cannot.

5 Q Okay. So and when you go over and
6 view discovery where do you have to do it?

7 A You have to do it in one of the two
8 offices that are provided and you have to share
9 that space with other attorneys. And there are
10 two computers that are in there. So there are
11 only two computers, one in each office.

12 MR. HAYWOOD: Can we show Mr. Adams
13 Exhibit G just so that I have identified by
14 someone? Can you look through those photographs?
15 It's Defense Exhibit G. Does that look like the
16 area where you have to do discovery?

17 THE WITNESS: So Defense Exhibit G is
18 the lobby and the Commonwealth's Attorney's
19 office with, showing the two rooms where
20 discovery is done.

21 BY MR. HAYWOOD:

22 Q And on the top, does that also show

1 this discovery time log or discovery log?

2 A Yes, the first page of G is the
3 discovery file log sheet.

4 Q How is that used?

5 A So when you come into the office, you
6 ask if the file that you previously asked for is
7 available. And once they have confirmed it's
8 available, before they give it to you, you have
9 to log it out basically. And then when you're
10 done with it, you log it back in.

11 Q So and then you also have to sign an
12 open file agreement and you have to sign a
13 discovery order. Is that right?

14 A That is correct.

15 Q In the open file agreement that tells
16 you, that's what tells you, you can't photograph,
17 photocopy, basically you can't obtain your own
18 copies of it?

19 A That's my understanding, yes.

20 Q And you're saying that's also without
21 the Commonwealth's permission, right?

22 A Correct.

1 Q So that's where we had sort of left
2 off. In your experience, does the Commonwealth
3 give you permission to have your own copies of
4 anything?

5 A Do they give me permission?

6 Q Like are you able to get your own
7 copies of anything printed?

8 A Again, not without their permission,
9 no.

10 Q And in your experience what do they
11 give you permission to have your own copies of?

12 A I think once in a while I've had a
13 copy of, a photograph of a car or something like
14 that, something innocuous like that.

15 Q They will give you also a copy of your
16 client's, if it's a recorded statement?

17 A Yes.

18 Q And then other than that, what do you
19 have to do in order to obtain discovery?

20 A Other than that?

21 Q Like apart from that if they don't
22 give you a copy, how do you get it?

1 A If they don't give me a copy, I don't
2 get one. Usually I don't get one unless I file a
3 motion for the Court asking specifically for a
4 copy of it.

5 Q Also can you, so but how do you get
6 it? Do you type it yourself or do you dictate
7 it?

8 A Yes. I dictate it.

9 Q And so are you, also one other thing.
10 Are you allowed to send people other than
11 yourself to get the discovery or do you have to
12 do it yourself?

13 A I have to do it myself.

14 Q So in your time as an attorney here
15 have you, what's the most amount of time that
16 you've spent obtaining discovery in a case?

17 A I think it's been easily up to five
18 hours or so in a case, in a particular case.

19 Q You ever spent more than that on a
20 case?

21 A Not that comes to mind, but at least
22 five hours and sometimes I've had to break up my

1 hours, come back the next day because either a
2 computer wasn't available so I could review a
3 video and the file was just too voluminous to
4 handle all in one day.

5 Q Does 42 hours sound like a lot to you?

6 A It's an awful lot.

7 Q What about 85?

8 A Yes.

9 Q Do you, are you aware of anywhere
10 outside of Arlington that makes you manually copy
11 discovery materials like you do here?

12 A None of the jurisdictions that I
13 regularly practice in do.

14 Q What do they do in Fairfax?

15 A In Fairfax, depending on the style of
16 the case, they will give you a copy of both any
17 video as well as any police report.

18 Q And that's Alexandria and federal
19 court too?

20 A Yes.

21 Q You said you also practice at Prince
22 William?

1 A I also practice in Prince William. I
2 can't speak to the federal system.

3 Q All right. You ever had a case where
4 your discovery, the time you spent in discovery
5 has been monitored, that you know of?

6 A I've had comments from prosecutors
7 before about, you know, you need to look at this
8 discovery sooner or request it sooner. But in
9 terms of how much time I've spent, I've never had
10 any questions like that.

11 Q Or has any attorney in the
12 Commonwealth's attorney's office approached you
13 and said I'm worried that the time you spent is
14 insufficient on discovery?

15 A I haven't had that, no.

16 Q Have you ever had to deal with a
17 motion where you were asked to be removed from a
18 case because the time was deemed insufficient by
19 a prosecutor?

20 A No.

21 Q The clerical task of manually copying
22 discovery, can you tell me how does that affect

1 your ability to prepare for a trial?

2 A I'm sorry, say that again.

3 Q The clerical task of manually copying
4 discovery or dictating it, how does that affect
5 your ability to prepare for trial?

6 A Well so, because there are only two
7 rooms and two computers and you have to share
8 those rooms. So when you're there, you know,
9 you're sensitive about the information.

10 But again, as I dictate, I'm sensitive
11 about the information because there's somebody
12 else in the room. And I want to protect my
13 client's privacy.

14 And so having to come to the office to
15 do that, the reports, the videos, it can be time-
16 consuming again, because there are only two video
17 or two cameras, not cameras, computers there and
18 they're often time in use.

19 And so if they are in use obviously I
20 can't use them and I have to, you know, spend
21 more time doing that. And it's just not an
22 efficient way to do it.

1 Q How often are you able to block off
2 four hours in an afternoon or in a morning just
3 to sit there and copy stuff?

4 A Right, that's the difficulty of it
5 all. You know, being a sole practitioner that
6 creates a problem for the other cases.

7 MR. HAYWOOD: I have no further
8 questions.

9 CROSS EXAMINATION

10 BY MS. EASTMAN:

11 Q Hello, Mr. Adams.

12 A Hello, Ms. Eastman.

13 Q You would agree, originally when you
14 answered Mr. Haywood's questions, indicated that
15 you got no copies from the Commonwealth's
16 attorney's office. That's not so, is it?

17 A I got no copies.

18 Q Okay. But you routinely get copies of
19 dashcam videos of DUI arrests, yes?

20 A You can now, yes.

21 Q You routinely get recorded video of
22 loss prevention, shoplifting videos?

1 A No. I --

2 Q You don't? Were you aware that it is
3 now readily available to defense counsel to get
4 recorded video from, let's say, a Macy's
5 shoplifting or the like?

6 A If the Commonwealth has possession of
7 those, I imagine that would be the case.

8 Q All right. But you've never asked for
9 it?

10 A That's not true. I have asked for it.

11 Q Okay.

12 A So if the Commonwealth has it, I have
13 asked for it or I've asked for it and the
14 Commonwealth has told me that they don't have it.

15 Q When has that happened?

16 A I'm sure it's happened just as
17 recently as my last shoplifting case was just
18 several months ago. But that's the routine.

19 Q So when you say that you get no
20 copies, that's not actually accurate is what I'm
21 trying to tell you or ask you, correct?

22 A I don't think I said I get no copies.

1 I think I said --

2 Q I think you did --

3 A -- I have to ask for copies.

4 Q I think you said no copies.

5 THE COURT: I've got, okay, I heard
6 it.

7 BY MS. EASTMAN:

8 Q So but, Mr. Adams, you come in three
9 weeks before cases and it comes up for
10 preliminary hearing in the General District Court
11 or for trial, yes?

12 A So it is my understanding that your
13 policy is that three weeks before any hearing,
14 the matter is then assigned to one of your
15 prosecutors and it is then that you reach out to
16 that prosecutor and ask them to make the file
17 available.

18 Q So you come in three weeks ahead of
19 time and do your discovery.

20 A It's not assigned until three weeks.
21 And that's the stated policy. But the reality is
22 it's less than three weeks before the scheduled

1 event, before you can identify who is assigned to
2 the case so that you can reach out to that
3 person.

4 You then reach out to that person by
5 either telephone or email and wait for them to
6 get back to you that the file is now available
7 and then you can go see it.

8 Q And you do?

9 A And I do.

10 Q And you sit in the office and you can
11 take any jail calls as your own copies of your
12 client's statements, yes?

13 A Any jail calls?

14 Q Yes, that your client, if there are
15 any jail calls attached to the file you can take
16 copies of those?

17 A If they're attached to the file, yes.

18 Q Any recorded statements you could take
19 those if they were attached to the file?

20 A Any of my client's statements?

21 Q Yes.

22 A Yes.

1 Q Okay. Dashcam video, if it's attached
2 to the file, you can download a copy to your
3 laptop, yes?

4 A You can now, yes.

5 Q All right. And you have been doing
6 this for a number of years?

7 A Yes.

8 Q Coming into the office and manually
9 recording the discovery that's provided by our
10 office?

11 A Correct.

12 Q Okay. Can you tell us at what time
13 have you filed with the State Bar or self-
14 reported yourself to the State Bar as being
15 ineffective due to the open file discovery
16 policies of the Arlington County Commonwealth
17 Attorney's Office?

18 A That I have called the State Bar and
19 told them that I was ineffective?

20 Q Yes.

21 A Because of your discovery policy?

22 Q Yes, sir.

1 A I have never done that.

2 Q When have you ever withdrawn from a
3 case because you were ineffective due to the open
4 file policies of the Commonwealth attorney's
5 office?

6 A I haven't done that.

7 Q Because what you're telling this Court
8 is you are not ineffective because of the open
9 file policies of the Commonwealth attorney's
10 office?

11 A That's not what I'm saying.

12 Q Well, it is or it isn't?

13 A It's not.

14 Q Well, are you ineffective when you
15 represent clients in this jurisdiction?

16 A That's the question?

17 Q That's the standard, the ineffective
18 assistance of counsel. Mr. Adams, are you
19 telling us that you are meeting that standard due
20 to the open file policies of the Commonwealth
21 attorney's office?

22 A I can tell you that I could be

1 certainly more effective if I had the opportunity
2 to have those materials without waiting in line
3 to review the video, et cetera. I can tell you I
4 could be more effective because I obviously would
5 have more time to prepare for trial.

6 Q Certainly. I'm not asking you whether
7 or not you would be more effective. I'm asking
8 you when you have been ineffective according to
9 the standard ineffective assistance of counsel
10 due to the open file policy of the Commonwealth
11 attorney's office in this jurisdiction?

12 MR. HAYWOOD: Objection, asked and
13 answered twice.

14 MS. EASTMAN: He has not answered the
15 question, Your Honor.

16 MR. HAYWOOD: He --

17 THE COURT: Well, last time, last
18 time.

19 THE WITNESS: All right. One more
20 time, I apologize.

21 MS. TINGLE: Can you tell us, in terms
22 of ethics and the rule of law, when you have

1 demonstrated ineffective assistance of counsel in
2 your criminal representation of clients in this
3 jurisdiction due to the open file policy of the
4 Commonwealth attorney's office?

5 THE WITNESS: Let me answer it this
6 way. Let's say we're preparing for a preliminary
7 hearing. The stated policy is three weeks
8 beforehand, but it actually isn't assigned and I
9 can't get information about who the prosecuting
10 attorney is. But when I do get that information
11 I make arrangements to go get that information.

12 MS. TINGLE: I apologize, Mr. Adams.
13 Judge, would --

14 MR. HAYWOOD: Your Honor, he's trying
15 to answer the question.

16 MS. TINGLE: -- you please ask the
17 witness to answer?

18 THE COURT: Hold on, one at a time.
19 And basically I will, it's a yes-or-no answer.
20 If you wish to follow up with him after, that is
21 what redirect is for.

22 But it's a yes-or-no answer to that

1 question. And then if you want him to explain it
2 then ask a follow-up on redirect.

3 MS. EASTMAN: One more time, Your
4 Honor, should I?

5 THE COURT: It's a yes-or-no answer.

6 THE WITNESS: Can you ask the question
7 again, please?

8 MS. EASTMAN: When and, let's just say
9 have you performed the standard, the legal
10 standard, ineffective assistance of counsel, Mr.
11 Adams, have you fallen down on your legal duties
12 in representing a criminal defendant in this
13 courthouse due to the open file policy of the
14 Commonwealth Attorney's Office?

15 THE WITNESS: Your Honor, this is a
16 difficult question to answer because, if you are
17 preparing for a case and you get the file a day
18 or two or three days beforehand, perhaps there
19 are identified witnesses in that case that you
20 might have wanted to subpoena for the preliminary
21 hearing or for the trial in that matter.

22 That creates an issue for counsel.

1 And so the answer to the question is, would I
2 prefer to see a file beforehand so that I can
3 call witnesses or subpoena witnesses, that is
4 always the case based on our current standard.
5 That's always the case.

6 MS. EASTMAN: And in which case have
7 you reported to the Court that you were going to
8 be ineffective due to the open file policy of the
9 Commonwealth Attorney's Office?

10 MR. HAYWOOD: Your Honor, I would
11 object.

12 THE COURT: Well, at this point he did
13 answer it. He said he hasn't ever done it.

14 MS. EASTMAN: Thank you, Judge.

15 REDIRECT

16 BY MR. HAYWOOD:

17 Q Mr. Adams, the Commonwealth asked you
18 some items that you do get. I want to ask you
19 about some items that you don't get. Have you
20 ever received a copy of a police report?

21 A Have I ever received a copy of the
22 police report here in Arlington County, no.

1 Q The Commonwealth mentioned some
2 recordings, mentioned two specifically. They
3 mentioned recording of your clients' statements
4 and it mentioned as of very recently recording of
5 dashcam video.

6 Are those the only kinds of recordings
7 that might be, you know, at issue or collected in
8 a case?

9 A Generally speaking, yes.

10 Q But I mean are there other times where
11 there may be recorded witness statements from
12 other witnesses?

13 A I don't get a copy of those, but they
14 are in the file.

15 Q That's what I mean.

16 A Yes.

17 Q So recordings of other witness
18 statements, you're not going to get those?

19 A I think there may have been an
20 occasion or two where I might have seen a co-
21 defendant's recorded statement because it was
22 left in the file.

1 Q But just like a complaining witness or
2 a victim are you going to get that recording?

3 A Recorded statement, no.

4 Q So what about written witness
5 statements not from your client. Do you get
6 those?

7 A Again, if they are in the file, I get
8 a chance to see them.

9 Q But do you get to copy, your own
10 copies?

11 A My understanding is no.

12 Q What about any photographs that are
13 taken of a crime scene or of property that's been
14 seized? Do you get, have your own copies of
15 those?

16 A Generally, no. But I have asked in
17 the past on occasion and I've been granted the
18 request for a copy of whatever I've asked for.

19 Q And you were asked a lot of questions
20 about trial preparation. So when you, you talked
21 about a case where you had to do discovery for
22 four hours.

1 Could you have done other things with
2 that four hours of time?

3 A Absolutely.

4 Q What could you have done? What kind
5 of things would you rather be doing than manually
6 copying discovery? How could you be more
7 effective?

8 MS. TINGLE: Your Honor, objection.
9 This is, number one, this is, thank you.

10 THE COURT: At this point, counsel,
11 there's a thousand things. We understand that.

12 MR. HAYWOOD: There are a thousand
13 things, that's fantastic and there are a thousand
14 things. So I think that's sufficient.

15 And you also said, do you feel more
16 prepared when you have a case in Alexandria or in
17 Fairfax than you do here, based -- I'm saying
18 about the discovery policy?

19 Do the discovery policies where you
20 get copies of everything, like in Alexandria do
21 you feel that better enables you to prepare a
22 defense for trial?

1 THE WITNESS: I do, I do.

2 MR. HAYWOOD: Thank you. No further
3 questions.

4 THE COURT: All right. Is Mr. Adams
5 excused?

6 MR. HAYWOOD: Yes, he is.

7 THE COURT: Thank you.

8 MR. HAYWOOD: Your Honor, I call Damon
9 Colbert.

10 WHEREUPON,

11 DAMON COLBERT

12 WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE
13 DEFENDANT AND, AFTER HAVING BEEN FIRST DULY
14 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

15 MS. TINGLE: Judge, at this juncture
16 as Mr. Colbert is about to take the stand I would
17 ask for a proffer if he's just going to talk
18 about how terrible it is to work in the salt
19 mines of the Arlington County Commonwealth
20 Attorney's Office, that's been cumulative
21 already.

22 So I just, I think that there should

1 be a proffer about what it is that Mr. Colbert is
2 going to offer that's going to be different.

3 THE COURT: Yes, I mean at this point,
4 counsel, if there is something additional.

5 MR. HAYWOOD: There is.

6 THE COURT: But to the extent this is
7 cumulative I mean I've heard it a couple, several
8 witnesses now and I've heard your proffer. If
9 only, I'm not going to stop him from, but I
10 prefer you just cover anything that has not been
11 covered.

12 MR. HAYWOOD: Okay, that's what I was
13 planning on doing.

14 THE COURT: All right.

15 DIRECT EXAMINATION

16 BY MR. HAYWOOD:

17 Q Mr. Colbert, could you state your name
18 for the Court?

19 A Damon Colbert.

20 Q And what do you do for a living?

21 A Criminal trial lawyer.

22 Q And where is your practice based?

1 A All over Northern Virginia and the
2 District of Columbia.

3 Q Do you practice here in Arlington?

4 A Yes.

5 Q What other courthouses have you
6 practiced in?

7 A City of Alexandria, Stafford, Fairfax
8 City, Fairfax County, Prince William, Warren
9 County, Loudoun.

10 Q What's the, and you have obtained
11 discovery here in Arlington?

12 A Yes.

13 Q I'm just going to ask you, have you
14 ever, are you ever given copies of police reports
15 in cases in Arlington County?

16 A No.

17 Q What about copies of recorded witness
18 statements other than your clients'?

19 A I'm sorry.

20 Q Other than your clients'?

21 A No.

22 Q You have, you are representing a

1 defendant in a murder case right now?

2 A Yes.

3 Q Have you gotten any copies of anything
4 in that case?

5 A I received copies of jail calls.

6 Q Okay, anything else?

7 A No.

8 Q Okay. Did anyone tell you that those
9 might be available to you, the other materials?

10 A Yes. Another defense lawyer told me
11 after I spent approximately six or seven hours on
12 March 22nd in the Commonwealth's Attorney's
13 Office or in this courthouse working on that
14 case, that there is now a policy that they will
15 release the binder to you, which left me
16 perplexed as to why.

17 Q Was that policy ever made known to
18 you?

19 A Never.

20 Q What about policies about obtaining
21 loss prevention video? Do you know if that's
22 written anywhere?

1 A That's not written anywhere. And the
2 only time I've ever, I've never received a copy
3 but Mr. Strange formerly of their office let me
4 watch the video in his office one time right
5 before he left.

6 Q Other than that, have you ever gotten
7 one of those?

8 A Absolutely not.

9 Q Okay. What's the most amount of time
10 you have ever spent manually copying discovery
11 for a case in Arlington?

12 A So I've never, I dictate. So it was
13 this past March 22nd. I can't, it just felt like
14 I was here all day long. I didn't, they have a
15 log.

16 Q So maybe eight hours?

17 A And more over the course of some other
18 cases here, yes, but it's spread out.

19 Q I'm saying from start to finish in any
20 given case, what's the most amount of time you've
21 spent and not just, if you're dictating, I'm
22 counting also dictating and then reducing it to

1 writing? What's the most amount of time in a
2 case that you've spent?

3 A Approximately eight hours.

4 Q You ever spent 42 hours on a case?

5 A Just doing discovery, not here.

6 Q What about 85 hours?

7 A Absolutely not.

8 Q Does that sound like a lot of time to
9 you to do that?

10 A I can quantify it by my hourly rate
11 and you're talking about \$20,000 to \$40,000 and
12 I've never gotten that for a fee here in
13 Arlington.

14 Q Have you ever been approached by a
15 prosecutor who alleged that you were providing
16 ineffective assistance of counsel because you had
17 only spent eight hours obtaining discovery in a
18 case or less?

19 A No.

20 Q Okay. Have you ever faced a motion
21 from a Commonwealth's attorney where they said
22 that was insufficient and you had to be kicked

1 off a case for that reason?

2 A No.

3 Q Has a prosecutor even expressed a
4 concern to you that your discovery, your process
5 of obtaining discovery was not enough?

6 A No, I don't think they would be that
7 crazy.

8 MR. HAYWOOD: I have no further
9 questions. Thank you.

10 MS. TINGLE: I'm sorry, what was that
11 last answer?

12 THE WITNESS: I don't think that a
13 prosecutor is that crazy to say something like
14 that to me.

15 CROSS EXAMINATION

16 BY MS. TINGLE:

17 Q Mr. Colbert.

18 A Good morning.

19 Q So where have you done more than 42
20 hours of discovery?

21 A Where have I done more than 42 hours
22 of discovery?

1 Q Counsel asked you, said have you ever
2 done 42 hours of discovery on a case and you said
3 not here.

4 A Not here. I've done more than 42
5 hours of discovery in the City of Alexandria in
6 racketeering and conspiracy to distribute over a
7 kilogram of heroin, 100 grams of cocaine.

8 It was a racketeering and drug
9 conspiracy case where the discovery was
10 voluminous and it was all provided to me. But it
11 was jail calls, multi-jurisdictional grand jury
12 transcripts. And I know that because I had to
13 quantify the time.

14 Q And you are aware, right, that Rule
15 3A:11 does not require anybody to give you police
16 reports?

17 A Absolutely.

18 Q And that all these jurisdictions are
19 doing it because they choose to, that they don't
20 have to?

21 A Yes. I am aware of that.

22 Q And you're also able to, as a private

1 attorney you're able to pick the jurisdictions
2 that you practice in, correct?

3 A Yes, that's correct.

4 Q So you can choose the jurisdictions
5 that provide open file versus choosing
6 jurisdictions that don't, correct?

7 A Yes, that's technically correct.

8 Q And so when you've done discovery,
9 were you here for Mr. Adams' testimony?

10 A I was.

11 Q Okay. So the simple question that was
12 put to Mr. Adams was, have you committed the
13 ineffective practice of law based on the
14 Commonwealth Attorney's discovery policies.

15 That was a very simple question.
16 Presumably, I'm not being crazy by asking you
17 that question and I would like an answer.

18 A I think the answer is no. But I think
19 that question calls for a legal conclusion and
20 I'm a lawyer. And I render that conclusion. I
21 think the answer is simply no.

22 Q I actually didn't ask you if you

1 could. Yes, the answer is no, correct, okay?

2 A The answer for me personally is no.

3 MS. TINGLE: Yes, right. Thank you
4 very much.

5 THE COURT: Anything additional?

6 REDIRECT

7 MR. HAYWOOD: Mr. Colbert, have you,
8 because of the time that you have wasted, eight
9 hours maybe you have wasted, have your clients
10 been prejudiced --

11 MS. TINGLE: Objection.

12 MR. HAYWOOD: I'm asking a question.

13 THE COURT: I'll allow.

14 BY MR. HAYWOOD:

15 Q Have your clients been prejudiced as
16 a result of the Commonwealth's open file
17 discovery policy?

18 A I think so and I think it comes in two
19 flavors. One, if somebody is incarcerated, it's
20 much easier when you get written discovery or
21 something tangible.

22 You can sort of mail it to the person

1 or deliver it and then they can take time. But
2 when you have to spend time here doing discovery
3 and then figure out a way to convey that to a
4 client that's incarcerated, it can be very
5 inefficient.

6 Q And I want to clarify one other answer
7 you made. So you said that you spent more than
8 40 hours on a case in Alexandria.

9 A Absolutely.

10 Q But they gave you the copies of
11 discovery?

12 A That's the gold standard in
13 Alexandria. They gave me everything I needed.

14 Q Okay. Have you ever had a case, are
15 you aware of any case you've had where because of
16 Alexandria's discovery policy your client went
17 out and intimidated somebody?

18 A Not -- let me answer --

19 MS. TINGLE: Your Honor, at this
20 juncture we are beyond the scope of cross.

21 MR. HAYWOOD: That's fine.

22 THE COURT: Sustained.

1 MR. HAYWOOD: No further questions,
2 thank you.

3 THE COURT: All right, Mr. Colbert,
4 thank you.

5 MR. HAYWOOD: Your Honor, we would
6 call Elizabeth Tuomey.

7 THE COURT: All right, just one
8 second.

9 WHEREUPON,

10 ELIZABETH TUOMEY
11 WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE
12 DEFENDANT AND, AFTER HAVING BEEN FIRST DULY
13 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

14 THE COURT: Ms. Tuomey, yes.

15 THE WITNESS: Your Honor.

16 DIRECT EXAMINATION

17 BY MR. HAYWOOD:

18 Q Ms. Tuomey, can you state your name
19 for the court?

20 A Elizabeth Tuomey.

21 Q And what do you do for a living?

22 A I'm an attorney. I do mostly criminal

1 defense. I also do some civil work.

2 Q Where do you work?

3 A Mostly in Arlington, but I also work
4 in Fairfax and Alexandria in some federal court
5 cases.

6 Q And how long have you been practicing
7 in Arlington County?

8 A Since 2004.

9 Q Is that as long as you've been an
10 attorney?

11 A I've been an attorney since 2002.

12 Q Okay. So in the 15 years that you've
13 practiced in Arlington County what's the most
14 amount of time that you've spent manually
15 obtaining discovery for one case?

16 A I would say upwards of 100 hours.

17 Q Okay.

18 A I had, in a recent murder case I
19 documented 99 hours that I personally spent
20 transcribing discovery. That was after the
21 prelim. So before the prelim it was certainly
22 more than that.

1 Q And that was a murder case, right?

2 A That was a murder case.

3 Q Okay. And in that case did the
4 Commonwealth ever give you copies of the
5 discovery materials?

6 A I did not get copies in that case.

7 Q Okay. You know they claim to have a
8 policy where they give you copies in a murder
9 case. Did they ever tell you about that?

10 A I had, in a more recent murder case,
11 one that happened this year, I was informed of
12 that policy.

13 Q Okay. So that appeared to be a policy
14 change to you?

15 A Well, to me. I don't know when the
16 policy changed. But I was informed of that in
17 January of this year.

18 Q Other than the murder case in which
19 you billed for 99 hours throughout the history of
20 the case what was the most you think you've
21 spent, the most time you've spent obtaining
22 discovery in a case?

1 A In any other case?

2 Q Yes.

3 A Probably somewhere around, maybe 20
4 hours in an embezzlement case.

5 Q Okay. Based on your experience does
6 42 hours sound like a lot of time to spend
7 obtaining discovery?

8 A That sounds like a lot.

9 Q What about 85 hours?

10 A That's also a lot.

11 Q And in the time that you had a case
12 and you spent 99 hours doing discovery did that
13 make it more challenging for you to represent
14 your client?

15 A Well it was more challenging because
16 I didn't have the hours during the day then to be
17 interviewing witnesses or to be, you know, doing
18 trial prep or researching the law or doing other
19 things that I would need to be doing.

20 Q And those things that you just
21 mentioned, those things are all things that can
22 help you get ready for trial?

1 A Of course.

2 Q And so you had less time to prepare
3 for trial, really?

4 A I just had to do it at night or I just
5 had to stay up all night or work on weekends.

6 Q And do you think there's a possibility
7 that your client might have been prejudiced
8 because of the Commonwealth's open file policy?

9 A I don't know that I would say
10 prejudiced, I mean I -- but I did have to stop
11 taking other cases to be able to make the time to
12 devote to this client.

13 MR. HAYWOOD: Thank you. I have no
14 further questions.

15 MS. TINGLE: Good to see you, Ms.
16 Tuomey.

17 THE WITNESS: Thank you.

18 THE COURT: All right. She is
19 excused.

20 MR. HAYWOOD: Those are all the
21 witnesses I have. I did have some additional
22 evidence I wanted to submit, transcripts and some

1 other papers.

2 Can I have a minute to gather these?

3 Is that possible?

4 THE COURT: Yes, sir.

5 MR. HAYWOOD: And also use the

6 restroom, sorry.

7 THE COURT: All right. We'll take

8 five minutes and come back at 12:00.

9 MR. HAYWOOD: Thank you.

10 (Whereupon, the above-entitled matter
11 went off the record at 11:51 a.m. and resumed at
12 12:03 p.m.)

13 MR. HAYWOOD: Thank you, Judge. So
14 there were just some additional exhibits. I want
15 to let the Court know what they are that we want
16 to have admitted.

17 This is mostly just for context and
18 for -- to make our record. There was an issue
19 that was raised at the last, at the hearing in
20 September regarding -- and we filed a pleading on
21 this and I know the Court wasn't fond of it.

22 But it's something that we filed and

1 we believe in which was related to statements
2 that were made at the July hearing. So we just
3 wanted to submit complete documentation regarding
4 that legal claim that was raised regarding
5 statements that were made regarding the David
6 Black case and also regarding the presence of a
7 reporter.

8 So I just wanted to give the court
9 additional background so they knew where that was
10 coming from. That includes a letter that I
11 provided to Ms. Stamos before that hearing and a
12 declaration under penalty of perjury from Joseph
13 King and from Jennifer Carroll-Foy.

14 So if the Commonwealth wants to look
15 at those. And sorry, there's also the discovery
16 inspection and protective order from the Black
17 case.

18 So the letter is Exhibit H. The
19 discovery inspection and protective order from
20 the Black case is I. And the affidavit of
21 Jennifer Carroll-Foy is Exhibit P.

22 And declaration of Joe King which is

1 Exhibit O. So I would submit those to the Court.

2 (WHEREUPON, THE DOCUMENTS
3 REFERRED TO WERE MARKED AS
4 DEFENDANT EXHIBITS H,
5 I, O AND P FOR
6 IDENTIFICATION.)

7 THE COURT: Any objection?

8 MS. TINGLE: You know, Judge, I
9 apologize. I was -- the motion that counsel is
10 talking about since the Court had, didn't quite
11 rule on it but the Court certainly expressed its
12 opinion on that I did not bring that motion up
13 with me today.

14 So I honestly can't remember where,
15 what Ms. Carroll-Foy's affidavit, I mean I
16 obviously remember the hearing and what happened
17 there. But I don't really know how that adds
18 anything to it. So I'm not really sure what the
19 relevance of that is today.

20 MR. HAYWOOD: The affidavit states
21 that prior to that hearing, does the Court want
22 to us to approach? I don't want to make a big

1 showing out of this.

2 And I know the court doesn't want it
3 to be like, I can -- or, I don't care.

4 MS. TINGLE: I guess, how is this
5 related to the motions for Sixth Amendment?
6 We're arguing to have the Commonwealth either
7 removed or reprimanded or in some way, shape or
8 form to have a consequence for violation of Sixth
9 Amendment due process and it's on discovery.

10 That's my understanding of what the
11 motions are on today. So that's my -- why I'm
12 perplexed.

13 MR. HAYWOOD: There was also a motion
14 to dismiss indictments and disqualify the
15 Commonwealth's attorney based on violations of
16 due process and equal protection which was a more
17 standard vindictive prosecution motion.

18 MS. TINGLE: I didn't realize that
19 actually got noticed to be heard with that, there
20 were multiple things that were filed including a
21 request for half a million dollars for a contract
22 fee.

1 So none of those were actually noticed
2 so I didn't know that those were going along with
3 this.

4 MR. HAYWOOD: The Court has heard
5 plenty of evidence related to the standard due
6 process and equal protection, vindictive
7 prosecution motion. I thought that was pretty
8 clear which we were talking about.

9 THE COURT: Well the only question now
10 is the affidavit from Ms. Carroll-Foy, how does
11 this aid in any way the motion that is being
12 heard?

13 MR. HAYWOOD: So the claim that we
14 raised was that at the July 10th hearing Ms.
15 Stamos made two statements that were either,
16 appeared to be known to be false or known to be
17 misleading.

18 One was related to the David Black
19 case. The David Black case included a discovery
20 procedure, requests made by defense counsel that
21 were virtually identical to what was the requests
22 that were made in our case and they were followed

1 by a, actually ceding to that request.

2 So the Commonwealth actually just
3 entered a discovery agreement with them. And in
4 our case it resulted in a motion being filed
5 with, Ms. Stamos had raised that as an example of
6 how defense attorneys should do discovery.

7 And she also accused me of having
8 invited a reporter to come to court. It was
9 definitely, I mean a non sequitur and ad hominem.

10 But it was, a statement was made to
11 the Court and we knew that it wasn't true because
12 Ms. Stamos had gone up to that same reporter and
13 we heard her ask her that question whether the
14 public defender had invited the reporter to be
15 there that day.

16 So I thought it was important for the
17 Court to know where that was coming from. And I
18 take no pleasure in raising that issue. But I do
19 not think that it's appropriate to convey
20 information like that to the Court in a reckless
21 fashion and that's why we need to follow up on
22 it, so.

1 THE COURT: All right. I'm going to
2 receive it. I'm not sure that it actually does
3 aid. But I will receive these exhibits over
4 objection.

5 (WHEREUPON, THE DOCUMENTS
6 REFERRED TO, PREVIOUSLY
7 MARKED DEFENDANT EXHIBITS
8 H, I, O AND P FOR
9 IDENTIFICATION, WERE RECEIVED
10 INTO EVIDENCE.)

11 MS. TINGLE: That's fine. I just
12 wanted to point out for the Court and for the
13 record that Ms. Carroll-Foy's affidavit actually
14 specifically says that she didn't hear Ms.
15 Carey's answer. So I actually don't think --

16 THE COURT: All right. Well then like
17 I said, for whatever it's worth the court is
18 going to receive it.

19 MS. TINGLE: And also for the record
20 and for, you know, for playing for the cheap
21 seats, essentially. Ms. Stamos came to the Court
22 after receiving Mr. Haywood's letter.

1 And as she had told Mr. Haywood she
2 would do, and informed the Court that she was
3 incorrect.

4 THE COURT: I understand. I remember
5 this. It's one thing about -- I've been living
6 with this for a while as all of us have and I
7 remember it.

8 MR. HAYWOOD: And, Your Honor, just to
9 supplement the record, I did not ask Ms. Carey to
10 come to the hearing. And in fact I --

11 THE COURT: Well it's all water under
12 the bridge at this point. I think that certainly
13 your comments and your concerns have been
14 expressed to the Court both then and now.

15 And I, because like I said I've been
16 following it since I've been assigned to this
17 case.

18 MR. HAYWOOD: Thank you, Judge. Do
19 you recall however, on September 5th I did not
20 respond to it in an appropriate forum. Can I
21 just finish that sentence just so the Court
22 knows?

1 THE COURT: Yes, sir.

2 MR. HAYWOOD: So I did not ask Ms.
3 Carey to attend that hearing. I had no
4 communication with her at all. I actually, I
5 went up to her at the same time right after Ms.
6 Stamos did and asked her who had invited her
7 there, whether it was the Commonwealth.

8 She said, no. She said it was just
9 happenstance that she had been obtaining search
10 warrant information in the clerk's office.

11 And then after the hearing I actually
12 talked to her again and just wondered where all
13 that came from and she had no idea. So that's --

14 THE COURT: Well, like I said, what
15 you're stating now is pretty much what was stated
16 previously. I remember it. I understand.

17 MR. HAYWOOD: Thank you, Judge. I did
18 want to submit several --

19 THE COURT: Let me just, to ask a
20 question. And certainly the Court is going to
21 give you whatever time we need the rest of the
22 day or whatever to get all of this done.

1 But I just want to know do you have
2 any idea whether or not we're going to need, just
3 for my scheduling because of something else so I
4 can let them know that I'm probably not going to
5 get to them today whether or not we think that
6 this is going to last -- because I need to break
7 at 1:00 because I have a meeting for an hour.

8 But then I have something else this
9 afternoon. But if we're not going to get to it I
10 probably, just to let people know.

11 MR. HAYWOOD: I wasn't planning to say
12 much. But I do know that the Court understands
13 our position and our arguments. We're done with
14 the evidence once we get these final few exhibits
15 in.

16 And I can provide brief argument
17 relying largely on the pleadings. And unless the
18 Commonwealth has evidence that would be it from
19 us.

20 THE COURT: I'm talking about there
21 are several other motions here. Do you think
22 that they are --

1 MR. HAYWOOD: There's no other
2 evidence that I'll be introducing with respect to
3 those.

4 THE COURT: So those would be
5 relatively short motions?

6 MR. HAYWOOD: That's right.

7 THE COURT: All right, okay. And like
8 I said, the Court is in no way rushing anybody.
9 I'm just trying to get an idea for scheduling
10 purposes to let other people know if I'm not
11 going to be available so that they'll have some
12 idea.

13 MR. HAYWOOD: Your Honor, there are
14 three, I think this Court has most of this. But
15 this is just, just want to make sure they have it
16 for the purpose of this motion.

17 So this is Exhibit R and Exhibit Q of
18 the, Exhibit R is the open file discovery
19 agreement that the attorneys have to sign prior
20 to obtaining discovery.

21 And Exhibit Q is the discovery
22 inspection and protective order which is the

1 discovery order that defense attorneys have to
2 sign prior to accessing discovery.

3 And then there's one other affidavit
4 from a federal prosecutor regarding discovery in
5 federal cases, so. And then finally we have
6 Exhibits L, M -- sorry, J, K, L, and M, which are
7 transcripts from August 15, 2017, May 1, 2018,
8 May 22, 2018, and July 10, 2018, just submit
9 those.

10 (WHEREUPON, THE DOCUMENTS
11 REFERRED TO WERE MARKED AS
12 DEFENDANT EXHIBITS R, Q,
13 N AND J THROUGH M, FOR
14 IDENTIFICATION.)

15 MS. TINGLE: Judge, I don't object to
16 the transcripts. I absolutely object or the
17 Commonwealth absolutely objects to, what's this
18 letter, Exhibit N, which is an affidavit from a
19 former federal prosecutor.

20 I don't see how on earth what a former
21 federal prosecutor has to say is of any moment to
22 this court.

1 MR. HAYWOOD: Your Honor, if the Court
2 wants to read the affidavit it talks about the --

3 THE COURT: I know the procedure. I
4 know exactly what it's going to talk about. I'm
5 going to receive it over objection. I don't
6 think that it adds anything. But it goes to
7 whatever, I will receive it.

8 (WHEREUPON, THE DOCUMENTS
9 REFERRED TO, PREVIOUSLY
10 MARKED DEFENDANT EXHIBITS R,
11 Q, N AND J THROUGH M FOR
12 IDENTIFICATION, WERE RECEIVED
13 INTO EVIDENCE.)

14 MS. TINGLE: I understand, Judge.

15 THE COURT: I'll let you make all the
16 records you need.

17 MR. HAYWOOD: Thank you, Your Honor.
18 We can't find this right now. It got misplaced.
19 But it's not a controversial exhibit. It's the
20 transcript from the January 2018 hearing.

21 Would it be acceptable to the Court if
22 we submit that to the clerk?

1 MS. TINGLE: No objection.

2 THE COURT: Yes, I think just let the
3 Commonwealth see it for whatever it's worth and
4 then you can submit it.

5 MR. HAYWOOD: So that would be all our
6 evidence for this hearing, for the hearings
7 today.

8 THE COURT: All right, argument.

9 MR. HAYWOOD: Your Honor, since the
10 Commonwealth wanted us to address these first
11 I'll do that in argument.

12 This is both a motion to dismiss and
13 disqualify Commonwealth's attorney based on --
14 dismiss indictments and disqualify the
15 Commonwealth's attorney based on violation of the
16 Sixth Amendment right to counsel and based on
17 violations of due process and equal protection.

18 As the Court is well aware with
19 respect to general claims of vindictive
20 prosecution, the real heart of a fair prosecution
21 in any case is whether a prosecutor can be deemed
22 to be impartial. They have to stand impartial to

1 the cause.

2 They have to think objectively about
3 the case. They have to think neutrally. Nothing
4 can become personal.

5 And although they have broad
6 discretion to do a lot of things, if there is
7 evidence that any of those things are done with
8 anything other than a motive to achieve justice
9 or fairness then it calls into question whether
10 the defendant can receive a fair trial.

11 And I think that's exactly what's
12 going on here. And it's something that has been
13 a pattern since this case began. And it's
14 something that makes us concerned about whether
15 we're going to -- or whether Ms. Berhane is going
16 to receive a fair trial.

17 And it really started, you know, it
18 started from the get-go in this case where we
19 have Ms. Berhane who did not want to accept the
20 Commonwealth's plea offer, apparently. And
21 actually none was communicated to her at the
22 preliminary hearing.

1 This was when Mr. Ellis had the case.
2 He had a preliminary hearing. That's all he did.
3 He did that because he's never had a problem
4 doing that.

5 He's an experienced attorney. He's
6 been a prosecutor himself in the JAG Corps. He
7 went ahead and had a preliminary hearing and he
8 did another two things because his client asked
9 him to.

10 And these are things that I think it's
11 improper for the Commonwealth to punish, which is
12 he asked for bond and Ms. Berhane got out on
13 bond. And he also asked for the Court to return
14 property to her.

15 When he met with Ms. Eastman
16 afterwards he was, it was explained to him what
17 were the reasons that the case was, why she was
18 unwilling to deal with Ms. Berhane on the same
19 terms that she was willing to deal with Mr.
20 Donat.

21 And what she said was, she mentioned
22 several things. She mentioned the fact that she

1 had not waived preliminary hearing which again
2 took an hour and a half out of anyone's life.

3 Even if there were ten or 11 witnesses
4 there that's an inconvenience for half of the day
5 for 11, ten or 11 individuals. The other thing
6 that she did, again that she cited was the bond
7 hearing and the return of property.

8 And for that reason alone, those
9 reasons alone apparently she indicted an
10 additional, it looks like as it turned out 45
11 counts at least and the plea agreement ended up
12 being even slightly different than that.

13 But an additional 40-something counts.
14 If you total up the total penalties for this
15 again, I mean the Commonwealth thinks this is
16 irrelevant.

17 But I think it's pretty highly
18 relevant because what's going on here, what's
19 going on here is it's a punitive action to show
20 that Ms. Berhane to stand down, should stop
21 fighting her case. She should be so intimidated
22 that she should take a plea offer and whatever

1 plea offer the Commonwealth dictates.

2 And they are given that kind of power.

3 And that kind of power these days is entrusted to

4 prosecutors throughout the Commonwealth. And

5 when you have that kind of power you can

6 virtually dictate the outcome of a case because

7 the threat of a trial becomes so great, becomes

8 so great that only a crazy person oftentimes

9 would go to trial.

10 And that's frankly what we have here.

11 Not only do we have total punishment, statutory

12 maximums for that exceed 1,000 years. Like,

13 that's not a joke, they do.

14 And there is a jury minimum that if

15 Ms. Berhane goes to jury a jury will have to

16 impose, I believe it's 17 years. So this is not,

17 I mean this is the way this case has been

18 charged.

19 And I know the allegations are

20 serious. No question the allegations are

21 serious. But still, just because the allegations

22 are serious doesn't mean that the Commonwealth

1 can impair someone's right to a fair trial.

2 So and this has continued to go on as
3 Ms. Berhane with the assistance of our office has
4 highlighted several practices of the Commonwealth
5 that we find really troubling.

6 This is a case, as the Court heard,
7 you know, when Detective Bamford was testifying
8 he thinks that if you printed this out we would
9 have possibly over a million pages of discovery.

10 I mean that's a lot even just to sit
11 down with nights and weekends all day during the
12 work week and sift through it to make sense of
13 it.

14 But then to have to sit down with that
15 only during business hours at the Commonwealth's
16 Attorney's Office, only through attorneys
17 themselves, not allowing investigators to go by
18 themselves, not allowing interns to go by
19 themselves, for us to fit that into our work day
20 and then make sense of all of that and be ready
21 for trial it is literally impossible.

22 It is literally impossible. And we

1 made a basic simple request of the Commonwealth
2 that we need an accommodation here basically.
3 It's almost like a disability, you know.

4 We need an accommodation. This is a
5 case where we can't get ready unless you help us
6 out. And they were unwilling to do that. Even
7 given the volume of the materials that were there
8 they were unwilling to do that.

9 And in fact when we made the argument
10 that it violated due process, which again, you
11 know, yes, we feel strongly about this. We think
12 it's in the interest of fair play that the
13 Commonwealth allows a defense attorney to get
14 prepared for a very serious trial.

15 So in a case like that where you're
16 facing so much punishment, where the consequences
17 are so great, of course we're going to file
18 motions to try to improve our case or to
19 challenge things that we don't think are
20 constitutional that we don't think are fair.

21 So we did that. We filed the motion.
22 There was time for the Commonwealth to reach out

1 to us. There was time for them to notify us of
2 what was going to happen when we came to court.

3 What they did in the meantime as soon
4 as they got our motion, they didn't talk to us
5 about it. They didn't talk to us about the work
6 that we were doing. They didn't talk to us about
7 how much of a burden it was to us to prepare.

8 What they did is they went, apparently
9 to these discovery time logs which we have been
10 prohibited from getting or looking at ourselves.
11 And they tallied up the total number of hours
12 that appeared on those logs.

13 They came to court and they told the
14 Court that we were ineffective as a result of
15 that. The Court has heard from multiple
16 witnesses today that talk about whether that
17 really is insufficient.

18 And I would submit to the Court it's
19 pretty obvious that it's not. You have some
20 really good attorneys that came here today,
21 people who take pride in zealous, client-centered
22 representation of their clients and they told you

1 even eight hours, five hours sounds like a lot.

2 The most that one of the witnesses
3 testified he ever did was 20 to 25 hours. We
4 have another one in a murder case, as serious as
5 a case gets, 99 hours was the very most.

6 And in any other case that she has
7 done it was something like 20 or 25 hours. This
8 is, had the Commonwealth been looking objectively
9 at those discovery time logs, had they been
10 reviewing that to compare our diligence versus
11 the diligence of other counsel they would have
12 known that what they were saying was absolutely
13 incorrect.

14 And they would have known furthermore
15 that the people that would have been available to
16 take Ms. Berhane's case in fact exercise a lot
17 less diligence than we do. We were getting
18 prepared.

19 We were trying our very hardest. At
20 some point when you have a case like this you've
21 got to almost do triage. You can't do
22 everything.

1 And there are things that we've got to
2 do to get ready for trial that don't involve
3 sitting in a room and manually copying a police
4 report. So, you know, that action alone, and
5 there is, I've passed this up to the Court
6 before.

7 But this is something that, this isn't
8 just my idea. This is legal ethics, you know.
9 The American Bar Association has -- let me get
10 this out.

11 I passed this up once before. But,
12 you know, the Bar Association talks, the American
13 Bar Association in the Criminal Justice Standards
14 for the Defense Function and for Prosecution
15 Function, you know, we have a duty as defense
16 attorneys first of all if we believe, and this is
17 ABA Standard 4-6.3(f), defense counsel believes
18 that prosecutorial conduct or conditions have
19 unfairly influenced the client's disposition
20 decision or really any other matter about the
21 case, then the defense counsel should bring the
22 circumstances to the attention of the Court on

1 the record unless after consultation with the
2 client it is agreed that the risk of losing the
3 disposition or other action outweighs other
4 considerations.

5 So we have duties in cases like that
6 to bring issues like this to the Commonwealth's
7 attention. And likewise, the Commonwealth has a
8 duty to make sure that it's not impairing our --
9 it's not getting in the middle of our
10 attorney/client relationship.

11 There's case law that speaks pretty
12 clearly on this. In the ABA Standards it's ABA
13 Standard 3-8.4, challenges to the effective
14 assistance of counsel.

15 And it does talk about that the
16 prosecutor has a duty to make sure that a
17 defendant is receiving effective assistance of
18 counsel. But if that comes up and they have a
19 legitimate concern, so during an ongoing defense
20 representation it says that the prosecutor should
21 not express concerns of providing possible
22 ineffective assistance on the public record

1 without an unambiguous legal basis or court order
2 and should not communicate any such concerns
3 directly to the defendant.

4 That's exactly what happened. It all
5 could have been avoided had there merely been a
6 conversation with us about what was going on with
7 us.

8 They knew, and frankly I don't even
9 know that they really needed a conversation.
10 Just go on the drive. See how much stuff is
11 there.

12 See all the number of indictments.
13 See how serious this case was. See how much time
14 the co-defendant got on his case, and understand
15 there's a lot that we've got to be doing.

16 And for them to merely assume simply
17 from one document that has the names of all kinds
18 of other counsel on it who have done a fraction
19 of what we did on this case and then to come to
20 the Court without talking to us in front of our
21 client and to effectively disparage us and to
22 call our effectiveness into question is really

1 beyond the pale.

2 And that's, I couldn't feel more
3 strongly about that. And that's just the Sixth
4 Amendment issue. And I think that Sixth
5 Amendment issue has been incorporated in both
6 motions because one, I think that's independent
7 grounds to dismiss indictments and to disqualify
8 a Commonwealth's attorney.

9 But it also is grounds, it's evidence
10 of a pattern that is continuing to occur where
11 they appears to be inappropriate conduct by the
12 Commonwealth to attempt to gain an advantage in
13 the case because like I said, you know, not only
14 are you putting pressure on with these additional
15 indictments, not only are they putting pressure
16 on by punishing exercise of statutory and
17 constitutional rights, but even at one point it
18 becomes clear that defense counsel is taking this
19 seriously and is challenging something maybe that
20 they don't want to be challenged.

21 To have a request to have us removed
22 as counsel maybe would have been the most

1 detrimental thing that happened to Ms. Berhane in
2 this case. To lose counsel of her choice, to
3 lose counsel that was prepared and to move
4 forward with the case with someone brand new who
5 knows who the heck that would have been.

6 So subsequent to that, you know, this
7 was treated as if it was the most offensive thing
8 that could possibly have happened. And I'm
9 sorry, but I don't think that when you have a
10 legitimate constitutional claim as to the use of
11 prosecutorial discretion that's something that
12 warrants the kind of vitriol that we faced
13 through this case.

14 And I know a lot of things we had to
15 say were uncomfortable. But they are things that
16 we felt needed to be said and they were claims
17 that we felt needed to be raised to the Court.

18 And we've attempted at every turn to
19 be as professional as possible about it and not
20 make a spectacle of what we're doing. We don't
21 invite journalists to come to court.

22 We're not here, you know, gladly as

1 you said or as you indicated, you know, we were
2 glad to offer a proffer of Mr. Robinson's
3 testimony rather than have him testify. It's not
4 that we're looking to make a spectacle of this.

5 These are important legal claims that
6 in our opinion really call into question whether
7 Ms. Berhane is going to receive a fair trial. So
8 for those reasons based -- or for those two
9 motions we would ask the Court to grant them.

10 Thank you.

11 MS. TINGLE: We are living in very
12 different times. For good or for ill we are
13 living in a time where the ability to have any
14 kind of reasonable dialogue seems to be slipping
15 through our fingers.

16 It's across the river, it's across our
17 state, across the country and the courthouse. We
18 are standing here today, Judge, because we are
19 litigating what amounts to a personal attack on
20 Ms. Eastman, a respected member of this Bar, a
21 respected member of this legal community that we
22 have traditionally in the 17th Circuit taken

1 pride about how we conduct business, all of us,
2 the Court, defense counsel, the Commonwealth, our
3 deputies, our police officers.

4 This has been a wonderful place to
5 practice. But we're standing here today and
6 we're talking about a vindictive prosecution
7 claim and we're talking about an attack on Ms.
8 Eastman and the way that she conducted herself in
9 this case.

10 To the extent focusing initially on
11 the Sixth Amendment argument to the extent that
12 there is any merit in that motion to argue, which
13 I contend that there is not, let's initially
14 focus on the law that applies because that at the
15 end of the day, despite whatever histrionics may
16 come out of either side, quite frankly, it's the
17 law that applies.

18 And as we said in our brief it's the
19 United States v. Morrison for the United States
20 Supreme Court that holds. And the holding is
21 that if, and that is a big if, a Sixth Amendment
22 violation occurs that the remedy must be tailored

1 to the injury suffered.

2 That's the standard. That's where we
3 are. There's a lot of reliance in their brief
4 about the Manning case from a state court in
5 Massachusetts. But the law that applies is from
6 the U.S. Supreme Court in Morrison as well in
7 Weatherford v. Bursey.

8 And the details of those are discussed
9 in our briefs. And first and foremost the Court
10 can't possibly find that there was a Sixth
11 Amendment violation given this record when the
12 Court looks at that precedent.

13 All right, when you're looking at U.S.
14 v. Morrison the conduct in that particular case
15 had to do with DEA agents that went to go and
16 contact a represented defendant and constantly --
17 you know, talking very poorly about counsel.

18 In that particular case the Court
19 actually said that there was in fact no
20 violation, that I'm sorry, that the remedy needs
21 to be tailored to the violation. They assumed
22 for purposes of argument that there was a

1 violation and they set the standard that the
2 remedy needs to be very specific.

3 In Weatherford v. Bursey, for example,
4 it's an informant that they had working an
5 ongoing operation and they said, at the request
6 of a defendant said, hey, come and sit with us.
7 I want you to be here with my attorney while we
8 talk about this case.

9 And in order to maintain his cover he
10 did so. He never disclosed anything. He never
11 disclosed the defense strategy. He never opined
12 on anything and the Court found that there was in
13 fact no injury therefore there is no violation.

14 So the standard that matters here is
15 that the Court needs to find that there was an
16 injury. There is in fact no injury.

17 And when you look at the record, not
18 the interpretation of the record, the actual
19 record, the fact is that had this case, they had
20 been on this case for 11 months and in their own
21 motion they said they had barely made a dent.

22 And the actual record shows that no

1 subpoena had ever been issued for either
2 witnesses or for documents. That remains the
3 case and we're now 22 months out.

4 There had never been a single subpoena
5 issued. We've issued legions of subpoenas for
6 trial, yes, for trial. The actual record shows
7 that they waited until three weeks before the
8 trial to identify any experts.

9 Those motions were heard on May 1st as
10 well and they were filed at the same time that
11 the motion for discovery was filed. And at that
12 point, Judge, I'll remind Your Honor that they in
13 fact had yet to identify one of those experts.

14 So at that point that Commonwealth
15 became notified at that juncture that they were
16 not prepared. Prior to that recently before as
17 Detective Bamford testified, his supplement had
18 been added and that was relatively close to where
19 we were in terms of the new trial date.

20 I don't recall whether or not that
21 came out at the previous motion or not. But one
22 of Ms. Berhane's devices, actually it's in the

1 papers that one of Ms. Berhane's devices, I
2 believe it was her phone, had finally been
3 unlocked because the technology had caught up to
4 be able to get into her phone.

5 And that phone had just been unlocked.
6 So where we sat we thought that there was going
7 to be a motion to continue based on those two
8 pretty significant pieces of information coming
9 into their possession very closely to trial.

10 However, what actually it was, it was
11 that they needed experts and they hadn't
12 identified them yet. If you just heard Detective
13 Bamford's testimony you could have known that you
14 would have needed experts in this case.

15 That's been evident from the very
16 beginning. That's been evident probably since
17 the time of the prelim, certainly afterwards.
18 And they certainly could have relied on the
19 Commonwealth's experts.

20 There's no reason for them to have to
21 get their own, right. They could certainly rely
22 on vigorous cross-examination. But three weeks

1 before trial they are asking the Court for
2 experts and not identified.

3 What other position are we in at that
4 point other than necessitating the need for a
5 continuance at that juncture? The Commonwealth
6 has been working diligently since the time of the
7 arrest to try to bring this case to trial.

8 Every single time we subpoenaed scores
9 of witnesses, scores of documents have been
10 subpoenaed. We've been working and we had
11 presumed, quite frankly, that defense had been
12 working as well.

13 The Commonwealth had never previously,
14 when the motions to continue were asked for we
15 didn't stand there and say they're not working
16 very hard. Quite to the contrary we assumed that
17 they were.

18 And it wasn't until their motions when
19 we find out that they have barely made a dent.
20 That was, quite frankly, shocking to the
21 Commonwealth because we obviously work with
22 counsel all the time and had no reason to doubt,

1 no reason to think that they were asleep at the
2 switch.

3 So it wasn't until that was presented
4 in their own motion, their own words, we have
5 barely made a dent that we needed to go to the
6 discovery logs to take a look and see what was
7 going on. This notion that we are the discovery
8 police in some way, the Court has heard why it is
9 that we keep those logs.

10 We keep them to be able to maintain
11 the integrity of our files, to know where they go
12 because if something goes missing we need to try
13 to figure out where to find it because it's got
14 witness information, it's got victim information,
15 there's police reports.

16 So the idea that we are doing this in
17 some way, shape or form to be vindictive, we're
18 simply trying to get this case tried. We are
19 trying to bring this case, this immense fraud
20 case that we too have been working, we are trying
21 to get this case to a conclusion.

22 Here we were at the eleventh hour and

1 the Court, I'll remind Your Honor the Court also
2 said these motions could have been brought
3 earlier, counsel. And that wasn't directed at
4 the Commonwealth.

5 So this has nothing to do with the
6 Commonwealth's discovery policy on this
7 particular issue, on the Sixth Amendment piece
8 that the Commonwealth's recitation of the actual
9 record, that is what necessitated us needing to
10 ask the court to try to find counsel who would.

11 This isn't disparagement of counsel.
12 It's stating facts. And quite frankly for two
13 lawyers, one who is from New Jersey and one who
14 is from New York, disparagement of others can be
15 seen as sport for each of those states, the
16 things that Ms. Eastman said at that motion, that
17 was not disparagement of counsel.

18 That was her simply trying to
19 represent the Commonwealth and we are entitled to
20 do so zealously. That is not solely within the
21 purview of defense counsel.

22 It was grounded in the record at hand

1 and the request for relief was reasonable given
2 that record. There is no remedy that needs to be
3 fashioned by this Court that's required by the
4 Supreme Court.

5 And the outlined, the remedies that
6 they are asking for number one, the Court is
7 asking, I'm sorry, the defense is asking to
8 reprimand Ms. Eastman to make it clear that her
9 accusations were baseless and uncalled for.

10 The Court in fact agreed that were we
11 to go forward that this would in fact be
12 ineffective assistance of counsel so that's an
13 inappropriate remedy. To dismiss some or all of
14 the indictments under the Sixth, under this Sixth
15 Amendment prong, this particular Sixth Amendment
16 argument to say that we are, what are we supposed
17 to dismiss, which ones?

18 Which ones were so offensive in that
19 particular argument that need to get dismissed?
20 The request itself makes it clear that the
21 ambiguity of it, excuse me, shows how much of an
22 overreach that is.

1 To disqualify Ms. Eastman or
2 disqualify the entire office of the
3 Commonwealth's attorney is another remedy that is
4 sought. And we have not heard of any actual
5 prejudice because that's what the Supreme Court
6 requires.

7 We have not heard of any actual
8 prejudice. I did not hear any of the witnesses
9 talk about any prejudice. I heard Mr. Haywood
10 talk about how what we said was incredibly
11 offensive, how that was incredibly rude.

12 That's what we've heard. We have not
13 heard any actual prejudice. So absent hearing
14 anything, the Court -- there's nothing to fashion
15 in terms of a remedy.

16 The idea to this that there is going
17 to be a chilling effect on the exercise of her
18 constitutional rights, seriously. After Ms.
19 Eastman made that motion that there's been a
20 chilling effect, if anything this has been
21 amplified. So there has been absolutely nothing
22 in here to demonstrate that there has been any

1 perjury. And unwillingness, the things that he
2 lists, an unwillingness to engage in good faith
3 plea negotiations? We've been negotiating all
4 along.

5 If they turn to us today and said we
6 want to keep negotiating we'll keep negotiating.
7 There has not been any sort of, any notion that
8 we are just going to say you know what, our way
9 or the highway.

10 That is not the case here, Judge. The
11 lack of objectivity at trial, I'll address that
12 in a moment.

13 This is an attack, Judge, on Ms.
14 Eastman and I find it quite curious that in the
15 same -- out of one side it's talking about the
16 attorneys that came before the Court, these hard
17 working attorneys that are here and how much work
18 they do.

19 Yet in their pleading, in their
20 pleading it is a disparagement of court-appointed
21 counsel. In their pleading it says that the
22 Office of the Public Defender employs the hardest

1 working, most diligent attorneys in the Arlington
2 County Courthouse.

3 There is, through that there is also
4 a very thinly veiled implication because they
5 refer to what they call a Circuit Court dumps,
6 right, that when counsel gets of the case in the
7 Circuit Court and then they receive those
8 appointments because they're required to by
9 statute for indigent defendants.

10 There's a thinly veiled implication
11 that court-appointed counsel is going to punt
12 essentially whenever a client wants to go to
13 trial, that they will represent that there is a
14 conflict of interest.

15 And the implication is clear certainly
16 to the Commonwealth that this is manufactured
17 because later in the motion it says that
18 defendants would benefit from having attorneys
19 from start to finish, including those who are
20 willing to represent them regardless of whether
21 they plea or go to trial.

22 So this is talking about the court-

1 appointed counsel. I don't know if any of them
2 are still here. Well they're certainly not still
3 here to hear how it is in his own brief he says
4 that his colleagues are not doing a good job,
5 that no one does as good a job as his office.

6 And that in fact Ms. Eastman knew,
7 knew that they are not worthy of being a good
8 advocate or being a worthy advocate I should say,
9 that she knew this, she's adopting this position
10 which let me tell you, Judge, absolutely not.

11 It has been our privilege to practice
12 across any of the number of people of this court-
13 appointed bar. I would say that it's been a
14 privilege and I defy counsel to say that the
15 individuals that come here and practice don't
16 work hard because that's absolutely what he says
17 in these pleadings.

18 And to sit here and say individuals
19 like the Honorable Jason Rucker, the Honorable
20 Dontae Bugg, the part-time Honorable Adam
21 Krischer, individuals of that ilk, that those are
22 people that fall into this category because

1 that's what he's saying, I find that on their
2 behalf offensive.

3 To say that Ms. Eastman then decided
4 that she knew that everyone on that list that
5 would be appointed if we were successful in our
6 motion was not going to provide adequate
7 representation, we knew it and we did it
8 deliberately because we wanted to undermine Ms.
9 Berhane's ability to defend herself in this case,
10 that's insidious, Judge.

11 What an inference that is. To say
12 that this is the -- well a), they're trying to
13 make this the analogous to the functional
14 equivalent of DEA agents, law enforcement agents
15 going and saying that their attorneys are
16 terrible, that somehow or another this rises to
17 that same level of an injury.

18 The Commonwealth will not subscribe to
19 that and I ask the court not to do so as well.
20 The Court is well aware of the fact that we have
21 a vigorous defense bar.

22 And to say that we are trying to

1 manipulate this proceeding to get a less worthy
2 adversary is simply unacceptable. So on this
3 particular Sixth Amendment piece, Judge, this is
4 why, this is a sad day, quite frankly, because
5 we're in a place where now these types of motions
6 appear to have a chilling effect.

7 That is what they want this to do,
8 have a chilling effect on the Commonwealth being
9 able to zealously advocate for its own case, for
10 its own witnesses, for its own victims.

11 That when the Commonwealth stands
12 before the court and uses adjectives perhaps that
13 the defense finds are too strong, perhaps that
14 were too zealously trying to ask the court to
15 deny the relief a defendant is seeking, if we use
16 words that are too vigorous that in some way,
17 shape or form that is going to be seen through an
18 accusatory lens of vindictiveness, that if we
19 state our position based on the record that we
20 are then going to have to stand before this court
21 on a vindictive prosecution hearing.

22 To say that this is just the tip of

1 the iceberg, quite frankly because if we stand
2 here and we stand by it, we stand by the fact
3 that the statement we made and we stand by the
4 request to have them removed that now Lisa
5 Bergman Tingle is going to be the next one on the
6 list because I'm saying the exact same things in
7 front of Ms. Berhane.

8 I'm not walking it back. So this is
9 now, this is perhaps the path that we're on and
10 that would really be unfortunate, Judge, to make
11 this a personal attack which is what this
12 particular motion is, it is unacceptable.

13 It is indefensible on the law, number
14 one and quite frankly on the facts. And it's
15 just quite frankly plain offensive.

16 When we're talking about the due
17 process argument counsel is claiming the
18 violation on that, the argument claim that is
19 similarly fraught. The facts and the law don't
20 support the remedy sought and the Court should
21 again deny that particular motion.

22 There are three specific reasons in

1 the motion that counsel uses to say that the
2 Commonwealth has run afoul of due process and
3 that we have demonstrated prosecutorial
4 vindictiveness. And each and every one of them
5 fails to pass muster.

6 Number one is that the element of
7 vindictiveness was that we asked for the removal
8 of counsel. I'm not going to repeat that, Judge,
9 given that we've certainly gone through it and
10 I'm quite frankly tired of saying it.

11 The Court in fact agreed at that
12 particular juncture with the Commonwealth
13 assessment and in fact knew that it needed to
14 grant the continuance because it would be
15 ineffective assistance of counsel had we gone
16 forward.

17 Counsel also in its paper talks about
18 that you can look at the evidence of removing the
19 hard drive, that that shows a level of
20 vindictiveness. As the Court could see from the
21 Commonwealth's exhibits, that was certainly our
22 interpretation.

1 Counsel now today says that, you know,
2 it's something that had we just reached out, had
3 we just reached out that all of this could have
4 been avoided. I find that highly -- I disagree
5 with that characterization entirely.

6 The Commonwealth took that motion and
7 took it all together because, as I said, we
8 believe that the motion to continue was going to
9 be based on something else.

10 And when you read that motion what is
11 said in that motion is that they filed the
12 discovery that the operating discovery order was
13 signed, quote, prior to learning of the full
14 quantity of discovery and the time required to
15 obtain it all.

16 So when you make a statement like
17 that, I mean in our job right we're not building
18 bridges, we're not digging ditches. You know,
19 words are what, words are our currency.

20 And so when you say that they signed
21 an order prior to learning the full quantity of
22 discovery and the time required to obtain it all

1 that makes it sound like we tried to do a bait
2 and switch.

3 That's what it makes it sound like
4 that here, come sign this order. Now you've got
5 all this information and we're not going to give
6 you any.

7 That certainly was the tenor, that was
8 the way the Commonwealth took it. And in fact
9 later Ms. Eastman apologized if she was
10 incorrect. And that's attached as, I apologize
11 if I misread that.

12 So to say that somehow removing a hard
13 drive is a way of looking at this as an
14 additional act of vindictiveness that again, also
15 fails. What both of those two things do though
16 however, when they use those because it's the
17 three factors right or three issues, one is
18 asking for them to be removed, the other is
19 removal of the hard drive and then it's the
20 charging decisions.

21 The only one that really matters,
22 quite frankly, that they would even have a claim

1 on which they don't, the only one that matters is
2 the charging decision because that's where you
3 show the evidence of prosecutorial
4 vindictiveness.

5 The claims that were made were made 11
6 months afterwards. So you really need to look,
7 it's really quite a stretch to try to bootstrap
8 the arguments or the statements that were made
9 and the actions after, on May 1st with the
10 charging decisions that happened any number of
11 months before that.

12 To bootstrap, that's the only way that
13 they can try to show that there is any additional
14 vindictiveness because at the end of the day
15 there is vindictiveness in the charging decision
16 and the Court is well aware of that. The
17 Commonwealth has always stated, always stated
18 that this was not limited to a four count charge.

19 The Court certainly heard, you know,
20 the intent for a larger prosecution didn't bloom
21 after the March 27 -- March 2017, excuse me,
22 preliminary hearing. It's not that all of a

1 sudden a preliminary hearing was put on and well
2 we'll have to look around and see what other
3 charges we've got, I wish we had more. From the
4 very get-go, from the bond motion that the Court
5 heard in 2016 the Court was put on notice that
6 this was a large scale fraud case, large scale
7 fraud case.

8 So the fact that we are not standing
9 here on four indictments should come as a
10 surprise to no one. It certainly didn't come as
11 a surprise to Mr. Ellis.

12 And so it certainly shouldn't come as
13 a surprise to Mr. Haywood's shop. The co-
14 defendant indicated a willingness to resolve the
15 case and enter into plea bargain talks.

16 That happened at the time of the
17 preliminary hearing. There was no such
18 conversation with the Defendant as Mr. Ellis
19 said. The Commonwealth had no choice but to
20 believe that it was going to trial as did Mr.
21 Ellis.

22 Mr. Ellis believed that this was going

1 up to Circuit Court. There was no indication
2 that there, that there was any type of
3 resolution.

4 And the Corbett case that the
5 Commonwealth cites in its motion, it is not
6 forbidden to extend a proper degree of leniency
7 in return for guilty pleas. That is 100 percent
8 within the purview of the Commonwealth and it is
9 proper and appropriate and sanctioned by our
10 Supreme Court.

11 The charging decision was based on the
12 assumption this case was going to trial and
13 therefore her charges reflected her criminal
14 conduct, quite frankly a limited amount of her
15 criminal conduct because Detective Bamford
16 testified we could be sitting here at 1,500
17 charges.

18 We would all be running to jump in the
19 river if we were standing here charging 1,500
20 charges. So they made a concerted decision to
21 sit down, look at the evidence and figure out
22 what was most representative.

1 The way that it would have been less
2 representative if we charged more charges, don't
3 commit as much fraud. I mean at the end of the
4 day they're trying to pick some, they are trying
5 to capture the scope of her fraud which was
6 immense.

7 So of course there are going to be
8 more charges to be able to do so. It is logical.
9 That is not punitive. That is not vindictive.
10 The idea that we're going to be forever bound by
11 the magistrate, heaven help us all if that's the
12 case.

13 That is certainly not the case at all.
14 Under the Goodwin case that the Commonwealth also
15 cites, it specifically stands for the proposition
16 that the initial indictment does not necessarily
17 define the extent of the legitimate interest of
18 the prosecution.

19 That is the law of the land, Judge.
20 So to say that this completely -- and that
21 comports with the way that Virginia works with
22 the magistrate system.

1 That case also says that the
2 prosecutor may forego legitimate charges already
3 brought to save time and expense of trial, may
4 also file charges at the initial expectation that
5 the Defendant will plead guilty to lesser charges
6 fails.

7 What have we done that has been
8 vindictive? We charged her with the crimes that
9 she committed. The Commonwealth also according
10 to the U.S. Supreme Court case law, the
11 Commonwealth may also absolutely promise to bring
12 more serious charges if you don't plead guilty.

13 That's the law, I know that doesn't
14 sit well with their narrative. I know that
15 doesn't feel like it's the right thing to do.
16 But the law says that the Commonwealth may
17 absolutely bring more charges if there's not
18 going to be a guilty plea.

19 That's what the cases stand for. We
20 are not running afoul. We're not cutting new
21 cloth. We're not doing anything that is afoul of
22 our criminal justice system.

1 The Bordenkircher case from the United
2 States Supreme Court says to punish a person
3 because they've done what the law allows them to
4 do is a due process violation.

5 But the give and take of a plea
6 bargain, excuse me, the give and take of plea
7 bargaining, excuse me, there no such element of
8 punishment or retaliation so long as the accused
9 is free to accept or reject the offer.

10 That is where we are. She is free to
11 accept or reject the offer. That is simply the
12 fact of doing business in the criminal justice
13 system and that is a risk you take when you
14 decide to engage in large scale racketeering
15 fraud.

16 It is constitutionally legitimate for
17 the Commonwealth to bring these charges. The
18 simple reality is that, this is again from
19 Bordenkircher, the simple reality that the
20 prosecutor's interest at the bargaining table is
21 to persuade the defendant to forego his rights
22 and to plead guilty. That is a legitimate aim of

1 the Commonwealth.

2 That is a legitimate aim for our
3 criminal justice system to induce guilty pleas.
4 And when a prosecutor openly presents the
5 defendant with the unpleasant alternatives, and
6 they are the unpleasant alternatives, of
7 foregoing trial or facing charges on which he was
8 plainly subject to prosecution, that does not
9 violate due process.

10 Detective Bamford said that as well as
11 Mr. Ellis both said that these charges were
12 absolutely based in probable cause. So the fact
13 here that when they are plainly subject to
14 prosecution that does not violate due process.

15 So you cannot look at actions so
16 remote in time from the charging decision and
17 then bolster this argument that the charging that
18 was done here was done in a vindictive manner.

19 The only real case that is cited that
20 actually goes toward the actual Defendant or
21 defense counsel in terms of vindictive
22 prosecution was the Powell case from Virginia

1 from Prince William County where Mr. Powell was
2 initially acquitted -- sorry, his case was
3 reversed and then he proceeded to write a letter
4 to the Commonwealth's attorney, gloating
5 essentially would be a polite way of saying it.

6 And then the charges were brought
7 against him again, because in his writings to Mr.
8 Ebert he then provided essentially information
9 for them to go prosecute him on different
10 charges. The letter in that case, Judge, the
11 information that Powell had provided was vile.

12 I mean it was a vile and hateful
13 letter that was sent to Mr. Ebert and in that
14 particular case from Virginia the evidence -- the
15 evidence must reflect the prosecutor is acting
16 not within the dictates of the law but has
17 strayed outside those parameters in furtherance
18 of a personal animus against the defendant.

19 That is our standard. That is what
20 rules us, that it will overbear the professional
21 judgment to see that justice is done.

22 Here there cannot possibly be a

1 finding of continued enmity after the preliminary
2 hearing, which is what the court needs to focus
3 on since the Commonwealth invited counsel to
4 explain his theory of the case including a
5 PowerPoint presentation, we had investigators
6 available, the Commonwealth provided it to prior
7 counsel and current counsel.

8 The Commonwealth outlined its entire
9 case from start to finish, the scheme used, the
10 timeline of events, the nature of the documents,
11 the examples, everything that Detective Bamford
12 said that he provided to Mr. Ellis which
13 presumably he also provided to counsel.

14 And then Ms. Eastman gave the same
15 presentation to new counsel. So what, how is
16 that vindictive? In retrospect it seems a bit
17 like a waste of time given where we are.

18 But how is that vindictive? Rather
19 than telling defense counsel hey, I told you all
20 this but I hope you took good notes, we put it on
21 the hard drive for them to be able to access.

22 In their papers they say, well it's

1 not really that helpful. We didn't have to
2 provide anything.

3 There is in fact not in the history of
4 this office and there are longer lenses than
5 mine, in the history of our office no prosecutor
6 has brought in defense counsel to essentially
7 walk you through this case.

8 This is not a whodunit, Judge. She
9 knows what she did. She knows exactly what she
10 did. And she in fact confessed. She confessed
11 to Detective Bamford.

12 Everybody knows that. However, this
13 is a how done it. This is a complicated case.
14 And what the Commonwealth chose to do was walk
15 defense counsel through it.

16 That's never been done in our office
17 before. Yet somehow that is viewed through the
18 lens of being vindictive.

19 Counsel also says that the
20 Commonwealth needs to stand indifferent to the
21 cause, absolutely not. We need to stand in
22 righteous belief of our cause.

1 We need to believe in our case. We
2 need to believe that it is the appropriate case
3 to bring before either a judge or members of this
4 community and that an individual has committed a
5 crime beyond a reasonable doubt.

6 That is our job. We absolutely need
7 to stand in complete and utter faith in that
8 cause and we should believe in it.

9 And in fact in a Second Circuit case
10 it said a prosecutor need not be disinterested in
11 the issue whether a prospective defendant has
12 committed the crime in which he was charged. If
13 honestly convinced of the defendant's guilt the
14 prosecutor is free, indeed obliged, to be deeply
15 interested in urging that view by any fair means.

16 So a claim for vindictive prosecution
17 here must focus on the charging decisions made in
18 April of 2017. The law is abundantly clear that
19 the Commonwealth is free to charge beyond those
20 four initial indictments that were issued by the
21 magistrate.

22 There is no challenge on the probable

1 cause supporting the additional indictments.
2 Only a claim that it's not fair that she's being
3 treated differently than the co-defendant who is
4 completely differently situated.

5 It's in our exhibits that we submitted
6 with our motion. It is in the exhibits, quite
7 frankly, that the defense counsel has submitted
8 with their motion.

9 We have, Ms. Eastman has given the
10 explanation multiple times on multiple ways how
11 they are different. Mr. Donat should be given a
12 benefit.

13 He ought to be given a benefit and
14 their clients have obtained that benefit in other
15 cases for standing differently than Ms. Berhane.
16 It would be grossly unfair if we did not as we
17 say in our moving papers.

18 So any effort to try to bootstrap the
19 Commonwealth's request to have them removed or
20 the removal of the hard drive is of no moment to
21 this.

22 And in thinking about this and in

1 preparing for these motions and we've had to,
2 geared up and pulled back a couple of times, you
3 know, I kept thinking about when it was the last
4 time that we've had to stand here to do a motion
5 based on vindictive prosecution.

6 And it's been a long time. It's been
7 a very long time. And there's a reason why, that
8 it's been a very long time, because that is not
9 who Ms. Eastman is, that is not who this office
10 is.

11 That is not the Office of the
12 Commonwealth Attorney that has vindictive
13 prosecutions. That's not who we are and that's
14 not what we do.

15 So the fact is that we are standing
16 here and there is a picture that is trying to be
17 painted of this office stands in stark contrast
18 to the way the good men and women of the Office
19 of the Commonwealth Attorney conduct their
20 business every single day in this courthouse.

21 We too are zealous advocates and the
22 court knows this. And I ask the court to deny

1 the due process argument because the law is clear
2 that the Commonwealth is free to charge as it
3 did.

4 It is an extension of the personal
5 attack on Ms. Eastman. It is also another
6 example to show how overall the system is not
7 working in the fashion that counsel would like it
8 to and he's trying to put in that argument.

9 He's trying to shoehorn that argument
10 into these two particular under these two
11 particular lines of thinking, the Sixth Amendment
12 and the due process. It's not right, Judge.

13 It's not right on the law. It's not
14 right on the facts and the court needs to deny
15 them.

16 MR. HAYWOOD: Response?

17 THE COURT: Briefly.

18 MR. HAYWOOD: Your Honor, trying to
19 remain just as dispassionate as possible on this
20 issue as we have from the beginning, as we
21 reiterated today we wanted to do. I have no
22 interest in making this personal.

1 The only way that this is personal is
2 in the way that a vindictive prosecution is
3 intrinsically personal which is that we are
4 alleging that someone actually made it personal.
5 So the allegation isn't that we dislike Ms.
6 Eastman or dislike Ms. Tingle.

7 It's that something happened in the
8 case that took this out of the realm of justice,
9 out of considerations just based on fairness, on
10 the equities of a case and the facts of a case
11 and the law of a case.

12 We've raised that and that's it, okay.
13 And we also, the only thing that proceeded any of
14 this was us asking for the ability to prepare for
15 trial.

16 This, what happened in this case
17 doesn't happen anywhere else. We've heard that
18 from the multiple defense attorneys that came and
19 testified today.

20 You could hear it from a whole lot of
21 the other ones if we had had the time to bring
22 even more people in here. The Commonwealth rises

1 to the defense of court appointed bar.

2 But the court appointed bar was here
3 testifying for us, okay. And the Commonwealth
4 has, beyond that has made it unable for us to
5 independently verify the allegations that it has
6 raised against us.

7 The only thing I talked about today,
8 and I don't mean to cast aspersions on anyone,
9 but the only thing I raised today was that we
10 have now evidence from multiple defense attorneys
11 of the maximum amount of time they spent
12 obtaining discovery in a case.

13 That was the entire basis with the
14 Commonwealth's motion is that we had spent
15 insufficient time and for some reason 42 hours or
16 even 85 hours or today as we stand here well into
17 the hundred, over a 100 hours that we've spent
18 obtaining discovery in this case according to Ms.
19 Tingle she thinks that means we're asleep at the
20 switch.

21 So if that's this state of affairs
22 that's never going to change and we will be

1 asleep at the switch in every single case. The
2 Commonwealth has complete ability to remedy this
3 issue.

4 And the way they remedy this issue is
5 by allowing us to get prepared for trial, doing
6 what their colleagues do in virtually every other
7 jurisdiction in a case of this nature and giving
8 us access to discovery and by also allowing us to
9 litigate vigorously.

10 We have a duty to do that. We have a
11 duty to be zealous. We have a duty to really
12 protect our client's rights hard. And I don't
13 think that it's in the Commonwealth's job
14 description to take offense to that.

15 It's sometimes something they have to
16 weather. And unfortunately, you know, it came up
17 in this case. But we believe in it. We believe
18 in it to this moment.

19 One last thing that I just want to
20 mention because the Commonwealth brought it up
21 again about ineffective assistance.

22 Well I'll tell you what, and I'll say

1 this today without the ability to access
2 discovery in a case like this defense counsel,
3 whoever it is whether it's me or whether it's any
4 other attorney, whether it's probably a team of
5 20 attorneys unless, if you can only access
6 discovery during the business hours of eight to
7 five when you've got other cases, when you've
8 got, you know, if you're a private attorney like
9 Ms. Tuomey who actually had to stop taking other
10 cases in order to, if you've got to make a living
11 you cannot, the discovery will never be done.

12 And whoever sets foot in that
13 courtroom will not be prepared and they will not
14 have done adequate discovery based on what was
15 obtained through the investigation in the case.
16 And the fact of the matter is admitting that
17 doesn't mean that I'm admitting that I'm the
18 wrong person for this job.

19 It simply means that the state of
20 affairs that was established by the Commonwealth
21 makes it impossible for an attorney to be
22 effective. That situation arises a lot in case

1 law.

2 It most often arises in the case of
3 where you have a continuance requested because of
4 maybe late disclosure of Brady or late disclosure
5 of discovery.

6 If the Commonwealth gives someone
7 Brady information that is critical, they haven't
8 had time to review it, they haven't had time to
9 subpoena witnesses as a result the trial is the
10 following week and they can't make use of it,
11 they would have to come to the court and they
12 would have to say because of this is we go to
13 trial on Monday or whatever it would be we are
14 going to be ineffective.

15 It doesn't mean that warrants the
16 Commonwealth then making a motion to have them
17 removed as counsel. The remedy for certain risks
18 of ineffective assistance of counsel is for
19 remedies, court orders to be imposed.

20 Those are talked about in depth in the
21 discovery motion and I'm sort of wandering into
22 this territory anyway. But that's what the court

1 has authority to do.

2 It has authority in a lot of cases to
3 order continuances. It has a lot more authority
4 than that. It has a supervisory role in making
5 sure that this discovery process is reasonable
6 and the parties are equally situated in terms of
7 their access to evidence.

8 So, Your Honor, I regret that this has
9 come to seem like it's personal. I have nothing
10 personal against Ms. Tingle or Ms. Eastman. My
11 duty is to my client and that's why we're here
12 today.

13 And we respectfully ask the court to
14 grant our motions.

15 THE COURT: Well certainly the court
16 has actually lived with this matter since its
17 inception and has heard some of these arguments
18 before, certainly listened carefully today, read
19 the briefs and everything that were involved in
20 the prosecution of this motion or these motions.

21 Let me just say that certainly I, as
22 someone who has been on this bench for more than

1 20 years and who practiced law in the same
2 jurisdictions that counsel, defense counsel
3 primarily or especially earlier in my practice
4 primarily doing criminal practice and certainly I
5 might concede that sometimes things are more
6 difficult in this jurisdiction.

7 But that does not mean that they are
8 not, they can't do it the way they do it. And
9 you just understand that and know it when you
10 come and you practice here.

11 I've read and listened to the
12 arguments and testimony. And I'm going to have
13 to deny the due process argument and the Sixth
14 Amendment argument because I don't believe it's a
15 violation.

16 I'm not saying that there aren't
17 problems. But it does not rise to the legal
18 standard that the court would have to assign to
19 it in order to grant your motions and accordingly
20 they are denied.

21 MR. HAYWOOD: I've kind of been
22 talking about the discovery motion. So I can

1 wrap that up pretty quickly if the court wants
2 to.

3 I think the court understands
4 completely our position on that which is that --

5 THE COURT: How much time do you need
6 because I tell you I have a 1 o'clock meeting? I
7 can come back after my meeting. But this is
8 somebody here from out of town to meet with me.

9 MR. HAYWOOD: I trust that the court
10 --

11 THE COURT: I'm going to be just
12 upstairs in chambers and I can come right back
13 down because they're coming upstairs.

14 MR. HAYWOOD: It won't be long. But
15 it sounds like we shouldn't delay your meeting.

16 THE COURT: Okay. I'll see you, I'll
17 come back at around 2 o'clock, okay.

18 (Whereupon, the above-entitled matter
19 went off the record at 1:02 p.m. and resumed at
20 2:10 p.m.)

21 THE COURT: Yes, sir.

22 MR. HAYWOOD: Your Honor, just as a

1 procedural matter just wanted to make sure that
2 the evidence that was taken this morning is
3 incorporated for the purposes of this hearing as
4 well. I don't believe the Commonwealth has any
5 objection.

6 MS. EASTMAN: No objection.

7 THE COURT: Yes, indeed.

8 MR. HAYWOOD: Your Honor, the court
9 has heard most of what I have to say. Really
10 what the summary or what it boils down to is
11 this, well a few things.

12 But the principle of this and why we,
13 one of the main reasons we filed this motion to
14 begin with was in order to provide something you
15 have to make it possible to actually obtain it.
16 So you can't say you've provided discovery if the
17 conditions you've imposed on discovery make it
18 actually impossible to obtain discovery.

19 So that's really the bottom line here
20 is that the conditions that have been imposed on
21 discovery make it impossible for us to get it.
22 And furthermore, beyond that just making it

1 impossible to get it also making it impossible
2 for us to use it in a way that makes, we can
3 meaningfully review it in preparation for trial.

4 As far as what are the legal
5 components or how this gets turned into a legal
6 issue is, like I said initially or as the court
7 knows this is mainly a due process issue which is
8 that even in areas where state action is
9 completely discretionary, and let's back up here
10 because this is a policy.

11 This is a policy. Essentially it's
12 just like a rule or, you know, a law in effect.
13 It's something that regulates or governs an
14 important process for trial preparation.

15 And it replaces a Supreme Court rule.
16 So analytically we have to approach it in the
17 same manner. And when courts review
18 discretionary action this would be a
19 discretionary action, I grant to the Commonwealth
20 that it is.

21 They're under no, well except for
22 constitutionally as we're discussing, but

1 according to the rule itself there's no
2 obligation to provide open file discovery.

3 I do think just to clarify my position
4 for the record as stated in the pleadings there
5 actually are constitutional requirements for them
6 to provide discovery which include a lot of
7 things that are necessary for us to prepare for
8 trial and obviously Brady information as well.

9 But that, setting all of that aside in
10 Virginia it's true there is no expressed
11 requirement that they provide open file
12 discovery.

13 However, just as with other areas
14 where state action in criminal proceeding,
15 including in criminal procedure is entirely
16 discretionary and I cited in the pleadings, I
17 cited appeals and I cited parole, there is
18 actually no constitutional requirement that a
19 defendant be permitted an opportunity to appeal
20 as a matter of right to a court of appeals.

21 But the case law is clear,
22 constitutional case law is clear that if a state

1 does decide to implement a process for appeals
2 that those, all the procedures that they
3 implement have to make sense. So they have to
4 comport with due process requirements.

5 At the very minimum regardless of what
6 interest is at stake they have to be non-
7 arbitrary. So they have to be reasonable. They
8 have to be rational.

9 But generally speaking when you're
10 dealing with issues like this when you're dealing
11 with liberty interests, dealing with the right to
12 a fair trial, you have to be ready for trial
13 prepared for trial actually the justification for
14 any procedure that is implemented has to be
15 considerably more weighted and that has to
16 satisfy a higher, a more stringent threshold.

17 In addition, I mention in the
18 pleadings parole. Parole is another example.
19 There is no requirement and Virginia no longer
20 has parole, a lot of states do.

21 And there's no requirement that any
22 state have parole. But when in that parole any

1 decisions that are made about a parolee, about
2 his parole status and any laws or rules that
3 govern how to deal with people who are parole and
4 how they get violated or how they don't have to
5 make sense.

6 Again, they have to promote the, they
7 not only have to safeguard the person's liberty
8 interests. But they also, or respect the
9 person's liberty interests, but they also have to
10 promote the stated goals of whatever that parole
11 system is.

12 So, you know, you can't just make
13 parole decisions willy-nilly about whether to
14 revoke someone's parole based on a conduct out in
15 the community. So those are a couple of
16 examples.

17 And this is where we get to discovery.
18 And I think it's well settled here also that just
19 as although the Commonwealth maybe is not
20 required to provide open file in all cases it
21 can't then just set any conditions it wants on
22 how you get discovery.

1 And I cited some more absurd examples.
2 But I really don't think they're that far from
3 the situation we have here.

4 If the court, Commonwealth were to say
5 that in order to get discovery you have to run
6 five miles first there's no way that could
7 possibly be constitutional. Just because they
8 don't have to provide discovery doesn't mean they
9 can put any condition on obtaining it that they
10 want.

11 They couldn't say, for example, that,
12 yes, you have to hand write it but you can only
13 use a number two pencil. You can't use a, you
14 know, ball point pen.

15 That's completely arbitrary. There's
16 no reason for that condition. So the
17 Commonwealth can't just do anything it wants when
18 it comes to discovery.

19 And not only can it not do anything it
20 wants. But again, we're dealing with an issue
21 here that is pretty critical in terms of
22 preparation for trial.

1 When courts talk about discovery being
2 discretionary in the same, virtually the same
3 breath they talk about how important it is in
4 terms of ensuring that a trial is fair and that a
5 person has access to all of the information he or
6 she might need to defend him or herself.

7 So that is an important thing to keep
8 in mind when we're talking about are these
9 conditions arbitrary.

10 But moreover, you know, you have to
11 look at what are the purposes behind what the
12 Commonwealth is saying are the conditions that
13 they placed on discovery or sorry, what are the
14 purposes for, you know, open file and what are
15 the, do the limitations advance those purposes?

16 They talk about in the letter they
17 provided to the court that they are providing
18 discovery in order to make the discovery process
19 less time consuming. They also talk about how
20 it's in order to promote the prompt resolution of
21 cases.

22 And ostensibly although this isn't

1 stated in the letter that was provided as an
2 exhibit with the Commonwealth's response to this
3 pleading they ostensibly also, it's to allow a
4 defendant to be more prepared for trial.

5 The question for the court or for the
6 Commonwealth in this case is this process really,
7 the way it's being implemented in this case is
8 that really advancing those goals in any way
9 whatsoever? We have a discovery process that has
10 been far, far more time consuming.

11 In fact, it's so time consuming as to
12 make it impossible for us to ever get the
13 discovery. Secondly, is it promoting a prompt
14 resolution of this case?

15 Obviously not. This has been the main
16 hurdle for us in terms of getting prepared. And
17 that brings us to the third. You know, are we
18 going to be more prepared, no way.

19 And there's one way to resolve all of
20 this obviously and that is to deal with this in a
21 way that I think the Constitution actually does
22 require. What is the end result?

1 Say we do get an army of contract
2 attorneys to work on this discovery project with
3 us. Say they all can come here, they can put in
4 their 12,000 hours, 11,500 hours I think we
5 estimated.

6 At the end of the day we are going to
7 have exactly the same documents if we do it right
8 because we're allowed to do that. We're going to
9 have exactly the same documents that we would
10 have if we just put all those documents in a
11 photocopier or if we had just plugged in a hard
12 drive and copied it to another hard drive.

13 We would have the exact same stuff.
14 The only thing this restriction that the
15 Commonwealth is placing on discovery is doing is
16 just making that process more time consuming.
17 Not just making it more time consuming but like
18 actually given those number of hours practically
19 speaking impossible.

20 So they are imposing a condition here
21 which is manual copying that just serves no
22 purpose at all. Even if they talk about the

1 witness safety, first of all the cases, you know,
2 there's no evidence of this but it's something
3 that the court can research if it wants.

4 I know the Commonwealth can bring it
5 up if they want. But cases where witness
6 intimidation is actually an issue are typically
7 gang cases, drug conspiracies, things of that
8 nature.

9 Exceedingly rare that any witness is
10 ever threatened in a case involving a financial
11 crime like the one we have here. So what's the
12 point?

13 You know, what's the point of
14 protecting this in this way? Not that, that
15 protection, this protection even would do
16 anything in that regard, like I said, because at
17 the end of the day we're going to have the same
18 stuff if we have enough time.

19 But what's the point of this? And
20 again, when you start looking for what's the
21 point, what's the reason these policies or these
22 rules are in place it just seems to me, it seems

1 to me that if it's rigidly applied and maybe
2 there are certain instances when I can understand
3 they want to make sure a file is still in the
4 office or a specific police report doesn't go
5 anywhere.

6 Most of those things though can be
7 addressed with a protective order and not with
8 this rigid condition. But, you know, except in
9 limited cases what is the point of having these
10 rules or conditions?

11 And it really just seems to make it,
12 seems to be or at least from our perspective, not
13 imputing motive to the Commonwealth, but it seems
14 to be just to make it more difficult for us to
15 get it.

16 And if that's really the point of this
17 that can't be acceptable. You know, that's why I
18 think that it's almost identical to a case where
19 it's truly just, it's obvious that it's just
20 some, you know, endurance test.

21 Like I said, if you've got to run a
22 race to get discovery that's just making it more

1 difficult to access. And there's got to be
2 something here that ties this policy, these
3 policies pretty closely together with the purpose
4 for them.

5 So based on all that, Your Honor, and
6 like I said, you know, we're talking about
7 ineffective assistance. But it's, this is, we
8 are never going to get all of this stuff.

9 Unless some accommodation is made to
10 us we are simply never going to get it. And
11 we're going to go to trial having not seen a lot
12 of exhibits and seen a lot of stuff that's going
13 to be presented at trial.

14 We just don't have the ability to look
15 through all that stuff without having these
16 procedures modified. So that's all that, the
17 purpose of these arguments. Thank you.

18 MS. TINGLE: That's alarming to say
19 the least for where we are. I mean what's
20 happening here is that counsel is saying that if
21 you don't grant the specific relief that they're
22 asking for which is turn everything over, that if

1 you don't do that then they're not going to be
2 ready.

3 That's what he just said, that we're
4 never going to have it. We're not going to look
5 at everything. And that's just, I mean someone
6 can start typing up the habeas decision now if
7 that's what was just said.

8 That should be alarming to the court.
9 It's certainly alarming to the Commonwealth
10 because what's happening in this motion is that
11 the Defendant is essentially trying to hold the
12 court hostage saying that if you don't give me
13 what I demand, I mean this is said in pleadings
14 and it was just said, you know, 30 seconds ago,
15 if you don't give me discovery in the form that
16 we are asking for, if it's not provided depending
17 on the relief granted they may continue to be
18 ineffective in the future.

19 So this is a massive moving of the
20 goal post here. So it's about being an agent for
21 institutional change that we're trying to bring
22 to Arlington County, that's what this is about.

1 Irrespective of the laws or the rules
2 of the Commonwealth that the purpose for this
3 motion, it's not just about this case though the
4 motion says that it's just about this case. This
5 is about all of our cases, Judge.

6 This is about how we practice in the
7 Seventeenth Circuit. That is what this is. It
8 will be a seed change in discovery if the court
9 abides by this.

10 This type of expanded discovery to say
11 that it's only going to be in this type of white
12 collar case in the cases that the Commonwealth
13 cites in his brief applies to all kinds of cases
14 across the board where they were asking for more
15 than what 3A:11 required.

16 Those were murder cases, rape, sodomy,
17 abduction with intent to defile, all types of
18 cases very serious charges where the courts have
19 refused to go beyond 3A:11 and order the
20 Commonwealth to do more.

21 And all of that is cited in the
22 Commonwealth's brief. And to say that in this

1 particular case that it's only going to apply
2 here that's wrong.

3 This is an attempt for the Office of
4 the Public Defender to try to change the way we
5 do discovery here. It's the way that he's trying
6 to move forward their version of justice forward.

7 They want to move justice forward here
8 in Virginia. That's what they're trying to do.
9 And I urge the court not to follow that
10 directive.

11 One of the central propositions of the
12 argument is that discovery in Arlington is
13 essentially lose-lose, that it's essentially
14 lose-lose, that either you only use 3A:11 and
15 then you run the risk of not getting, not being
16 able to see everything or you do open file and
17 then somehow you're doing open file and you're
18 not prepared.

19 Right, that's what the parade of the
20 defense attorneys that we had here is that
21 they're not going to be prepared. But no one
22 would concede that they were actually unprepared.

1 That they would have liked to be
2 better prepared but they weren't actually
3 unprepared. But that's what the proposition is
4 in the motion and that we are in fact ensuring
5 that counsel is not going to have enough time to
6 collect discovery.

7 And to say that this is not imputing
8 some sort of motive on the Commonwealth of course
9 it is, of course it is. This is, the argument is
10 that the Commonwealth is doing this with a
11 purpose to try to deprive her of her rights.

12 That is what this argument is about
13 and it couldn't be farther from the truth. In
14 fact, the idea that we are giving too much to
15 attorneys to actually handle, I mean it turns
16 everything on its head.

17 In this particular case the nature of
18 these discovery materials is problematic. We're
19 talking about a fraud case.

20 We're talking about the fact that
21 we've got thousands and thousands of victim
22 information, thousands of people, victim's

1 information that are throughout all of this
2 discovery.

3 And we're also talking about,
4 specifically counsel is referring to the hard
5 drive in his papers. And there's an implication
6 that the hard drive is sort of a deliberate mess,
7 that it's just this hard drive of, you know,
8 chaotic material.

9 MR. HAYWOOD: You Honor, I never said
10 that and I don't believe that. The hard drive is
11 easy to get through. It's just an immense
12 quantity of information, that's it.

13 I mean we can make sense of it if we
14 get it. I never said that.

15 THE COURT: I understand, Counsel.
16 It's just argument.

17 MS. TINGLE: Actually, Judge, I have
18 no doubt that the court has read the motion and
19 the court knows exactly what it was that counsel
20 said because in fact the implication is that were
21 we in the federal system, and trust me in this
22 very moment don't I wish that we were because

1 none of us would be here right now, that if we
2 were in the federal system that this would be
3 cataloged differently, there would be a much, you
4 know, a more sophisticated array of digital tools
5 that would be available.

6 You know, the skies would open and we
7 would have all sorts of things. Well we're here.
8 Our hard drive is the exact same as theirs,
9 exactly the same.

10 There was no difference. There was no
11 attempt to gain a home field advantage like we'll
12 just chuck a bunch of stuff on this hard drive
13 and let them try to figure it out, ours is going
14 to be this perfect, it's exactly the same.

15 We in fact are the ones who suggested
16 they would get their own hard drive to try to
17 make discovery easier so that they wouldn't have
18 to share the same one with Ms. Eastman when she
19 was working on it, if she was in court, not
20 available.

21 So it was the suggestion let's make
22 this work. So we were trying to make open file

1 work to the best that we can.

2 We all have an interest in ensuring
3 that these rules are followed and the
4 Commonwealth fulfils its obligations and we do so
5 every single day across the board in every court.
6 We have done more than fulfil our obligations as
7 the court knows.

8 We do more than satisfy 3A:11. We
9 provide more than what's required. The court is
10 well aware of this and as the court knows, every
11 single case in discovery in Virginia starts off
12 the very first paragraph is there is no
13 constitutional right to discovery, every single
14 one.

15 But even though, so there's no
16 surprise that they have to move past Virginia law
17 to try to apply the law of other jurisdictions to
18 what happens here. The majority of those cases
19 are actually more federal cases, you know, from
20 other jurisdictions.

21 So when we're talking about Virginia
22 law though we are talking about Virginia law and

1 what the rules require. And as the court, I know
2 the court is aware but we touched on it with Mr.
3 Ellis but I know the court is aware of the task
4 force that was working on 3A:11 and what those
5 recommendations were and what the Supreme Court
6 was going to do.

7 So the unanimous recommendation of
8 people including their boss, including David
9 Johnson, including the capital defendant --

10 MR. HAYWOOD: Your Honor, this is,
11 nothing is in evidence. It's not even on any
12 record anywhere.

13 THE COURT: This is argument, counsel.

14 MR. HAYWOOD: But when you're talking
15 about what my boss says about things. Like I can
16 tell you what my boss says because I have
17 conversations with him about this and that's not
18 accurate. So if that's something, we can --

19 THE COURT: She didn't say what he
20 said. She said he was a part of the panel, the
21 group.

22 MR. HAYWOOD: I just want to be clear

1 --

2 THE COURT: I'm listening.

3 MR. HAYWOOD: Thanks.

4 MS. TINGLE: Correct, that he is part
5 of a task force equal defendants, equal
6 prosecutors, judges and a law professor. And
7 they all made that recommendation that copies of
8 police reports are not, they are not required to
9 get turned over.

10 The fact that the Supreme Court did
11 not, that they were going to implement it and
12 then they didn't is of no moment. What I'm
13 talking is the recommendation that was made.

14 And so that is what the Supreme Court,
15 they adopted it. They said that sounds good.
16 Thank you very much for your hard work. That's
17 what we are going to do.

18 So to say beyond that, that now this
19 court is going to say that was awfully nice,
20 Supreme Court of Virginia, I see that you were
21 going to, we're going to do more here. That is
22 more of an ask than I think is appropriate to do

1 here.

2 Even if those rules, as I said, even
3 those rules had been put into place as they were
4 supposed to be they still wouldn't get Detective
5 Bamford's report. They still wouldn't get that
6 copy under the rules had they been adopted.

7 That's still not accessible to them.
8 What completely gets lost in any of this is the
9 fact our, we have an obligation to the victims of
10 crime. We have an obligation under the Virginia
11 Constitution and we have an obligation under the
12 code.

13 And this particular case is a case
14 about greed. It is a case about taking the
15 identifying information of thousands of
16 unsuspecting individuals and converting it to her
17 own gain.

18 So the nature of the discovery in this
19 particular case is of grave concern to the
20 Commonwealth. And, you know, to say that only
21 maybe witness intimidation happens in gang cases
22 and cases like that, we don't make a

1 determination about which witnesses and which
2 victims are worthy of any more protections.

3 They all are regardless of the kind of
4 case. So to say, what is also alarming is that
5 when they say that if they're going to have their
6 army of attorneys come in, of contract attorneys
7 to come in they would get the same exact stuff,
8 right that was the quote they get the same exact
9 stuff that's in there I should hope not because
10 the protective order says that they're not
11 supposed to write down identifying information
12 because we need to hold that dear.

13 We are tasked with holding that dear.
14 And it's a very different thing really, Judge,
15 when you think about it when you, if we're going
16 to turn something like this over it's a very
17 different thing to have all of this information
18 and have it reviewed in our office.

19 Once it walks out the door we lose
20 some level of ability to be able to maintain the
21 integrity of that information, right. We lose
22 that.

1 It just is the case. It's in
2 somebody's office. Somebody else has it.
3 Someone else is taking a look at it. We lose
4 that ability.

5 And in a case like this, identity
6 fraud all over the place this particular case as
7 well as all the other cases we need to make that
8 of paramount concern. That cannot be discounted.

9 When we're talking about what our
10 obligations are in terms of open file a good
11 chunk of what is on that hard drive also includes
12 financial records. And the court heard about
13 Detective Bamford and how he subpoenaed, you
14 know, a multitude of financial records.

15 Many of those were the Defendant's own
16 records. And as I've mentioned in the previous
17 arguments that not a single subpoena duces tecum,
18 excuse me, had been issued for her own financial
19 records which they are entitled, they could get
20 on their own are on the hard drive.

21 Had they wanted to simply focus their
22 attention on just the materials they do not have

1 the right to, which specifically state Detective
2 Bamford's police report they certainly have the
3 ability, they have the tools to be able to get
4 that information.

5 We in fact then after we were here in,
6 one of the hearings that we had, I can't remember
7 sometime in the fall, when we were here in the
8 fall we in fact then later on reached out to
9 defense counsel to try to say, listen, what can
10 we do.

11 Let's talk about what it is that we
12 can provide to you, right. Let's find some sort
13 of middle ground. We'll provide to you her
14 financial records.

15 We'll provide a multitude of other
16 things. But we want a stipulation in terms of
17 chain of custody, custodian of records, excuse
18 me.

19 And that was rejected. So we tried
20 and that was rejected.

21 MR. HAYWOOD: Your Honor, this is
22 something that I think evidence would need to

1 have been taken on this.

2 MS. TINGLE: I'm an officer of the
3 court.

4 MR. HAYWOOD: The Commonwealth didn't
5 produce any evidence. That's something that we
6 could certainly produce more evidence on because
7 I disagree with her characterization.

8 MS. EASTMAN: Well there are emails to
9 that, Judge, if we need to.

10 MR. HAYWOOD: Yes, and there are also
11 in person conversations.

12 THE COURT: Well at this point let's
13 see if we can finish this, conclude this
14 argument.

15 MS. TINGLE: The fact remains, Judge,
16 that had they chosen to get that information they
17 could have focused on the other information that
18 was on that hard drive.

19 And as the court can see from the
20 affidavit that was provided today from Joe King
21 in the Black case in fact one of the reasons why
22 that discovery was provided in that fashion and

1 it says so in the affidavit was in exchange for
2 stipulations.

3 What we have here is a demand for all
4 or nothing, that we want everything. We don't
5 want to have to make any concessions. We don't
6 want to have to make any stipulations.

7 We don't want to have to do anything.
8 We don't want to have to do anything of that
9 sort. The rules however, provide the discovery
10 lane.

11 They give us our parameters. They
12 give, they define it. And the court's ability to
13 step in is governed under 19.2-265.4 that talks
14 about what it is that the court can do when
15 there's been a violation of Rule 3A:11.

16 That is where the court, that is
17 expressly where the court is allowed to step in.
18 And then the court may fashion a remedy. There
19 has been no violation of 3A:11.

20 We go beyond 3A:11. There has been no
21 violation for the court to fashion a remedy for.
22 The motion is asking the court to redefine what

1 materials in Virginia law must be produced in
2 discovery.

3 That's far beyond what is appropriate.
4 When we're talking about the fact that we are
5 refusing to provide their own set of discovery,
6 that it's arbitrary and that it is unreasonable.

7 And it's not just in this case. As
8 the court heard it's in all cases. We've got
9 pictures of, you know, our discovery rooms.

10 We've got pictures of where lawyers
11 have to sit, that they have to sit in an office
12 with air conditioning, that they have to sit at
13 desks with, you know, tables and chairs. That,
14 we've got this, you know, as if we are putting
15 some sort of onerous responsibility on them to
16 come here and look at this information.

17 That we want licensed attorneys to be
18 with their army of interns. It would be nice to
19 have an army of interns. If they have any to
20 spare the Commonwealth's Attorney's Office would
21 take some.

22 The fact that we ask licensed

1 attorneys to sit when we do discovery is because
2 licensed attorneys are the only ones who can be
3 held accountable if they violate the terms of the
4 protective order.

5 Some intern can't be held responsible.
6 They haven't sworn, they haven't taken an oath as
7 we all did. That is not arbitrary.

8 Asking them to do so during business
9 hours is not arbitrary. These are not things
10 that are done just, you know, willy-nilly to use
11 counsel's, you know, use counsel's expression.

12 They might think it's unreasonable,
13 which we don't agree with. There is no evidence
14 that this decision is an arbitrary one, none
15 whatsoever.

16 The definition of arbitrary is
17 obviously based on a random choice or a personal
18 whim rather than any reason or system. And to
19 say that we conduct discovery in the Office for
20 Arlington County and the City of Falls Church is
21 not arbitrary.

22 You heard all the defense attorneys.

1 This is the case in all of our cases. This is
2 how we conduct our business all the time.

3 So it's not that we are singling out
4 Ms. Berhane in terms of her treatment and that we
5 are going to treat her differently because of the
6 motions that she's filed or anything along those
7 lines.

8 She is treated the exact same way.
9 And just so the court is also aware that on March
10 5th counsel reached out to, defense counsel
11 reached out to the Commonwealth about getting
12 copies of the digital images of Ms. Berhane's
13 devices, whether or not they could get those
14 copies of those images to be able to provide to
15 their experts to be able to do their work.

16 Same day, yes, you can. We'll work on
17 a protective order, yes. You can have that. So
18 when it's appropriate we do give that
19 information. And when we can have those
20 protections we do give that information.

21 So I urge the court that the
22 Commonwealth's practice of providing open file,

1 our entire case we hold nothing back. We do that
2 because we're in the business of doing justice,
3 that's why.

4 Doing justice requires a balancing act
5 the likes of which that they cannot possibly
6 understand because we have to balance defendant's
7 rights, victim's rights, citizen's rights, the
8 multiple agencies that we deal with.

9 We have a host of issues that we need
10 to consider when we are figuring out how it is
11 that we are going to provide information in all
12 of our cases. We do so in a matter that is done
13 consistently.

14 We do so in a matter that is done with
15 integrity. And to say otherwise flies in the
16 face of the way that we've operated for these
17 many years.

18 The concern though that I have in this
19 particular case given these statements we are
20 asking the court not to step beyond what the
21 rules allow. But the concern is that counsel has
22 now said that they might not be ready if the

1 court doesn't.

2 And what precedent does that then set
3 going forward. Are we then landing with the tail
4 wagging the dog situation that any time we are
5 here and it's not going to be just on this case,
6 that if the court doesn't grant the specific
7 relief that's required it's going to be well, I
8 guess we can't be ready.

9 I urge the court to be cautious and to
10 be concerned about that statement from counsel.
11 And I ask the court to deny the motion.

12 MR. HAYWOOD: Your Honor, again I'm
13 not going to engage in snark. I want to keep
14 this as dispassionate as possible and as
15 objective as possible.

16 I do think the court should also be
17 concerned about that statement because it's a
18 true statement. And I'm not saying that to play
19 games.

20 I'm saying that because, again, let's
21 talk about this, let's stick to objective facts
22 in this case. First of all, I don't need to tell

1 the Commonwealth our trial strategy and what I
2 think is important in this case.

3 Frankly, I don't think us issuing
4 subpoenas duces tecum benefits our client really
5 almost at all. And I think there are many ways
6 in which and we could argue this for a while, it
7 could actually be detrimental to her defense.

8 Setting that aside though, that's a
9 small fraction of what was the complete amount of
10 information that was provided to us in discovery.
11 As you heard Officer Bamford say exclusive of the
12 subpoenaed documents probably or potentially over
13 a million pages, over a million pages worth.

14 That had, none of those were
15 subpoenaed documents. Those merely are
16 documents, data, emails, text messages, pictures,
17 all that sort of thing that was obtained from
18 electronic devices through executing search
19 warrants, from interviewing witnesses, all those
20 things.

21 That's over a million pages. So to
22 lean on the fact that we haven't issued a

1 subpoena duces tecum to get this stuff does not
2 matter.

3 We could spend another full, my
4 estimate of 11,000 hours, 500 hours was based on
5 actually a pretty conservative estimate of
6 200,000 pages going at about seven to ten pages
7 per minute.

8 If we're talking about a million pages
9 let's, we're getting more into the neighborhood
10 of having a big law firm working on this for
11 several years before we would be able to go trial
12 if we've got to have those people obtain all this
13 information manually.

14 I want to remind the court and remind
15 the Commonwealth that this is the only place
16 where this happens. So the court can be
17 concerned about the statement that I made.

18 But we're not, we simply cannot obtain
19 the information we are required by law to obtain
20 and review unless there's an accommodation made.
21 There are accommodations made in every other
22 jurisdiction.

1 You heard testimony about that today.
2 I can proffer that to you. I've handled lots of
3 big cases in other places.

4 When we have a situation like this in
5 instances where there's a much greater threat,
6 potential threat to witness safety those
7 materials are simply given to us.

8 Capital murder cases they are given to
9 us. Even in this jurisdiction capital murder for
10 hire given to us. All that was required was a
11 protective order.

12 And frankly that, you know, this
13 wasn't completely argued in the motions. But
14 there is an equal protection argument here just
15 as well as there is anything else.

16 You know, the Commonwealth's attorney
17 now claims even though it's not really told the
18 defense counsel and I don't think it's written
19 down anywhere, Commonwealth's attorney now claims
20 to have policy where defense counsel get their
21 own copies of discovery materials in murder
22 cases.

1 Well if we're talking about witness
2 safety here, yes, we can make a distinction.
3 When is witness safety more critical when
4 somebody has stolen somebody, allegedly stolen
5 somebody's credit card information or when
6 they've killed somebody else or when they've
7 hired someone to kill someone else?

8 And by the way, I know Ms. Tingle
9 would like you to believe that it's impossible
10 for the court to make this distinction. Well Ms.
11 Tingle relied a lot on this proposed discovery
12 rule.

13 First of all, the proposed discovery
14 rule itself makes that distinction. It talks
15 about restricted dissemination of materials.

16 It talks about cases where the defense
17 counsel believes that certain materials are
18 especially important to have in their possession
19 and you can make a petition for those materials
20 and then there's a process by which the court can
21 adjudicate whether they can have those materials
22 and whether a protective order would be in place

1 because of that.

2 And the factors that are considered
3 are identical to the factors considered in a very
4 similar rule in Federal Court. In Federal Court
5 if there's a concern by the federal prosecutors
6 that those materials will lead to a threat to
7 witness safety then what do they do, they do
8 exactly the same thing.

9 They have a process by which they can
10 get a protective order that binds the attorneys
11 and not just the attorneys, yes, actually people
12 who work for us can be bound by those same
13 things.

14 So if somebody on our watch commits a
15 discovery violation it's attributable in many
16 ways to us. So that is not, I don't know where
17 the Commonwealth is getting that, that we can't
18 be, our office can't be accused of a discovery
19 violation because it was done by a paralegal and
20 not by us.

21 We're responsible for that work. And
22 by the way, we're happy to sign any kind of, I

1 would sign any, almost any protective order the
2 Commonwealth wants in this case.

3 I mean just to be allowed to have a
4 drive. And again, they talk about we have the
5 same hard drive that they do. No, we don't.

6 We have a hard drive that is tethered
7 to their office between the hours of 8:30 and
8 5:00 p.m. We can't look at it any other time.

9 We have cases every single day in this
10 courthouse. The time that we do discovery, the
11 time that I do discovery is nights and weekends.
12 Same thing for my colleagues, same thing, Mr.
13 Adams indicated the same thing when he testified.

14 We cannot do that. We cannot obtain
15 a million pages or a million documents just by
16 sitting in the office from the hours of 8:30 to
17 5:00. It probably doesn't matter how much time
18 we get.

19 It's just not going to happen. The
20 Commonwealth also brought up the matter of
21 stipulations. It's asking for us now that we
22 have litigation, for us to continue to stipulate

1 to the things that are their burden of proof.

2 This is their burden of proof to prove
3 that my client, our client is guilty or not
4 guilty and obviously they're trying to prove that
5 she's guilty. But those are, first of all,
6 setting aside a matter of degree.

7 We have made stipulations in this
8 case. And we made them before any of the
9 litigation ever occurred.

10 We stipulated pursuant to, I forget
11 the code section, but Ms. Tingle knows this, Mr.
12 Robinson made those stipulations with respect to,
13 I think it was seven different custodians of
14 records, something like that.

15 But we made stipulations. And, you
16 know, if we were on sort of the footing here
17 where we could trust what's going on, trust the
18 process that's going on that there was a spirit
19 of good faith in this than perhaps there is more
20 that could be done in that regard.

21 But we're not there right now. And
22 besides like how much do we need to give away

1 just to be able to ourselves prepare for trial?
2 Do we need to give away, this is a case that's
3 mostly documents by the way.

4 I mean it's mostly, it's a financial
5 case. So the more you stipulate to documents or
6 things of that nature the more you're just
7 relieving the Commonwealth of their burden of
8 proof.

9 And that's their whole job in this
10 case is to satisfy a burden of proof. So just to
11 give away important elements of proving their
12 case in order to access what are just the basic
13 raw materials in order to be prepared for trial,
14 do not understand why that is in any way deemed
15 to be reasonable.

16 Lastly, well two more things. One is
17 with regard to our interns again, I know that was
18 snark. But I just feel I needed to respond to
19 it. We don't have endless, we just are going
20 through that this summer.

21 We can fit a maximum of 11 or 12
22 interns in our office at any given time. We are

1 literally hiring people during the school year
2 almost without regard for their qualifications
3 because they are warm bodies who can write with
4 their hands or because they can type on a
5 keyboard.

6 We are literally hiring people just
7 for that reason to come over here when we could
8 absolutely if we had the opportunity, if we had
9 more time to work we could put them on actual,
10 meaningful, substantive legal work rather than
11 clerical work.

12 This is such a huge undertaking for
13 our office every day of the week particularly on
14 this case. And I said there were two more points
15 and this is the second of the two points.

16 Ms. Tingle talks about walking out the
17 door with police reports. And I just want to
18 reiterate to the court if this discovery policy
19 operates as it is supposed to then in every case
20 we will, we will in every single case be able to
21 walk out the door with all that information
22 subject to redactions that we're required to

1 make.

2 And we are, regardless of the form of
3 discovery which we receive it we are happy to
4 abide by any policies in that regard in terms of
5 redacting information in terms of protective
6 orders, in terms of protecting it from, you know,
7 witnesses or even our own client in a case.

8 We're happy to do all of that. We
9 just need access to it. But to say that it will
10 walk out the door, well it does walk out the door
11 if we're able to actually obtain it.

12 So that's just only a concern if, the
13 only way it's a concern about it walking out the
14 door is if we're not able to actually obtain it.
15 And that kind of belies what's actually going on
16 here.

17 So, Your Honor, and in conclusion we
18 talk about is this opening the gates to every
19 other case. We were very intentional about how
20 we phrased our motion.

21 And this, the court knows we filed
22 this motion what ten months ago. And it hasn't

1 been filed in another case since then, not in a
2 single case since then.

3 This is the one case that frankly is
4 crippling the defense team and it's crippling the
5 office in terms of the amount of resources and
6 the inability for us to prepare for trial. So we
7 said in the conclusion of the motion and I can
8 read it myself.

9 You know, the Commonwealth's discovery
10 policy barring the defense from obtaining its own
11 copies of discovery materials is arbitrary and
12 unreasonable. This is arguably true of all cases.

13 But that's not what the court needs to
14 decide at this juncture. The court only needs to
15 decide the issue as to Ms. Berhane's case with
16 the overwhelming quantity of information renders
17 the process of obtaining discovery so unwieldy
18 and it would effectively be impossible.

19 Just like they do in Federal Court,
20 just as they do in Alexandria and Fairfax and
21 Prince William and Loudoun County when you have a
22 situation like this and you want defense counsel

1 to be adequately prepared so you don't have to
2 worry about the habeas claim down the line you
3 give them the materials they need to get ready
4 and that's all we're asking for. Thank you.

5 THE COURT: Well again, this is a
6 court of law. I'm not a member of the
7 legislature. I hear what you're saying.

8 But it is what it is. The law is what
9 it is for now. So respectfully the court is
10 going to have to deny your motion.

11 MR. HAYWOOD: Your Honor, I have two
12 other motions asking for about half a million
13 dollars of funding for contract attorneys and for
14 I think \$50,000 for onsite analysis of discovery
15 materials.

16 That's really what we need. I would
17 ask the court to rule on those motions as well.

18 THE COURT: Commonwealth.

19 MS. TINGLE: I suppose I went over the
20 addition or reinsertion of Mr. Robinson into the
21 case makes a difference given that Mr. Robinson
22 was on this case for many, many months

1 beforehand.

2 MR. HAYWOOD: That's the problem Mr.
3 Robinson was still employed at the office. I
4 mean it doesn't alter the calculus.

5 One attorney when we need that many
6 hours just to get this stuff I don't think it
7 makes, it's a drop in the bucket.

8 MS. EASTMAN: Judge, for the court's
9 information he is asking for money for onsite
10 forensic computer analysis.

11 As Ms. Tingle told the court we are in
12 the process right now with the public defender's
13 provided hard drives of taking a lot of the
14 images and the extractions from the various
15 devices and actually copying them onto the hard
16 drive for them.

17 And they can take it with them subject
18 to a protective order. So I don't know why we
19 need \$45,000 for that.

20 And I'll point out to the court as
21 already appointed without objection an expert in
22 forensics for the Public Defender's Office and

1 they have submitted an estimate for the cost for
2 that of the analysis. So I'm not sure why we
3 need another \$45,000 for that.

4 MR. HAYWOOD: Your Honor, this was
5 brought up during Ms. Tingle's argument that we,
6 this request has been on the table for a year and
7 it was only last week I brought it up again just
8 to say I need to make sure because we're going to
9 argue this.

10 You're not even going to give us
11 access to our client's own electronic devices.
12 And there was discussion about okay, fine maybe
13 we will.

14 At that point now a month before trial
15 or less than a month at this point now we're
16 going to get this stuff. And it now seems to me
17 that it's being, you know, it was being demanded
18 of me that I actually make an admission of my
19 client in order for them to be deemed hers.

20 That's an issue here. There are co-
21 defendants. Culpability is an issue. Again,
22 they are also being deemed co-conspirators. So I

1 don't really know why it matters that I say out
2 loud which devices I believe to be my client's or
3 not.

4 Moreover that by the way would take a
5 pretty huge effort in and of itself just for me
6 to go through all of them. I don't know if the
7 Commonwealth is really hanging on that at this
8 point or if it's okay for them to just provide
9 the devices and the images or extractions without
10 us creating evidence against our client.

11 But that is sort of the status quo
12 with that. With respect to independent forensic
13 analysis, you know, part of the issue here is
14 that it is sometimes okay.

15 I think when you having had cases like
16 this if the detective has used a type of
17 extraction software that enables us to make
18 adequate use of what we receive, you know, a lot
19 of them will index files and make it searchable
20 and make it so, you know, you won't be looking at
21 duplicates of things.

22 If it's something like that where it's

1 going to be, you know, in each instance that's
2 going to be sufficient then that's probably, that
3 might be fine. I think then it's really just a
4 matter of sifting through it all.

5 It's sort of like in one of those
6 massive, you know, corporate cases where you've
7 got millions of pages of documents. You really
8 probably just need people to click through is
9 this relevant or not relevant.

10 And then that's what the process
11 becomes for us at that point. You know, I can see
12 more once we get these images of these devices
13 that Ms. Eastman has said she would give us.

14 MS. EASTMAN: I'm sorry, I didn't want
15 to interrupt you. To be clear, I have never
16 demanded the Defendant make any admissions as to
17 what were her devices and were not her devices.
18 I've never demanded that.

19 Secondly, I have never been asked
20 for copies of the extractions and images
21 specifically. As far as the Commonwealth has
22 been concerned in this case it was an all or

1 nothing proposition.

2 You give us the complete hard drive
3 including police reports, victim information,
4 even my PowerPoint presentation or, you know,
5 everything that's on that hard drive that they've
6 been using for discovery was give me a copy of
7 that, all or nothing.

8 However, there have been instances
9 when, for example, Mr. Robinson asked me early on
10 the case, Evie, I need to write down a little bit
11 of personal information so I can distinguish one
12 credit card from the next.

13 He asked me if he could do that. I
14 said sure you can. So when they have asked us,
15 Judge, for specifics we have responded. But it
16 has always been the all or nothing approach to
17 give us everything on the hard drive or nothing.

18 Now when Mr. Haywood asked us on March
19 5th, March 5th, whether or not we would be
20 willing to provide images I probably took him by
21 surprise that I said yes.

22 But I did. And we are now in the

1 process of making that happen. But I would love
2 to see where those specific requests were made
3 before because I don't recall them, Mr. Haywood,
4 I don't.

5 MR. HAYWOOD: I've got them.

6 MS. EASTMAN: Yes, I would. I don't
7 recall him ever asking me if he could make copies
8 of the specific devices and take them out of the
9 office.

10 THE COURT: Well I guess the question
11 is like what, if anything, the court is going to
12 be willing to at this point order in terms of
13 bonds and so forth.

14 And I'm hearing things that would lead
15 me to believe that the figure and number that
16 you're asking for would not necessarily be an
17 accurate figure given the fact that the
18 Commonwealth is obviously at this point willing
19 to, and they have said that they are amenable to
20 giving you a number of things.

21 MR. HAYWOOD: That's good to know
22 because then we could have more people working on

1 it more hours because we could work on it after
2 hours.

3 Just for the court's information this
4 specific request, I mean in my opinion this was
5 pretty clear. I mean we made this request to --

6 THE COURT: Just tell me when. I
7 understand you say you did, when?

8 MR. HAYWOOD: There was another follow
9 up request in December where we were trying to
10 negotiate resolution of this and Ms. Tingle
11 stated that subject to stipulations we would get
12 financial records.

13 Let's see and forensic examination of
14 our client's phones and computers subject to,
15 including bench notes from the examiners. So not
16 the other devices.

17 And then we said that we also would
18 need access to those electronic devices and that
19 we need the police report and the response was
20 that we're focusing only on the items that were
21 listed in that email.

22 So, you know, it's, there have been

1 specific requests. There's always been a quid
2 pro quo that was attached to that. It was never
3 everything.

4 And so, and besides that was, those
5 were negotiations that simply did not go anywhere
6 because again, just for the different equities in
7 terms of the legal issues involved.

8 You know, now we're at a very
9 different position. And this is true. Last week
10 and I frankly appreciate that. So like I wish
11 that it happened before.

12 But now that we're being told we can
13 get all of them and if I am being told that it's
14 not going to require us to stipulate that these
15 devices all belong to our client, that's
16 fantastic and that will help.

17 There's still the matter of going
18 through all of those things which is going to be
19 a pretty massive undertaking in and of itself.
20 That's where the million pages comes from. And
21 so, million documents comes from.

22 THE COURT: You still haven't answered

1 my question here as to whether or not there is
2 some, you said initially there was this figure.
3 Given the fact that they are now, these things
4 are being made available what is the figure, I
5 mean what do you think would be reasonable?

6 MR. HAYWOOD: So, like I said, that's
7 when I was estimating did we need to copy 200,000
8 pages. I haven't done the math on what it's going
9 to take to go through all these devices and
10 anything else they're willing to actually give us
11 and then determine whether they are relevant or
12 not.

13 I imagine it's a heck of a lot. I'm
14 sure it's in the hundreds of hours, you know.
15 Maybe, I really don't know. I would really just
16 be speculating.

17 That was me sitting down doing, I was
18 okay at math in high school but that was really
19 just amateur math. And it was based on what I
20 know to be the speed at which we copy pages and
21 how many pages I thought that were involved.

22 But in terms of how quickly can we get

1 through, how quickly can we review each one of
2 these devices I don't know that. I would just be
3 speculating.

4 MS. TINGLE: Can I make a suggestion,
5 Judge?

6 THE COURT: Yes.

7 MS. TINGLE: Perhaps now that we have
8 this information perhaps we can go back and he
9 can go back and make a new calculation and we can
10 come back.

11 THE COURT: I will, hopefully I will
12 and I am back in April to accommodate, you know,
13 find a half hour here or there or whatever almost
14 any day to, I mean it's not that the court is
15 going to say, no, to some request.

16 But I just need to know before I
17 assign an order unless I assign an order in some
18 arbitrary figure and then allow you to come back
19 if you think you need more.

20 MR. HAYWOOD: Yes, that's fine.
21 Probably tomorrow, Friday, Monday we can get you
22 a better sense of what this is going to entail in

1 terms of hours.

2 THE COURT: How about Monday, not
3 Friday?

4 MR. HAYWOOD: Monday is great. Sorry,
5 I'm going to be at a leadership conference for
6 Indigent Defense Commission. So unless --

7 THE COURT: I can't have anything
8 Friday. Friday is, no, nothing else on Friday.
9 That's going to be an all-day as it is. So
10 whatever day you want except not Friday.

11 MR. HAYWOOD: If it's just the matter
12 of communicating time to the court --

13 THE COURT: Well if you and the
14 Commonwealth can talk maybe you can reach an
15 agreeable number. And let me just say that
16 obviously it's not, it's without prejudice.

17 And if you decide you have to come
18 back and ask for more then why don't we do that.

19 MR. HAYWOOD: Fair enough. Then maybe
20 we can docket for Monday. We can put in Ms.
21 Collins covering it and we'll talk. And then if
22 there's not something we can agree we can set it

1 for a different day.

2 THE COURT: All right, all right.

3 MR. HAYWOOD: Thank you, Judge.

4 THE COURT: Yes, sir. Yes, sir.

5 MR. HAYWOOD: I appreciate your

6 patience today. I know it's tough.

7 THE COURT: I pride myself on my

8 patience.

9 MS. TINGLE: Judge, can we clarify are
10 we coming back on just the motion about the
11 forensic expert or are we still talking about the
12 half a million?

13 MR. HAYWOOD: I think that we are
14 determining whether we can resolve the number of
15 hours correct and then if there's additional --

16 THE COURT: Yes. We'll do both of
17 those together.

18 MS. TINGLE: Very well, thank you.

19 THE COURT: Yes, ma'am. Yes, ma'am.

20 (WHEREUPON, at 2:58 O'CLOCK P.M., THE
21 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE
22 CONCLUDED.)

A

- a.m** 1:17 4:2 39:20,21
136:11
- ABA** 158:17 159:12,12
- abduction** 218:17
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In the matter of: Virginia v Adiam Berhane

Before: The Honorable William T. Newman, Jr., Judge

Date: 03-27-19

Place: Arlington, VA

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Before: The Honorable Lisa B. Kemler, Judge

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