

In The Matter Of:
*INDIANA SUPREME COURT DISCIPLINARY
COMMISSION
DAVID E. SCHALK*

May 21, 2012

*Accurate Reporting of Indiana-Margie Addington, CSR,
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IN THE SUPREME COURT OF THE STATE OF INDIANA

CAUSE NO. 53S00-1104-DI-244

IN THE MATTER OF:

DAVID E. SCHALK
Attorney No. 15551-53

The hearing in the above-referenced matter was held before Judge Wayne Trockman at the Indiana Supreme Court Disciplinary Commission, 30 South Meridian Street, Suite 850, Indianapolis, Indiana, at 10:00 a.m., on the 21st day of MAY, 2012, and reported by me, Marjorie A. Addington, Notary Public in and for the County of Hamilton, State of Indiana, CM, CSR: KS.

ACCURATE REPORTING OF INDIANA
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1 APPEARANCES

2

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7

8 FOR THE INDIANA SUPREME COURT
9 DISCIPLINARY COMMISSION:

10 Mr. Seth Pruden
11 Indiana Supreme Court Disciplinary Commission
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14 Indianapolis, Indiana 46204-3520

15 HEARING OFFICER:

16 Hon. Wayne Trockman
17 Vanderburgh Superior Court
18 Courts Building
19 Room 116
20 825 Sycamore Street
21 Evansville, Indiana 47708

22 I N D E X

23	Commission Exhibit 4 is admitted	62
24	Commission Exhibit 1 is admitted	63
25	Commission Exhibit 2 is admitted	64
	Commission Exhibit 3 is admitted	64
	Commission Exhibit 5 is admitted	69
	Commission Exhibit 10 is admitted	70
	Commission Exhibit 14-2 is admitted	97
	Commission Exhibits 9-1 and 9-2 are admitted	109
	Commission Exhibits 8-1, 8-2, and 8-3 are admitted	119
	Commission Exhibit 12 is admitted	119

1 JUDGE TROCKMAN: We're on the record. This
2 is in re: The matter of David E. Schalk. It's Cause No.
3 53S00-1104-DI-00244. Present are Seth Pruden on behalf
4 of the Disciplinary Commission, and also present and in
5 person is David Schalk, pro se, and this is the time and
6 date set for hearing on all pending matters.

7 For the record, by way of court order and
8 scheduling conference order this matter was set for 9
9 a.m. Eastern Time. There was a scheduling snafu or
10 scheduling error by Mr. Schalk and we were able to reach
11 Mr. Schalk and give Mr. Schalk the time that he
12 requested to get from where he was to here, which was
13 approximately two hours, and the time is now 1:00 p.m.
14 Eastern Time. Preliminary matters, Mr. Pruden?

15 MR. PRUDEN: No preliminary matters, Your
16 Honor.

17 JUDGE TROCKMAN: Mr. Schalk, any preliminary
18 matters?

19 MR. SCHALK: Just a question because I'm not
20 familiar with these procedures, but I believe a
21 recommendation is made to the Supreme Court. Does the
22 Supreme Court accept briefs after this hearing?

23 JUDGE TROCKMAN: Yes, typically after the
24 hearing, the hearing officer, myself, will take this
25 matter under advisement, give both counsel an

1 opportunity to file proposed findings of fact and
2 conclusions of law and any post-trial brief or memoranda
3 which you wish to file. The hearing officer will then
4 make findings and conclusions and recommendations as a
5 proposal and forward those to the Indiana Supreme Court.
6 The Indiana Supreme Court then can adopt the hearing
7 officer's proposed resolution of the matter or can
8 reject it or can adopt part and reject part, and we'll
9 talk about a timeframe for you and Mr. Pruden filing
10 proposed findings of fact and memoranda at the
11 conclusion of the hearing.

12 MR. SCHALK: And does the Supreme Court ever
13 hear oral argument on these matters?

14 JUDGE TROCKMAN: I do not know if the
15 Supreme Court regularly hears. I know that you can
16 petition the Supreme Court to hear oral argument, but
17 the frequency of which -- and, Mr. Pruden, you may be
18 more familiar with that procedure than I.

19 MR. PRUDEN: I believe the Supreme Court has
20 heard oral arguments in disciplinary cases maybe twice.

21 MR. SCHALK: Okay.

22 JUDGE TROCKMAN: And that was my
23 understanding.

24 MR. PRUDEN: Yeah.

25 JUDGE TROCKMAN: Very rarely, but you can

1 petition for oral argument before the Indiana Supreme
2 Court.

3 MR. SCHALK: And if somebody, some
4 organization or some person, wanted to file an amicus
5 brief, would they file that with you, Your Honor?

6 JUDGE TROCKMAN: Yes, and that would be made
7 part of the record and that should be filed within the
8 deadline of the proposed findings and conclusions and
9 memoranda.

10 MR. SCHALK: Okay, that's all I have for
11 preliminary matters, thank you.

12 JUDGE TROCKMAN: All right. The Hearing
13 Officer has a couple of preliminary matters. First, Mr.
14 Schalk, you filed a Report to the Hearing Officer which
15 has been made a part of the record in this case and at
16 our telephone conference, which I believe was on the
17 11th of May, you asked that in my view that this be
18 considered as a motion to dismiss, would that be
19 accurate, sir?

20 MR. SCHALK: Oh, I think you brought that up
21 and I said, well, that sounds appropriate, but I hadn't
22 thought of it until you said it and I don't really even
23 think that it's a motion to dismiss, however I don't --
24 I don't -- in a way I don't want it dismissed because
25 I'd like the Supreme Court to opine on some of these

1 matters.

2 JUDGE TROCKMAN: Okay.

3 MR. SCHALK: But I will accept dismissal
4 without objection.

5 JUDGE TROCKMAN: All right, so you do not
6 wish that it be considered a motion to dismiss, just a
7 filing with the Hearing Officer containing facts,
8 representations, et cetera?

9 MR. SCHALK: No, Your Honor, just trying to
10 get things organized.

11 JUDGE TROCKMAN: Okay.

12 MR. SCHALK: I had a 10-page document I
13 could've picked up if I could've gone by my house but
14 you probably don't need that.

15 JUDGE TROCKMAN: Well, and that can be filed
16 with your findings.

17 MR. SCHALK: Okay.

18 JUDGE TROCKMAN: All right, so the document
19 that was filed with the Hearing Officer prior to the
20 11th of May is not to be considered as a motion to
21 dismiss, only a filing by the respondent.

22 And then the second preliminary matter is,
23 Mr. Schalk, you had moved for a continuance of the
24 hearing date that was scheduled for today and that has
25 been the subject of some confusion this morning, and

1 based upon that motion for continuance, on May 11th the
2 Hearing Officer made an order showing that this matter
3 would not be two days in length, that counsel believed
4 that it would be one day in length, and that it would be
5 heard on the 21st of May, today's date, at 9 a.m.
6 Eastern Time.

7 There was some confusion this morning and
8 you were going about your duties practicing law when we
9 were able to contact you by cell phone, correct, and you
10 moved for a continuance of today's hearing based upon
11 your belief that the hearing had been scheduled for the
12 25th and not the 21st, is that correct, sir?

13 MR. SCHALK: Yes, Your Honor, I thought I
14 distinctly heard the "25th," put it in my calendar,
15 didn't continue my other matters, which they were all on
16 the schedule in Lawrence County, so I really thought
17 that the matter had been resolved so that I could do
18 everything and Friday was free and it was a
19 misunderstanding.

20 JUDGE TROCKMAN: All right, and so you did
21 receive prior to today the Court's order showing the
22 matter set for today?

23 MR. SCHALK: It came in my mailbox on
24 Saturday, that's right, and my impulse was to call
25 people on the phone but it was Saturday and this morning

1 I neglected to do that and got my 11-year-old ready for
2 school and found my documents and hit the road for
3 Bedford and so hopefully we can still get this over with
4 today.

5 JUDGE TROCKMAN: All right, and so you moved
6 for a continuance at that time. The Hearing Officer
7 asked if you could be here today and continue your other
8 court commitments, you indicated that you could, and
9 obviously you did because you were here within the
10 timeframe that we agreed to, is that right?

11 MR. SCHALK: Well, yes, when I got your
12 phone call, Your Honor, I was in the courthouse in
13 Bedford, Indiana and I went across the street to where
14 the superior courts are located in the basement and
15 found the prosecutor. But anyway, I got it resolved
16 with the prosecutor, he was very understanding.

17 JUDGE TROCKMAN: Very good.

18 MR. SCHALK: I was unable to find a good
19 phone number for my clients who were supposed to meet me
20 at the Golden Corral at noon and then go to court with
21 me at 1:30, so I don't know what they'll think about
22 that, but I left some documents with the prosecutor to
23 give to my clients should he have any contact with them,
24 and I called circuit court in Monroe County on my way
25 here and cancelled three pretrial conferences for

1 Charles Fleck (phonetic) that were on the calendar, so I
2 did everything, you know, I put this -- this is my first
3 priority, I wanted to be here, and you came all the way
4 from mountaintown, Terre Haute, I believe?

5 JUDGE TROCKMAN: Evansville.

6 MR. SCHALK: Yeah. Anyway, so I didn't want
7 you to have to go back, and so I certainly didn't try to
8 insist on doing it on Friday when I might've been more
9 prepared and so here I am.

10 JUDGE TROCKMAN: All right, so would you
11 like us to show that you did move for a continuance this
12 morning?

13 MR. SCHALK: Yeah, I moved to continue 'til
14 this afternoon until I could get here.

15 JUDGE TROCKMAN: All right, and that motion
16 was granted.

17 MR. SCHALK: Yes.

18 JUDGE TROCKMAN: Very good. Thank you. Mr.
19 Pruden, the case is with you.

20 MR. PRUDEN: Thank you. Your Honor, before
21 I get too far into it, I would like to offer a trial
22 brief on the issue of the inclusivity of criminal
23 convictions as to the factual allegations contained
24 therein. Briefly, Your Honor, when a person is
25 convicted of a criminal offense, they are proven guilty

1 beyond a reasonable doubt, the highest standard of proof
2 that we have. Disciplinary burden in a disciplinary
3 case is clear and convincing, in a disciplinary case
4 it's clear and convincing, it's a lesser standard.
5 There isn't a case in the country that says that the
6 disciplinary authority must reprove any kind of criminal
7 conviction that's already occurred, that's why they're
8 final, that's why we have appeals, and I just wanted to
9 offer that trial brief. We don't have to argue it here,
10 but I'm just offering that for you to review, and with
11 that, Your Honor, I will begin.

12 First of all, Your Honor, if I could direct
13 your attention to the Verified Complaint for
14 Disciplinary Action, I am going to try to pretty much
15 follow the template of the Verified Complaint when I'm
16 presenting evidence, so it might be helpful -- Mr.
17 Schalk, I do not have a copy for you, but the first
18 allegation that we made was that --

19 JUDGE TROCKMAN: Would you like a -- Excuse
20 me, Mr. Pruden. Would you like a copy --

21 MR. SCHALK: Oh, yeah, that would be nice.

22 JUDGE TROCKMAN: -- so you can follow along?

23 MR. SCHALK: Or maybe I can make scribbles
24 and notes, but --

25 JUDGE TROCKMAN: Okay, could we ask that you

1 make a copy of this? Thank you very much.

2 MR. SCHALK: I don't mind if we proceed
3 while he's doing that.

4 JUDGE TROCKMAN: Okay, very good, unless you
5 want to wait so he can follow.

6 MR. PRUDEN: No, I can go ahead. It's your
7 call.

8 JUDGE TROCKMAN: Okay. I've been through
9 it, so I won't --

10 MR. PRUDEN: For example, Your Honor, just
11 to cut to the chase, the first rhetorical paragraph,
12 respondent is an attorney, was admitted to the Indiana
13 Bar on October 15th, 1990, and at relevant times he
14 practiced in Bloomington, Monroe County. Mr. Schalk
15 admitted that allegation in his answer, which was also
16 submitted to the Court.

17 So moving on, in Paragraph 2 we allege that
18 Mr. Schalk represented Chad Pemberton in a criminal case
19 which Pemberton had been charged with unlawful
20 possession of methamphetamine. Again, Mr. Schalk
21 admitted that in his answer that was filed.

22 Then Allegation 3, the arrest of Pemberton
23 had been the result of his purchase of methamphetamine
24 from confidential informant. I'd like to ask Mr. Schalk
25 a question regarding that. Mr. Schalk, in your

1 answer --

2 JUDGE TROCKMAN: Mr. Pruden, if you could
3 hold on just a moment.

4 MR. PRUDEN: Sure.

5 JUDGE TROCKMAN: Mr. Schalk, would you raise
6 your right hand for me, please?

7 MR. PRUDEN: Thank you.

8 JUDGE TROCKMAN: Do you swear or affirm to
9 tell the truth, the whole truth and nothing but the
10 truth, so help you God?

11 MR. SCHALK: I do.

12 JUDGE TROCKMAN: All right.

13 MR. PRUDEN: Sorry, Your Honor, I'll call
14 Mr. Schalk as my first witness, sorry about that.

15 JUDGE TROCKMAN: No, no, no, that's fine.

16 MR. PRUDEN: And he can testify from where
17 he is.

18 JUDGE TROCKMAN: Okay. And state your name,
19 your full name, sir.

20 MR. SCHALK: I'm David Eugene Schalk, the
21 respondent in this matter.

22 JUDGE TROCKMAN: Very good, thank you.

23 MR. SCHALK: And, sir, I think you said
24 Pemberton was arrested for buying drugs and I'm not sure
25 if that's what that says, but you might want to rephrase

1 it.

2 DIRECT EXAMINATION BY MR. PRUDEN:

3 Q. Mr. Schalk, I'm going to show you what I've
4 marked as Exhibit No. 4. Would you tell the Court what
5 that is?

6 A. Well, it says "Answer to the Verified Complaint."
7 I assume it's my answer.

8 Q. I don't want you to assume. Look at it, tell me
9 what it is.

10 A. It has every indication of being my answer. That
11 looks like my signature. I have no reason to dispute
12 that this is what I mailed to the Commission in response
13 to the Verified Complaint.

14 Q. Did you file your answer with the Supreme Court
15 Clerk's Office?

16 A. Right.

17 Q. "Yes"?

18 A. Yes, sir, I did.

19 Q. All right. Directing your attention to Page 4 of
20 the answer to the Verified Complaint, top of the page it
21 says in Paragraph 2 "In 2007 the respondent represented
22 Chad Pemberton in a criminal case in which Pemberton had
23 been charged with unlawful possession of
24 methamphetamine. Answer: Admit," is that correct?

25 A. Now which one is that? That's 4?

1 Q. No. 2, Page 4.

2 A. All right. Well, had I read this more carefully,
3 I believe I would've said he was charged with selling a
4 small amount of --

5 Q. You want to change your answer now, is that
6 correct, is that what you're saying?

7 A. Well, just to conform with the case. I just
8 assumed that, you know, this was boilerplate and we were
9 going to get to the gist of what I did wrong. Yeah, I
10 think he was charged with dealing in methamphetamine as
11 a Class A felony, it was a small amount, but it was
12 within a thousand feet of a housing complex and that's
13 what the case was about and it was an A felony dealing
14 case, so if I admitted anything different, I was being
15 careless and just thinking this was the -- you know,
16 reciting the --

17 Q. Did you represent Chad Pemberton in 2007?

18 A. Yes, sir.

19 Q. Okay, and he was charged in a criminal case,
20 correct?

21 A. Absolutely.

22 Q. And he was charged with something to do with
23 either the unlawful possession or control or use of
24 methamphetamine, isn't that correct?

25 A. Control, yeah, dealing, I mean he was dealing,

1 but yeah.

2 Q. Okay, so you were his lawyer?

3 A. I was his lawyer in a drug case in 2007 in Monroe
4 County, Indiana.

5 Q. We allege in Paragraph 3 of the Verified
6 Complaint that "the arrest of Pemberton had been the
7 result of his purchase of methamphetamine from a
8 confidential informant." You answered "This is
9 certainly true if we substitute 'alleged purchase' for
10 'purchase.'"

11 A. Yes, well, we should also substitute "purchased
12 from Pemberton" because the allegation was that the
13 confidential informant bought the drugs from Pemberton,
14 so --

15 Q. My allegation in the Verified Complaint, Mr.
16 Schalk, is what I'm asserting, not some allegation
17 against -- Is it an accurate statement that the arrest
18 of Pemberton had been the result of his purchase of
19 methamphetamine from a confidential informant?

20 A. No.

21 Q. I can't tell from your answer if you admit or
22 deny that.

23 A. Well, I answered here something like it and now I
24 must say I deny it, but I'll be glad to clarify that the
25 point was that he sold --

1 Q. No, I don't want you to -- I just want you to
2 tell me --

3 A. Okay, well, then I'm going to have to change my
4 answer to "Deny" then --

5 Q. Fine.

6 A. -- now that I've carefully read it.

7 Q. Was Pemberton arrested?

8 A. Yes.

9 Q. And was it alleged in his arresting charges that
10 he had purchased methamphetamine?

11 A. No.

12 Q. What was alleged in his charge?

13 A. That he had sold it.

14 Q. Okay, so someone bought it from him, allegedly?

15 A. Brandon Hyde alleged that he bought it from him,
16 yes.

17 Q. Okay, well, we alleged a confidential informant.

18 Was Brandon Hyde a confidential informant?

19 A. Yes, he was.

20 Q. All right. Paragraph 4 we allege that "Pemberton
21 discovered the identity of the informant, told the
22 respondent, who then participated in a scheme to
23 purchase drugs from the informant, ostensibly as a means
24 of discrediting him." You denied that answer?

25 A. Right.

1 Q. Okay. Did Pemberton have a belief about who the
2 informant was when you were representing him?

3 A. He really wasn't -- he wasn't exactly sure but he
4 had it pretty --

5 Q. Where did you get the --

6 A. -- narrowed down.

7 Q. -- name "Brandon"? Did you --

8 A. I think I got that name from Pemberton and I
9 called Brandon Hyde on the telephone and at first he
10 denied that he was the informant and eventually he
11 admitted it and told me my client better take a deal
12 because he's going to show up with a smile on his face
13 and his suit on on trial day.

14 Q. Okay, I don't know what any of that has to do
15 with my question, Mr. Schalk, but let me get you back to
16 my question. Did Mr. Pemberton give you the name of
17 someone he thought might be the confidential informant?

18 A. Yes, I'm pretty sure that that's where I first
19 heard that name.

20 Q. So he thought it might be Brandon Hyde, correct?

21 A. Yes.

22 Q. Later you confirmed that, correct?

23 A. Yes.

24 Q. No. 5, we allege that "the respondent discussed
25 with Pemberton's mother the idea of proving that the

1 informant," that would be Brandon Hyde, "was still
2 dealing drugs," you admitted that, No. 5?

3 A. Yes, I did.

4 MR. PRUDEN: Your Honor, I'd ask that the
5 Court find any admitted fact to be proved.

6 JUDGE TROCKMAN: Yes.

7 Q. No. 6, the respondent also spoke to Pemberton's--
8 Let me go back to that one a minute.

9 A. Sure.

10 Q. No. 5, how did you discuss with Pemberton's
11 mother the idea of proving that the informant was
12 dealing drugs?

13 A. I don't recall discussing that with her at all.
14 I gave the succinct answer of "Admit" because it would
15 certainly be a good thing to do since the informant was
16 sent to -- had targeted Pemberton and they were going
17 to, you know, deny that he had targeted Pemberton or
18 that he was a drug-dealer, and so I don't know if I -- I
19 mean I -- you know, I suppose or I imagine I said, you
20 know, it would be nice to prove that. I talked to
21 people about that, that I would certainly --

22 Q. Did you talk to Pemberton's mother when you were
23 representing Pemberton?

24 A. I'm saying that the probability is so high I'll
25 just say yes, but I don't remember the conversation or

1 exactly what was said.

2 Q. The probability that you discussed with
3 Pemberton's mother about maybe proving that Hyde was
4 still dealing drugs, how high was the probability that
5 you discussed that with Pemberton's mother?

6 A. Well, since I wanted the jury to know that, I
7 think it's real high, --

8 Q. Okay.

9 A. -- you know, I mean I did. I didn't talk about
10 all of these, you know, going and making a buy from him
11 and stuff, I said it would be nice if somehow that could
12 get into evidence.

13 Q. Okay. Why would you suspect that Hyde was still
14 dealing drugs?

15 A. Well, that was the word on the street, that was
16 what --

17 Q. How did you get "the word"?

18 A. Oh, gosh! I know the Sudano brothers knew a lot
19 about it but I'm not sure when I first spoke with them.
20 I just don't know. I mean I talked to people and it
21 seemed like -- I had a witness list of people who might
22 know this and, you know, I think I'd confirmed it with
23 some of them, but it was just a known fact, you know,
24 there's little drug circles and I was trying to --

25 Q. Is something that's known on the street a fact?

1 A. No, it could be misinformation, it could be an
2 urban legend.

3 Q. Okay, but at some point you got information from
4 someone that Hyde was still dealing drugs, correct?

5 A. Yeah, I thought that he was, yes.

6 Q. Okay, and you may have talked to Pemberton's
7 mother about it, high probability --

8 A. Well, she wouldn't have known, you know, she
9 wouldn't know if he was dealing drugs, so I -- But yeah,
10 I probably said something about it, that "I hear he's
11 still dealing drugs," you know.

12 Q. Okay, and --

13 A. Who volunteered that information to me is "Well,
14 Man, you ought to know this, you know, the guy's still
15 dealing drugs," --

16 Q. Did you --

17 A. -- but I --

18 Q. Are you done?

19 A. Yes.

20 Q. Okay. Did you discuss with other people besides
21 Pemberton's mother the fact that Brandon Hyde may be
22 dealing drugs still? Did you talk to Pemberton's sister
23 about it?

24 A. Yeah, Leslie Pemberton, I think she definitely
25 was someone who knew that he was still dealing.

1 Q. Now, how do you know she definitely knew that?

2 A. Well, I mean she's a -- Well, she told me --

3 Q. That's what I'm trying to get to, Mr. Schalk.

4 A. I don't remember the exact words, but she, as I
5 recall, confirmed that.

6 Q. Okay.

7 MR. SCHALK: Also, I've got to object to
8 this on the grounds of relevance because we're not
9 getting anywhere here. I wanted to prove that he was
10 dealing drugs, it was certainly useful to Pemberton's
11 case that he was targeted by a guy with a lot to lose
12 and a lot to gain by, well, depending on whether or not
13 he kept the police happy and, you know, I just thought
14 that was a part of the case I'd like to bring out and I
15 don't know who I mentioned that to, but, you know,
16 that's something I wanted to do.

17 MR. PRUDEN: Your Honor, there's an
18 objection before the Court, may I respond to it?

19 JUDGE TROCKMAN: The Court overrules the
20 objection.

21 MR. PRUDEN: Okay.

22 JUDGE TROCKMAN: You may proceed.

23 MR. SCHALK: That's fine.

24 Q. So you talked to Leslie. Was her last name
25 Pemberton?

1 A. I did.

2 Q. And the mother, probably?

3 A. Well, I spoke with her, yeah. I remember going
4 over to her workplace with my young son and talking
5 about things.

6 Q. And some of these discussions again had to do
7 with Brandon Hyde still dealing drugs, correct?

8 A. Yes.

9 Q. Okay. No. 6, "The respondent also spoke to
10 Pemberton's sister, a minor, about whether she or
11 someone she knew might purchases," that's a misspelling
12 there, "marijuana from the informant." You did not
13 admit or deny that allegation.

14 Now, your answer is "All discussions with
15 Pemberton's sister about purchasing drugs were in the
16 context of setting up a controlled buy with the police"
17 and you said some other things, too, but I want to focus
18 on that.

19 A. Okay.

20 Q. Is that statement in your answer a statement that
21 you did speak to Pemberton's sister about whether she or
22 someone she knew would be willing to do a controlled buy
23 with Brandon Hyde, with the police or not with the
24 police isn't my question, the question is was a
25 controlled buy discussed with her by you?

1 A. As I recall, it was like about the 27th or so of
2 June, it was very late in the game, and I asked her if
3 she would be willing to do a controlled buy for the
4 police and then I got on the phone to the police, I
5 relayed --

6 Q. Wait a minute, what did she say when you asked
7 her that?

8 A. She said that she would do that, that she would
9 work as a confidential informant for the police, get all
10 wired up and go do what they do. So with that
11 information I had a good-faith basis to ask the
12 police -- Most of the narcotic -- I call them the narc
13 squad, the special investigations unit of the
14 Bloomington Police Department, were at some training,
15 but there was one guy there and he was telling me that
16 that would be a conflict for him to do that and he had a
17 few reasons but that was one of them, why would he help
18 me defend Pemberton, and I was just kind of curious to
19 see how they would handle it. Prior to that I had --

20 Q. Sir, I --

21 A. If you want me to I can tell you. I had my
22 memory refreshed on what we discussed before then
23 because I had Shawn Carr's tape-recording of his
24 conversation with her where she spoke at length that I
25 wanted somebody to tape-record Brandon Hyde, you know,

1 agreeing to sell drugs and --

2 Q. Who did you talk to about that?

3 A. Leslie Pemberton.

4 Q. You lost me somewhere.

5 A. Okay.

6 Q. You had already talked to someone about recording
7 it, you talked --

8 A. No, this was the recorded police interview that
9 the police questioned her and --

10 Q. Before you had your conversation with --

11 A. Well, before I asked anything about a controlled
12 buy. She specifically said I never asked her to make
13 any controlled buy, she said "He did not say that and
14 didn't ask me that." Now, the officer committed perjury
15 in his Probable Cause Affidavit --

16 Q. Mr. Schalk, I'm asking you a question about
17 rhetorical paragraph No. 6 in the Verified Complaint, --

18 A. Yeah, right.

19 Q. -- okay? You didn't answer it "Deny" or "Admit."
20 You said "All discussions with Pemberton's sister about
21 the purchasing drugs were in the context of setting up a
22 controlled buy by the police. I wanted to hear what the
23 police would say if I told them I had someone willing to
24 make a buy."

25 A. I'm just now reading that. I probably didn't

1 need to say all of that. Anyway, that's an "Admit" with
2 clarification there.

3 Q. So you admit that you discussed it with Leslie
4 Pemberton about making a controlled buy but your intent
5 was that the police would be involved?

6 A. Well, absolutely.

7 Q. And she said she would do that but then the
8 police said "No, we're not interested"?

9 A. That's what she testified to at the trial, yes.

10 Q. Okay. You've denied No. 7. My question to you
11 is did anyone in the police investigation or at the
12 trial of Chad Pemberton ever testify or state that you
13 told them that "We want to make sure that the amount of
14 any controlled buy is large enough so that it makes the
15 impeachment more reliable" or something to that effect?

16 A. You're asking me to tell you if anybody said --
17 They -- No.

18 Q. Did you ever say to somebody that "If we do a
19 controlled buy, we need to make sure the amount is large
20 enough so we can impeach Pablo" or "Brandon Hyde,"
21 whatever his name is?

22 A. No, I didn't.

23 Q. You never said that?

24 A. No.

25 Q. But somebody testified to that, didn't they?

1 A. No, not about this "reliable" thing. I think I
2 said that if it was over 30 grams it would be a felony
3 amount and it would be stronger impeachment.

4 Q. Okay, who did you tell that to?

5 A. Oh, gosh! Probably it would've been Lisa
6 Edwards. I'll write these names down.

7 Q. Lisa Edwards was a friend of your client, isn't
8 that correct, or an acquaintance of his?

9 A. Lisa Edwards' sister is the mother of my client's
10 very young child. I think the child was like one or two
11 at the time.

12 Q. Let me ask it simply, Lisa Edwards knew Chad
13 Pemberton, is that correct?

14 A. Yeah, she knew Pemberton.

15 Q. Okay, so if you explained to somebody that a
16 felony amount would make the impeachment stronger, you
17 would've told that to Lisa Edwards, is that correct?

18 A. Probably, I mean, you know, it stands to reason,
19 yeah, yes, yes.

20 Q. Okay. No. 8 we said that "Pemberton's sister
21 declined to help," which you've already said she wasn't
22 interested without the police, "but Pemberton suggested
23 that two of his friends, Edwards and Grubb, might assist
24 in making the purchase."

25 A. No. 1 I'd like to correct the record. I didn't

1 say what you just said I said, I didn't say she declined
2 to do it because I --

3 Q. Mr. Schalk, I haven't asked you a question yet.

4 A. Oh, well, you said --

5 Q. I'm repeating what I alleged in Paragraph 8.

6 A. Oh, well, if you're just reading that, I'll
7 read --

8 Q. "Pemberton's sister declined to help, but
9 Pemberton suggested that two of his friends, Edwards and
10 Grubb, might assist in making the purchase of illegal
11 drugs from the informant." Your answer "Deny. I was
12 told that Edwards and Grubb wanted to help Chad
13 Pemberton, but when I called it turned out they had
14 nothing useful to offer." Okay, who told you that
15 Edwards and Grubb wanted to help?

16 A. Oh!

17 Q. This is your answer, Mr. Schalk.

18 A. Right, yeah, yeah, I mean I probably -- I know
19 that I got that information from Chad Pemberton, he was
20 in jail the whole time and I think he told me that they
21 might be interested in, you know, somehow helping out.
22 I called them and they didn't want to -- I mean I called
23 Lisa, that was the main one, she was kind of the brains
24 and the spokesman for the group. But anyway, she didn't
25 want to, she wasn't interested and so I'd forgotten

1 about her.

2 Q. Okay, you forgot about her for a while but then
3 she called you, correct?

4 A. On June 25th, yeah, the day in question.

5 Q. About a week before the trial --

6 A. Right.

7 Q. -- of Mr. Pemberton?

8 A. Right, yeah, I remember it well.

9 Q. And she told you she was going to buy marijuana
10 from Mr. Hyde, correct?

11 A. That's right.

12 Q. Did you ask her why she had changed her mind?

13 A. No.

14 Q. Did you ask her why she called you?

15 A. At the trial I did but not then.

16 Q. So she told you previously "I'm not going to
17 help, I have nothing to offer"?

18 A. Oh, by the way, I mean I didn't ask her why she
19 changed her mind. It did turn out that she hadn't
20 changed her mind at all, she didn't have any intention
21 of --

22 Q. Well, but at the time you first talked --

23 A. But at the time, yeah, it seemed like maybe she
24 had, but I didn't ask her about it.

25 Q. So you didn't ask her "What made you change your

1 mind?" you didn't ask that question?

2 A. No.

3 Q. Did you say "Why are you telling me this? Why
4 are you telling me you're going to buy pot from Brandon
5 Hyde, why are you telling me?" Did you ask her that
6 question?

7 A. No, not really 'til the trial I asked her.

8 Q. Okay, so this woman who had originally told you
9 that there was no -- she wasn't going to help, then a
10 week before trial she apparently wants to do something
11 because she's calling you, correct, --

12 A. Yeah.

13 Q. -- to tell you she's going to go commit a crime,
14 correct?

15 A. Yes, that was --

16 Q. That would be a crime?

17 A. She was a dealer, that was her supplier.

18 Q. Did you tell her maybe she shouldn't engage in
19 criminal misconduct, did you suggest that to her?

20 A. No, she -- No, I didn't.

21 Q. Okay, that's all I'm asking. All right. No. 9,
22 see allegation No. 9 in our Verified Complaint, "The
23 respondent spoke to Edwards and Grubb and convinced them
24 that the purchase was legitimate and none of them would
25 get in trouble. Answer: "Admit. I didn't use the word

1 'legitimate' but I did say it would be an outrage for
2 them to get in trouble."

3 MR. PRUDEN: Your Honor, I'd show that the
4 rhetorical paragraph has been admitted by Mr. Schalk's
5 answer.

6 A. Well, let's stick to reality as to what exactly I
7 admitted, but --

8 Q. Well, whatever I said in Paragraph 9 is what you
9 admitted.

10 A. Well, there's some clarification there. I'm not
11 sure I can read what I said but --

12 Q. Well, you said you didn't use the word
13 "legitimate."

14 A. Okay, well, I probably --

15 Q. So what word did you use that means legitimate?

16 A. Well, I don't have time to read all of this, but
17 I said that if instead of smoking it and selling it they
18 would take it to the police for use as evidence, that it
19 didn't seem to me that that would be a violation. It
20 certainly seems way better than their usual practice of
21 smoking and selling it.

22 Q. Had you ever represented Lisa Edwards?

23 A. No.

24 Q. Had you ever represented this Mr. Grubb?

25 A. No.

1 Q. Then how did you know they were smoking and using
2 it, what information do you have that that was their
3 usual practice?

4 A. The word on the street.

5 Q. "The word"?

6 A. Sudano Brothers showed me where they lived and
7 showed me --

8 Q. Who are the Sudono Brothers?

9 A. Oh, they're just a couple guys that live back
10 there. At trial more information -- What specifically
11 did you ask me?

12 Q. I asked you what information you had that Edwards
13 -- You said that Edwards and Grubb, it's better than
14 their usual practice of smoking it.

15 A. Right, yeah.

16 Q. How do you know that's their usual practice?

17 A. I never saw them do it, just I'm inclined to say,
18 well, everybody knows that they're potheads and how he
19 lives at their house half the time and deals drugs out
20 of their living room.

21 Q. And you know this why?

22 A. I just heard it. I mean until I met Pemberton I
23 didn't know about this crowd, but I don't get my
24 information from the prosecuting attorney. I get some
25 information from them and then I find out what is going

1 on.

2 Q. So Pemberton told you that's what they did?

3 A. Among others, I mean yeah, I spent time with him
4 in jail and he told me things, I'm sure he told me that,
5 everybody told me that, it was just something I heard
6 everywhere.

7 Q. Well, if you had to convince Edwards and Grubb
8 that they wouldn't get in trouble, they must have been
9 reluctant to do this, is that correct?

10 A. That's just outrageous, I can't believe you said
11 that. If I had to convince them that this was -- I
12 didn't have to convince them. They were on their way to
13 get weed from "Pablo" is the way she put it. Nothing I
14 could've done could've stopped them. I could've said
15 "It's bad for your lungs, it's against the law," I
16 could've said anything to them. That's just the
17 business she was about. It had nothing to do with me or
18 convincing her. She wasn't trying to help Pemberton
19 either.

20 Q. Mr. Schalk, would you look at Paragraph 9?

21 A. Uh-huh.

22 Q. Let's read it together.

23 A. Okay.

24 Q. "The respondent spoke to Edwards and Grubb and
25 convinced them that the purchase was legitimate and none

1 of them would get into trouble. Answer: Admit" with
2 the proviso you didn't use the word "legitimate."

3 A. Well, you know what, I shouldn't have admitted
4 that because I don't recall convincing them of anything.

5 MR. PRUDEN: Your Honor, I want the evidence
6 to show he's admitted it, he can't retract it now, it's
7 a conclusively proven when a -- in a pleading -- Your
8 Honor, it sounds to me like it was a waste of time to
9 file a pleading in this case because Mr. Schalk
10 apparently isn't going to stick to the admissions or
11 denials that he's made, which might take us a little
12 longer to get through this hearing.

13 A. Okay.

14 JUDGE TROCKMAN: The questions, the answers,
15 the admissions and the explanations contained in the
16 respondent's answer are admitted.

17 MR. SCHALK: And that's fine, Your Honor, as
18 long as you understand that I didn't have to use
19 persuasion, I didn't have to disabuse them from any
20 prior thoughts that they might've had. I think we did
21 have a discussion that I didn't see how that could be
22 wrong to take it to the police, that the police do that
23 all the time and there's no statute that says they have
24 any special right to do that, and when my time comes I
25 hope I remember, but if you know that somebody is going

1 to buy drugs and you tell them to take it to the police,
2 you know, cops lie all the time when they try to get
3 people to do various things for them, I think that kind
4 of a little white lie saying "Don't smoke it and sell
5 it, I want you to take it to the cops," I mean that's
6 a --

7 JUDGE TROCKMAN: Okay, well, we're off
8 subject.

9 MR. SCHALK: All right, but anyways, I
10 didn't have to persuade them, and I want to make that
11 clear. I think he's trying to mislead you, Your Honor,
12 into thinking that my admission meant that I had to use
13 some persuasion, which --

14 JUDGE TROCKMAN: The answer stands, next
15 question.

16 Q. Were Edwards and Grubb reluctant to -- Let me go
17 back.

18 Lisa Edwards called you out of the blue after
19 she'd already told you that she didn't want to do a
20 controlled buy, then she called you and said she's going
21 to buy pot from "Pablo"?

22 A. Yes, weed from "Pablo."

23 Q. How did it happen you talked to Grubb about this
24 matter? Who's Grubb?

25 A. Well, Roger Grubb is the guy that's lived with

1 her over the years. I think maybe they eventually broke
2 up, but that was her significant other, live-in roommate
3 guy.

4 Q. Okay, and how did you happen to talk to him?

5 A. He came to our -- I asked her if she had a tape-
6 recorder and she said, well, she had a cell phone. She
7 seemed kind of surprised by the question, and I said
8 "Well, why don't you meet me at Arby's and I'll give you
9 something that you can record the conversation with."

10 Q. Well, you're ahead of me.

11 A. That's where I met them at Arby's.

12 Q. Lisa Edwards called you on the phone?

13 A. Right.

14 Q. What was the step between her calling you on the
15 phone and you talking to her and Grubb? Did you invite
16 her to come talk to you, did she ask to come talk to
17 you? During the conversation when she called someone
18 either asked for a meeting or invited to a meeting, how
19 did that happen, who did what?

20 A. I said "Do you have a tape-recorder?" She said
21 "Well, I have a cell phone." I said "Why don't you meet
22 me someplace, I have a nice little voice recorder that I
23 can lend you," and we settled on Arby's restaurant in
24 Ellettsville and she did show up there shortly there
25 after.

1 Q. Why did you want to meet with her?

2 A. To give her a tape-recorder.

3 Q. For what purpose?

4 A. So she could record her conversation with "Pablo"
5 when she bought weed from Brandon Hyde so that we would
6 have a recording of the sale, you know, the
7 conversations.

8 Q. And did you discuss this with her when she called
9 your office?

10 A. No, it was a real brief conversation, I just said
11 "Do you have a tape-recorder?" and apparently she
12 didn't, so I said "Why don't you meet me, I've got a
13 nice one I can lend you."

14 Q. So she must've been aware during the phone call
15 that you wanted to record her purchase from Brandon
16 Hyde, she must've been aware of at least that much,
17 correct?

18 A. Yeah, I was assuming that she wanted to get
19 evidence that he was dealing, I thought that's what she
20 was doing. It turned out she wasn't.

21 Q. But that's what you believed at the time she
22 called?

23 A. Right, and that's why I wanted to give her that
24 digital voice recorder.

25 Q. Okay, so you suggested that you meet with her at

1 Arby's, correct?

2 A. I'm not sure who came up with Arby's first, but
3 it turned out to be convenient and we both went there.

4 Q. Okay, so at that Arby's meeting was there a
5 conversation with -- And then Grubb showed up with her,
6 is that correct?

7 A. That's right.

8 Q. Okay, and you weren't expecting that, he just
9 happened to be with her, correct?

10 A. Right.

11 Q. "Yes"?

12 A. That's right, yes, I didn't expect anybody but
13 her.

14 Q. All right, so then she showed up, and was there a
15 conversation with her, and maybe Grubb was present,
16 about whether she would or wouldn't get in trouble for
17 purchasing this pot?

18 A. I just don't think -- I don't recall that
19 conversation. I do recall saying "We ought to have an
20 officer involved in this" and she said "No," and that
21 really wasn't what we were talking about, I mean that
22 really didn't happen, you know, what you're saying, that
23 she was wondering if she would get in trouble if she
24 took the dope to the police. You know, it turned out
25 she had no intention of doing that anyway, it was pretty

1 obvious from her subsequent actions.

2 Q. Well, we'll get to that in a little bit.

3 A. Okay.

4 Q. I'm still trying to figure out how you admit my
5 Paragraph 9 that says you spoke to Edwards and Grubb and
6 convinced them to purchase it and they wouldn't get into
7 trouble and now you're saying you don't remember if you
8 even talked about them getting in trouble, I'm trying to
9 reconcile your two contradictory statements.

10 A. Yeah, well, I don't -- I should've said "Deny."
11 I mean I look at that and I think I didn't really
12 convince them of that. I don't know, I just -- I'm
13 sorry I said that I convinced them of it because I don't
14 right now remember the discussion. I'm going to see
15 what I remember when I answered here. Anyway, that's --
16 I don't know, maybe I remembered something. I mean that
17 could very well have happened. If they would've asked
18 me, I would've said "Yeah, that's a good thing to do."

19 Q. Okay, let's move on to No. 10. "On or about June
20 25th, 2007, the respondent met with Edwards and Grubb
21 and also a 15-year-old boy and provided them with a
22 tape-recorder and \$200 cash to purchase marijuana from
23 the informant. Answer: Admit," okay?

24 A. Right, Roger Grubb is the one who got the \$200
25 and recorded money and the recorder, so just to be even

1 more precise about who got what, that's what happened.

2 Q. You'd never represented Lisa Edwards, correct?

3 A. That's right.

4 Q. Never represented Roger Grubb?

5 A. That's true.

6 Q. Didn't know who this 15-year-old boy was?

7 A. That's right.

8 Q. Now I'll use your words instead of mine, "Answer:
9 Admit," No. 10, "Lisa Edwards said she intended to get
10 marijuana from Brandon Hyde. I persuaded her to meet me
11 at the Ellettsville Arby's to get a digital voice
12 recorder." Did she need persuading?

13 A. Oh, we didn't argue about it. She seemed a
14 little surprised, you know, that I wanted to give her a
15 recorder, but, you know, like I said, we didn't have to
16 have a debate over it, I just said, you know, "How about
17 that?" and she said "Okay," you know, "Fine."

18 Q. So she didn't ask you for a tape-recorder?

19 A. It was my idea.

20 Q. Okay. You also state in your answer "Once there,
21 I realized I had \$200 in cash and on the spur of the
22 moment I wrote down the serial numbers and provided the
23 currency for the transaction," correct?

24 A. Yes.

25 Q. Well, I've been curious about this since this

1 whole case began. If Lisa Edwards called you to tell
2 you she was going to buy marijuana, why did she need
3 your money?

4 A. Well, I thought at the time that, you know, they
5 didn't seem to be very prosperous people and that they
6 were doing this -- if they were doing this for Chad
7 Pemberton, it seemed to me like he ought to pay for it,
8 that this is evidence. I don't know, to some extent I
9 don't think I thought this out in words, you know, but
10 they'd be more likely to take it to the police, you
11 know, if it wasn't their own money. I don't know, I'm
12 not sure if I thought of that, but I mean it just seemed
13 like proper not to rely on them, they're doing this,
14 sticking their necks out for Pemberton here and then to
15 make them pay for it, too, seemed a bit much, and the
16 other consideration --

17 Q. Did they ask you for money --

18 A. No.

19 Q. -- to make this purchase?

20 A. No, no, they were surprised. I think the --

21 Q. They were surprised about what?

22 A. A primary consideration in my mind was that I
23 could write down these serial numbers on a sheet of
24 paper and then --

25 Q. I'll get to that in a second. Could you write --

1 I'm just curious, did they -- Is there any reason you
2 believed that Lisa Edwards didn't have the money to make
3 this purchase?

4 A. Well, you know, it's possible that she wanted
5 "Pablo" to front her some, is the way they say it, to
6 give her some and owe the money to take to him after the
7 sale, so that's possible. It's also possible that they
8 were just going to get high and maybe she hoped to take
9 a little home with her, or that they were going to buy
10 some. Any of those three possibilities I don't really
11 know, I never did get any more information than I've
12 just given you about what exactly she was going to do.

13 Q. Now, I'll ask you a question about the serial
14 numbers, why did you write the serial numbers down?

15 A. In case he got arrested the police would have
16 that as more evidence that this transaction really did
17 happen. I thought the time might come when we needed to
18 prove that he really did sell drugs to somebody a week
19 before the trial.

20 Q. Well, Lisa Edwards could've testified to that if
21 she in fact did that, correct?

22 A. Right.

23 Q. But you just thought -- Now, how was "Pablo"
24 going to -- or Brandon Hyde -- Let the record reflect
25 that's the same person, correct, "Pablo" is the street

1 name for Brandon Hyde?

2 A. Yes.

3 Q. Were you intending to arrest Brandon Hyde after
4 Lisa Edwards made the drug deal?

5 A. No, I didn't plan --

6 Q. The police had not been called, nor had they
7 agreed to make an arrest at this sale?

8 A. That's right, yeah. Prior to that at Arby's I
9 mentioned that they should be and they said no, they --

10 Q. Did you know where the sale was going to take
11 place?

12 A. No, I didn't ask.

13 Q. Did you know if it was going to be in Bloomington
14 or some other city?

15 A. Well, I assumed it would be in Bloomington.

16 Q. But you didn't know that?

17 A. No, I didn't know.

18 Q. So when did you think Mr. Hyde would be arrested
19 where he's still going to have your \$200 in his pocket?

20 A. I didn't know. It was a week before trial, the
21 man was facing up to 50 years in prison, I was doing
22 what I could for him.

23 Q. Roger Grubb took the recorder from you, is that
24 correct?

25 A. Yes.

1 Q. Did they try to put it in the pocket of the 15-
2 year-old boy?

3 A. No, I don't think that ever even happened.

4 Q. Somebody testified to that, though, didn't they?

5 A. Well, they may have some crazy story and then
6 even the prosecutor didn't follow up on that.

7 Q. But someone did testify to that, that someone
8 tried to put the tape-recorder in his pocket and it
9 wouldn't fit, somebody did testify to that?

10 A. No, I don't think so.

11 Q. No one made that statement to the police?

12 A. The officer who very demonstrably and clearly
13 committed perjury in the Probable Cause Affidavit wrote
14 something to that effect in there, I'm pretty sure.

15 Q. Okay, so in some police report that is a
16 statement that the policeman made, correct?

17 A. Right, that's right.

18 Q. Okay. No. 11, "Edwards and Grubb agreed to
19 purchase the marijuana and record the transaction as
20 requested by the respondent." You didn't admit or deny
21 that, you just made a statement about some things, so
22 let me go over that with you. You said "Lisa Edwards
23 called to tell me she intended to get some marijuana
24 from defendant. She said she was not going to do that
25 as requested by the respondent because I had made no

1 such request." Well, part of my question is a request
2 to record the transaction, agree to record the
3 transaction, that you did request her to do, correct?

4 A. Right, yes.

5 Q. No. 12, "Edwards and Grubb purchased only \$50
6 worth of marijuana from the informant, used it for
7 themselves, kept the remainder and deleted the
8 recording. Answer: Insufficient information to admit
9 or deny." Did someone testify at Pemberton's trial or
10 your trial, either one, --

11 A. Pemberton's trial didn't get off the ground --

12 Q. Okay, so your trial, did someone testify that
13 Edwards and Grubb had purchased only \$50 worth of
14 marijuana, used it for themselves and kept the rest, did
15 someone testify to that?

16 A. That was Lisa Edwards' testimony.

17 Q. Okay. No. 13, "Respondent, who was under the
18 mistaken belief that Edwards and Grubb still had
19 possession of the marijuana, attempted to make contact
20 with several police authorities who would take
21 possession of the marijuana." What's wrong with that
22 statement? You didn't admit or deny it. You said you
23 didn't have sufficient information. So let me just ask
24 it this way. At some point did Lisa or Roger imply or
25 state to you that they had the marijuana?

1 A. Yes.

2 Q. They had a rolled-up newspaper, as I recall, is
3 that correct?

4 A. It was folded, it was like a newspaper that was
5 folded.

6 Q. And they tried to hand it to you implying that
7 the marijuana was in the newspaper?

8 A. That did happen, yes.

9 Q. And you said "I don't want it, don't give it to
10 me"?

11 A. Yeah, "Don't put me in the chain of custody, I'm
12 the attorney."

13 Q. Well, you're already in the chain of custody,
14 right, you provided the money, you provided the --

15 A. No.

16 Q. -- the tape-recorder?

17 A. None of that was necessary at the jury trial. I
18 mean sometimes confidential informants don't even
19 testify because people observe what they do and there's
20 enough -- So no, I was not --

21 Q. You were not what?

22 A. My role was not at all necessary at the trial,
23 but if I took charge of it and then gave it to somebody
24 else, I would have to be in the chain of custody, I
25 mean, you know, if there was --

1 Q. The chain of custody of the actual contraband?

2 A. Right, yeah.

3 Q. Okay, so you told them to hang on to it?

4 A. Right.

5 Q. So you believed that they had it because that's
6 what they implied to you?

7 A. Right, and I tried to get them to take it to the
8 police and we tried to find a police officer who we
9 thought was a sensible person.

10 Q. In fact, you called several police officers,
11 correct?

12 A. Started with the sheriff himself and called the
13 deputy that I knew and couldn't get through to him, he
14 was in traffic accidents, and called the county
15 prosecutor and then eventually got through to his chief
16 deputy, Robert Miller.

17 Q. Well, I think my allegation in No. 13 is you
18 tried to make contact with several police authorities.

19 A. Well, the next day I also contacted the chief of
20 police and the city police and a detective on the city
21 police department that I knew and then eventually
22 petitioned the court to see if they could just find
23 somebody in case this marijuana was out there and could
24 be used as evidence to help Pemberton.

25 Q. I'm just trying to find out factually if you

1 called the police.

2 A. Certainly did.

3 Q. Okay, several of them?

4 A. Yes.

5 Q. Okay, and the prosecutor?

6 A. Yes.

7 Q. All trying to get them to accept custody over
8 what you thought was the marijuana that Lisa Edwards
9 had, correct?

10 A. Well, not the prosecutor, I didn't want him to
11 take custody, but the judge, the court, and the police
12 officers, yes.

13 Q. Well, let's go to No. 14 on my Verified Complaint
14 there. "The respondent also sought assistance from the
15 court in taking possession of the unlawfully obtained
16 marijuana." You deny that, but then you go on to say "I
17 petitioned the court to take possession of lawfully
18 obtained marijuana." So what you deny about 14 is the
19 word "unlawful," is that correct?

20 A. Right.

21 Q. You admit that you wanted to get "the marijuana"
22 to either the court or someone in authority?

23 A. Right.

24 Q. Your dispute of 14 is that you believed it was
25 lawfully obtained and not unlawfully obtained, is that

1 correct?

2 A. Yes, if the purpose was, you know, police
3 custody, used as evidence and eventual destruction, I
4 thought that was legal since it's a common practice.

5 Q. It's a common practice for defense attorneys to
6 acquire --

7 A. It's not common for --

8 Q. -- or help in setting up a drug purchase and then
9 turn it over to the police, you think that's a common
10 occurrence?

11 A. It's not uncommon for defense attorneys to try
12 very hard for their clients and in all my experience
13 just only once did somebody call and say they were going
14 to get some marijuana from the informant. It'll
15 probably never happen again, but --

16 Q. How long have you been a lawyer, Mr. Schalk?

17 A. 20 -- I don't know, since 1990 is when I got
18 sworn in. I don't think this kind of a thing comes up
19 very often.

20 Q. Had it ever come up before?

21 A. No.

22 Q. Okay. No. 15, "On or about April 30th, 2008, the
23 respondent was charged with conspiracy to commit
24 possession of marijuana, D felony, and attempt to
25 possess marijuana, Class A misdemeanor," under the cause

1 number listed there, you admitted that, that's correct,
2 you were charged?

3 A. Yes.

4 Q. And Chad Pemberton's case was still pending at
5 the time, isn't that correct? He hadn't pled guilty, he
6 hadn't had the trial yet?

7 A. He had, but I filed a petition for post-
8 conviction release saying that he was denied a speedy
9 trial and the only reason given was removing me because
10 I had a conflict, which was not a good reason. Shortly
11 thereafter I was charged with a crime.

12 Q. Okay, so prior to your charges what was the
13 status of Chad Pemberton's case?

14 A. I had just very recently filed a petition for
15 post-conviction relief in the Monroe Circuit Court.

16 Q. Okay, that means Chad Pemberton had been
17 convicted, is that correct?

18 A. He had been, he had been convicted --

19 Q. Was it a trial?

20 A. No.

21 Q. Was it a plea agreement?

22 A. It was.

23 Q. Were you representing him on that plea agreement?

24 A. No.

25 Q. Okay.

1 A. I'd been removed from the case and everything got
2 delayed.

3 Q. All right, so at the time of the Lisa Edwards/
4 Brandon Hyde Arby's purchase, I realize the purchase
5 didn't happen at Arby's but --

6 A. Yeah, I know what you mean.

7 Q. So from that point to Mr. Pemberton's plea
8 agreement you were removed from the case, is that
9 correct?

10 A. That's correct.

11 Q. And is that when Judge Kellams alleged that you
12 had a conflict?

13 A. Yes, and that's the reason I was removed.

14 Q. Okay.

15 A. He thought there was a big conspiracy, his mind
16 was full of conspiracy ideas.

17 Q. How did it come to Judge Kellams' attention that
18 there was a conflict, at least in his belief there was a
19 conflict, how did that come to his attention?

20 A. I petitioned the court to take custody of some
21 marijuana that I thought existed and I wanted to use it
22 as evidence in the Pemberton trial and asked the court
23 if it could possibly see to it that it would be placed
24 in a police locker so that I could use it as an exhibit
25 at trial.

1 Q. And in your petition to Judge Kellams did you
2 describe what you had done with the tape-recorder and
3 the money?

4 A. I don't remember. It was not a real long
5 petition but I --

6 Q. How would Judge Kellams have any idea about your
7 participation, if any?

8 A. Well, the whole place lit up with that. I mean I
9 called Bob Miller on the phone on the same day, he's the
10 chief deputy prosecuting attorney, he called a deputy
11 sheriff that morning, I guess, to see if they could
12 start something against me and the whole place was abuzz
13 with the information that they thought they had me on
14 something and --

15 Q. I think I just lost you.

16 A. Okay, I don't know where Judge Kellams got his
17 ideas, but I can just say it's only natural that he
18 would --

19 Q. Well, what --

20 A. Well, the petition is what told him. I don't
21 know if --

22 Q. That's what I'm asking, did you put something in
23 the petition that gave him a belief that somehow you had
24 assisted in this sale?

25 A. Yeah, probably.

1 Q. Okay.

2 A. I don't have a copy with me. It was short, but
3 it might've had that much information in it.

4 Q. All right, so after you filed your petition with
5 Judge Kellams to have custody of the marijuana brought
6 in, what happened next with the case? Did the judge set
7 a hearing?

8 A. No.

9 Q. Okay.

10 A. Well, I mean there was like a pretrial, I don't
11 know if it had been previously scheduled, and he took it
12 under advisement. I think the 25th was like a Tuesday
13 or something, there was a hearing on a Friday,
14 approximately, and that next Monday I think he removed
15 me from the case on grounds of a conflict and appointed
16 an attorney whose last name is Plummer.

17 Q. Did you have a discussion with the court
18 regarding that issue prior to him removing you?

19 A. Well, yeah, that's right. In fact, another
20 lawyer consulted with Pemberton privately to tell him
21 all about conflicts of interest and all of that and
22 Pemberton said whatever this conflict is that y'all
23 perceive that he certainly waives it and he wants me as
24 his attorney, so yeah, there was a discussion, --

25 Q. Well, and was this --

1 A. -- and I told him that, you know, there wasn't
2 any --

3 Q. Was this discussion in a hearing?

4 A. Yes, there was a hearing in the courtroom.

5 Q. A live hearing where you went into the courtroom?

6 A. Yes, yes.

7 Q. It wasn't on the telephone?

8 A. No, no.

9 Q. All right, so you had this hearing in front of
10 Judge Kellams?

11 A. That's true.

12 Q. And that's where he -- Did he tell you from the
13 bench "I think you have a conflict"?

14 A. No, he took it under advisement over the weekend
15 and I believe it was Monday when he issued his order.

16 Q. Who alleged you had the conflict, the prosecutor?

17 A. I guess it must have been. That would be my
18 adversary in the case.

19 Q. And you argued your points, whatever they were,
20 correct?

21 A. Yes, said there's no conflict, that our interests
22 coincided completely, there's nothing I would fail to do
23 or do that could possibly harm Pemberton. They thought
24 that maybe I wouldn't call some witnesses that would
25 know about the purchase --

1 Q. Did the prosecutor inform Judge Kellams at that
2 hearing that the fact that you might've participated in
3 this purchase in some way made you liable for criminal
4 charges?

5 A. I don't know, I don't know if he told the judge
6 that. I mean that wasn't so much the point there, they
7 were trying to act like there was a conspiracy and
8 Pemberton was in on it and it was all a big plan.

9 Q. Well, let me ask you about that, Mr. Schalk.
10 There was a plan. You got a call from Lisa -- Wasn't
11 there? You got a call from --

12 A. There really wasn't.

13 Q. -- Lisa Edwards and within an hour a plan
14 developed, correct?

15 A. Yeah, yeah, I immediately tried to get something
16 going, yeah.

17 Q. And that was your plan, that wasn't Lisa Edwards'
18 plan?

19 A. No, she was just going to get weed from "Pablo"
20 and --

21 Q. Right, she didn't have a plan other than to buy
22 pot, your plan was to do the tape-recording and the
23 money and set up evidence, correct?

24 A. Yeah, I wanted to --

25 Q. So that's a plan, isn't it?

1 A. Yes.

2 Q. You can say there's no plan but that's a plan?

3 A. Well, what I mean is a plan involving me and Chad
4 Pemberton such that --

5 Q. You were doing this on behalf of Chad Pemberton.

6 A. I know, that's true, but I'm just saying it
7 wouldn't affect how I represented him at trial, it was
8 not --

9 Q. You think if you're charged with a criminal
10 offense in the same case that you're representing your
11 client that doesn't create some sort of conflict of
12 interest?

13 A. No.

14 Q. Is that your testimony today that that's not a
15 conflict for you to be charged criminally for engaging
16 in conduct while you're representing your client?

17 A. No, not necessarily, it wouldn't be a conflict,
18 no, if Pemberton had --

19 Q. Your interest now --

20 A. See, here's how this goes, if Pemberton had some
21 knowledge of some conspiracy or something, then possibly
22 he would want to get a better deal and give evidence
23 against me, you know, so I --

24 Q. Okay.

25 A. -- can see that scenario, but if I'd robbed a

1 bank or something, you know, while I was representing
2 him, well, you know, I'd be in a bunch of trouble, but
3 it wouldn't be a conflict of interest.

4 Q. Why wouldn't it be?

5 A. Well, because I was --

6 Q. Wouldn't your interest --

7 A. My interest would still be to defend him as hard
8 as I could, that's what I always do.

9 Q. Even if how you defended him might affect your
10 criminal case?

11 A. Well, how could it? I mean if it couldn't affect
12 it -- If how I defend him could affect my case, then
13 there could be a conflict.

14 Q. Don't you become a witness in your client's own
15 case if there's a dispute over how this sale with
16 Brandon Hyde occurred? You're now going to have to
17 cross-examine Lisa Edwards, you're going to have to
18 cross-examine Brandon Hyde, you're going to have to
19 cross-examine your own client if there's any question
20 whether or not he had suggested that these people get
21 involved, that doesn't put you in an adverse
22 relationship with your own client?

23 A. Not at all, I was not in an adverse relationship
24 with Chad Pemberton at any time and I haven't been. His
25 interests and mine --

1 Q. Do you believe that the word "adversity" has to
2 mean it's something negative to your client, is that
3 your belief?

4 A. "Adversity" means a lot more than that, but,
5 yeah, I mean that would be adverse.

6 Q. So you were removed from the case by Judge
7 Kellams and then Chad Pemberton pled guilty with no
8 lawyer, is that correct?

9 A. No, he was appointed a lawyer who was so bad that
10 he wouldn't even --

11 MR. PRUDEN: Objection, that's not
12 responsive.

13 MR. SCHALK: Okay.

14 JUDGE TROCKMAN: Sustained.

15 Q. My question is did he plead guilty with another
16 lawyer representing him?

17 A. Yes.

18 Q. You filed a petition for PCR on behalf of Chad
19 Pemberton, is that correct?

20 A. Yes.

21 Q. And was part of your allegations in the PCR that
22 your removal denied Mr. Pemberton, what, effective
23 counsel?

24 A. No, he asked for a speedy trial, he has to be
25 tried within 70 days, and the only reason that he didn't

1 get his trial within 70 days was my removal and I said
2 there was no good reason for that, so there was no good
3 reason for not giving him his trial within 70 days, and
4 I was promptly charged with a crime.

5 Q. Okay, I'll get to that in a minute. So you filed
6 a PCR and then that was appealed, isn't that correct?

7 A. Yes, it is.

8 Q. Because that was denied, the PCR was denied?

9 A. Yes, the judge refused to hold a hearing and took
10 judicial notice of the underlying criminal case, which
11 back then you weren't supposed to do, so I appealed on
12 solid grounds.

13 Q. Well, you appealed?

14 A. Yes, sir.

15 Q. And the appeal was unsuccessful, isn't that
16 correct?

17 A. (Nods head affirmatively.)

18 Q. That's a "yes," it was successful, you won the
19 PCR, or "No, it was unsuccessful, we lost the PCR"?

20 A. Unsuccessful.

21 Q. Thank you. Now, you got a ruling from the Court
22 of Appeals on the PCR, correct, that it was
23 unsuccessful?

24 A. You know, they didn't really get to the merits
25 exactly, but in a roundabout way --

1 MR. PRUDEN: Unresponsive, Your Honor, I'd
2 ask the witness to be responsive to my question.

3 A. Try it --

4 Q. Did you get --

5 JUDGE TROCKMAN: Was there an opinion?

6 Q. Did you get a ruling? How did you know it was
7 unsuccessful? I'll ask it a different way. How did you
8 know the PCR was not successful?

9 A. The Court of Appeals declared that I had a
10 conflict of interest, removed me even from the appeal,
11 ordered the case remanded to the trial court with
12 instructions to the judge to dismiss the petition for
13 post-conviction relief without prejudice and to remove
14 me from the case with the understanding then that Chad
15 Pemberton could come back and seek post-conviction
16 relief on grounds that there wasn't really a conflict
17 after the Court of Appeals had just declared there was.

18 Q. Okay, that declaration, what would you call that,
19 an order, a ruling, an opinion? They declared it on a
20 piece of paper, correct?

21 A. Yeah, it was arbitrary, capricious, contrary to
22 law. It was --

23 MR. PRUDEN: Nonresponsive, Your Honor, ask
24 the witness to --

25 A. I'll try really hard. What --

1 Q. Listen to my question, Mr. Schalk. Did you get
2 something in the mail that said "PCR denied"? How did
3 you find out it was denied? This isn't a tough
4 question.

5 A. They didn't rule on whether or not the judge was
6 within his rights to deny it. I think they just told
7 him to dismiss it and let Pemberton come back with a new
8 lawyer.

9 Q. Okay.

10 A. I don't really recall them saying whether or not
11 there was merits and, you know, my saying that --

12 Q. Wasn't my question.

13 A. Well, I'm trying to answer your question, so --

14 Q. That wasn't my question, why don't you answer the
15 one I asked.

16 A. Okay, ask it again and I'll --

17 Q. I'm asking you did the Supreme Court issue some
18 sort of ruling in the PCR? "Yes, they did," "No, they
19 didn't."

20 A. Yeah, there's a published opinion.

21 Q. Aah! Thank you. So a published opinion, that's
22 all I was asking.

23 A. Wait.

24 Q. Okay.

25 A. Yeah, it was published, yeah.

1 Q. Okay, a published opinion. And in that published
2 opinion you already testified, and you can elaborate
3 now, that they not only -- not only was your argument
4 not successful but they also removed you from the PCR as
5 Chad Pemberton's lawyer, is that correct?

6 A. They removed me from the appeal and from the --

7 Q. Excuse me, not the PCR but the --

8 A. Right, it was remanded with instructions to
9 remove me there.

10 Q. Okay, so it sounds like they agreed with Judge
11 Kellams, is that correct?

12 A. Without any hearing or evidence or any chance for
13 any due process.

14 Q. I'm trying to make a record.

15 A. Okay.

16 Q. Whether they had a hearing or evidence --

17 A. Yes, they --

18 (Reporter requests one person speak at a
19 time.)

20 JUDGE TROCKMAN: Mr. Schalk, listen to the
21 question and after the question's concluded then you may
22 answer.

23 A. Judge Kellams thought I had a conflict, the Court
24 of Appeals thought I had a conflict. They didn't say
25 that they were exactly agreeing with Judge Kellams, but

1 I suppose since they both had the same opinion that they
2 were in agreement.

3 Q. Okay. We've already established 15, you did get
4 charged with a crime with the Monroe County Prosecutor's
5 Office charge.

6 No. 16, "On November 17th, 2009, a bench trial
7 was held on respondent's criminal case and the court
8 found the respondent guilty of attempt to commit
9 possession of marijuana, a Class A misdemeanor."
10 "Admit" was your answer to that?

11 A. That's right.

12 Q. Okay. 17, "On February 28, 2011, the Indiana
13 Court of Appeals affirmed the conviction of the
14 respondent. A copy of the Court of Appeals' Opinion is
15 attached hereto as Exhibit A. Answer: Admit," is that
16 correct?

17 A. Yes.

18 Q. Mr. Schalk, I will show you what's been marked as
19 Exhibit 1.

20 MR. PRUDEN: Your Honor, by the way, I would
21 move for the admission of the answer, Exhibit 4.

22 JUDGE TROCKMAN: Any objection?

23 MR. SCHALK: No objection, Your Honor.

24 JUDGE TROCKMAN: Admitted.

25 (Commission Exhibit 4 is admitted.)

1 Q. I'll show you Exhibit 1, and tell the Court if
2 you know what that is.

3 A. Well, it says "Judgment of Conviction and
4 Sentencing Order." It says "David Schalk, three months
5 suspended, unsupervised probation." Anyway, that's a
6 Judgment of Conviction and Sentencing.

7 MR. PRUDEN: Well, Your Honor, to save a
8 little bit of the Court's time, I would submit that it
9 is a certified copy of Mr. Schalk's criminal conviction.

10 Q. Do you agree with that, Mr. Schalk? The
11 certification is on the back.

12 A. Oh, yeah, I mean, yeah, this is all legitimate.

13 MR. PRUDEN: I'd offer 1, Your Honor.

14 JUDGE TROCKMAN: Any objection?

15 MR. SCHALK: I'm just trying to follow the
16 numbers. What's the exhibit? What's the Verified
17 Answer?

18 MR. PRUDEN: No. 4.

19 MR. SCHALK: I mean is that Exhibit 1 or is
20 that --

21 MR. PRUDEN: Exhibit 4.

22 MR. SCHALK: Oh, okay, all right. Well,
23 anyway, I don't object to the admission of this at all.

24 JUDGE TROCKMAN: 1's admitted.

25 (Commission Exhibit 1 is admitted.)

1 Q. Show you what I've marked as Exhibit 2.

2 MR. PRUDEN: Your Honor, again I am
3 tendering to you a certified copy of a court docket in
4 Mr. Schalk's criminal case.

5 Q. Is that what that appears to you?

6 A. It certainly does appear to be that, yes.

7 MR. PRUDEN: I would offer No. 2, Your
8 Honor.

9 JUDGE TROCKMAN: Any objection to 2?

10 MR. SCHALK: No, Your Honor.

11 JUDGE TROCKMAN: 2's admitted.

12 (Commission Exhibit 2 is admitted.)

13 MR. PRUDEN: I have the original of 4 for
14 some reason, Your Honor, I don't know why I have that.

15 JUDGE TROCKMAN: Okay.

16 MR. PRUDEN: Thank you. Your Honor, I'm
17 tendering you what I've marked as Commission's Exhibit 3
18 as a certified copy of the Court of Appeals' Opinion in
19 Mr. Schalk's criminal case.

20 MR. SCHALK: No objection.

21 JUDGE TROCKMAN: 3's admitted.

22 (Commission Exhibit 3 is admitted.)

23 Q. All right, a few more questions, Mr. Schalk, if
24 that's all right. You had a special judge appointed in
25 your criminal case, isn't that correct?

1 A. Yes.

2 Q. Was that Michael Robbins --

3 A. Yes.

4 Q. -- of the Lawrence Superior Court?

5 A. Yes.

6 Q. You had a bench trial before Judge Robbins, is
7 that correct?

8 A. Yes.

9 Q. It's my understanding you waived jury and either
10 as a condition of or in some agreement with the
11 prosecutor they dismissed the felony charge. Was that
12 an agreement by the prosecutor, you waived jury if they
13 knocked off the felony charge?

14 A. Yes.

15 Q. And so you had a bench trial on what ultimately
16 was the attempt to commit possession of marijuana, Class
17 A misdemeanor, correct?

18 A. Yes.

19 Q. A presentence investigation is typically not
20 ordered in a misdemeanor case, isn't that true?

21 A. Yes.

22 Q. You've been a criminal defense lawyer for a long
23 time?

24 A. Very rare, yes.

25 Q. Almost always in a felony case, correct, I think

1 the statute requires it?

2 A. Yeah.

3 Q. But rare in a misdemeanor case. You had a
4 presentence report issued in your case, isn't that
5 correct?

6 A. Yeah, there was.

7 Q. Did you ask for that?

8 A. No.

9 Q. Judge Robbins ordered that, isn't that correct?

10 A. That's right.

11 Q. As part of the presentence investigation Judge
12 Robbins asked you to be evaluated by the Judges and
13 Lawyers Assistance Program, is that correct?

14 MR. SCHALK: Your Honor, I'd object on
15 grounds of relevance. These are personal matters.

16 JUDGE TROCKMAN: Overruled.

17 A. Yes, I did, I met with somebody at the --

18 Q. Okay.

19 A. -- Disciplinary Commission.

20 Q. You've seen the letter that Judge Robbins wrote
21 to our office?

22 A. Yeah, I think that explains what he was worried
23 about, he just couldn't understand.

24 Q. I'm showing you Exhibit 5. Is Exhibit 5 the
25 letter that you've seen that Judge Robbins sent to the

1 Disciplinary Commission? You've seen this letter
2 before, isn't that correct?

3 A. I've seen this letter and I don't object to its
4 admission for what it's worth, but as far as any
5 conclusion as to the ultimate facts of the case, that
6 sort of thing, I certainly would object to it's being
7 considered.

8 MR. PRUDEN: We'd offer 5, Your Honor.

9 MR. SCHALK: And what's this thing attached
10 to it that says "presentence" -- How did that get -- Why
11 is that writing on it? I mean I don't understand. You
12 asked me about a letter and you have two separate
13 documents with one exhibit number on it. You have Judge
14 Robbins' letter and then I open it up and then out pops
15 a presentencing -- an "official version." I certainly
16 object to that. I don't care if you know whatever Judge
17 Robbins thought, that's fine with me.

18 Q. You don't know whether this attachment came with
19 Judge Robbins' letter?

20 A. This is the first I ever heard of that.

21 Q. Then I will remove it --

22 A. Thanks.

23 Q. -- if you have not seen it.

24 A. I haven't.

25 MR. PRUDEN: Your Honor, this witness says

1 he's never seen part of Exhibit 5, the last two pages,
2 so I would like to have Exhibit 5 back.

3 JUDGE TROCKMAN: That would've come directly
4 out of the PSI, wouldn't it, sir?

5 MR. PRUDEN: Yeah.

6 MR. SCHALK: I'm saying I never -- I didn't
7 know it was an attachment to this letter. I didn't say
8 I didn't know that such a thing ever existed.

9 JUDGE TROCKMAN: All right.

10 MR. PRUDEN: If he's never seen it, that's
11 fine.

12 MR. SCHALK: I'm saying --

13 MR. PRUDEN: I'd tender 5.

14 MR. SCHALK: -- that this is like --

15 MR. PRUDEN: I'd offer 5.

16 MR. SCHALK: -- incredible hearsay within
17 hearsay and opinions. It's just -- I mean it's just not
18 useful and I object to it being admitted and considered.
19 Judge Robbins' opinion here, I don't know, I think it's
20 just --

21 JUDGE TROCKMAN: 5 is admitted over
22 objection, however the Court will order 5 sealed in the
23 Court's file.

24 MR. SCHALK: Well, I don't care if 5's
25 admitted for the world to see, I'm just saying I object

1 to the opinion as to the ultimate issue here --

2 MR. PRUDEN: I removed the two pages he's
3 never seen, Your Honor. Exhibit 5 is just the letters
4 and he doesn't have any objection to that.

5 JUDGE TROCKMAN: With no objection to 5 and
6 no objection to 5 not being sealed in the Court's file,
7 5 is admitted.

8 (Commission Exhibit 5 is admitted.)

9 MR. SCHALK: You understand that I would
10 object to it being considered for an opinion as to the
11 ultimate fact in violation of the rules, but anything
12 else in there may help inform the Court as to what was
13 going on.

14 JUDGE TROCKMAN: Yes.

15 Q. Mr. Schalk, at the beginning of the hearing today
16 Judge Trockman referred to a Report to the Hearing
17 Officer that was submitted by you a couple weeks back.

18 A. Yes.

19 MR. PRUDEN: And, Your Honor, it's already
20 part of the court record, but I want to talk about this
21 exhibit, so I'm going to --

22 Q. I've marked the Report to Hearing Officer as
23 Exhibit 10.

24 A. Thank you.

25 Q. And can you identify if that is what I've

1 purported to be is correct?

2 A. Yes.

3 MR. SCHALK: Your Honor, may I say one
4 preliminary thing?

5 JUDGE TROCKMAN: Do you have any objection
6 to Exhibit 10?

7 MR. SCHALK: No objection.

8 MR. PRUDEN: Then it's offered.

9 MR. SCHALK: And I swear that the facts in
10 this are true and offer it as evidence as far as that
11 goes.

12 MR. PRUDEN: Okay.

13 JUDGE TROCKMAN: All right, 10's admitted.

14 (Commission Exhibit 10 is admitted.)

15 Q. Would you please turn to Exhibit 10 on Page No.
16 4, Mr. Schalk?

17 A. Okay, I'm here.

18 Q. At the top of Page 4 you cite a case In Re:
19 Wilkins, do you see that?

20 A. Yes.

21 Q. Wilkins was an attorney discipline case, isn't
22 that correct?

23 A. Right.

24 Q. Do you know generally what that case was about
25 and why you cited it in this report?

1 A. Yes.

2 Q. Would you please explain?

3 A. There was a footnote in an appellate brief where
4 it was a petition for transfer, possibly, and the
5 footnote said that one might think, something to this
6 effect, that one might think that the Court of Appeals
7 had already made up its mind and cherry-picked the facts
8 in cases to reach the opinion that it wanted to reach, I
9 think something to that effect.

10 Q. And do you know why that would be a disciplinary
11 violation?

12 A. Well, it would impugn the integrity of the Court
13 of Appeals, according to the Supreme Court.

14 Q. Okay.

15 A. He was suspended 30 days and then that was taken
16 away, but some members of the Supreme Court still
17 thought he shouldn't have had that footnote and some
18 thought it was free speech. But anyways, it's a warning
19 to all attorneys not to impugn the integrity of the
20 Court of Appeals unless you've got your facts.

21 Q. In your Report to the Hearing Officer on Page 1
22 toward the bottom you refer to "Judge Kellams' imaginary
23 conspiracy and related nonexistent conflict of
24 interest," correct?

25 A. Yes.

1 Q. A little bit above that you state that, and this
2 is regarding this disciplinary hearing today, it says
3 "For almost five years now the retaliation against me
4 for exposing the ongoing drug dealing of Brandon Hyde
5 has not involved criticizing me for what I actually did,
6 but instead has been characterized as things such as, 1,
7 Judge Kellams' imaginary conspiracy and conflict,
8 outright perjury," next page, "witnesses changing
9 stories. No. 4, a bench trial at which neither the
10 prosecutor or judges even acknowledged my legal
11 analysis. 5, strangely reasoned and illogical appellate
12 decision containing factual errors tending to support
13 the local imaginary conspiracy theory," and finally, "an
14 opinion authored by a Bloomington resident and joined in
15 by two other judges who had already made up their minds
16 in the Pemberton case." Let's start with that one.

17 A. Okay.

18 Q. What Bloomington resident authored --

19 JUDGE TROCKMAN: Excuse me, what page?

20 MR. PRUDEN: I'm sorry, I just went to Page
21 2, Your Honor, I was at the bottom of Page 1 on Exhibit
22 10 and then at the top of Page 2, I was reading that
23 entire paragraph.

24 JUDGE TROCKMAN: Thank you.

25 MR. SCHALK: And specifically No. 5.

1 Q. Which Bloomington resident was the author of a
2 strangely reasoned and illogical appellate decision
3 containing errors and joined in by two others who had
4 already made up their minds in the Pemberton case?

5 A. Ted Najam.

6 Q. So you're saying that the other two judges in
7 your appellate case, that would be Judge Bailey and
8 Judge Darden, had already made up their minds before any
9 briefs were filed in your --

10 A. Yeah, they declared my actions to be criminal in
11 the opinion that they wrote in the Pemberton case,
12 that's what I meant by "they already made up their
13 minds." Now, I didn't say they didn't put a lot of deep
14 thought into reconsidering it, but on the other hand I
15 have no reason to think they did. But anyways, yeah,
16 they had offered the opinion that my actions were
17 illegal in the opinion in the Pemberton case and that --

18 Q. They say they were or they could be or they might
19 be?

20 A. No, they just pretty much implied that they were,
21 you know, they said "Well, you know, it's a violation of
22 the Disciplinary Rules to commit a criminal offense."
23 You know, it's like "Well, yeah, you know, sue me."

24 Q. But you were just charged at that time, you
25 hadn't been convicted.

1 A. Oh, I wasn't charged -- Well, was I by the time
2 the appeal came down? Yeah, I was charged, yes, I was,
3 but Judge Darden offered the opinion, Bailey and one
4 other one were in on it and then Darden and Bailey were
5 two of the judges in my case which Najam authored.

6 Q. So because they had denied your PCR which was a
7 challenge to the disqualification because Judge Kellams
8 thought you had a conflict, you believe they had already
9 made up their minds in the criminal case?

10 A. No, that's illogical. It's because they said
11 that my actions were criminal and so that's part of why
12 they thought I had a conflict and needed to be removed.

13 Q. Okay, but then later in your appeal you are
14 claiming here that they had already made up their minds
15 because of that?

16 A. They made up their minds once. I'm not saying
17 they didn't reconsider. I don't know if they did or
18 didn't, but they had already opined without hearing my
19 arguments, without acknowledging them, that my actions
20 were criminal.

21 Q. You're talking about in the PCR appeal?

22 A. In the PCR appeal of Chad Pemberton, yes.

23 Q. Now, when you got your criminal appeal, you're
24 saying that somehow something that they already knew
25 about that previous case meant that they didn't pay

1 attention to your briefs, is that what you're saying?

2 A. I don't know.

3 MR. SCHALK: By the way, would the Court
4 take judicial notice of these two opinions, the
5 Pemberton one and the Schalk versus State, mine?

6 JUDGE TROCKMAN: Yes.

7 MR. PRUDEN: I don't have the Pemberton one,
8 Your Honor, so if he's going to offer it.

9 Q. But do you have the citation for the Pemberton
10 one?

11 A. No, I don't have it.

12 Q. Is it --

13 A. I just had to rush here from Bedford and so I
14 didn't bring it, but it's easy enough to find.

15 MR. PRUDEN: I don't have a problem with it,
16 Your Honor.

17 JUDGE TROCKMAN: The Court will take
18 judicial -- Which opinion, sir?

19 MR. SCHALK: It was the case of Chad
20 Pemberton versus State and then the case of David Schalk
21 versus State. We're discussing those two cases. I
22 represented Pemberton and his case found that I had a
23 conflict of interest and then --

24 JUDGE TROCKMAN: No objection?

25 MR. PRUDEN: There isn't, Your Honor, but I

1 realize it's hard for a lawyer to be a witness in a
2 case, but this is really what Mr. Schalk should be
3 presenting in his own defense, not on my examination. I
4 realize that it might be a little formalistic, but it's
5 really hard to keep this hearing straight if we start
6 getting into the defenses and he starts offering
7 evidence while he's a witness. Right now he's a
8 witness. Now later he can start, you know, presenting
9 his own case. So it gets a little confusing to me when
10 he starts offering evidence in the middle of my case.

11 JUDGE TROCKMAN: You may offer those two
12 opinions during your case, sir.

13 MR. SCHALK: All right. I mean we were deep
14 in a discussion of both of them, so I just ask that the
15 Court notice them. Anyway, --

16 MR. PRUDEN: I'm just asking questions, I'm
17 not in a discussion, Your Honor.

18 MR. SCHALK: Okay.

19 JUDGE TROCKMAN: Yeah, next question, thank
20 you.

21 Q. Mr. Schalk, in this disciplinary proceeding we
22 tendered exhibit lists, do you recall that?

23 A. Yes.

24 Q. And then subsequent to me getting your witness
25 list I submitted some interrogatories to you, do you

1 remember that?

2 A. Yes.

3 Q. Okay. I'm going to show you what I've marked as
4 14-2 because I've marked something called 14-1. Are
5 these your responses to the interrogatories to which I
6 just referred, Mr. Schalk?

7 A. They certainly appear to be and I have no reason
8 to doubt that this is exactly what I sent you.

9 Q. All right. Is it an accurate statement that I
10 asked you to provide me with the expected testimony of
11 the witnesses that you had listed on your witness list?

12 A. Yes.

13 Q. One of the witnesses you listed was Judge
14 Kellams, correct?

15 A. Yes, I guess so. Yeah, I see "Judge Kellams"
16 there right now, yes.

17 Q. And you responded to my inquiry about what Judge
18 Kellams is going to testify to on Page 5 of Exhibit
19 14-2, --

20 A. Uh-huh.

21 Q. -- is that correct? Do you see that under
22 subsection (e)?

23 A. Yes.

24 Q. And you state there "I listed the Honorable Marc
25 Kellams because he presided over the Pemberton case. I

1 have no direct or compelling circumstantial evidence
2 that he was instrumental in the decision to file
3 criminal charges against me," do you see that?

4 A. Yes.

5 Q. Okay. Now, I asked you what you expected the
6 witnesses to testify to, not what they weren't going to
7 testify to. Why did you state that, "I have no direct
8 or compelling evidence that he had anything to do with
9 the charges against me," why is that listed in your
10 response?

11 A. Well, you wanted to know why I listed him as a
12 possible witness --

13 Q. Uh-huh.

14 A. -- and --

15 Q. Would he have some knowledge about why you were
16 charged with a crime?

17 A. I heard from one attorney that he heard from
18 another attorney over at the Justice Building that my
19 big problem was Judge Kellams and then eventually I got
20 charged, okay, that's all I know. I don't know
21 anything. That's pretty tenuous, pretty far out there,
22 but I've always wondered if he was at all involved in
23 any discussions. I don't know that that would be
24 improper, by the way.

25 Q. So your implication here is Judge Kellams may

1 have had something to do with the decision to file
2 charges against you?

3 A. Well, I didn't mean to imply that. I have to be
4 very cautious about that, but I was just curious and I
5 don't know if I would be crossing any lines by asking
6 him, but that was one of the things I had in mind when I
7 put him down on the witness list. I certainly would've
8 thought of that before I got to the hearing and asked
9 him anything that could get me in trouble for even
10 asking.

11 Q. So without ever having talked to Judge Kellams
12 about whether he had any involvement, you stated on
13 here, at least implied, that he might have had some
14 involvement, that he might testify?

15 A. It says what it says. You know, you can take it
16 for what it is.

17 Q. Well, it says what you don't have evidence of.

18 A. Yeah.

19 Q. But I asked you what is the witness going to
20 testify to, so in your response to what is he going to
21 testify to you replied "Well, I don't really have
22 evidence that he had anything to do with the charges
23 against me." That's not even relevant to my question,
24 is it, of "What's he going to testify to?"

25 A. That's right, it was pretty nonresponsive and --

1 Q. So if it isn't relevant to my question, what's it
2 relevant to, what were you trying to say here?

3 A. Just expressing some thoughts. I didn't know
4 what he would say if he were to be called. I just --

5 Q. Would you ask him the question "Did you have
6 anything to do with the criminal charges against me?"
7 Is that what you intended to ask him?

8 A. I didn't intend to ask him that. I had a
9 deadline for submitting a witness list. I just got done
10 telling you that, well, maybe that'd be crossing the
11 line to ask him a question. It might imply that he
12 talked to the special prosecutor about charging me after
13 he saw that I had challenged his decision in the
14 Pemberton case, maybe I shouldn't even ask him that, you
15 know, I didn't know, but you asked me what I was
16 thinking and that's the best I could do. He probably
17 would not have been called and if he were called he
18 probably -- I don't really know what he would say. I
19 don't know that it would be improper for him to discuss
20 this with the special prosecutor who he appointed, I
21 don't know that they can't talk about it every day all
22 they want, you know, and --

23 Q. Well, but isn't the implication here that it
24 would be improper because if it was proper, why would it
25 matter? If it's proper for him to talk to the special

1 prosecutor, then why would it matter?

2 A. Well, I didn't say it is or --

3 Q. Why would that be relevant to anything if it's
4 okay? It's only if it's not okay that it's relevant.

5 A. Well, I wanted to flesh out the story, you know,
6 and I had a deadline for my witness list and I thought
7 that might be a big part of the -- that might be a part
8 of the story and I didn't make any decision as to
9 whether or not I would actually subpoena him, I didn't
10 know what I would ask him, and I don't know why this
11 inquisition is going on and on and on, I don't know.
12 I'm not saying anything. I said I don't have any
13 evidence that he was even involved.

14 Q. But you pointed out that you didn't have any
15 evidence that he was involved.

16 A. Right, yeah, I didn't want to --

17 Q. Which, again, you're telling me in discovery what
18 you're not going to talk about in a case.

19 A. Yeah, I was telling you something I'm curious
20 about and might possibly ask him at a hearing. You
21 know, --

22 Q. Do you have any reason --

23 A. -- it's possible that I probably would have
24 contacted him first, in fact I think I did, actually,
25 ask some people about it and they didn't remember, so

1 that kind of fizzled out. Anyway, so it's a nonissue.

2 Q. Well, let's go to Page 6 of the same exhibit,
3 14-2.

4 MR. PRUDEN: Sorry, Your Honor, I've got the
5 wrong piece of paper in front of me.

6 Q. All right. Very first full sentence on Page 6,
7 "I listed him," that would be Judge Kellams we're still
8 talking about, "in order to keep my options open, in
9 case evidence supporting my speculation materialized."
10 What speculation? And look at the sentence just before
11 that on --

12 A. Where are you at on Page 6?

13 Q. The very first full sentence where it says "I
14 listed him" at the top of the page. Are you with me?
15 Top of the page, Page 6.

16 A. Okay, I'm sorry. "I listed him in order to keep
17 my options open, in case evidence supporting my
18 speculation materialized."

19 Q. Now go back to the previous sentence on the
20 bottom of Page 5.

21 A. Okay.

22 Q. "I have no direct evidence that Judge Kellams
23 exerted an improper influence over the special
24 prosecutor and I'm not saying he is the sort who would
25 ever consider such a thing. I listed him in order to

1 keep my options open, in case evidence supporting my
2 speculation materialized." What are you speculating
3 about?

4 A. I've speculated that he might've had some
5 influence on my getting charged. I say right now at
6 this hearing, I'm sorry, I was just trying to tell you
7 why I listed the guy. I'm not saying that he's the sort
8 of person who would ever consider doing such a thing and
9 for purposes of this hearing I'd like to tell you that
10 Judge Kellams is not the sort of person who would ever
11 do such a thing and --

12 Q. Then why were you speculating that he did?

13 A. Geez, just thinking, you know, I just want to
14 tell you for the record he's not that kind of guy, he
15 would never do such a thing.

16 Q. Then why is it relevant to your answers?

17 A. Well, he didn't get called as a witness. I don't
18 know. I don't know what you're trying to get me to say.
19 I didn't know. I was thinking of fleshing out the
20 picture. I thought maybe I could make a big
21 presentation to show public policy, to show what really
22 happened in this case, but I decided not to do all of
23 that.

24 Q. You were going to file a writ of mandamus against
25 Judge Kellams because he wouldn't let you see Chad

1 Pemberton, isn't that correct?

2 A. Oh, I had all of the paperwork in the office and
3 the check and I got a call from the clerk saying "Do you
4 want me to deposit this check and set this in motion?"

5 Q. All right, let's go down to Page 6 where about
6 two paragraphs from the bottom it says "My prosecution,"
7 do you see that? Follow along with me.

8 A. Which page is this now?

9 Q. Page 6.

10 A. Okay, I see it.

11 Q. Last two paragraphs, "My prosecution was an act
12 of retribution carried out by people who seem to
13 sincerely believe it is wrong to challenge the
14 perception that police enjoy extra constitutional powers
15 and privileges," do you see that?

16 A. Yes.

17 Q. All right. Now, this is in the same paragraph
18 where you're talking about what Judge Kellams is going
19 to testify about, it's in the same subsection (e) under
20 "Marc Kellams," I said what are your witnesses going to
21 testify to and Marc Kellams is the one listed under (e),
22 we're still under (e).

23 A. Well, I may have changed the subject a little,
24 but let me tell you, it might make you happy, but I
25 think that there is some kind of a pervasive attitude

1 that the police enjoy powers and privileges that are not
2 granted to them by our state legislature.

3 Q. Well, let's talk about the first part of your
4 sentence.

5 A. I don't know what that's got to do with Kellams,
6 but I'm very concerned that --

7 Q. So does this statement, "My prosecution was an
8 act of retribution," have nothing to do with Judge
9 Kellams?

10 A. Probably nothing to do, no, I don't think it
11 does. I mean his attitudes about whether or not this is
12 a police prerogative to violate laws, you know, without
13 any permission from the state legislature, my problem is
14 that the Court of Appeals seems to have this feeling.
15 Judge Robbins who convicted me, and I love the man, I'm
16 not trying to say anything about him, but he said that
17 we have men in brown shirts to do that kind of thing,
18 and I think unless the legislature specifically grants
19 special powers that we shouldn't assume the police have
20 them. It makes you wonder what else can the police do
21 outside the law, and I don't know, I mean I think that
22 was kind of a pet-peeve of mine that I stuck in there,
23 but I think about this, I think about it quite a bit but
24 not with reference to Judge Kellams so much. I don't
25 know why I put it in there, I'm not sure, because he's

1 not the main one that has that problem that I know
2 about.

3 Q. Well, let's go back to your first statement there
4 where it says "My prosecution was an act of
5 retribution."

6 A. Right.

7 Q. Who was engaging in retribution against you?

8 A. Well, it began with the city police knocking on
9 doors saying, you know, "You're not going to get in any
10 trouble, we're trying to make a case against David
11 Schalk, he's the one. If you help us with that, then
12 you won't have any problems," so it would be like the
13 city police --

14 Q. Wait a minute, wait a minute, they knocked on
15 your door?

16 A. No, no, witnesses, you know, people that they
17 thought might help them.

18 Q. Okay.

19 A. I mean I made them angry and the prosecuting
20 attorney didn't like me poking into what goes on behind
21 the scenes with confidential informants.

22 Q. Now who told you that?

23 A. Well, I could just tell.

24 Q. So no one told you that, you just believe it
25 because you got prosecuted, is that correct?

1 A. Yeah, well, because I could see they went on a
2 rampage and the deputy prosecutor, you could just see
3 that he was hoppin' mad and the cops immediately tried
4 to make a case against me and --

5 Q. Well, they did make a case against you, didn't
6 they?

7 A. Yeah.

8 Q. You got convicted, didn't you?

9 A. Yeah.

10 Q. The Court of Appeals affirmed it?

11 A. Right.

12 Q. And you made all of these arguments to the Court
13 of Appeals about the police state and --

14 A. I don't think so but maybe I did.

15 Q. Well, you had your chance, you appealed the case,
16 correct?

17 A. Yeah, I definitely did appeal the case. I
18 tried --

19 Q. And you filed a petition for review with the -- a
20 petition for rehearing with the Court of Appeals,
21 correct?

22 A. Yes.

23 Q. They denied it?

24 A. Yes.

25 Q. You filed a petition to transfer with the Supreme

1 Court, they denied it?

2 A. Yes.

3 Q. And so you've made all of these arguments to all
4 of these legal authorities along the way and I'm trying
5 to figure out who is engaged in an act of retribution
6 when in fact you were found to have convicted the crime,
7 you were on appeal all the way up, what's the
8 retribution?

9 A. Well, I --

10 Q. Let me ask it this way, does the Supreme Court
11 have something against you that they want to get an act
12 of retribution against you?

13 A. No, not at all.

14 Q. Okay, but they affirmed the conviction, correct?

15 A. Well, no, they declined to grant transfer.

16 Q. All right, which is the same as --

17 A. Well, they're not saying either way, they just
18 didn't consider it.

19 Q. Fine, so the final appeal goes to the Court of
20 Appeals. Are they engaged in retribution against you?

21 A. No, they're not engaged in retribution against
22 me.

23 Q. Okay, you think Judge Robbins engaged in
24 retribution against you?

25 A. Not knowingly, not intentionally, you know, but

1 my answer to your question --

2 Q. Well, retribution isn't accidental, it's
3 intentional, if you're going to get retribution against
4 somebody you're doing it on purpose, aren't you?

5 A. Right, they didn't like me exposing their
6 confidential informant. This was --

7 Q. Judge Robbins didn't?

8 A. Well, he wrote you a letter saying that, you
9 know, it wasn't that I was really trying to possess
10 marijuana or something, you know, but that I was just
11 doing things I shouldn't do and he thought we have men
12 in brown shirts to do that and, no, I mean, he's got
13 nothing against me. I really have affection for the man
14 and I think he --

15 Q. What did the prosecutors have against you?

16 A. Well, people didn't think that attorneys should
17 be poking into their business --

18 Q. Maybe they didn't think --

19 A. -- behind the curtain like that. They do what
20 they do and we're supposed to get discovery from the
21 prosecutor and not be concerned about things that they
22 think need not concern us.

23 Q. Do you think whenever a prosecutor brings a
24 charge against somebody that they have probable cause to
25 believe committed a crime that that's a retribution?

1 A. No, but, you know, I wasn't prosecuted to further
2 the purposes of the marijuana prohibition, you know, or
3 to do something about the evil that the legislature
4 wanted to ban. I mean I tried to get it off the street
5 and into the police locker for --

6 Q. Did you succeed in that?

7 A. Well, no, I didn't.

8 Q. Where did the marijuana go?

9 A. Well, according to Lisa, she smoked it, I guess
10 her and Roger. Well, I'm just saying --

11 Q. Which is exactly what the laws against the
12 illegal drugs are designed to prevent, correct, so
13 instead of getting marijuana off the street you helped
14 assist Lisa get some to smoke, is that correct?

15 A. Well, no.

16 Q. That maybe not was your intent but that's what
17 happened, isn't it?

18 A. My intent was quite the opposite.

19 Q. I understand.

20 A. I was trying to get it over to the police, I did
21 what I could.

22 Q. So you trusted a person named Lisa Edwards, whom
23 you've never met, a person named Roger Grubb, whom you
24 had never met, who the word on the street was they were
25 drug-dealers because you testified to that earlier, and

1 you trusted them with your \$200 to go out and buy some
2 pot to give to the police?

3 A. Uh-huh.

4 Q. Is that your testimony?

5 A. That's what I was hoping would happen.

6 Q. You hoped it would happen?

7 A. Yeah. They weren't coming off the A felony in
8 the bargaining. He would have had to plead to an A
9 felony and I'm glad I didn't have to break any law but
10 this is very akin to, like say, capture the slave, you
11 know, like people sometimes broke the law and let them
12 go, some people may have done things just against the
13 outrageous cruelty that society is capable of, burning
14 heretics and so on. There's people languishing in our
15 prisons over this war on drugs, it's a complete disgrace
16 and it saddens me greatly and I did what I could for
17 Chad Pemberton.

18 Q. Let's go back to your answer in the Verified
19 Complaint, Exhibit No. 4, it's already been admitted,
20 could you find that, please?

21 A. Okay.

22 Q. Exhibit No. 4, okay, Page 5 of Exhibit 4, Page 5
23 of your answer to the Verified Complaint, about the
24 middle of the first paragraph -- In fact, let's do this
25 so you understand what I'm driving at here. Paragraph 4

1 of the Verified Complaint was "Pemberton discovered the
2 identity of the informant and told the respondent who
3 then participated in the scheme to purchase drugs," you
4 denied that, but then you go on to say a whole bunch of
5 other things, and we get to the middle of the first
6 paragraph on Page 5, you're still under Paragraph 4, and
7 right in the middle it's hard to spot because it's not
8 the beginning of a line, where it says "It did not
9 surprise me," it's one, two, three, four, five lines
10 from the top, "It did not surprise me to be attacked by
11 the local police, prosecutor and presiding judge. I am
12 dismayed by what the Court of Appeals published in its
13 opinion," see that?

14 A. Yes.

15 Q. "I deserve the praise of the Disciplinary
16 Commission. The words 'scheme' and 'ostensibly' in your
17 question are inappropriate and offensive."

18 A. That's right.

19 Q. Let's go one at a time.

20 A. Okay.

21 Q. How were you attacked by the local police?

22 A. Trying to get people to say things about me, you
23 know, gathering evidence, I guess. The prosecutor --

24 Q. Well, let me stop you right there.

25 A. Okay.

1 Q. I don't want to argue with you and if this is an
2 argument I apologize. It was your idea to do the tape-
3 recorder and the money and not to call the police ahead
4 of time to have them do this buy, or actually you did
5 call the police and they weren't interested, is that
6 correct? I misspoke. You had tried to call somebody
7 and they said "No, we're not interested"?

8 A. At some point I did. It wasn't --

9 Q. Whether it was before or after.

10 A. I think before I did call some police
11 agencies, --

12 Q. Okay.

13 A. -- but I didn't really have a volunteer, so yeah.

14 Q. So at least somewhere in the chain of the
15 purchase of this marijuana you were facilitating Lisa
16 Edwards in that purchase, you gave her the money and you
17 didn't know if she had any money of her own, you already
18 testified to that, you thought she was poor, you gave
19 her the \$200 out of your pocket, so you assisted her at
20 least in coming up with the funds, isn't that correct?

21 A. I really don't know if she got \$50 worth, if she
22 was going to get less than \$50 worth if it hadn't have
23 been for me, I can't say, I don't really know if --

24 Q. But you gave her \$200?

25 A. Yeah.

1 Q. You could've given her \$50? You can buy
2 marijuana for \$50, can't you?

3 A. Yeah.

4 Q. But you made it 200, you wanted it to be a
5 certain amount of marijuana, correct?

6 A. Well, I wanted to pay for it because I didn't
7 think it should be her responsibility and I wanted the
8 numbers written down on the --

9 Q. She didn't even ask you for the money, correct?

10 A. No.

11 Q. You volunteered the money, --

12 A. (Nods head affirmatively.)

13 Q. -- it was a voluntary act?

14 A. Yeah, it was.

15 Q. It wasn't even a request by her, correct?

16 A. No, I think she was surprised.

17 Q. Okay. Now, how did the prosecutor attack you,
18 legally attack? I mean I realize it's not physical.
19 How did he legally attack you or attack --

20 A. Well, I mean a special prosecutor filed an
21 Information naming me as a defendant in a case.

22 Q. Well, how is that an attack?

23 A. I don't know.

24 Q. It's your word, not mine.

25 A. Okay, well, I--

1 Q. What do you mean by "attack"?

2 A. That's what I mean.

3 Q. All right, fine. And then the presiding judge,
4 how did he attack you?

5 A. Well, he threw me off the case. I guess that's
6 what I meant.

7 Q. Okay, and you deserve the praise of the
8 Disciplinary Commission, why?

9 A. I hope I get it. Criminal defense attorneys in
10 Indiana need all the encouragement they can get and they
11 certainly don't need to see this happening to me for
12 trying to defend Chad Pemberton. As I can explain, I
13 didn't break any law but the Court found that I did.
14 What I did is I tried to prevent a fraud upon the Court.
15 I had good reason to believe that the police and Brandon
16 Hyde were going to lie about his ongoing drug dealing
17 and I just wanted the jury to know that. I think that I
18 have endured so much in retribution, really, for my
19 efforts on behalf of my client. I know most attorneys
20 wouldn't do what I do, but I'm glad I am who I am.

21 Q. "The word 'scheme' and 'ostensibly' in your
22 question are inappropriate and offensive." Well, let's
23 start with 'ostensibly.' That's the word the Court of
24 Appeals used, isn't it?

25 A. Well, I was probably offended when I saw it

1 there, probably more so than when you wrote it.

2 Q. And "scheme," why is that offensive?

3 A. I don't know, doesn't that sound kind of sleazy,
4 underhanded, you know, "scheme"? I don't think the
5 Founding Fathers --

6 Q. Why is it inappropriate?

7 A. Well, because there was nothing like that going
8 on. To call it a "scheme" is a pejorative word that's
9 used for it and --

10 Q. So if I used "plan," that would've been better?

11 A. I don't care. You know, it's probably -- Yeah.
12 I mean I don't even remember what you're talking about.
13 Maybe neither one of them would apply, but, yeah,
14 'scheme' and 'ostensibly' doesn't sound too good.

15 Q. All right, got one more subject and then I'll be
16 done. On your interrogatory answers --

17 MR. PRUDEN: By the way, if I haven't
18 offered them, Your Honor, I'd offer them at this time.
19 I don't remember if they've been offered or not.

20 MR. SCHALK: No objection.

21 JUDGE TROCKMAN: Interrogatory answers --

22 MR. PRUDEN: Whatever exhibit that is.

23 JUDGE TROCKMAN: -- are admitted. The
24 exhibit number it looks like is --

25 MR. PRUDEN: I'll get it here, Your Honor.

1 14-2.

2 JUDGE TROCKMAN: Answers to interrogatories
3 14-2, yes.

4 (Commission Exhibit 14-2 is admitted.)

5 Q. In your responses to interrogatories you stated
6 that you had listed Sheriff James Kennedy as a witness
7 and in your response to my request as to what you
8 expected him to testify you said he was going to confirm
9 that you were still an authorized deputy sheriff, or
10 something to that effect, is that accurate?

11 A. What exactly did I write?

12 Q. 14-2, I'll refer you right to it, if that's
13 helpful. 14-2, subsection (j) titled "James Kennedy"
14 and it starts at the bottom of Page 8.

15 A. Got it. All right.

16 Q. It says "He can confirm that nothing in the
17 sheriff's office suggests that my 1985 appointment as a
18 deputy sheriff had been revoked prior to June 25, the
19 day I met with Lisa Edwards at Arby's in Ellettsville."

20 A. Right.

21 Q. Okay. At some point after the interrogatory
22 responses did you receive a copy of a notice of
23 deposition and subpoena that I sent to Sheriff Kennedy
24 for his deposition?

25 A. I don't recall that. I do recall the deposition,

1 though, we had it here.

2 Q. Show you 9-1 and represent to you this was the
3 subpoena and notice of deposition that I sent to you
4 regarding that deposition, do you see that?

5 A. Sure.

6 Q. And you must have received some information that
7 we were going to take -- that I was going to take
8 Sheriff Kennedy's deposition, correct?

9 A. Yes.

10 Q. Does this look like something you would've gotten
11 from me?

12 A. Well, I was well aware of the deposition and I
13 showed up for it.

14 Q. So you don't dispute it if I represent that that
15 is what I sent to you?

16 A. No.

17 Q. All right. Now I'm going to show you what has
18 been marked as 9-2. Would you identify 9-2?

19 A. It's a copy of a letter that I wrote to Sheriff
20 James Kennedy. It's got the date of "April 11th" on it.
21 I'm not sure that that's right but it probably is close,
22 but that's my signature and I do recall writing him a
23 letter, so this is undoubtedly it.

24 Q. Is this the letter you wrote to James Kennedy
25 then upon receiving some sort of notice that his

1 deposition had been scheduled?

2 A. Yes.

3 Q. Okay. Would you go to the third paragraph --
4 Well, I'm not sure it's the third paragraph, the one
5 that started "That couldn't be any plainer"?

6 A. Yes.

7 Q. You cited a civil trial rule where it says "The
8 place of depositions will be in the county where the
9 person resides or is employed or such other convenient
10 place as is fixed by an order of the court," that was
11 your second paragraph citing the rule, correct?

12 A. Yeah.

13 Q. And then you say "That couldn't be any plainer.
14 We don't have to go to Indianapolis for your deposition.
15 I will gladly enter my appearance on your behalf and get
16 the location of the deposition changed to your
17 headquarters in Bloomington. Just say the word. I
18 would be adequately compensated by not having to drive
19 to Indianapolis and find a parking garage next
20 Wednesday," that's what you wrote, correct?

21 A. Yes, yes.

22 Q. You offered to represent a witness in your own
23 case to get a subpoena quashed or changed, is that
24 correct?

25 A. Just for the limited purpose of not having to

1 drive to Indianapolis.

2 Q. Well, so you were going to offer to represent a
3 witness in the case because it was inconvenient to you,
4 correct?

5 A. Well, I thought maybe it would be inconvenient to
6 him, too, but, yeah, I was concerned about driving to
7 Indianapolis when it seemed like we could just have it
8 in Bloomington, so I looked up the rule and there it
9 was, so I sent the sheriff a copy and said I didn't want
10 to horn in on his business but give me the green light
11 and I'll go ahead and move to quash this.

12 Q. On his behalf?

13 A. Well, I guess he's the one that has standing to
14 object. I don't know, maybe I did, too, it hadn't
15 occurred to me.

16 Q. You think it's okay to represent witnesses in
17 cases where you're a party, you think that's
18 permissible?

19 A. Let's see, represent witnesses --

20 Q. He's a witness in this case, he was identified as
21 a witness by you, now you're offering to represent him.

22 A. Yeah, to get the deposition moved to Bloomington.
23 I don't see anything wrong with it. I don't know, is
24 that improper?

25 Q. That's what I was asking, do you see anything

1 wrong with it, --

2 A. No.

3 Q. -- offering to represent him?

4 A. No, not in this context. I just said "If you
5 want, I'll get the thing moved if you'd like me to,"
6 that's all I wanted to do, that's the only purpose of
7 it. If you want to stress the word "represent," I don't
8 really know where you're going with it, but I asked him
9 if he wanted me to get it changed to Bloomington I'd be
10 glad to.

11 Q. You didn't ask for him to get it changed, you
12 said "I will represent you to get it changed," you'll
13 become his lawyer for that purpose, you'll engage in an
14 attorney-client relationship with a witness in this
15 case, isn't that what you offered to do?

16 A. Not really, I didn't offer to advise him or
17 anything beyond sending him the rule.

18 Q. Well, you already advised him.

19 A. Yeah, advised him by sending him the rule. He's
20 a lawyer, you know, I mean --

21 Q. I do know that.

22 A. Well, what's the problem?

23 Q. So you think he's incapable of deciding for
24 himself if he wants to change the venue?

25 A. He can do that. I just pointed out the rule to

1 him in case he wasn't aware of it and said --

2 Q. Well, you wanted him to do it, you wanted him to
3 change it.

4 A. Well, it would've been nice, yeah, I mean I --

5 Q. Well, you said in here "I would be adequately
6 compensated by not having to go to Indianapolis.

7 A. Yes, but --

8 Q. You wanted him to change it, correct?

9 A. Yeah, I didn't want to have to come here, so
10 yeah, I said, you know, if he wanted me to have it in
11 Bloomington, fine.

12 Q. Did you call Sheriff Kennedy to see maybe if it
13 was his idea to come to Indianapolis?

14 A. Well, he let me know that he had business here on
15 that day and that you guys had arranged that.

16 Q. Well, he let you know that at the deposition.

17 A. No, he --

18 Q. He didn't tell you before that -- or yeah, he
19 sent you an e-mail, didn't he?

20 A. Yeah, telling me "Thank you, but it's okay, we
21 arranged that because I have other business in
22 Indianapolis" and that was the end of that.

23 Q. All right, and you told him here in the next
24 paragraph "I don't think there is any good reason for
25 taking your deposition."

1 A. Yeah.

2 Q. Why would you tell a witness that there's no good
3 reason for the other side to take their deposition, why
4 would you tell that to a witness?

5 A. That must be what I thought, you know.

6 Q. I know it's what you thought, but why would you
7 say it to a witness? Do you think it's all right for a
8 lawyer to advise witnesses -- I mean are you implying
9 that it was improper to take his deposition? Third full
10 paragraph, "I don't think."

11 A. Yeah, what I was saying is that the only issue is
12 this issue of, you know, was my appointment cancelled or
13 something and that could be taken care of, that he could
14 tell you, you know, I mean why do we all have to go and
15 convene and record it if this bit of information that I
16 wanted -- that's all I wanted to establish, that that
17 could be established simply by other means, yeah. So
18 yeah, I mean I think -- I think there was no good reason
19 to take the deposition, I think you could've established
20 what you wanted to. I'm glad you did, it was kind of
21 interesting.

22 Q. Okay. Tell me how I would refute your statement
23 in the interrogatories that he was going to testify that
24 your appointment as deputy sheriff had not been revoked
25 without asking him that question, how's that going to

1 happen?

2 A. Well, if you knew it hadn't been then I guess you
3 wouldn't, I don't know, you wouldn't raise the issue, I
4 mean you wanted to know that, I think.

5 Q. I did want to know that.

6 A. Yeah, he didn't, his predecessor didn't, in fact
7 nobody has so far.

8 Q. I'm asking you why there was no good reason for
9 me to take his deposition to find out under oath what
10 he's going to say about the subject matter that you
11 claim he's going to testify to.

12 A. Like I said, he's an experienced attorney, he's a
13 strong man, you know, he can deal with this just fine
14 without your assistance in saying that I wasn't supposed
15 to give him my opinion about going to Indianapolis --

16 Q. How am I going to know what he's going to say?

17 A. Look, he's not even here.

18 Q. Uh-huh, I've got his deposition. We'll get to
19 that in a minute.

20 A. Are you going to substitute that for his
21 testimony?

22 MR. PRUDEN: Your Honor, let me ask the
23 questions.

24 MR. SCHALK: Okay.

25 JUDGE TROCKMAN: Next question.

1 Q. Did Sheriff Kennedy ever express to you that he
2 didn't want to have his deposition taken?

3 A. No.

4 Q. Did he ever ask for your opinion about whether or
5 not he thought his deposition should be taken?

6 A. No.

7 Q. So you just volunteered to him that "I don't
8 think there's any good reason for the Disciplinary
9 Commission taking your deposition"?

10 A. Right.

11 Q. Is that because you didn't want the Disciplinary
12 Commission to take his deposition?

13 A. I didn't want to drive to Indianapolis. It
14 turned out I enjoyed the deposition and I thought it was
15 somewhat useful, so I didn't have any strong feelings at
16 the time.

17 Q. If the prosecutor called one of your witnesses in
18 a criminal case and said "Oh, you know, I really think
19 it's unnecessary for you to testify, I don't think you
20 ought to cooperate with Mr. Schalk," what would you
21 think, how would you react to that if you were going to
22 offer a witness at a trial and the prosecutor contacted
23 them and said "You know, this is really unnecessary, I
24 don't really think Mr. Schalk ought to be calling you as
25 a witness. Why don't you let me represent you and get

1 that quashed," what would your reaction be to that?

2 A. First off, this is completely irrelevant and very
3 misleading. I never asked --

4 Q. That's for him to determine. Why don't you
5 answer my question, please, sir.

6 A. To get a deposition quashed? I didn't try to
7 quash a deposition. Why don't you stick to this and
8 then I can answer your question.

9 Q. If a prosecutor contacted one of your witnesses
10 and said "You don't have to go to Indianapolis, we'll
11 move the deposition, I'll represent you on that. Oh,
12 and by the way, this deposition isn't even necessary,"
13 how would you react to a prosecutor doing that with one
14 of your witness?

15 A. Well, I --

16 Q. Favorably, would you be favorable to a prosecutor
17 approaching one of your witnesses and making those two
18 statements?

19 A. Well, it would depend if Sheriff Kennedy was my
20 witness and it was just a conversational thing with the
21 prosecutors over there, I would have absolutely no
22 problem with it, they can talk about the case and what
23 they think all they want.

24 Q. If they offered to --

25 A. If somebody was trying to get one of my clients,

1 you know, to not testify, I would be offended by that,
2 certainly, --

3 Q. But witnesses are okay?

4 A. -- but I wasn't trying to do that, I was just
5 trying to say that "the deposition could be in
6 Bloomington where we both live if you want to."

7 Q. Well, and you also said it wasn't necessary.

8 A. Well, yeah, to establish whatever you needed to
9 establish, it seemed awfully like a lot of, what would
10 you call it, just a lot of fuss over --

11 Q. Legal --

12 A. No, if you want to know an answer to a simple
13 question you can get the answer, I would stipulate to
14 whatever you wanted. I mean there are very simple ways
15 to do it. It seemed like --

16 Q. Would it have been simple for you just to give me
17 a phone call and say "Hey, can we do this down in
18 Bloomington? This is a long drive for me," would that
19 have been a simple way to handle it?

20 A. I remember when you told me you were going to
21 take his deposition, it didn't seem like it was
22 negotiable.

23 MR. SCHALK: I guess I'll object on
24 relevance grounds just in the hope that we can move on.

25 MR. PRUDEN: Let me tell you the relevance,

1 Your Honor, there's an objection before you.

2 JUDGE TROCKMAN: Overruled. The Court
3 believes that the question's relevant and directs the
4 witness to answer.

5 A. Okay, well, I've tried to answer the question all
6 I can. James Kennedy has been a US Marshal, he's been
7 the chief of police of the City of Bloomington, the head
8 of the Indiana University Police, he's now the elected
9 sheriff of Monroe County and he's a colonel in the
10 military, he works on security issues, that's kind of
11 vague in my mind, it's probably supposed to be, and he's
12 a licensed attorney, so these kind of conversational
13 things with him is not going to affect him at all. He's
14 not going, you know, to be misled or anything and I
15 didn't even try to do that. You know, I just said "We
16 can have it in Bloomington if you want, I'll file the
17 papers, you know, I'll make the motion or whatever."

18 JUDGE TROCKMAN: Thank you.

19 A. But you've got to understand the context to
20 understand what Sheriff Kennedy and I were discussing
21 there was not improper.

22 JUDGE TROCKMAN: Thank you.

23 MR. PRUDEN: I'd offer 9-1 and 9-2.

24 JUDGE TROCKMAN: Any objections?

25 MR. SCHALK: No objection, Your Honor.

1 Which one's 9-1? Oh, I see, the notice of deposition,
2 okay, yeah. No objection.

3 JUDGE TROCKMAN: 9-1 and 9-2 are admitted.
4 (Commission Exhibits 9-1 and 9-2 are
5 admitted.)

6 Q. All right, Mr. Schalk, I'm going to show you what
7 I have marked as Exhibits 8-1, 8-2, and 8-3.

8 A. Okay.

9 Q. Would you identify those for the Court, please?

10 A. 8-1 is a subpoena to the Honorable Mark Bailey to
11 come to the Disciplinary Commission hearing in this
12 matter. It was the one that was previously scheduled
13 for March 12th, and that's a one-page document, and then
14 attached to that is a letter to Judge Bailey, a four-
15 page letter, and a copy of my sheriff credentials as an
16 attachment. So this is a subpoena I sent to the
17 Honorable Mark Bailey, a letter I sent to him and an
18 attachment showing my credentials as a Monroe County
19 Deputy Sheriff. Oh, and then 2 is similar, it's a
20 subpoena but it's directed to the Honorable Edward W.
21 Najam, Jr., and in there is a letter to Judge Najam, and
22 that letter is only a three-page letter and it has the
23 same attachment, a copy of my sheriff's credentials, and
24 No. 3 is a letter to the Honorable Carr L. Darden with a
25 short cover letter and no attachment.

1 Q. You say these are subpoenas and letters you sent
2 to these three Court of Appeals judges, correct?

3 A. That is correct.

4 Q. And this is to subpoena them to testify in this
5 hearing, although the original setting --

6 A. Yes, but it's set for a different date.

7 Q. Of March the 12th, back in 2 --

8 A. Right.

9 Q. Okay, on your behalf, correct?

10 A. That's right.

11 Q. Now, these are the three Court of Appeals judges
12 that ruled against you in your criminal case, isn't that
13 correct?

14 A. That's right.

15 Q. And apparently two of them that had something to
16 do with the denial of the Pemberton PCR, is that
17 correct?

18 A. Right, the appeal from the denial of that, yes.

19 Q. What did you expect these Court of Appeals judges
20 to testify to that would benefit you in this proceeding?

21 A. Well, I asked you -- I'm answering your question.
22 I asked you how you intended to prove the facts that you
23 were alleging in your complaint and you said that it
24 would be the opinion of the Court of Appeals.

25 Q. Yes.

1 A. Well, the facts in that opinion don't even
2 correspond to the trial testimony. It's not only not
3 well-reasoned but it's factually incorrect and --

4 Q. So did you think that the Court of Appeals judges
5 would come in and confirm that their opinion was
6 factually incorrect?

7 A. Well, I just wanted to cross-examine them on
8 whatever you were going to put into evidence based on --

9 Q. Oh, you thought I was going to call them?

10 A. No, you were just going to use their hearsay
11 statements in the opinion as evidence of facts, to offer
12 that to prove the truth of matters asserted in the
13 opinion, that's what I understood you to say, and I
14 thought "Well, if these guys are going to come and their
15 statements are going to be admitted for the sake of
16 people believing they're true, I'd better be able to
17 cross-examine them," so I subpoenaed them. Now, that
18 was all ridiculous but after what I've seen I didn't
19 know, I didn't know if you were actually going to try
20 that, and I've seen --

21 Q. Try what?

22 A. Well, establishing facts with a Court of Appeals'
23 Opinion as if it were somehow findings of fact that
24 would somehow be admissible as facts or something, you
25 know, and I --

1 Q. Is it your position that the Court of Appeals'
2 Opinion are not findings of fact?

3 A. Yeah, it's just hearsay. Often they're wrong, I
4 mean they get stuff wrong, you know, but they weren't
5 there, they weren't witnesses, all they know is what
6 they read that somebody else said, I mean it's usually
7 hearsay within hearsay within hearsay by the time they
8 write it.

9 Q. How do we cite appellate opinions as legal
10 precedent for factual situations if we don't rely on the
11 facts in those opinions, tell me how we do that?

12 A. I don't know how you do it. How do you do it?

13 Q. If it's hearsay on hearsay on hearsay, then how
14 can it be legal precedent to support any factual
15 situation?

16 A. Well, it's like a hypothetical. They're saying
17 if these are the facts, then the law compels this
18 outcome and people read that and then they see how facts
19 compel an outcome, you know, but the facts might not --

20 Q. What if the appeal is is there sufficient
21 evidence to establish beyond a reasonable doubt that
22 this crime occurred? That's not a hypothetical, they're
23 ruling on the facts of the case, just like they did in
24 your case.

25 A. Yeah, but it wasn't turning on the facts, it was

1 turning on the legal analysis. You know, I've freely
2 admitted from the beginning that I provided currency and
3 a voice recorder with the understanding that -- with the
4 hope that marijuana would be purchased and taken to the
5 police so that I could establish facts at the Pemberton
6 trial, I said that from the very beginning, I repeated
7 it over and over, and so the facts weren't really an
8 issue, you know.

9 Q. If the facts aren't an issue, then why is it
10 relevant to bring in the Court of Appeals to cross-
11 examine them about it?

12 A. Well, the facts that the case didn't turn on now
13 suddenly, you know, despite the fact that I and Lisa
14 Edwards both testified that she called me and, you know,
15 she didn't really know why and stuff, the Court of
16 Appeals wrote that I called her on June 25th and they
17 had something else in there that was wrong about Leslie,
18 my asking Leslie Pemberton if she would go buy marijuana
19 or something and that simply never happened and it's not
20 supported by any evidence.

21 I can understand if witnesses come and lie and
22 untrue things are believed, then too bad, I mean, but it
23 wasn't even based on the evidence. It didn't matter,
24 the case didn't turn on that, but I didn't want the
25 Court of Appeals or the Supreme Court to get their facts

1 wrong on things that now matter --

2 Q. But you --

3 A. -- in this.

4 Q. But you appealed the Court of Appeals? You
5 petitioned to transfer. Actually, you asked for a
6 rehearing, correct?

7 A. Well, yeah.

8 Q. So they denied that, right?

9 A. Yeah, they did.

10 Q. So you already made that argument to them once?

11 A. What argument? Well, no, the case didn't turn on
12 those facts that I was concerned with and I didn't
13 even --

14 Q. So if the facts --

15 A. I don't think I even pointed that out to them, I
16 don't think I ever said "You've got your facts wrong
17 here and there." It doesn't matter --

18 Q. So you didn't argue to them in your appeal that
19 their facts were wrong? If you thought their facts were
20 wrong, you didn't even raise that as an appeal issue?

21 A. No, I don't believe I did. The case didn't turn
22 on that at all. There were facts that specifically
23 explicitly were not considered. In a footnote they said
24 they were not considering something I mentioned. The
25 fact that I'm a deputy sheriff, that that was mentioned

1 in the issues but not argued and they said "Anything
2 that's mentioned but not argued we're not considering in
3 this opinion," so, you know, some facts weren't
4 considered. The ones they got wrong it didn't matter.
5 What mattered was they thought a definition in the
6 Indiana Code somehow granted powers and immunities to
7 police officers and all it does is define law
8 enforcement officers.

9 Q. Okay, you've made all of those arguments but that
10 wasn't my question. My question was what were you going
11 to ask them to testify about? Certainly they can only
12 testify as to facts, correct?

13 A. Well, you know, they got the Attorney General to
14 represent them and an attorney from there cited some
15 case law for me showing that, you know, you --

16 Q. I don't think you're --

17 MR. PRUDEN: Nonresponsive, Your Honor.

18 JUDGE TROCKMAN: Sustained.

19 Q. They can only testify as to facts, can't they?

20 A. Well, I was trying to answer that. I don't know.
21 They can testify to whatever they testify to. If
22 they're asked a question and they answer it, then they
23 testify to it. Would they be allowed to testify over
24 objection about some things? Probably not, but I don't
25 know what -- You know, that's what I was trying to

1 explain was I really don't know.

2 Q. In one of your pleadings, I believe it was
3 answers to interrogatories, although I'm not sure of
4 that now, I'll find it in a minute, you actually used
5 the term -- you said you wanted to confront the Court of
6 Appeals judges regarding either their legal analysis or
7 their lack of following your legal analysis, I think
8 that's the word you used.

9 A. I may have, I don't know.

10 Q. Was that the purpose of subpoenaing them for this
11 hearing so you could confront them about their opinion,
12 whether they got it right or wrong?

13 A. Well, yeah, I mean I would've liked to have done
14 that but I've come to understand that that probably
15 wouldn't survive an objection, so I wouldn't get too far
16 on --

17 Q. You know the courts speak through their orders,
18 correct?

19 A. Yeah, but they completely ignored my legal
20 argument, you know, but the facts speak for themselves.

21 Q. How do you know they completely ignored it?

22 A. Well, they wrote an opinion that kind of defamed
23 me in a way, said that I made some argument that's
24 pretty stupid that wouldn't have even occurred to me and
25 ignored the argument that I did make because it makes

1 sense, so they didn't deal with that, they just said I
2 said something else and then they knocked it down since
3 it was --

4 Q. Okay, I've just got one more question and I'm
5 going to be done. So I just want to follow up on
6 something you just said. They ignored the argument that
7 you filed because it made sense and they only went by
8 something that was not argued, is that your testimony?

9 A. No, it's not my testimony because I really can't
10 read their minds and know. You know, I guess it's
11 possible to read my brief and not know what my argument
12 was and think that I said something else, and I know
13 they have clerks and helpers and all of that, so there's
14 probably no reason, it's just a random error is what I
15 think it is, like somehow they just didn't know what my
16 argument was, and so then they said that my actions
17 didn't come under the Citizen's Arrest Statute for
18 whatever reasons. Maybe they thought that that's what I
19 was saying, I don't know. It made me look pretty dumb.
20 I never would've said that, and what I did say makes a
21 whole lot of sense and hasn't been dealt with yet, which
22 is why I'm grateful to be here today.

23 MR. PRUDEN: Okay, nothing further.

24 JUDGE TROCKMAN: The Commission rests. Mr.
25 Schalk.

1 MR. SCHALK: Can we stretch for five
2 minutes, maybe?

3 JUDGE TROCKMAN: Yes.

4 MR. SCHALK: Thanks.

5 MR. PRUDEN: Your Honor, I apologize. It is
6 3:30 and as we talked about earlier today I do have a
7 commitment.

8 JUDGE TROCKMAN: You indicated you need to
9 be done by 5 --

10 MR. PRUDEN: 5.

11 JUDGE TROCKMAN: -- or is that --

12 MR. PRUDEN: That's correct. I mean I can
13 go 5:15.

14 JUDGE TROCKMAN: That's the limit, about the
15 limit?

16 MR. PRUDEN: Yes, and same with the court
17 reporter.

18 MR. SCHALK: Did you mean to offer these
19 into evidence?

20 MR. PRUDEN: What are they?

21 MR. SCHALK: 8-1, 2 and 3.

22 MR. PRUDEN: Thank you, I do want to offer
23 those, thank you, Your Honor, thank you, Mr. Schalk.

24 MR. SCHALK: No objection.

25 JUDGE TROCKMAN: 8-1, 8-2 and 8-2 are

1 admitted.

2 (Commission Exhibits 8-1, 8-2, and 8-3 are
3 admitted.)

4 MR. PRUDEN: And, Your Honor, --

5 JUDGE TROCKMAN: Are 9-1 and 9-2 admitted?

6 MR. PRUDEN: Well, Your Honor, any exhibit
7 that I have handed to the Court I am now offering.

8 MR. SCHALK: And I don't object, Your Honor.

9 JUDGE TROCKMAN: There we go. All right.
10 Take a five-minute break.

11 (Off the record discussion.)

12 MR. PRUDEN: Your Honor, we've had a
13 discussion off the record and I am handing you what I'm
14 representing to be -- Let me make sure I've got the
15 right exhibit number on here -- what I am going to --
16 Uh-oh! I'm sorry. Exhibit 12.

17 MR. SCHALK: No objection.

18 MR. PRUDEN: And Exhibit 12, Your Honor, is
19 the deposition taken of Sheriff Jim Kennedy in this
20 proceeding.

21 JUDGE TROCKMAN: Very good.

22 MR. PRUDEN: This is the original.

23 JUDGE TROCKMAN: There being no objection,
24 12's admitted.

25 (Commission Exhibit 12 is admitted.)

1 JUDGE TROCKMAN: While we're back on the
2 record, Mr. Schalk, with regard to your case in chief,
3 as I recall you indicated that you did not intend to
4 call any witnesses.

5 MR. SCHALK: That's right, and I don't.

6 JUDGE TROCKMAN: And so your case is going
7 to involve testimony by yourself pro se, I'm assuming?

8 MR. SCHALK: Pretty much, and legal
9 argument, Your Honor.

10 JUDGE TROCKMAN: All right.

11 MR. SCHALK: I mean the facts --

12 JUDGE TROCKMAN: Well, and the reason I
13 bring that up is I am going to ask that the legal
14 argument -- counsel may certainly make short statements,
15 if you wish, but as we discussed before we began, I'm
16 going to give counsel adequate time, and we'll discuss
17 what you think is adequate, to file proposed findings of
18 fact, conclusions of law and any post-trial briefs.

19 MR. SCHALK: Okay.

20 JUDGE TROCKMAN: And so obviously that will
21 be an opportunity to make legal argument. You can
22 obviously cite authority --

23 MR. SCHALK: Okay.

24 JUDGE TROCKMAN: -- and give your argument
25 more thought if you'd like. Do you have any objection,

1 Mr. Schalk, if we were to handle closing argument in
2 that fashion and that is any argument would be placed in
3 your post-trial brief?

4 MR. SCHALK: I wonder if we could maybe have
5 5 minutes here and do the main body of it, you know,
6 citations and all in the brief, or maybe 10 minutes, 5
7 might do it. I just kind of would like to very briefly
8 outline here --

9 JUDGE TROCKMAN: So let's ask Mr. Pruden.

10 MR. PRUDEN: I'll leave that up to him, Your
11 Honor. It's his law license. You know, if he wants
12 more time to argue to convince you of whatever, I think
13 that's okay. It's at your convenience.

14 JUDGE TROCKMAN: All right, so we'll allow
15 you to present whatever evidence that you wish by way of
16 a narrative. Mr. Pruden would obviously be allowed to
17 cross-examine, and you're asking for some time to make
18 arguments here and I'm indicating that I'll allow both
19 parties and you'll exchange and the date for filing will
20 be identical, so neither of you will see the other's
21 until they're filed.

22 MR. SCHALK: Okay.

23 JUDGE TROCKMAN: But you'll be allowed to
24 file any authority and arguments.

25 MR. SCHALK: Okay, now I might want to quote

1 from the trial transcript when I was put on trial and I
2 don't know that that's in evidence.

3 JUDGE TROCKMAN: You can attach that. Was
4 that transcribed?

5 MR. PRUDEN: I don't know.

6 MR. SCHALK: We went up on appeal, so the
7 transcript exists.

8 JUDGE TROCKMAN: All right, then if it was
9 accepted by the Court of Appeals and it's part of the
10 record of the Court, then you can attach whatever
11 portion of that transcript you wish.

12 MR. SCHALK: Okay, and there's two
13 depositions from that case that I would like to make
14 exhibits, it was Detective Shawn Carr and a city
15 detective whose name is escaping me, it was a short
16 deposition and he admitted that Brandon Hyde had
17 targeted Chad Pemberton in the hopes that he would
18 testify, he would be under pressure, you know, could be
19 coerced into testifying against --

20 JUDGE TROCKMAN: You don't have those with
21 you?

22 MR. SCHALK: I don't have them with me, no,
23 it's just two depositions from my case.

24 MR. PRUDEN: Relevance?

25 JUDGE TROCKMAN: Mr. Pruden?

1 MR. SCHALK: I don't know, you've questioned
2 and you may in your brief, you know, why did I even need
3 that to prove this, you know, or would the judge have
4 allowed me to prove that Brandon Hyde was currently
5 dealing drugs and I think it kind of helps to show the
6 kind of pressure Brandon Hyde was under to keep the
7 police happy, so if you're going to make that argument
8 then --

9 MR. PRUDEN: Relevance to this case?

10 JUDGE TROCKMAN: Yes, let's take that under
11 advisement --

12 MR. PRUDEN: Okay.

13 JUDGE TROCKMAN: -- because I have a
14 question, I made a note on here, which I'd like to ask
15 before Mr. Schalk begins and it goes to your question of
16 relevance. Okay, so let's go off the record and take a
17 5-minute break where counsel can use the restroom and
18 stretch and the court reporter as well.

19 (A brief recess was taken.)

20 JUDGE TROCKMAN: So we'll show the
21 Commission concludes its case in chief. The case is now
22 with you, Mr. Schalk. I do have a question and I'm
23 going to ask the question of you now and maybe you can
24 incorporate this into your response or your testimony
25 since your testimony is going to be narrative in form,

1 I'm assuming.

2 MR. SCHALK: Yes.

3 JUDGE TROCKMAN: So as I understand it,
4 there is a meth-related arrest and the dealer -- your
5 client is named Pemberton and the dealer's name is Hyde
6 and you went about a process of making a controlled buy
7 through Mr. Hyde who you knew to be the confidential
8 informant, and what I'd like for you to include in your
9 narrative statement is how you believe that making yet
10 an alleged second purchase or at least a purchase from
11 this confidential informant, whose name was Hyde, was
12 going to assist your client, Pemberton, who had either
13 made a purchase from Pemberton or not made a purchase
14 from Pemberton, point being if the purchase was made
15 your client was guilty, if the purchase was not made
16 your client was not guilty, and knowing that Hyde was a
17 confidential informant, he either was or had been or
18 continued to be in the business of selling drugs and in
19 this case methamphetamine, marijuana and maybe other
20 drugs as well. If you would incorporate a response to
21 that inquiry into your narrative I would appreciate it.
22 Obviously, there is no requirement to do so. So, Mr.
23 Schalk, you are under oath. State your name.

24 MR. SCHALK: I am David E. Schalk.

25 JUDGE TROCKMAN: And you're currently

1 licensed to practice law in the state of Indiana?

2 MR. SCHALK: Yes.

3 JUDGE TROCKMAN: Your business address is?

4 MR. SCHALK: 1706 South Olive Street in
5 Bloomington, Indiana, 47401, and my disciplinary -- I
6 mean my license number is 15551-53.

7 JUDGE TROCKMAN: And your office telephone
8 number is?

9 MR. SCHALK: (812) 336-9093.

10 JUDGE TROCKMAN: And e-mail address?

11 MR. SCHALK: These days it's
12 schalk999@gmail.com, S C H A L K 9 9 9 at gmail.com.

13 JUDGE TROCKMAN: Very good. Mr. Schalk.

14 MR. SCHALK: All right. Now, in this case,
15 I am going to address your comments and say that in this
16 case the allegation was that Pemberton sold a small
17 amount of methamphetamine to Brandon Hyde within a
18 thousand feet of a public housing complex. Hyde was
19 working for the police. I believe he'd previously been
20 arrested for selling cocaine, you know, but in this
21 case, I mean, the whole issue was his marijuana, and so
22 there was -- and during this case there was never an
23 allegation that Hyde provided any methamphetamine to
24 anybody. My understanding is that he hasn't done that,
25 but that wasn't what the issue was here, but with

1 Pemberton it was not marijuana but it's methamphetamine.
2 Now, I thought that the jury is going to be intelligent
3 people that will want to know what's going on, who are
4 these players? What is this story? Indiana's one of
5 only two states which have constitutions giving juries
6 not only the power but the right to judge the law, which
7 it is a correct statement of the law to say that means
8 that they can find a person guilty of each and every
9 element of an offense beyond a reasonable doubt yet
10 return a verdict of not guilty if they think justice is
11 better served that way. So in Indiana and one other
12 state, I don't know which one, fully-informed juries
13 is -- that's really important.

14 JUDGE TROCKMAN: And you believe that that
15 is the state of the law in Indiana that a jury may
16 disregard the law or disregard the facts or both in
17 returning a verdict that it believes is just?

18 MR. SCHALK: Yes, Your Honor, and I can send
19 you a case because the case was was it reversible error
20 for the judge not to give that instruction. The Court
21 of Appeals said, well, he didn't have to give that
22 instruction, but maybe it was a dissent but nobody
23 really said any different and it was said that that is
24 an accurate statement of the law, it's just that the
25 judge didn't have to give that instruction that way

1 because he gave other instructions about the jury being
2 the judge of the law. That's just an ongoing battle
3 with, you know, defense attorneys trying to push that
4 forward and I've seen, you know, prosecutors of course
5 trying to put that to the back and so the instruction is
6 the court is your best source of the law but, you know,
7 I don't think juries really quite get it, but anyways,
8 that's just one aspect of it.

9 The other one is this, Your Honor, I didn't
10 know -- Pemberton and I didn't really discuss exactly
11 whether he did it or not. You know, I might've had my
12 suspicions but it was something that was left alone.
13 You know, he was in deep trouble and we really hadn't
14 gotten to that. Now, eventually he took a deal and said
15 that he did make the sale, so we can now say that that's
16 a fact.

17 But the way things stood, the credibility of
18 Brandon Hyde was an issue because he was out of sight of
19 the police, I mean they didn't see him the whole time.
20 They didn't search him thoroughly. You know, we don't
21 really know. Hyde had access to drugs because he was a
22 dealer, so he could've come up with some drugs, so No.
23 1, if he's a dealer, that shows that, well, he had other
24 ways of getting a little methamphetamine and from
25 Pemberton maybe more likely that he would be able to do

1 that. No. 2, the officer who handled Hyde did admit in
2 his deposition that Brandon Hyde was sent to try to get
3 something from Chad Pemberton because they were hoping
4 that they could somehow convince Pemberton to testify
5 against Carlton White. I don't know much about him, but
6 he was going on trial for an A felony. I asked
7 Pemberton if he knew anything about Carlton White and he
8 said really hardly anything, he didn't think he actually
9 knew anything that would be useful to the State, but
10 after he got arrested he didn't even discuss it with the
11 police officer.

12 So but anyway, so here's Brandon Hyde, he's
13 got a dope-dealing business going on, he's not getting
14 in any trouble, and he's being asked to do favors for
15 the police. Well, he had more to gain and more to lose
16 than probably most confidential informants. If the
17 police were to sour on Brandon Hyde, he'd go to prison,
18 you know, but if they liked him, why, he's got kind of
19 his own little business.

20 I mean when these kind of things reach a
21 stasis, the dealer who's in with the cops then denounces
22 his competition, gets them busted, the cops all look
23 good because they're making arrests, the prosecutors are
24 prosecuting and the dealer is making money and things
25 kind of settle into that. I don't know exactly what

1 kind of stasis might have been arrived at here, but that
2 kind of thing happens and something --

3 JUDGE TROCKMAN: If I can interrupt. You
4 believe that the police allow individuals who have been
5 charged with crimes to act as confidential informants
6 and profit by doing so --

7 MR. SCHALK: That is not the policy of the
8 Bloomington --

9 JUDGE TROCKMAN: -- financially?

10 MR. SCHALK: Yeah, that happens all the
11 time, I mean the police are in on the drug-dealing quite
12 frequently, but the Bloomington Police Department's
13 policy --

14 JUDGE TROCKMAN: That happens all the
15 time, --

16 MR. SCHALK: Well, it happens, it does
17 happen.

18 JUDGE TROCKMAN: -- defendants profit
19 individually from these controlled buys that the police
20 arrange?

21 MR. SCHALK: Well, I mean I've had enough
22 experience to know that the confidential informants
23 often don't bring all the drugs back to the police, you
24 know, and things like that, little things. I don't know
25 how often that this happens, obviously I have no way of

1 knowing for sure, but I mean, you know, this whole
2 prohibition just leads to corruption and criminality,
3 just like it did with the alcohol prohibition and things
4 happen. In Bloomington, Indiana the policy of the
5 Bloomington Police Department is that the confidential
6 informants may not even consume drugs and certainly not
7 sell them.

8 Brandon Hyde ended up being murdered, you
9 know, but what he told me was that the officer who
10 handles him called him, said "Watch out, if you have any
11 money, Schalk's after you" and he already knew, because
12 this is what Hyde told me anyways, he already knew
13 because Lisa Edwards had told him exactly what I was up
14 to when she arrived at the house, so he took the money
15 to a local fast-food place, bought a \$180 money order
16 and got change for the other 20, so the recorded money
17 was gone, and he indicated to me that the cop Fino
18 (phonetic) would prefer that he not deal but if he does,
19 confine it to marijuana, you know, so I don't really
20 know what the facts are. I mean poor Brandon Hyde got
21 shot over a car deal, but this is just to give you, you
22 know, a flavor and a feeling for what all was going on
23 in Bloomington around that time. I think Hyde was being
24 allowed to deal but that's not police department's
25 policy and they eventually turned against him and he did

1 a little time for continuing to deal for cocaine
2 dealing, he went to prison for a short time, got out and
3 not too long after that got shot. So I'm not trying to
4 denounce our police department or all of them but the
5 corruption certainly exists.

6 And what I thought is that Brandon Hyde did
7 not want to -- didn't want to fail in this mission.
8 It's not like he was out and had to make so many busts
9 every -- you know, make eight busts and you're out of
10 trouble or, you know, make busts with some frequency.
11 It was like he was supposed to get Chad Pemberton and he
12 wanted to, you know, he wanted to succeed, I mean he had
13 motivations to succeed and reasons to not want to go
14 back and say he couldn't do it. I wanted the jury to
15 know that, so Hyde had access to drugs and he had a
16 special motivation to say he succeeded, whether he did
17 or not, and so that's why I thought it would be
18 admissible, and I just, you know, would've been happy to
19 have the jury see the whole picture of what was going
20 on.

21 JUDGE TROCKMAN: Is there anything else that
22 you wish for the Hearing Officer to know?

23 MR. SCHALK: Yes. I have something on my
24 mind and that has to do with statutory interpretation
25 and I'll brief all of this, but if I may with this

1 opportunity, I finally reached the Supreme Court,
2 almost, and I have never seen a case where a statute
3 isn't interpreted according to its plain meaning of its
4 words, where it's interpreted otherwise, isn't
5 interpreted in terms of legislative intent, and I argued
6 that to the trial judge and I couldn't get an answer.
7 He looked over at the prosecutor even at my trial and
8 the prosecutor just looked down at his pen and nobody
9 would say anything.

10 On appeal I said "Look, these controlled
11 buys are, under the letter of the law, are violations,
12 there's nothing in the law that says that the police can
13 possess these drugs and things, but to say that all the
14 police and prosecutors of Indiana are in an ongoing
15 criminal enterprise, that they constantly commit crimes,
16 that's just absurd, we're not going to say that and
17 that's not the state of things. It's legal for the
18 police to do that, they do it all the time and, you
19 know, so the plain words of the statute are pretty much
20 out the window. So now the question is, or normally
21 would be, well, what kind of intent are we going to
22 impute to the state legislature, who may never have
23 thought about it, but you impute an intent to the
24 legislature, and what I said is, well, where they have
25 spoken in the area of arrest, any person has pretty

1 nearly the same arrest powers as a police officer, you
2 don't even have to be a citizen under the Citizen's
3 Arrest Statute. If a felony has definitely been
4 committed and you have probable cause to believe you
5 know who did it, you can wrestle that person to the
6 ground, bind his hands behind his back, confine him, you
7 know, 'til a squad car can get there and take him to the
8 jail. You can use whatever reasonable force the police
9 can use.

10 If there's an ongoing breach of the peace,
11 even if it's a misdemeanor, you can arrest the culprit.
12 You know, if you can find a way to hem in a drunk driver
13 and keep him there while you call phone 911, that's a
14 citizen's arrest because a drunk driver is considered to
15 be a person involved in an ongoing breach of the peace.

16 JUDGE TROCKMAN: Do you see a difference
17 between that and arranging the commission of a crime?

18 MR. SCHALK: Well, yeah, there's all the
19 difference in the world. I'm not -- Yeah, I mean
20 that's -- Yeah, of course there is. But what I said is
21 I said are we living in the tradition of bounty hunters
22 and Pinkerton men back, you know, when the train owners
23 would hire their own detectives and the cattlemen's
24 association would have their police and once again
25 there'd be bounties, so even federal marshals who were

1 in charge of the census and, you know, distributing
2 federal proclamations and things, you know, if
3 Marshal -- I don't know if Marshal Dillon was a federal
4 marshal, but anyways, you know, if they went after a
5 robber or something, well, probably they wanted the
6 bounty, you know, I don't know, I'm not sure how it all
7 worked, but I certainly do know that we have a long
8 tradition of law enforcement being the responsibility of
9 everyone.

10 So I said, all I'm saying is, okay, a
11 controlled buy, that is where you purchase some
12 contraband, you know, some drugs usually, for the sole
13 purpose of taking it directly to a police station where
14 it's placed in a locker after being, you know, duly
15 tagged and the chain of custody duly noted and kept
16 there for use as evidence of dealing and then eventually
17 destroyed, that is what the police do and that is legal.
18 I think everybody agrees with me on that. So now did
19 the Indiana State Legislature intend for that to be
20 legal only for the police and I say no, you can't
21 conclude that, that's not logical. Where they have
22 spoken in the area of arrest, any person can arrest
23 people. Why would you presume -- why would you impute
24 this to the legislature, I said that's irrational, and
25 nobody's answered me yet and that's why I'm grateful to

1 be here because --

2 MR. PRUDEN: Your Honor, can I ask a
3 preliminary question for objection?

4 JUDGE TROCKMAN: Yes.

5 MR. PRUDEN: Mr. Schalk, do you think this
6 Hearing Officer has the authority to overrule the Court
7 of Appeals in their criminal case against you?

8 MR. SCHALK: No, of course not.

9 MR. PRUDEN: Then how is your re-arguing the
10 arguments that you made to the Court of Appeals that
11 were rejected by the Supreme Court, how is that
12 permissible in this discipline case if this Hearing
13 Officer can't rule on it and the Supreme Court's already
14 ruled on it in an unrelated matter? Why is that --

15 MR. SCHALK: No. 1, the Supreme Court has
16 not ruled on it and No. 2, we're making a record for the
17 Supreme Court and that's what I'm doing right now.

18 MR. PRUDEN: Well, I'm asking --

19 MR. SCHALK: Before you interrupted that's
20 what I was doing.

21 MR. PRUDEN: I'm allowed to interrupt you if
22 your narrative goes off on to irrelevant subjects.

23 MR. SCHALK: Well, I don't need very much
24 more time and I'm not going to take nearly as much as
25 you did.

1 JUDGE TROCKMAN: All right.

2 MR. SCHALK: But I've got this pet-peeve,
3 I've worked five years to get here, I'm making a record
4 for the Indiana Supreme Court. They're busy, so I think
5 this transcript is going to be top on their pile of
6 papers and I'd like them to see this.

7 JUDGE TROCKMAN: The record for the Indiana
8 Supreme Court is going to be the record of the Court of
9 Appeals, obviously, and the Indiana Supreme Court will
10 review all or a portion of that record, whatever portion
11 of it that they deem appropriate. The Indiana Court of
12 Appeals is not going to, as Mr. Pruden has indicated, is
13 not going to modify or make any changes to that record
14 based upon what is said today as it relates to the
15 acts --

16 MR. SCHALK: Right.

17 JUDGE TROCKMAN: -- with regard to the
18 commission of the crime for which you were found guilty.

19 MR. SCHALK: Well, I'm going to let this
20 thing end soon.

21 JUDGE TROCKMAN: All right.

22 MR. SCHALK: I'm almost done.

23 JUDGE TROCKMAN: Go right ahead.

24 MR. SCHALK: But I've been trying -- I've
25 been asking this question and not getting an answer, and

1 if the Supreme Court of Indiana looks at this and says
2 that the Indiana Court of Appeals didn't address it,
3 because they didn't, they did not acknowledge that I
4 made that argument, they just said "Well, the Citizen's
5 Arrest Statute doesn't apply to a controlled buy."

6 JUDGE TROCKMAN: Go right ahead. We'll show
7 this over Mr. Pruden's objection.

8 MR. SCHALK: Okay. I think that, by the
9 way, the relevance of this is to what extent could I
10 have known this was against the law, so I might just add
11 that that's another thing, another reason why I think
12 this is relevant, because normally you consider
13 legislative intent and that wasn't done, but I thought
14 that's how you always do things. And you know something
15 else I thought, I thought that we had the rule of lenity
16 here, the cases all talk about it, it's sometimes called
17 Void for Vagueness Doctrine where if there's doubt about
18 whether a statute reaches you, then it doesn't, a
19 criminal statute. If it's reasonable to argue about
20 whether or not it includes somebody, then it does not
21 include them.

22 So the combination of imputing legislative
23 intent where, admittedly, they might not have actually
24 thought about it but you have to analyze it in those
25 terms and they don't seem to think that only the police

1 should be able to do all law enforcement, and add to
2 that, well, if there's any doubt about it, then the rule
3 of lenity would surely say that it wouldn't apply to
4 somebody, that it's Void for Vagueness, because I really
5 couldn't tell, I didn't know, I don't know how -- And
6 the Court of Appeals' Opinion I won't criticize it too
7 much now, it's in my letters and things, I tell about
8 it.

9 But then, Your Honor, there's the irony of
10 the Court of Appeals' Opinion which ignored my arguments
11 and proclaimed that the definition of "law enforcement
12 officer" is a list of the people who can enforce laws in
13 Indiana, I mean the obvious implication there was that
14 only they may do these so-called controlled buys,
15 loosely called "controlled buys." Well, you know, back
16 at the time in 2007 I was very well aware of the fact
17 that I was a deputy sheriff, I had been deputized by
18 Sheriff Jim Young. I didn't broadcast it far and wide,
19 but, you know, my little guy, he's 11 now and he's
20 interested in it, I think back then he was and, you
21 know, my other kids, I have three grown kids all
22 approximately 30 and they think it's cool that dad's a
23 deputy and, you know, I show people my credentials now
24 and then with my old bushy beard. But anyway, I knew I
25 was a police officer, but I strongly believe that you

1 can't say that things are okay for police officers to do
2 when it's not clearly stated in our laws that it's all
3 right for the police to do it. That makes me wonder if
4 the only thing that an officer has to worry about when
5 he burglarizes a house looking for evidence is that it
6 might be suppressed, but, oh, well, he's engaged in his
7 activities there, his duties, you know, or if he
8 tortures a confession out of somebody, well, then you
9 can't use that confession but he doesn't have to worry
10 about aggravated battery or anything because, well, he's
11 just doing his job and, see, the cops get to do things
12 that other people can't do, like possess illegal drugs
13 and stuff or like even tell informants that they can and
14 stuff. You know, I think that that's taking us too
15 close to a police state, that's taking us too far down
16 the wrong road. I don't think that it's right to say
17 that only the police can -- only police can serve
18 warrants, only the police can make traffic stops.
19 There's a lot of things that only the police can do
20 because the law says so, not because some trial court
21 judge says so and then the Court of Appeals says so.
22 You know, they just say "Oh, well, that's just -- See,
23 look, there's the definition of 'law enforcement
24 officer.'" "What?" So I'm about to completely conclude
25 my presentation by saying that I don't want to win this

1 on grounds that the Court of Appeals said that my
2 credentials are -- that deputy sheriffs can do this and
3 other people can't because I don't think that's the
4 right conclusion, but I do happen to be a deputy
5 sheriff. I'll put it in my brief. If somebody wants to
6 challenge that, there's a way to do it and if the
7 sheriff wants to fire me, he can do that any day he
8 wants and I suppose I'll send him a resignation letter,
9 you know, that probably will do the job if he
10 acknowledges it and accepts it. You'll see in his
11 deposition that he just thought my term expired
12 automatically, but it doesn't say that and I dispute
13 that.

14 So all I was trying to do, Judge, is
15 represent my client, I was just doing what I could to
16 save a man from a long, long time in prison. He had a
17 prior felony, and in the plea bargain negotiations they
18 wouldn't come off of the A felony, so even if he took a
19 deal he was going to go away for 20, do 10, and I was a
20 cop, I was doing something that the prosecutors do, they
21 encourage people and facilitate drug buys and stuff. My
22 counterpart in the case, the county prosecutor, to do
23 essentially what I did, it just seemed to me like the
24 right thing to do. It seemed like if I were to say "Oh,
25 I'm going to make too many people mad, geez, this is

1 going to be trouble, this is going to be bad for
2 business," you know, and just let him go to prison, I
3 just couldn't live that way, I have just a strong
4 feeling that a man lives his life right if he can and
5 how much money you have when you die is not nearly as
6 important as how good you feel about what you did along
7 the way and I've, you know, not been perfect along the
8 way, but I couldn't take that, I couldn't just let
9 Pemberton go to prison because I was going to be like a
10 lot of the other attorneys, most of them, and just be
11 scared to make anybody mad. I really thought I was not
12 disobeying any laws.

13 I would say if it was a case of civil
14 disobedience, it wouldn't be something that brought
15 shame or disrepute on myself, but it wasn't civil
16 disobedience, I wasn't trying to save a man by accepting
17 a misdemeanor. I didn't break the law. I had no way of
18 knowing that I was.

19 And finally, I just would like to say that I
20 respect the Court of Appeals' Opinion. It's certainly
21 what -- Their pronouncement is right. I didn't argue
22 that I was a law enforcement officer in the trial court,
23 so it doesn't really make sense to me to say that, oh,
24 I'm definitely guilty because I was found guilty because
25 I didn't present that argument, and we actually have a

1 new case called David Schalk versus State of Indiana
2 that now pronounces that law enforcement officers get to
3 do that. I am finishing up and I've lost my train of
4 thought, but --

5 JUDGE TROCKMAN: All right, thank you.

6 MR. SCHALK: Let me just -- I did have one
7 other thing I wanted to say, I just lost it. It's going
8 to be less than a minute now, but I wanted to -- Well, I
9 guess that's my point. My point is I thought I was
10 doing the right thing, I thought I was being an
11 honorable man and a good man in coming to the guy's
12 rescue who depended on me and I don't think I had any
13 way of knowing that it was going to be pronounced
14 lawless based on a definition.

15 You know, I just -- I think the Court of
16 Appeals' Opinion, I think that the illogical nature of
17 it all, just goes to how was Schalk supposed to know he
18 wasn't doing the right thing in helping his client. All
19 right, that's all.

20 JUDGE TROCKMAN: Mr. Pruden, any questions?

21 MR. PRUDEN: Unfortunately, Your Honor, I
22 know the time is short, but I have a few.

23 JUDGE TROCKMAN: Yes, sir.

24 MR. SCHALK: Oh, just so we don't forget, do
25 we have everything in evidence that we wanted because I

1 think we said when my turn came that you would take
2 judicial notice of --

3 JUDGE TROCKMAN: A request was made that all
4 exhibits that were offered be admitted and, as I recall,
5 you have no objection, is that right, Mr. Schalk?

6 MR. SCHALK: That's right, and I wanted
7 judicial notice of Pemberton versus State and Schalk
8 versus State, the two cases that are in the Court of
9 Appeals, and then there was the transcript and the two
10 depositions. I think I just wanted to make sure that I
11 can cite those in my brief if I want to.

12 JUDGE TROCKMAN: Mr. Pruden?

13 MR. PRUDEN: On that point I'm not sure what
14 the depositions are going to prove or disprove since
15 I've never seen them, don't know what he's talking
16 about, don't know what relevance they have. I may not
17 object, but if Mr. Schalk could tell the Court why these
18 depositions are going to help his case.

19 MR. SCHALK: Okay, well, one thing is the
20 Court of Appeals' Opinion states as a fact that I asked
21 Lisa Pemberton to buy drugs, I think that's what it
22 says, something like that. I'm sorry, it's --

23 MR. PRUDEN: You meant Lisa Edwards?

24 MR. SCHALK: It was -- It was -- I'm talking
25 about Chad Pemberton's sister and I guess it's not -- I

1 said her name --

2 MR. PRUDEN: Leslie.

3 MR. SCHALK: Leslie. Okay. Now, in the
4 Probable Cause Affidavit the officer says that Leslie
5 Pemberton told him that I asked her to buy drugs for me
6 during her questioning. I took the officer's deposition
7 and I played his questioning of Leslie Pemberton and she
8 was as clear and plain as could possibly be that, no, I
9 did not ask her that. She thought maybe I might've
10 asked her that if I thought, you know, that she would
11 say yes or something, but she doesn't know because I
12 never did ask her, and I mean she just kept saying that
13 I did not ask her that but yet the affidavit says that I
14 asked her to go buy drugs. She said that I was
15 interested in just a tape-recording of Brandon Hyde's
16 voice, you know, talking about prices and availability
17 and stuff, I thought maybe that would be good for
18 something. That's as far as that ever went. Then at
19 trial the questioning was kind of ambiguous, kind of,
20 you know, leading her into saying things that maybe
21 sounded a little bit like that, but really even in the
22 trial transcript you can tell what she really meant, and
23 the truth of the matter is I never did ask her that and
24 she never said. So that's one thing. The other thing
25 in the deposition I guess he said Chad Pemberton told

1 him that we had, you know, discussed this plan and
2 Pemberton didn't have any idea what he was talking about
3 in the actual recording of what was said. Pemberton
4 wasn't trying to help me or anything, he was just kind
5 of perplexed, he said "Well, Schalk thought, you know,
6 that the cops should bust a guy that is doing that but
7 they won't."

8 And so those were I think just the -- You
9 know, perjury is sometimes simply saying two things that
10 can't both be true under oath, two contradictory things
11 under oath, I mean it's defined that way, it's in the
12 definition anyway, and it's just as plain as perjury to
13 compare that with the Probable Cause Affidavit. But I
14 guess the most important thing is I would like to
15 squelch this idea that I was asking Leslie to go buy
16 drugs for me. You know, the only time I mentioned it
17 was like she said she'd be a confidential informant and
18 then I found out what the cops would say and sure enough
19 that it was a conflict. I think that's really all I
20 wanted to do with that.

21 JUDGE TROCKMAN: Okay.

22 MR. PRUDEN: Your Honor, may I --

23 JUDGE TROCKMAN: I think Mr. Pruden's going
24 to state that that's been resolved by the Court of
25 Appeals.

1 MR. PRUDEN: Well, we assume these witnesses
2 were all cross-examined at the trial or if they weren't
3 cross-examined the opportunity to cross-examine existed.
4 We assume that any inconsistencies in their testimony
5 versus their Probable Cause Affidavits would've been
6 pointed out during that trial. Any inconsistencies
7 between a witness and another witness, like a police
8 officer, would've been pointed out in the trial, and
9 those inconsistencies were resolved, they were resolved
10 by a guilty verdict, which means either they believed
11 one statement versus another, or the judge, it wasn't a
12 jury, or whatever attempt at destroying credibility of
13 one witness versus another failed, or the judge didn't
14 think the credibility issue was relevant, any of those
15 are possible.

16 Having witnesses' testimony that's sort of
17 selective, because he only wants part of the witnesses'
18 testimony in the case, versus the rest of the evidence
19 in the case serves no purpose at all in this
20 disciplinary case, it absolutely is not relevant. If
21 Mr. Schalk wants me to stipulate just for purposes of
22 this disciplinary hearing that the idea to buy drugs
23 from Brandon Hyde didn't come from him but came from one
24 of Pemberton or his cronies, I'm okay with that. I
25 don't think that's relevant to this case. We've never

1 accused Mr. Schalk in this case of whose idea it was.
2 Now, if he believes that his conviction is based upon
3 whose idea it was, now we're relitigating the criminal
4 case and that's not proper, it's a waste of our time,
5 and I'm going to have to brief something. I've already
6 briefed that it's conclusory that he has been convicted
7 of the crimes that he was charged with and the facts
8 found by the Court of Appeals were challenged in a
9 petition for review, a petition to transfer, and those
10 were not successful, so those facts are conclusively
11 proven. He doesn't like them, he doesn't believe in
12 them, he disagrees with them, I get all of that, but
13 they are conclusive as a matter of law and neither this
14 proceeding --

15 JUDGE TROCKMAN: Okay, we are not going to
16 reweigh any of that --

17 MR. PRUDEN: And so if we let all of this
18 evidence in from the underlying Pemberton trial, or even
19 his trial, we're starting that over again.

20 JUDGE TROCKMAN: There's not going to be any
21 transcripts because we're not going to go into briefing
22 and relitigating the cases that have already been tried.
23 You may cite the two cases that you indicated and refer
24 to those two cases.

25 MR. SCHALK: Well, sir, first of all, this

1 thing about facts, you know, at my trial there was
2 Officer --

3 JUDGE TROCKMAN: Wait a minute.

4 MR. SCHALK: Yeah.

5 JUDGE TROCKMAN: I'm not going to argue the
6 point.

7 MR. SCHALK: Okay, I'm not trying to argue
8 with you, but I didn't even -- You can question Shawn
9 Carr. I didn't care, it was irrelevant. Most of these
10 things were irrelevant to the issue at hand until now
11 we're at the Disciplinary Commission and now, you know,
12 have I misbehaved as a lawyer, it's a whole different
13 thing than that.

14 The Disciplinary Commission in Paragraph 19
15 says "By his conduct in conspiring with others to engage
16 in his misconduct by making requests of other persons to
17 assist him in his criminal conduct and thus to place
18 third parties at risk of harm for engaging" --

19 JUDGE TROCKMAN: Mr. Schalk, I indicated I'm
20 not going to argue, the Court has made its ruling. That
21 comes right out of your answer to the requests for
22 admissions.

23 MR. SCHALK: Yeah, it just pertains to my
24 relationship with Lisa Edwards and -- Okay, whatever.
25 Anyway, these facts aren't conclusively proven, they

1 weren't relevant. If anything, they're dicta, and I --

2 JUDGE TROCKMAN: Wait a minute, wait, wait.

3 The Court's made its ruling on that issue. Other
4 questions, Mr. Pruden?

5 MR. PRUDEN: No. Oh, I have other
6 questions, yes.

7 JUDGE TROCKMAN: Okay.

8 MR. PRUDEN: I was just making the point on
9 the transcripts.

10 JUDGE TROCKMAN: Right.

11

12 CROSS EXAMINATION BY MR. PRUDEN:

13 Q. Mr. Schalk, have you ever gone to Law Enforcement
14 Academy as a trainee?

15 A. No, I have not.

16 Q. You have no certificate that says you're a law
17 enforcement officer, correct?

18 A. Yes, I do.

19 Q. Strike that. You've never graduated from the Law
20 Enforcement Academy?

21 A. I have not gone there, nor have I graduated, nor
22 have I applied.

23 Q. Okay. Have you gone through any formal police
24 training?

25 A. No.

1 Q. Have you ever been engaged by the Sheriff's
2 Department of Monroe County to investigate a criminal
3 case on its behalf?

4 A. No.

5 Q. Have you ever been hired or engaged by the
6 Sheriff's Department of Monroe County to participate in
7 a controlled drug buy?

8 A. No.

9 Q. Have you ever been employed by the sheriff's
10 department for patrol duties?

11 A. No.

12 Q. Have you ever been engaged by the sheriff's
13 department for crowd control duties?

14 A. No.

15 Q. Have you ever been engaged by the sheriff's
16 department to perform any law enforcement function?

17 A. No.

18 MR. PRUDEN: No further questions.

19 JUDGE TROCKMAN: All right, that concludes
20 the evidence in this case. Let's talk about findings of
21 fact, conclusions and a briefing schedule. What would
22 be the pleasure of counsel?

23 MR. PRUDEN: 30 days from the date of the
24 transcript of the record of this proceeding.

25 JUDGE TROCKMAN: Mr. Schalk?

1 MR. SCHALK: I can do that.

2 JUDGE TROCKMAN: Okay.

3 MR. SCHALK: I mean if there's a problem I
4 suppose we could ask for an extension but we might not
5 need that.

6 JUDGE TROCKMAN: Any extension, obviously,
7 needs -- Well, let's make an order that any extension be
8 made -- let me make some notes -- any extension be made
9 10 days prior to the date for filing, and so 30 days
10 after transcript is completed, and that'll be findings
11 and conclusions and post-trial briefs. Mr. Pruden?

12 MR. PRUDEN: Yes.

13 JUDGE TROCKMAN: Any other record?

14 MR. PRUDEN: No.

15 JUDGE TROCKMAN: Mr. Schalk, any other
16 record at this time?

17 MR. SCHALK: No, Your Honor.

18 JUDGE TROCKMAN: All right, that concludes
19 the proceeding.

20 MR. SCHALK: Okay.

21 (WHEREUPON, at 4:45 p.m., May 21, 2012, this
22 hearing concluded for the day.)

23

24

25

1 CERTIFICATE

2 STATE OF INDIANA

SS:

3 COUNTY OF HAMILTON

4
5 I, Marjorie A. Addington, the undersigned Court
6 Reporter and Notary Public residing and maintaining
7 offices in the City of Carmel, Hamilton County, Indiana,
8 do hereby certify:

9 That I reported to the best of my ability in machine
10 shorthand all of the words spoken by all parties in
11 attendance during the course of the hearing;

12 That I later reduced my shorthand notes into the
13 foregoing typewritten transcript form, which typewritten
14 transcript is a true record to the best of my ability of
15 the hearing;

16 That I am not a relative or employee or attorney or
17 counsel of any of the parties, nor am I a relative or an
18 employee of such attorney or counsel, and that I am not
19 financially interested in this action.

20 IN WITNESS HERETO, I have affixed my
21 Notarial Seal and subscribed my
22 signature below this 6th day of
23 JUNE, 2012.

24 Notary Public

County of Residence: Hamilton (Seal)

My Commission Expires on: August 22, 2015

25

	17 (1) 62:12	30th (1) 48:22	119:2	acknowledging (1) 74:19
§	1706 (1) 125:4	336-9093 (1) 125:9	8-3 (2) 109:7;119:2	acquaintance (1) 26:8
\$180 (1) 130:15	17th (1) 62:6	3's (1) 64:21	9	acquire (1) 48:6
\$200 (7) 38:22,24;39:21;42:19; 91:1;93:19,24	19 (1) 148:14	4	9 (10) 3:8;7:5;29:21,22;30:8; 32:20;38:5;125:12,12,12	across (1) 8:13
\$50 (6) 44:5,13;93:21,22; 94:1,2	1985 (1) 97:17	4 (18) 13:4,19,25;14:1; 16:20;62:21,25;63:18, 21;64:13;70:16,18;72:9; 91:19,22,22,25;92:6	9-1 (6) 98:2;108:23;109:1,3, 4;119:5	act (8) 54:7;84:11;85:8;86:4; 88:5,11;94:13;129:5
1	1990 (2) 11:13;48:17	4:45 (1) 151:21	911 (1) 133:13	Action (1) 10:14
1 (11) 26:25;62:19;63:1,13, 19,25;71:21;72:6,21; 127:23;135:15	1's (1) 63:24	47401 (1) 125:5	9-2 (6) 98:18,18;108:23; 109:3,4;119:5	actions (6) 38:1;73:10,16;74:11, 19;117:16
1:00 (1) 3:13	2	5	A	activities (1) 139:7
1:30 (1) 8:21	2 (14) 11:17;13:21;14:1; 64:1,7,9,12;72:21,22; 109:19;110:7;118:21; 128:1;135:16	5 (28) 17:24;18:2,10;66:24, 24;67:8;68:1,2,13,15,21, 22;69:3,5,6,7,8;72:11, 25;77:18;82:20;91:22, 22;92:6;118:9,10;121:5, 6	Aah! (1) 60:21	acts (1) 136:15
10 (10) 38:19;39:9;69:23; 70:6,14,15;72:22;121:6; 140:19;151:9	20 (3) 48:17;130:16;140:19	5:15 (1) 118:13	able (5) 3:10;7:9;111:16; 127:25;138:1	actual (2) 46:1;145:3
10-page (1) 6:12	200 (1) 94:4	50 (1) 42:21	above (1) 72:1	actually (10) 72:5;81:9,24;93:4; 111:19;114:5;116:4; 128:8;137:23;141:25
10's (1) 70:13	2007 (5) 13:21;14:17;15:3; 38:20;138:16	53S00-1104-DI-00244 (1) 3:3	Absolutely (4) 14:21;25:6;106:21; 146:20	add (2) 137:10;138:1
11 (2) 43:18;138:19	2008 (1) 48:22	5-minute (1) 123:17	absurd (1) 132:16	address (4) 125:3,10,15;137:2
11th (4) 5:17;6:20;7:1;98:20	2009 (1) 62:6	5's (1) 68:24	abuzz (1) 51:12	adequate (2) 120:16,17
11-year-old (1) 8:1	2011 (1) 62:12	6	Academy (2) 149:14,20	adequately (2) 99:18;102:5
12 (4) 44:5;119:16,18,25	2012 (1) 151:21	6 (9) 18:7;22:9;24:17;82:2, 6,12,15;84:5,9	accept (3) 3:22;6:3;47:7	admissible (2) 111:24;131:18
12's (1) 119:24	21 (1) 151:21	7	accepted (1) 122:9	admission (4) 34:12;62:21;63:23; 67:4
12th (2) 109:13;110:7	21st (2) 7:5,12	7 (1) 25:10	accepting (1) 141:16	admissions (3) 33:10,15;148:22
13 (2) 44:17;46:17	25 (1) 97:18	70 (3) 57:25;58:1,3	accepts (1) 140:10	Admit (19) 13:24;15:21;18:14; 22:13;24:19;25:1,3; 29:25;33:1;38:4,23; 39:9;43:20;44:8,22; 47:21;62:10,15;128:1
14 (3) 47:13,18,24	25th (6) 7:12,14;28:4;38:20; 52:12;113:16	8	access (2) 127:21;131:15	admitted (43) 11:12,15,21;14:14; 17:11;18:2,5;30:4,7,9; 33:3,6,16;49:1;62:24,25; 63:24,25;64:11,12,21, 22;68:18,21,25;69:7,8; 70:13,14;91:19;96:23; 97:4;109:3,5;111:15; 113:2;119:1,3,5,24,25; 122:16;143:4
14-1 (1) 77:4	27th (1) 23:1	8 (3) 26:20;27:5;97:14	accidental (1) 89:2	admittedly (1) 137:23
14-2 (8) 77:4,19;82:3;97:1,3,4, 12,13	28 (1) 62:12	8-1 (5) 109:7,10;118:21,25; 119:2	accidents (1) 46:14	adopt (2) 4:6,8
15 (2) 48:22;62:3	2's (1) 64:11	8-2 (4) 109:7;118:25,25;	according (3) 71:13;90:9;132:3	adversary (1) 53:18
15- (1) 43:1	3		accurate (5) 5:19;15:17;77:9; 97:10;126:24	
15551-53 (1) 125:6	3 (6) 11:22;15:5;64:17,22; 109:24;118:21		accused (1) 147:1	
15th (1) 11:13	3:30 (1) 118:6		acknowledge (1) 137:3	
15-year-old (2) 38:21;39:6	30 (5) 26:2;71:15;138:22; 150:23;151:9		acknowledged (1) 72:10	
16 (1) 62:6			acknowledges (1) 140:10	

90:4 bank (1) 56:1 Bar (1) 11:13 bargain (1) 140:17 bargaining (1) 91:8 based (7) 7:1,10;111:8;113:23; 136:14;142:14;147:2 basement (1) 8:14 basis (1) 23:11 battery (1) 139:10 battle (1) 127:2 beard (1) 138:24 become (2) 56:14;101:13 Bedford (3) 8:3,13;75:13 began (3) 40:1;86:8;120:15 begin (1) 10:11 beginning (4) 69:15;92:8;113:2,6 begins (1) 123:15 behalf (8) 3:3;55:5;57:18;95:19; 99:15;100:12;110:9; 150:3 behind (3) 86:20;89:19;133:6 belief (6) 7:11;17:1;44:18; 50:18;51:23;57:3 believes (3) 108:3;126:17;147:2 believing (1) 111:16 bench (5) 53:13;62:6;65:6,15; 72:9 benefit (1) 110:20 besides (1) 20:20 best (2) 80:16;127:6 better (7) 17:11;30:20;31:13; 55:22;96:10;111:16; 126:11 beyond (4) 10:1;101:17;112:21; 126:9	big (5) 50:15;54:8;78:19; 81:7;83:20 bind (1) 133:6 bit (7) 38:2;40:15;63:8;72:1; 85:23;103:15;144:21 Bloomington (22) 11:14;23:14;42:13,15; 72:14,18;73:1;99:17; 100:8,22;101:9;102:11; 107:6,18;108:7,16; 125:5;129:8,12;130:4,5, 23 blue (1) 34:18 Bob (1) 51:9 body (1) 121:5 boilerplate (1) 14:8 both (9) 3:25;37:3;62:1;76:14; 107:6;113:14;121:18; 126:16;145:10 bottom (5) 71:22;72:21;82:20; 84:6;97:14 bought (5) 15:13;16:14,15;36:5; 130:15 bounties (1) 133:25 bounty (2) 133:21;134:6 boy (3) 38:21;39:6;43:2 brains (1) 27:23 Brandon (36) 16:15,18;17:7,9,20; 18:1;20:21;22:7,23; 23:25;25:20;29:4;36:5, 15;39:10;41:24;42:1,3; 50:4;56:16,18;72:4; 95:15;122:16;123:4,6; 125:17;127:18;128:2,12, 17;130:8,20;131:6; 144:15;146:23 breach (2) 133:10,15 break (5) 91:9;95:13;119:10; 123:17;141:17 brief (15) 4:2;5:5;9:22;10:9; 36:10;71:3;117:11; 121:3,6;123:2,19; 131:25;140:5;143:11; 147:5 briefed (1)	147:6 briefing (2) 147:21;150:21 Briefly (2) 9:24;121:7 briefs (5) 3:22;73:9;75:1; 120:18;151:11 bring (5) 21:14;75:14;113:10; 120:13;129:23 brings (1) 89:23 broadcast (1) 138:18 broke (2) 35:1;91:11 brothers (3) 19:18;31:6,8 brought (3) 5:20;52:5;141:14 brown (2) 85:17;89:12 Building (1) 78:18 bunch (2) 56:2;92:4 burden (1) 10:2 burglarizes (1) 139:5 burning (1) 91:13 bushy (1) 138:24 business (10) 32:17;89:17;100:10; 102:14,21;124:18; 125:3;128:13,19;141:2 bust (1) 145:6 busted (1) 128:22 busts (3) 131:8,9,10 busy (1) 136:4 buy (33) 19:10;22:16,22,25; 23:3;24:12,13,22,24; 25:4,14,19;28:9;29:4; 34:1,20,21;40:2;41:9; 54:21;91:1;93:4;94:1; 113:18;124:6;134:11; 137:5;143:21;144:5,14; 145:15;146:22;150:7 buying (1) 12:24 buys (5) 129:19;132:11; 138:14,15;140:21	C	14:15 Carlton (2) 128:5,7 Carr (3) 109:24;122:14;148:9 carried (1) 84:12 Carr's (1) 23:23 case (118) 5:15;9:19;10:3,3,5; 11:18;13:22;14:7,13,14, 19;15:3;21:11,14;33:9; 40:1;41:15;46:23;49:4, 13;50:1,8;52:6,15; 53:18;55:10;56:10,12, 15;57:6;58:10;59:11,14; 62:7;64:4,19,25;65:20, 25;66:3,4;67:5;70:18,21, 24;72:16;73:4,7,11,17; 74:5,9,25;75:19,20,22; 76:2,9,10,12;77:25; 80:14;81:18;82:9,17; 83:1,22;86:10;87:4,5,15, 17;94:21;95:5;99:23; 100:3,20;101:15;102:1; 105:18;106:22;110:12; 112:23,24;113:12,24; 114:11,21;115:15;120:2, 6;122:13,23;123:9,21, 21;124:19;125:14,16,21, 22;126:19,19;132:2; 135:7,12;140:22; 141:13;142:1;143:18; 146:18,19,20,25;147:1, 4;150:3,20 cases (9) 4:20;71:8;75:21; 100:17;137:16;143:8; 147:22,23,24 cash (2) 38:22;39:21 cattlemen's (1) 133:23 Cause (9) 3:2;24:15;43:13; 48:25;89:24;133:4; 144:4;145:13;146:5 cautious (1) 79:4 cell (4) 7:9;35:6,21;133:13 census (1) 134:1 certain (1) 94:5 certainly (21) 9:7;15:9;18:15,21; 21:10;30:20;47:2;52:23; 64:6;67:6,15;77:7;79:7; 95:11;107:2;115:11; 120:14;130:6;131:5; 134:7;141:20
--	---	--	----------	---

certificate (1) 149:16	child (2) 26:10,10	cocaine (2) 125:20;131:1	14:12;125:18	82:25;83:8;88:18; 137:12
certification (1) 63:11	circles (1) 19:24	Code (1) 115:6	concern (1) 89:22	consideration (2) 40:16,22
certified (3) 63:9;64:3,18	circuit (2) 8:24;49:15	coerced (1) 122:19	concerned (4) 85:6;89:21;100:6; 114:12	considered (9) 5:18;6:6,20;67:7; 68:18;69:10;114:23; 115:4;133:14
cetera (1) 6:8	circumstantial (1) 78:1	coincided (1) 53:22	conclude (2) 134:21;139:24	considering (2) 114:24;115:2
Chad (28) 11:18;13:22;14:17; 25:12;26:12;27:12,19; 40:6;49:4,13,16;55:3,5; 56:24;57:7,18;59:14; 61:5;74:22;75:19;83:25; 91:17;95:12;122:17; 128:3;131:11;143:25; 144:25	citation (1) 75:9	colonel (1) 108:9	concluded (2) 61:21;151:22	conspiracy (8) 48:23;50:15,16;54:7; 55:21;71:23;72:7,13
chain (6) 45:11,13,24;46:1; 93:14;134:15	citations (1) 121:6	combination (1) 137:22	concludes (3) 123:21;150:19;151:18	conspiring (1) 148:15
challenge (3) 74:7;84:13;140:6	cite (5) 70:18;112:9;120:22; 143:11;147:23	coming (3) 91:7;93:20;142:11	conclusion (3) 4:11;67:5;140:4	constantly (1) 132:15
challenged (2) 80:13;147:8	cited (3) 70:25;99:7;115:14	comments (1) 125:15	conclusions (6) 4:2,4;5:8;120:18; 150:21;151:11	constitutional (1) 84:14
chance (2) 61:12;87:15	citing (1) 99:11	Commission (25) 3:4;13:12;62:25; 63:25;64:12,22;66:19; 67:1;69:8;70:14;92:16; 95:8;97:4;105:9,12; 109:4,11;117:24;119:2, 25;123:21;133:17; 136:18;148:11,14	conclusive (1) 147:13	constitutions (1) 126:5
change (7) 14:5;16:3;28:25; 101:24;102:3,8;130:16	citizen (1) 133:2	Commission's (1) 64:17	conclusively (3) 33:7;147:10;148:25	consulted (1) 52:20
changed (9) 28:12,19,20;84:23; 99:16,23;101:9,11,12	Citizen's (4) 117:17;133:2,14; 137:4	commit (6) 29:13;48:23;62:8; 65:16;73:22;132:15	conclusory (1) 147:6	consume (1) 130:6
changes (1) 136:13	city (7) 42:14;46:20,20;86:8, 13;108:7;122:14	commitment (1) 118:7	conduct (3) 55:16;148:15,17	contact (4) 7:9;8:23;44:19;46:18
changing (1) 72:8	civil (3) 99:7;141:13,15	commitments (1) 8:8	conference (2) 3:8;5:16	contacted (4) 46:19;81:24;105:22; 106:9
characterized (1) 72:6	claim (1) 104:11	committed (4) 24:14;43:13;89:25; 133:4	conferences (1) 8:25	contained (2) 9:23;33:15
charge (7) 16:12;45:23;62:5; 65:11,13;89:24;134:1	claiming (1) 74:14	common (4) 48:4,5,7,9	confession (2) 139:8,9	containing (3) 6:7;72:12;73:3
charged (21) 11:19;13:23;14:3,10, 19,22;48:23;49:2,11; 55:9,15;58:4;62:4; 73:24;74:1,2;78:16,20; 83:5;129:5;147:7	clarification (2) 25:2;30:10	compare (1) 145:13	confidential (19) 11:24;15:8,13,19; 16:17,18;17:17;23:9; 45:18;86:21;89:6;124:7, 11,17;128:16;129:5,22; 130:5;145:17	context (4) 22:16;24:21;101:4; 108:19
charges (8) 16:9;49:12;54:4;78:3, 9;79:2,22;80:6	clarify (1) 15:24	compel (1) 112:19	confine (2) 130:19;133:6	continuance (5) 6:23;7:1,10;8:6;9:11
charging (1) 80:12	Class (4) 14:11;48:25;62:9; 65:16	compelling (2) 78:1,8	confirm (3) 97:8,16;111:5	continue (3) 7:15;8:7;9:13
Charles (1) 9:1	clear (4) 10:3,4;34:11;144:8	compels (1) 112:17	confirmed (3) 17:22;19:22;21:5	continued (1) 124:18
chase (1) 11:11	clearly (2) 43:12;139:2	compensated (2) 99:18;102:6	conflict (25) 23:16;49:10;50:12,18, 19;52:15,22;53:13,16, 21;55:11,15,17;56:3,13; 59:10,16;61:23,24; 71:23;72:7;74:8,12; 75:23;145:19	continuing (1) 131:1
check (2) 84:3,4	clerk (1) 84:3	competition (1) 128:22	confront (2) 116:5,11	contraband (2) 46:1;134:12
cherry-picked (1) 71:7	clerks (1) 117:13	complaint (14) 10:13,15;13:6,13,20; 15:6,15;24:17;29:22; 47:13;91:19,23;92:1; 110:23	conform (1) 14:7	contradictory (2) 38:9;145:10
chief (6) 46:15,19;51:10;108:7; 120:2;123:21	Clerk's (1) 13:15	complete (1) 91:15	confusing (1) 76:9	contrary (1) 59:21
	client (14) 17:11;26:7;55:11,16; 56:19,22;57:2;95:19; 124:5,12,15,16;140:15; 142:18	completed (1) 151:10	confusion (2) 6:25;7:7	control (3) 14:23,25;150:13
	clients (4) 8:19,23;48:12;106:25	complex (2)	consider (4)	controlled (19) 22:16,22,25;23:3; 24:11,13,22;25:4,14,19; 34:20;124:6;129:19; 132:10;134:11;137:5; 138:14,15;150:7
	client's (2) 26:9;56:14			convene (1) 103:15
	close (2) 98:21;139:15			convenience (1) 121:13
	closing (1) 121:1			

convenient (2) 37:3;99:9	16,19;5:2,25;8:8,20,24; 11:16;13:4,14;18:5; 21:18,19;46:22;47:11, 15,17,22;49:15;50:20, 22;52:17;58:21;59:9,11, 17;60:17;61:23;62:7,13, 14;63:1;64:3,18;65:4; 68:22;69:12,20;71:6,12, 13,16,20;75:3,17;76:15; 85:14;87:10,12,20;88:1, 10,19;92:12;95:13,14, 23;99:10;108:2;109:9; 110:2,11,19,24;111:4, 22;112:1;113:10,15,25, 25;114:4;116:5;118:16; 119:7;122:9,10;123:18; 126:20;127:6;132:1; 135:6,10,11,15,17; 136:4,8,8,9,11;137:1,2; 138:6,10;139:20,21; 140:1;141:20,22; 142:15;143:8,17,20; 145:24;147:8;148:20	criticize (1) 138:6 criticizing (1) 72:5 cronies (1) 146:24 CROSS (1) 149:12 cross- (1) 113:10 cross-examine (7) 56:17,18,19;111:7,17; 121:17;146:3 cross-examined (2) 146:2,3 crossing (2) 79:5;80:10 crowd (2) 31:23;150:13 cruelty (1) 91:13 culprit (1) 133:11 curious (5) 23:18;39:25;41:1; 79:4;81:19 currency (2) 39:23;113:2 currently (2) 123:4;124:25 curtain (1) 89:19 custody (10) 45:11,13,24;46:1; 47:7,11;48:3;50:20; 52:5;134:15 cut (1) 11:11	deal (11) 17:11;42:4;55:22; 104:13;117:1;127:14; 130:18,21,24;131:1; 140:19 dealer (6) 29:17;124:4;127:22, 23;128:21,24 dealer's (1) 124:5 dealing (22) 14:10,13,25,25;18:2, 12;19:4,14;20:4,9,11,15, 22,25;21:10;22:7;36:19; 72:4;95:16;123:5;131:2; 134:16 deals (1) 31:19 dealt (1) 117:21 debate (1) 39:16 decided (1) 83:22 deciding (1) 101:23 decision (6) 72:12;73:2;78:2;79:1; 80:13;81:8 declaration (1) 59:18 declared (4) 59:9,17,19;73:10 declined (4) 26:21;27:1,8;88:15 deem (1) 136:11 deep (3) 73:13;76:13;127:13 defamed (1) 116:22 defend (4) 23:18;56:7,12;95:12 defendant (2) 43:24;94:21 defendants (1) 129:18 defended (1) 56:9 defense (6) 48:5,11;65:22;76:3; 95:9;127:3 defenses (1) 76:6 define (1) 115:7 defined (1) 145:11 definitely (5) 20:24;21:1;87:17; 133:3;141:24 definition (5) 115:5;138:11;139:23;	142:14;145:12 delayed (1) 50:2 deleted (1) 44:7 demonstrably (1) 43:12 denial (2) 110:16,18 denials (1) 33:11 denied (14) 16:24;17:10;25:10; 49:8;57:22;58:8,8;60:2, 3;74:6;87:23;88:1;92:4; 114:8 denounce (1) 131:4 denounces (1) 128:21 deny (14) 15:22,24;16:4;18:17; 22:13;24:19;27:11; 38:10;43:20;44:9,22; 47:16,18;60:6 Department (9) 23:14;46:21;130:5; 131:4;150:2,6,10,13,16 Department's (2) 129:12;130:24 depend (1) 106:19 depended (1) 142:12 depending (1) 21:12 deposit (1) 84:4 deposition (36) 97:23,24,25;98:3,4,8, 12;99:1,14,16;100:22; 102:16,25;103:3,9,19; 104:9,18;105:2,5,9,12, 14;106:6,7,11,12;107:5, 21;109:1;119:19; 122:16;128:2;140:11; 144:6,25 depositions (6) 99:8;122:13,23; 143:10,14,18 deputized (1) 138:17 deputy (14) 46:13,16;51:10,10; 87:2;97:9,18;103:24; 109:19;114:25;138:17, 23;140:2,4 describe (1) 51:2 deserve (2) 92:15;95:7 designed (1) 90:12	
conviction (8) 10:7;49:8;62:13;63:3, 6,9;88:14;147:2 convictions (1) 9:23 convince (6) 32:7,11,12;38:12; 121:12;128:4 convincing (4) 10:3,4;32:18;33:4 cool (1) 138:22 cooperate (1) 105:20 cop (2) 130:17;140:20 cops (8) 34:2,5;87:3;128:21, 22;139:11;145:6,18 copy (13) 10:17,20;11:1;52:2; 62:14;63:9;64:3,18; 97:22;98:19;100:9; 109:15,23 Corral (1) 8:20 correspond (1) 111:2 corruption (2) 130:2;131:5 counsel (7) 3:25;7:3;57:23; 120:14,16;123:17; 150:22 counterpart (1) 140:22 country (1) 10:5 County (12) 7:16;8:24;11:14;15:4; 46:14;62:4;99:8;108:9; 109:18;140:22;150:2,6 couple (3) 5:13;31:9;69:17 course (3) 127:4;133:20;135:8 court (114) 3:7,21,22;4:5,6,12,15,	courthouse (1) 8:12 courtroom (2) 53:4,5 courts (2) 8:14;116:17 Court's (6) 7:21;63:8;68:23;69:6; 135:13;149:3 cover (1) 109:25 crazy (1) 43:5 create (1) 55:11 credentials (5) 109:15,18,23;138:23; 140:2 credibility (3) 127:17;146:12,14 crime (11) 29:13,16;49:11;58:4; 62:4;78:16;88:6;89:25; 112:22;133:17;136:18 crimes (3) 129:5;132:15;147:7 criminal (34) 9:22,25;10:6;11:18; 13:22;14:19;29:19;54:3; 55:9;56:10;58:10;62:7; 63:9;64:4,19,25;65:22; 73:10,22;74:9,11,20,23; 78:3;80:6;95:9;105:18; 110:12;132:15;135:7; 137:19;147:3;148:17; 150:2 criminality (1) 130:2 criminally (1) 55:15	criticizing (1) 72:5 cronies (1) 146:24 CROSS (1) 149:12 cross- (1) 113:10 cross-examine (7) 56:17,18,19;111:7,17; 121:17;146:3 cross-examined (2) 146:2,3 crossing (2) 79:5;80:10 crowd (2) 31:23;150:13 cruelty (1) 91:13 culprit (1) 133:11 curious (5) 23:18;39:25;41:1; 79:4;81:19 currency (2) 39:23;113:2 currently (2) 123:4;124:25 curtain (1) 89:19 custody (10) 45:11,13,24;46:1; 47:7,11;48:3;50:20; 52:5;134:15 cut (1) 11:11	D	dad's (1) 138:22 Darden (4) 73:8;74:3,4;109:24 date (8) 3:6;6:24;7:5;98:20; 110:6;121:19;150:23; 151:9 David (8) 3:2,5;12:20;63:4; 75:20;86:10;124:24; 142:1 day (10) 7:4;17:13;28:4;46:19; 51:9;80:21;97:19; 102:15;140:7;151:22 days (9) 7:3;57:25;58:1,3; 71:15;125:11;150:23; 151:9,9 deadline (3) 5:8;80:9;81:6	defamed (1) 116:22 defend (4) 23:18;56:7,12;95:12 defendant (2) 43:24;94:21 defendants (1) 129:18 defended (1) 56:9 defense (6) 48:5,11;65:22;76:3; 95:9;127:3 defenses (1) 76:6 define (1) 115:7 defined (1) 145:11 definitely (5) 20:24;21:1;87:17; 133:3;141:24 definition (5) 115:5;138:11;139:23;

<p>33:5;36:19;40:8;41:16; 46:24;48:3;50:22;54:23; 55:22;61:12,16;70:10; 76:7,10;78:1,8;79:17,22; 81:13,15;82:9,17,22; 83:1;92:23;111:8,11; 112:21;113:20,23; 118:19;121:15;122:2; 134:16;139:5;142:25; 146:18;147:18;150:20</p> <p>evil (1) 90:3</p> <p>exact (1) 21:4</p> <p>exactly (12) 17:3;19:1;30:6;41:12; 58:25;61:25;77:8;90:11; 97:11;127:10;128:25; 130:13</p> <p>EXAMINATION (3) 13:2;76:3;149:12</p> <p>examine (1) 113:11</p> <p>example (1) 11:10</p> <p>exchange (1) 121:19</p> <p>Excuse (3) 10:19;61:7;72:19</p> <p>exerted (1) 82:23</p> <p>Exhibit (42) 13:4;50:24;62:15,19, 21,25;63:1,16,19,21,25; 64:1,12,17,22;66:24,24; 67:13;68:1,2;69:3,8,21, 23;70:6,14,15;72:21; 76:22;77:18;82:2;91:19, 22,22;96:22,24;97:4; 119:6,15,16,18,25</p> <p>Exhibits (5) 109:4,7;119:2;122:14; 143:4</p> <p>existed (3) 50:21;68:8;146:3</p> <p>exists (2) 122:7;131:5</p> <p>expect (2) 37:12;110:19</p> <p>expected (3) 77:10;78:5;97:8</p> <p>expecting (1) 37:8</p> <p>experience (2) 48:12;129:22</p> <p>experienced (1) 104:12</p> <p>expired (1) 140:11</p> <p>explain (3) 71:2;95:12;116:1</p> <p>explained (1) 26:15</p>	<p>explains (1) 66:22</p> <p>explanations (1) 33:15</p> <p>explicitly (1) 114:23</p> <p>exposing (2) 72:4;89:5</p> <p>express (1) 105:1</p> <p>expressing (1) 80:3</p> <p>extension (4) 151:4,6,7,8</p> <p>extent (2) 40:8;137:9</p> <p>extra (1) 84:14</p>	<p>130:15</p> <p>Fathers (1) 96:5</p> <p>favorable (1) 106:16</p> <p>Favorably (1) 106:16</p> <p>favours (1) 128:14</p> <p>February (1) 62:12</p> <p>federal (3) 133:25;134:2,3</p> <p>feel (1) 141:6</p> <p>feeling (3) 85:14;130:22;141:4</p> <p>feelings (1) 105:15</p> <p>feet (2) 14:12;125:18</p> <p>felony (14) 14:11,13;26:2,16; 48:24;65:11,13,25;91:7, 9;128:6;133:3;140:17, 18</p> <p>few (3) 23:17;64:23;142:22</p> <p>figure (2) 38:4;88:5</p> <p>file (14) 4:1,3;5:4,5;13:14; 33:9;68:23;69:6;78:2; 79:1;83:24;108:16; 120:17;121:24</p> <p>filed (16) 5:7,14;6:15,19;11:21; 49:7,14;52:4;57:18; 58:5;73:9;87:19,25; 94:20;117:7;121:21</p> <p>filing (5) 4:9;6:7,21;121:19; 151:9</p> <p>final (2) 10:8;88:19</p> <p>finally (3) 72:13;132:1;141:19</p> <p>financially (1) 129:9</p> <p>find (14) 8:18;18:5;31:25;46:8, 22,25;60:3;75:14;91:20; 99:19;104:9;116:4; 126:8;133:12</p> <p>findings (10) 4:1,4,10;5:8;6:16; 111:23;112:2;120:17; 150:20;151:10</p> <p>fine (11) 12:15;16:5;21:23; 33:17;39:17;67:17; 68:11;88:19;95:3; 102:11;104:13</p>	<p>finishing (1) 142:3</p> <p>Fino (1) 130:17</p> <p>fire (1) 140:7</p> <p>First (21) 5:13;9:2;10:12,17; 11:11;12:14;17:9,18; 19:19;28:22;37:2;67:20; 81:24;82:6,13;85:3; 86:3;91:24;92:5;106:2; 147:25</p> <p>fit (1) 43:9</p> <p>five (4) 72:3;92:9;118:1;136:3</p> <p>five-minute (1) 119:10</p> <p>fixed (1) 99:10</p> <p>fizzled (1) 82:1</p> <p>flavor (1) 130:22</p> <p>Fleck (1) 9:1</p> <p>flesh (1) 81:5</p> <p>fleshing (1) 83:19</p> <p>focus (1) 22:17</p> <p>folded (2) 45:4,5</p> <p>follow (7) 10:15,22;11:5;43:6; 63:15;84:7;117:5</p> <p>following (1) 116:7</p> <p>footnote (4) 71:3,5,17;114:23</p> <p>force (1) 133:8</p> <p>forget (1) 142:24</p> <p>forgot (1) 28:2</p> <p>forgotten (1) 27:25</p> <p>form (1) 123:25</p> <p>formal (1) 149:23</p> <p>formalistic (1) 76:4</p> <p>forward (2) 4:5;127:4</p> <p>found (10) 8:2,15;62:8;75:22; 88:6;95:13;136:18; 141:24;145:18;147:8</p> <p>Founding (1)</p>	<p>96:5</p> <p>four (1) 92:9</p> <p>four- (1) 109:14</p> <p>fraud (1) 95:14</p> <p>free (2) 7:18;71:18</p> <p>freely (1) 113:1</p> <p>frequency (2) 4:17;131:10</p> <p>frequently (1) 129:12</p> <p>Friday (3) 7:18;9:8;52:13</p> <p>friend (1) 26:7</p> <p>friends (2) 26:23;27:9</p> <p>front (3) 41:5;53:9;82:5</p> <p>full (5) 12:19;50:16;82:6,13; 103:9</p> <p>fully-informed (1) 126:12</p> <p>function (1) 150:16</p> <p>funds (1) 93:20</p> <p>further (3) 90:1;117:23;150:18</p> <p>fuss (1) 107:10</p>
F		G		
<p>face (1) 17:12</p> <p>facilitate (1) 140:21</p> <p>facilitating (1) 93:15</p> <p>facing (1) 42:21</p> <p>fact (24) 4:1,10;18:5;19:23,25; 20:21;41:21;46:10; 52:19;54:2;69:11;81:24; 88:6;91:24;104:6; 111:23;112:2;113:13; 114:25;120:18;127:16; 138:16;143:20;150:21</p> <p>facts (38) 6:7;67:5;70:9;71:7,20; 110:22;111:1,11,22,24; 112:11,17,18,19,23,25; 113:5,7,9,12,25;114:12, 14,16,19,19,22;115:3,12, 19;116:20;120:11; 126:16;130:20;147:7, 10;148:1,25</p> <p>factual (4) 9:23;72:12;112:10,14</p> <p>factually (3) 46:25;111:3,6</p> <p>fail (2) 53:22;131:7</p> <p>failed (1) 146:13</p> <p>familiar (2) 3:20;4:18</p> <p>far (9) 9:21;67:4;70:10; 78:21;104:7;116:15; 138:18;139:15;144:18</p> <p>fashion (1) 121:2</p> <p>fast-food (1)</p>	<p>gain (2) 21:12;128:15</p> <p>game (1) 23:2</p> <p>garage (1) 99:19</p> <p>gathering (1) 92:23</p> <p>gave (7) 18:14;45:23;51:23; 93:16,18,24;127:1</p> <p>Geez (2) 83:13;140:25</p> <p>General (1) 115:13</p> <p>generally (1) 70:24</p> <p>gets (2) 76:9;128:22</p> <p>gist (1) 14:9</p> <p>given (3) 41:12;49:9;94:1</p> <p>giving (2)</p>			

<p>58:3;126:5 glad (5) 15:24;91:9;95:20; 101:10;103:20 gladly (1) 99:15 gmailcom (1) 125:12 God (1) 12:10 goes (7) 55:20;70:11;86:20; 88:19;123:15;135:22; 142:17 Golden (1) 8:20 good (23) 8:17,18;9:18;11:4; 12:22;18:15;38:18; 49:10;58:2,2;95:15; 96:14;102:24;103:2,18; 104:8;105:8;119:21; 125:13;128:23;141:6; 142:11;144:17 good-faith (1) 23:11 gosh! (2) 19:18;26:5 graduated (2) 149:19,21 grams (1) 26:2 grant (1) 88:15 granted (3) 9:16;85:2;115:6 grants (1) 85:18 grateful (2) 117:22;134:25 greatly (1) 91:16 green (1) 100:10 ground (2) 44:11;133:6 grounds (7) 21:8;52:15;58:12; 59:16;66:15;107:24; 140:1 group (1) 27:24 grown (1) 138:21 Grubb (26) 26:23;27:10,12,15; 29:23;30:24;31:13;32:7, 24;34:16,23,24,25; 35:15;37:5,15;38:5,20, 24;39:4;42:23;43:18; 44:5,13,18;90:23 guess (14) 51:11;53:17;77:15;</p>	<p>90:9;92:23;95:5;100:13; 104:2;107:23;117:10; 142:9;143:25;144:25; 145:14 guilty (13) 9:25;49:5;57:7,15; 62:8;124:15,16;126:8, 10;136:18;141:24,24; 146:10 guy (8) 21:11;23:15;34:25; 35:3;83:7,14;138:19; 145:6 guys (3) 31:9;102:15;111:14 guy's (2) 20:14;142:11</p>	<p>9:4 head (3) 58:17;94:12;108:7 headquarters (1) 99:17 hear (4) 4:13,16;20:10;24:22 heard (9) 4:20;7:5,14;17:19; 31:22;32:5;67:20;78:17, 17 hearing (46) 3:6,22,24,24;4:3,6,11; 5:12,14;6:7,19,24;7:2, 10,11;8:6;33:12;52:7, 13;53:3,4,5,9;54:2;58:9; 61:12,16;69:15,16,22; 71:21;72:2;74:18;76:5; 79:8;81:20;83:6,9; 109:11;110:5;116:11; 131:22;135:6,12; 146:22;151:22 hears (1) 4:15 hearsay (10) 68:16,17;111:10; 112:3,7,7,7,13,13,13 held (1) 62:7 help (16) 12:10;23:17;26:21; 27:8,12,15;28:17;29:9; 32:18;46:24;48:8;69:12; 86:11,17;143:18;145:4 helped (1) 90:13 helpers (1) 117:13 helpful (2) 10:16;97:13 helping (2) 27:21;142:18 helps (1) 123:5 hem (1) 133:12 here's (2) 55:20;128:12 heretics (1) 91:14 hereto (1) 62:15 Hey (1) 107:17 high (5) 18:24;19:4,7;20:7; 41:8 highest (1) 10:1 himself (2) 46:12;101:24 hire (1) 133:23</p>	<p>hired (1) 150:5 hit (1) 8:2 hold (2) 12:3;58:9 home (1) 41:9 Honor (63) 3:16;5:5;6:9;7:13; 8:12;9:20,24;10:11,12; 11:10;12:13;18:4;21:17; 30:3;33:5,8,17;34:11; 59:1,23;62:20,23;63:7, 13;64:2,8,10,14,16; 66:14;67:8,25;69:3,19; 70:3;72:21;75:8,16,25; 76:17;82:4;96:18,25; 104:22;108:1,25; 115:17;118:5,23;119:4, 6,8,12,18;120:9;121:11; 126:18;127:9;135:2; 138:9;142:21;145:22; 151:17 Honorable (6) 77:24;109:10,17,20, 24;142:11 hope (4) 33:25;95:9;107:24; 113:4 hoped (2) 41:8;91:6 hopefully (1) 8:3 hopes (1) 122:17 hoping (2) 91:5;128:3 hoppin' (1) 87:3 horn (1) 100:10 hour (1) 54:13 hours (1) 3:13 house (4) 6:13;31:19;130:14; 139:5 housing (2) 14:12;125:18 how's (1) 103:25 hunters (1) 133:21 Hyde (50) 16:15,18;17:9,20; 18:1;19:3,13;20:4,21; 22:7,23;23:25;25:20; 28:10;29:5;36:5,16; 39:10;41:24;42:1,3,18; 50:4;56:16,18;72:4; 95:16;122:16;123:4,6;</p>	<p>124:5,7,11,16;125:17, 18,23;127:18,21;128:1, 2,12,17;130:8,12,20,23; 131:6,15;146:23 Hyde's (1) 144:15 hypothetical (2) 112:16,22</p>
H			I	
	<p>half (1) 31:19 hand (4) 12:6;45:6;73:14; 148:10 handed (1) 119:7 handing (1) 119:13 handle (3) 23:19;107:19;121:1 handled (1) 128:1 handles (1) 130:10 hands (1) 133:6 hang (1) 46:3 happen (14) 34:23;35:4,19;37:22; 41:17;45:8;48:15;50:5; 91:5,6;104:1;129:17; 130:4;140:4 happened (8) 37:9;38:17;39:1;43:3; 52:6;83:22;90:17; 113:19 happening (1) 95:11 happens (5) 129:2,10,14,16,25 happy (4) 21:13;84:24;123:7; 131:18 hard (6) 48:12;56:7;59:25; 76:1,5;92:7 hardly (1) 128:8 harm (2) 53:23;148:18 Haute (1)</p>		<p>I- (1) 94:25 idea (11) 17:25;18:11;39:19; 51:6;93:2;102:13;145:2, 15;146:22;147:1,3 ideas (2) 50:16;51:17 identical (1) 121:20 identified (1) 100:20 identify (3) 69:25;98:18;109:9 identity (2) 16:21;92:2 ignored (5) 116:19,21,25;117:6; 138:10 illegal (4) 27:10;73:17;90:12; 139:12 illogical (4) 72:11;73:2;74:10; 142:16 imaginary (3) 71:22;72:7,13 imagine (1) 18:19 immediately (2) 54:15;87:3 immunities (1) 115:6 impeach (1) 25:20 impeachment (3) 25:15;26:3,16 implication (3) 78:25;80:23;138:13 implied (3) 46:6;73:20;79:13 imply (3) 44:24;79:3;80:11 implying (2) 45:6;103:8 important (3) 126:13;141:6;145:14 improper (7) 78:24;80:19,24;82:23; 100:24;103:9;108:21 impugn (2) 71:12,19</p>	

<p>impulse (1) 7:24</p> <p>impute (3) 132:22,23;134:23</p> <p>imputing (1) 137:22</p> <p>inappropriate (3) 92:17;95:22;96:6</p> <p>incapable (1) 101:23</p> <p>inclined (1) 31:17</p> <p>include (2) 124:8;137:21</p> <p>includes (1) 137:20</p> <p>inclusivity (1) 9:22</p> <p>inconsistencies (3) 146:4,6,9</p> <p>inconvenient (2) 100:3,5</p> <p>incorporate (2) 123:24;124:20</p> <p>incorrect (2) 111:3,6</p> <p>incredible (1) 68:16</p> <p>Indiana (25) 4:5,6;5:1;8:13;11:12; 15:4;62:12;95:10;108:8; 115:6;125:1,5;126:11, 15;130:4;132:14; 134:19;136:4,7,9,11; 137:1,2;138:13;142:1</p> <p>Indianapolis (10) 99:14,19;100:1,7; 102:6,13,22;104:15; 105:13;106:10</p> <p>Indiana's (1) 126:4</p> <p>indicated (7) 8:8;118:8;120:3; 130:17;136:12;147:23; 148:19</p> <p>indicating (1) 121:18</p> <p>indication (1) 13:10</p> <p>individually (1) 129:19</p> <p>individuals (1) 129:4</p> <p>influence (2) 82:23;83:5</p> <p>inform (2) 54:1;69:12</p> <p>informant (26) 11:24;15:8,13,19; 16:17,18,21,23;17:2,10, 17;18:1,11,15,22;12; 23:9;27:11;38:23;44:6; 48:14;89:6;92:2;124:8, 11,17;145:17</p> <p>informants (7) 45:18;86:21;128:16; 129:5,22;130:6;139:13</p> <p>information (17) 20:3,13;23:11;27:19; 31:2,10,12,24,25;41:11; 44:8,23;51:13;52:3; 94:21;98:6;103:15</p> <p>inquiry (2) 77:17;124:21</p> <p>inquisition (1) 81:11</p> <p>insist (1) 9:8</p> <p>instead (4) 30:17;39:8;72:6;90:13</p> <p>instruction (4) 126:20,22,25;127:5</p> <p>instructions (3) 59:12;61:8;127:1</p> <p>instrumental (1) 78:2</p> <p>Insufficient (1) 44:8</p> <p>integrity (2) 71:12,19</p> <p>intelligent (1) 126:2</p> <p>intend (3) 80:8;120:3;134:19</p> <p>intended (4) 39:9;43:23;80:7; 110:22</p> <p>intending (1) 42:3</p> <p>intent (8) 25:4;90:16,18;132:5, 21,23;137:13,23</p> <p>intention (2) 28:20;37:25</p> <p>intentional (1) 89:3</p> <p>intentionally (1) 88:25</p> <p>interest (9) 52:21;55:12,19;56:3, 6,7;59:10;71:24;75:23</p> <p>interested (8) 25:8;26:22;27:21,25; 93:5,7;138:20;144:15</p> <p>interesting (1) 103:21</p> <p>interests (2) 53:21;56:25</p> <p>interpretation (1) 131:24</p> <p>interpreted (3) 132:3,4,5</p> <p>interrogatories (6) 76:25;77:5;97:2,5; 103:23;116:3</p> <p>interrogatory (3) 96:16,21;97:21</p> <p>interrupt (2) 129:3;135:21</p> <p>interrupted (1) 135:19</p> <p>interview (1) 24:8</p> <p>into (19) 9:21;19:12;33:1; 34:12;38:6;53:5;73:14; 76:6;86:20;89:17;90:5; 111:8;118:19;122:19; 123:24;124:21;128:25; 144:20;147:21</p> <p>investigate (1) 150:2</p> <p>investigation (3) 25:11;65:19;66:11</p> <p>investigations (1) 23:13</p> <p>invite (1) 35:15</p> <p>invited (1) 35:18</p> <p>involve (1) 120:7</p> <p>involved (8) 25:5;37:20;56:21; 72:5;78:22;81:13,15; 133:15</p> <p>involvement (2) 79:12,14</p> <p>involving (1) 55:3</p> <p>irony (1) 138:9</p> <p>irrational (1) 134:24</p> <p>irrelevant (4) 106:2;135:22;148:9, 10</p> <p>issue (16) 9:22;52:18;60:17; 69:1;103:11,12;104:3; 113:8,9;114:20;125:21, 25;127:18;146:14; 148:10;149:3</p> <p>issued (2) 53:15;66:4</p> <p>issues (2) 108:10;115:1</p>	<p>joined (2) 72:14;73:3</p> <p>Jr (1) 109:21</p> <p>JUDGE (206) 3:1,17,23;4:14,22,25; 5:6,12;6:2,5,11,15,18; 7:20;8:5,17;9:5,10,15, 18;10:19,22,25;11:4,8; 12:2,5,8,12,15,18,22; 18:6;21:19,22;33:14; 34:7,14;47:11;50:11,17; 51:1,6,16;52:5,6;53:10; 54:1,5;57:6,14;58:9; 59:5,12;60:5;61:10,20, 23,25;62:22,24;63:14, 24;64:9,11,15,21,24; 65:6;66:9,11,16,20,25; 67:13,16,19;68:3,9,19, 21;69:5,14,16;70:5,13; 71:22;72:7,19,24;73:7,8; 74:3,7;75:6,17,24;76:11, 19;77:13,15,17;78:19, 25;79:11;82:7,22;83:10, 25;84:18;85:8,15,24; 88:23;89:7;92:11;95:3; 96:21,23;97:2;104:25; 108:2,18,22,24;109:3, 14,21;115:18;117:24; 118:3,8,11,14,25;119:5, 9,21,23;120:1,6,10,12, 20,24;121:9,14,23; 122:3,8,20,25;123:3,10, 13,20;124:3,25;125:7, 10,13;126:6,14,20,25; 127:2;129:3,9,14,18; 131:21;132:6;133:16; 135:4;136:1,7,17,21,23; 137:6;139:21;140:14; 142:5,20,23;143:3,12; 145:21,23;146:11,13; 147:15,20;148:3,5,19; 149:2,7,10;150:19,25; 151:2,6,13,15,18</p> <p>Judges (10) 66:12;72:10,15;73:6; 74:5;110:2,11,19;111:4; 116:6</p> <p>Judgment (2) 63:3,6</p> <p>judicial (5) 58:10;75:4,18;143:2,7</p> <p>JUGE (1) 125:3</p> <p>June (5) 23:2;28:4;38:19; 97:18;113:16</p> <p>juries (3) 126:5,12;127:7</p> <p>jury (11) 19:6;45:17;65:9,12; 95:17;126:2,15;127:1; 131:14,19;146:12</p>	<p>Justice (2) 78:18;126:10</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep (6) 76:5;82:8,16;83:1; 123:6;133:13</p> <p>Kellams (29) 50:11;51:1,6,16;52:5; 53:10;54:1;57:7;61:11, 23,25;74:7;77:14,15,18, 25;78:19,25;79:11;82:7, 22;83:10,25;84:18,20, 21;85:5,9,24</p> <p>Kellams' (3) 50:17;71:22;72:7</p> <p>Kennedy (11) 97:6,13,23;98:20,24; 102:12;105:1;106:19; 108:6,20;119:19</p> <p>Kennedy's (1) 98:8</p> <p>kept (5) 21:13;44:7,14;134:15; 144:12</p> <p>kids (2) 138:21,21</p> <p>kind (28) 10:6;23:18;27:23; 34:3;35:7;48:18;82:1; 83:14;84:25;85:17,22; 96:3;103:20;108:10,12; 116:22;121:7;123:5,6; 128:18,20,25;129:1,2; 132:21;144:19,19;145:4</p> <p>knew (17) 19:18;20:25;21:1; 22:11,22;26:12,14; 46:13,21;74:24;104:2; 124:7;128:7,9;130:11, 12;138:24</p> <p>knocked (3) 65:13;86:14;117:2</p> <p>knocking (1) 86:8</p> <p>knowing (4) 124:16;130:1;141:18; 142:13</p> <p>knowingly (1) 88:25</p> <p>knowledge (2) 55:21;78:15</p> <p>known (4) 19:23,25;20:8;137:10</p> <p>knows (1) 31:18</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack (1) 116:7</p> <p>languishing (1)</p>
	J	
	<p>jail (3) 27:20;32:4;133:8</p> <p>James (5) 97:6,13;98:20,24; 108:6</p> <p>Jim (2) 119:19;138:18</p> <p>job (2) 139:11;140:9</p>	

91:14 large (2) 25:14,19 last (4) 21:24;52:16;68:1; 84:11 late (1) 23:2 Later (3) 17:22;74:13;76:8 law (37) 4:2;7:8;32:15;59:22; 85:21;91:9,11;95:13; 112:17;115:7,15; 120:18;121:11;125:1; 126:6,7,15,16,24;127:2, 6;132:11,12;134:8; 137:10;138:1,11;139:20, 23;141:17,22;142:2; 147:13;149:13,16,19; 150:16 lawfully (2) 47:17,25 lawless (1) 142:14 Lawrence (2) 7:16;65:4 laws (5) 85:12;90:11;138:12; 139:2;141:12 lawyer (15) 15:2,3;48:16;52:20; 57:8,9,16;60:8;61:5; 65:22;76:1;101:13,20; 103:8;148:12 Lawyers (1) 66:13 leading (1) 144:20 leads (1) 130:2 least (6) 36:16;50:18;79:13; 93:14,20;124:10 leave (1) 121:10 left (2) 8:22;127:12 legal (16) 48:4;72:10;88:4; 107:11;112:9,14;113:1; 116:6,7,19;120:8,13,21; 132:17;134:17,20 legally (2) 94:18,19 legend (1) 20:2 legislative (3) 132:5;137:13,22 legislature (8) 85:2,13,18;90:3; 132:22,24;134:19,24 legitimate (6)	29:24;30:13,15;32:25; 33:2;63:12 legitimate' (1) 30:1 lend (2) 35:23;36:13 length (3) 7:3,4;23:24 lenity (2) 137:15;138:3 Leslie (11) 20:24;21:24;24:3; 25:3;113:17,18;144:2,3, 4,7;145:15 less (2) 93:22;142:8 lesser (1) 10:4 letter (22) 66:20,25;67:1,3,12,14, 19;68:7;89:8;98:19,23, 24;109:14,15,17,21,22, 22,24,25;132:11;140:8 letters (3) 69:3;110:1;138:7 liable (1) 54:3 license (2) 121:11;125:6 licensed (2) 108:12;125:1 lie (4) 34:2,4;95:16;113:21 life (1) 141:4 light (1) 100:10 liked (2) 116:13;128:18 likely (2) 40:10;127:25 limit (2) 118:14,15 limited (1) 99:25 line (2) 80:11;92:8 lines (2) 79:5;92:9 Lisa (34) 26:5,7,9,12,17;27:23; 30:22;34:18;35:12;39:2, 9;40:1,41:2,20;42:4; 43:22;44:16,24;47:8; 50:3;54:10,13,17;56:17; 90:9,14,22;93:15;97:19; 113:13;130:13;143:21, 23;148:24 list (7) 19:21;76:25;77:11; 79:7;80:9;81:6;138:12 listed (13) 49:1;77:11,13,24;	78:9,11;82:7,14,16,25; 83:7;84:21;97:6 Listen (2) 60:1;61:20 lists (1) 76:22 lit (1) 51:8 little (18) 19:24;33:11;34:4; 35:22;38:2;39:14;41:9; 63:8;72:1;76:4,9;84:23; 127:24;128:19;129:24; 131:1;138:19;144:21 live (4) 31:9;53:5;107:6;141:3 lived (2) 31:6;34:25 live-in (1) 35:2 lives (2) 31:19;141:4 living (2) 31:20;133:21 local (4) 72:13;92:11,21; 130:15 located (1) 8:14 location (1) 99:16 locker (3) 50:24;90:5;134:14 logical (1) 134:21 long (9) 33:18;48:16;51:4; 65:22;107:18;131:3; 134:7;140:16,16 longer (1) 33:12 Look (10) 13:8;32:20;38:11; 82:10;98:10;104:17; 117:19;128:22;132:10; 139:23 looked (3) 100:8;132:7,8 looking (1) 139:5 looks (3) 13:11;96:24;137:1 loosely (1) 138:15 lose (2) 21:11;128:15 lost (5) 24:4;51:15;58:19; 142:3,7 lot (10) 19:18;21:11,12;57:4; 73:13;107:9,10;117:21; 139:19;141:10	love (1) 85:15 lungs (1) 32:15 M mad (3) 87:3;140:25;141:11 mail (1) 60:2 mailbox (1) 7:23 mailed (1) 13:12 main (3) 27:23;86:1;121:5 makes (5) 25:14;85:20;116:25; 117:20;139:3 making (13) 19:10;25:4;26:24; 27:10;106:17;124:6,9; 128:23,24;135:16; 136:3;148:16;149:8 Man (10) 20:14;42:21;85:15; 89:13;104:13;140:16; 141:4,16;142:11,11 mandamus (1) 83:24 many (2) 131:8;140:25 Marc (3) 77:24;84:20,21 March (2) 109:13;110:7 marijuana (38) 22:12;28:9;38:22; 39:10;40:2;43:19,23; 44:6,14,19,21,25;45:7; 46:23;47:8,16,18,21; 48:14,24,25;50:21;52:5; 62:9;65:16;89:10;90:2, 8,13;93:15;94:2,5;113:4, 18;124:19;125:21; 126:1;130:19 Mark (2) 109:10,17 marked (9) 13:4;62:18;64:1,17; 69:22;77:3,4;98:18; 109:7 Marshal (4) 108:6;134:3,3,4 marshals (1) 133:25 materialized (3) 82:9,18;83:2 matter (21) 3:2,8,25;4:7;6:22;7:2, 17,22;12:21;34:24; 80:25;81:1;104:10;	109:12;113:23;114:1, 17;115:4;135:14; 144:23;147:13 mattered (1) 115:5 matters (11) 3:6,14,15,18;4:13; 5:11,13;6:1;7:15;66:15; 111:12 may (29) 4:17;5:17;6:20;7:1,5; 20:6,21;21:18,22;43:5; 61:21;69:12;70:3;76:11; 78:25;84:23;91:12; 116:9;120:14;123:2; 126:15;130:6;131:25; 132:22;138:14;143:16; 145:22;147:23;151:21 maybe (31) 4:20;10:23;19:3; 28:23;29:18;35:1;37:15; 38:16;41:8;53:24;80:10, 14;83:20;87:14;89:18; 90:16;96:13;100:5,14; 102:12;117:18;118:2; 121:4,6;123:23;124:19; 126:22;127:25;144:9,17, 20 mean (70) 14:25;18:19;19:9,20; 21:2;26:18;27:18,22; 28:18;31:22;32:3;34:5; 37:21;38:11,16;40:12; 45:18,25;50:6;51:8; 52:10;54:6;55:3;56:11; 57:2,5;63:12,19;67:11; 68:17;76:13;79:3;85:11, 21;86:19;89:12;90:4; 94:18,20;95:1,2;96:12; 101:20;102:4;103:8,14, 18;104:4;107:14;112:4, 6;113:22;116:13; 118:12,18;120:11;125:6, 21;127:19;128:20; 129:11,21;130:1,20; 131:12;133:19;138:13; 144:12;145:11;151:3 meaning (1) 132:3 means (7) 16:23;30:15;49:16; 57:4;103:17;126:7; 146:10 meant (6) 34:12;73:12;74:25; 95:6;143:23;144:22 meet (7) 8:19;35:8,21;36:1,12, 25;39:10 meeting (3) 35:18,18;37:4 members (1) 71:16
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<p>memoranda (3) 4:2,10;5:9</p> <p>memory (1) 23:22</p> <p>men (3) 85:17;89:11;133:22</p> <p>mentioned (6) 21:15;42:9;114:24,25; 115:2;145:16</p> <p>merits (2) 58:24;60:11</p> <p>met (7) 31:22;35:11;38:20; 66:17;90:23,24;97:19</p> <p>methamphetamine (13) 11:20,23;13:24;14:10, 24;15:7,19;16:10; 124:19;125:17,23; 126:1;127:24</p> <p>meth-related (1) 124:4</p> <p>Michael (1) 65:2</p> <p>middle (4) 76:10;91:24;92:5,7</p> <p>might (32) 10:16;12:25;17:17,20; 19:21;22:11;26:23; 27:10,21;33:11;41:17; 56:9;71:5,6;73:18;76:4; 79:13,14;80:11;81:7,7, 20;84:24;86:17;112:19; 121:7,25;129:1;137:10, 23;139:6;151:4</p> <p>might've (7) 9:8;33:20;52:3;54:2; 83:4;127:11;144:9</p> <p>military (1) 108:10</p> <p>Miller (2) 46:16;51:9</p> <p>mind (11) 11:2;28:12,19,20; 29:1;40:22;50:15;71:7; 79:6;108:11;131:24</p> <p>minds (8) 72:15;73:4,8,13;74:9, 14,16;117:10</p> <p>mine (5) 39:8;56:25;75:5; 85:22;94:24</p> <p>minor (1) 22:10</p> <p>minute (10) 18:8;23:6;58:5;86:14, 14;104:19;116:4;142:8; 148:3;149:2</p> <p>minutes (3) 118:2;121:5,6</p> <p>misbehaved (1) 148:12</p> <p>misconduct (2) 29:19;148:16</p>	<p>misdemeanor (7) 48:25;62:9;65:17,20; 66:3;133:11;141:17</p> <p>misinformation (1) 20:1</p> <p>mislead (1) 34:11</p> <p>misleading (1) 106:3</p> <p>misled (1) 108:14</p> <p>mission (1) 131:7</p> <p>misspelling (1) 22:11</p> <p>misspoke (1) 93:6</p> <p>mistaken (1) 44:18</p> <p>misunderstanding (1) 7:19</p> <p>modify (1) 136:13</p> <p>moment (2) 12:3;39:22</p> <p>Monday (2) 52:14;53:15</p> <p>money (20) 38:25;40:3,11,17; 41:2,6;45:14;51:3; 54:23;93:3,16,17;94:9, 11;128:24;130:11,14,15, 16;141:5</p> <p>Monroe (9) 8:24;11:14;15:3; 49:15;62:4;108:9; 109:18;150:2,6</p> <p>months (1) 63:4</p> <p>more (20) 4:18;9:8;14:2;25:15; 31:10;39:1;40:10;41:11, 16;57:4;64:23;96:1,15; 117:4;120:25;121:12; 127:25;128:15,15; 135:24</p> <p>morning (5) 6:25;7:7,25;9:12; 51:11</p> <p>Most (6) 23:12;95:19;128:16; 141:10;145:14;148:9</p> <p>mother (9) 17:25;18:11,22;19:3, 5;20:7,21;22:2;26:9</p> <p>motion (8) 5:18,23;6:6,20;7:1; 9:15;84:4;108:17</p> <p>motivation (1) 131:16</p> <p>motivations (1) 131:13</p> <p>mountaintown (1)</p>	<p>9:4</p> <p>move (6) 9:11;38:19;62:21; 100:11;106:11;107:24</p> <p>moved (6) 6:23;7:10;8:5;9:13; 100:22;101:5</p> <p>moving (1) 11:17</p> <p>much (16) 10:14;11:1;36:16; 40:15;52:3;54:6;73:20; 85:24;95:18;120:8; 128:5;132:19;135:23, 24;138:7;141:5</p> <p>murdered (1) 130:8</p> <p>must (6) 10:6;15:24;32:8; 53:17;98:6;103:5</p> <p>must've (2) 36:14,16</p> <p>myself (2) 3:24;141:15</p>	<p>6:14;25:1,19;39:12; 40:2;89:22;95:10,11; 118:8;123:2;135:23; 151:5</p> <p>needed (3) 41:17;74:12;107:8</p> <p>needs (1) 151:7</p> <p>negative (1) 57:2</p> <p>neglected (1) 8:1</p> <p>negotiable (1) 107:22</p> <p>negotiations (1) 140:17</p> <p>neither (4) 72:9;96:13;121:20; 147:13</p> <p>new (2) 60:7;142:1</p> <p>newspaper (3) 45:2,4,7</p> <p>next (9) 34:14;46:19;52:6,14; 72:8;76:19;99:19; 102:23;104:25</p> <p>nice (6) 10:21;18:20;19:11; 35:22;36:13;102:4</p> <p>nobody (3) 104:7;126:22;132:8</p> <p>nobody's (1) 134:25</p> <p>Nods (2) 58:17;94:12</p> <p>none (3) 29:24;32:25;45:17</p> <p>nonexistent (1) 71:23</p> <p>nonissue (1) 82:1</p> <p>Nonresponsive (3) 59:23;79:25;115:17</p> <p>noon (1) 8:20</p> <p>nor (3) 42:6;149:21,21</p> <p>normally (2) 132:20;137:12</p> <p>note (1) 123:14</p> <p>noted (1) 134:15</p> <p>notes (2) 10:24;151:8</p> <p>notice (9) 58:10;75:4;76:15; 97:22;98:3,25;109:1; 143:2,7</p> <p>November (1) 62:6</p> <p>number (7)</p>	<p>8:19;49:1;67:13; 96:24;119:15;125:6,8</p> <p>numbers (6) 39:22;40:23;41:14,14; 63:16;94:8</p>
O				
		N		
		<p>Najam (4) 73:5;74:5;109:21,21</p> <p>name (15) 12:18,19;17:7,8,16,19; 21:24;25:21;42:1;52:16; 122:15;124:5,11,23; 144:1</p> <p>named (3) 90:22,23;124:5</p> <p>names (1) 26:6</p> <p>naming (1) 94:21</p> <p>narc (1) 23:12</p> <p>narcotic (1) 23:12</p> <p>narrative (5) 121:16;123:25;124:9, 21;135:22</p> <p>narrowed (1) 17:6</p> <p>natural (1) 51:17</p> <p>nature (1) 142:16</p> <p>nearly (3) 133:1;135:24;141:5</p> <p>necessarily (1) 55:17</p> <p>necessary (4) 45:17,22;106:12; 107:7</p> <p>necks (1) 40:14</p> <p>need (12)</p>		
			<p>oath (4) 104:9;124:23;145:10, 11</p> <p>object (13) 21:7;63:23;66:14; 67:3,6,16;68:18,25; 69:10;100:14;107:23; 119:8;143:17</p> <p>objection (29) 6:4;21:18,20;57:11; 62:22,23;63:14;64:9,20; 68:22;69:4,5,6;70:5,7; 75:24;96:20;108:1,25; 109:2;115:24;116:15; 118:24;119:17,23; 120:25;135:3;137:7; 143:5</p> <p>objections (1) 108:24</p> <p>observe (1) 45:19</p> <p>obtained (4) 47:15,18,25,25</p> <p>obvious (2) 38:1;138:13</p> <p>obviously (8) 8:9;120:20,22;121:16; 124:22;129:25;136:9; 151:6</p> <p>occurred (5) 10:7;56:16;100:15; 112:22;116:24</p> <p>occurrence (1) 48:10</p> <p>October (1) 11:13</p> <p>off (13) 34:7;44:11;65:13; 90:4,13;91:7;95:5; 106:2;119:11,13; 123:16;135:22;140:18</p> <p>offended (2) 95:25;107:1</p> <p>offense (4) 9:25;55:10;73:22; 126:9</p> <p>offensive (3) 92:17;95:22;96:2</p> <p>offer (19) 9:21;10:9;27:14; 28:17;63:13;64:7;67:8; 68:15;70:10;75:8;76:11; 96:18;100:2;101:16; 105:22;108:23;111:11; 118:18,22</p>	

<p>offered (9) 70:8;73:16;74:3; 96:18,19;99:22;101:15; 106:24;143:4</p> <p>offering (6) 10:10;76:6,10;100:21; 101:3;119:7</p> <p>Office (7) 13:15;36:9;62:5; 66:21;84:2;97:17;125:7</p> <p>officer (30) 3:24;4:3;5:13,14;6:7, 19;7:2;8:6;24:14;37:20; 43:12;46:8;69:17,22; 71:21;128:1,11;130:9; 131:22;133:1;135:6,13; 138:12,25;139:4; 141:22;144:4;146:8; 148:2;149:17</p> <p>officer' (1) 139:24</p> <p>officers (6) 46:10;47:12;115:7,8; 139:1;142:2</p> <p>officer's (2) 4:7;144:6</p> <p>official (1) 67:15</p> <p>often (4) 48:19;112:3;129:23, 25</p> <p>Oh! (1) 27:16</p> <p>old (1) 138:24</p> <p>Olive (1) 125:4</p> <p>Once (5) 39:20;48:13;74:16; 114:10;133:24</p> <p>one (55) 7:4;13:25;18:8;23:15, 17;26:10;27:23;36:13; 38:24;43:11;44:10; 60:15;61:18;67:13;70:3; 71:5,6;72:16;74:3,4; 75:5,7,10;77:13;78:17; 79:6;84:21;86:1,11,24; 92:9,19;96:13,15;99:4; 100:13;105:17;106:9,13, 17,25;109:12;116:2; 117:4;126:4,11,12; 127:8,9;142:6;143:19; 144:24;146:11,13,23</p> <p>one-page (1) 109:13</p> <p>ones (1) 115:4</p> <p>one's (1) 109:1</p> <p>ongoing (6) 72:4;95:16;127:2; 132:14;133:10,15</p>	<p>only (29) 6:21;44:5,13;48:13; 49:9;51:17;57:25;61:3, 3;81:4;101:6;103:11; 109:22;111:2;115:11, 19;117:7;126:5,6; 134:20;137:25;138:14; 139:4,17,17,18,19; 145:16;146:17</p> <p>open (4) 67:14;82:8,17;83:1</p> <p>opine (1) 5:25</p> <p>opined (1) 74:18</p> <p>opinion (37) 59:5,19;60:20,21; 61:1,2;62:1,14;64:18; 68:19;69:1,10;71:8; 72:14;73:11,16,17;74:3; 75:18;92:13;104:15; 105:4;110:24;111:1,5, 11,13,23;112:2;115:3; 116:11,22;138:6,10; 141:20;142:16;143:20</p> <p>opinions (5) 68:17;75:4;76:12; 112:9,11</p> <p>opportunity (4) 4:1;120:21;132:1; 146:3</p> <p>opposite (1) 90:18</p> <p>options (3) 82:8,17;83:1</p> <p>oral (4) 4:13,16,20;5:1</p> <p>order (14) 3:7,8;7:2,21;53:15; 59:19;63:4;68:22;82:8, 16,25;99:10;130:15; 151:7</p> <p>ordered (3) 59:11;65:20;66:9</p> <p>orders (1) 116:17</p> <p>organization (1) 5:4</p> <p>organized (1) 6:10</p> <p>original (3) 64:13;110:5;119:22</p> <p>originally (1) 29:8</p> <p>ostensibly (1) 16:23</p> <p>ostensibly' (4) 92:16;95:21,23;96:14</p> <p>others (3) 32:3;73:3;148:15</p> <p>other's (1) 121:20</p> <p>otherwise (1)</p>	<p>132:4</p> <p>ought (5) 20:14;37:19;40:7; 105:20,24</p> <p>out (42) 21:14;27:13,21;28:19; 31:19,25;34:18;36:20; 37:3,24;38:4;40:9,14; 46:23,25;60:3;67:14; 68:4;78:21;81:5,14; 82:1;83:19;84:12;88:5; 91:1;93:19;101:25; 104:9;105:14;114:15; 127:18;130:10;131:2,8, 9;132:20;139:8;145:18; 146:6,8;148:21</p> <p>outcome (2) 112:18,19</p> <p>outline (1) 121:8</p> <p>outrage (1) 30:1</p> <p>outrageous (2) 32:10;91:13</p> <p>outright (1) 72:8</p> <p>outside (1) 85:21</p> <p>over (25) 8:3;22:4;26:2;35:1; 39:16;43:22;47:7;48:9; 53:14;56:15;68:21; 77:25;78:18;82:23; 90:20;91:15;106:21; 107:10;113:7,7;115:23; 130:21;132:7;137:7; 147:19</p> <p>overrule (1) 135:6</p> <p>Overruled (2) 66:16;108:2</p> <p>overrules (1) 21:19</p> <p>owe (1) 41:6</p> <p>own (10) 40:11;56:14,19,22; 76:3,9;93:17;99:22; 128:19;133:23</p> <p>owners (1) 133:22</p>	<p>pages (2) 68:1;69:2</p> <p>paper (3) 40:24;59:20;82:5</p> <p>papers (2) 108:17;136:6</p> <p>paperwork (1) 84:2</p> <p>paragraph (23) 11:11,17;13:21;15:5; 16:20;24:17;27:5;30:4, 8;32:20;38:5;72:23; 84:17;91:24,25;92:6,6; 99:3,4,11;102:24; 103:10;148:14</p> <p>paragraphs (2) 84:6,11</p> <p>parking (1) 99:19</p> <p>part (16) 4:8,8;5:7,15;21:14; 44:1;57:21;66:11;68:1; 69:20;74:11;81:7,7; 85:3;122:9;146:17</p> <p>participate (1) 150:6</p> <p>participated (3) 16:22;54:2;92:3</p> <p>participation (1) 51:7</p> <p>parties (2) 121:19;148:18</p> <p>party (1) 100:17</p> <p>patrol (1) 150:10</p> <p>pay (4) 40:7,15;74:25;94:6</p> <p>PCR (16) 57:18,21;58:6,8,19,19, 22;59:8;60:2,18;61:4,7; 74:6,21,22;110:16</p> <p>peace (2) 133:10,15</p> <p>pejorative (1) 96:8</p> <p>Pemberton (96) 11:18,19,22;12:24; 13:22,22;14:17;15:6,12, 13,18;16:7,20;17:1,8,16; 18:16,17,23;20:24; 21:25;23:18;24:3;25:4, 12;26:13,14,22;27:9,13, 19;28:7;31:22;32:2,18; 40:7,14;46:24;49:16; 50:22;52:20,22;53:23; 54:8;55:4,5,18,20;56:24; 57:7,19,22;59:15;60:7; 72:16;73:4,11,17;74:22; 75:5,7,9,20,22;77:25; 80:14;84:1;91:17;92:1; 95:12;110:16;113:5,18; 122:17;124:5,12,13,14;</p>	<p>125:16;126:1;127:10, 25;128:3,4,7;131:11; 141:9;143:7,21;144:5,7, 25;145:2,3;146:24; 147:18</p> <p>Pemberton's (22) 17:25;18:10,22;19:3, 5;20:6,21,22;21:10; 22:10,15,21;24:20; 26:20;27:8;44:9,11; 49:4,13;50:7;61:5; 143:25</p> <p>Pemberton's- (1) 18:7</p> <p>pen (1) 132:8</p> <p>pending (2) 3:6;49:4</p> <p>people (27) 7:25;18:21;19:20,21; 20:20;34:3;40:5;45:19; 56:20;81:25;84:12; 86:16;89:16;91:11,12, 14;92:22;111:16; 112:18;126:3;134:23; 138:12,23;139:12;140:3, 21,25</p> <p>perceive (1) 52:23</p> <p>perception (1) 84:14</p> <p>perfect (1) 141:7</p> <p>perform (1) 150:16</p> <p>perjury (5) 24:14;43:13;72:8; 145:9,12</p> <p>permissible (2) 100:18;135:12</p> <p>permission (1) 85:13</p> <p>perplexed (1) 145:5</p> <p>person (16) 3:5;5:4;9:24;41:25; 46:9;61:18;83:8,10; 90:22,23;99:9;126:8; 132:25;133:5,15;134:22</p> <p>personal (1) 66:15</p> <p>persons (1) 148:16</p> <p>persuade (1) 34:10</p> <p>persuaded (1) 39:10</p> <p>persuading (1) 39:12</p> <p>persuasion (2) 33:19;34:13</p> <p>pertains (1) 148:23</p>
		P		
		<p>Pablo (9) 25:20;32:13;34:21,22; 36:4;41:5,23,25;54:19</p> <p>Page (27) 13:19,20;14:1;70:15, 18;71:21;72:8,19,20,21, 22;77:18;82:2,6,12,14, 15,15,20;84:5,8,9;91:22, 22;92:6;97:14;109:15</p>		

<p>pervasive (1) 84:25</p> <p>petition (17) 4:16;5:1;49:7,14;51:1,5,20,23;52:4;57:18; 59:12;71:4;87:19,20,25; 147:9,9</p> <p>petitioned (4) 46:22;47:17;50:20; 114:5</p> <p>pet-peeve (2) 85:22;136:2</p> <p>phone (13) 7:9,25;8:12,19;23:4; 35:6,12,15,21;36:14; 51:9;107:17;133:13</p> <p>phonetic (2) 9:1;130:18</p> <p>physical (1) 94:18</p> <p>picked (1) 6:13</p> <p>picture (2) 83:20;131:19</p> <p>piece (2) 59:20;82:5</p> <p>pile (1) 136:5</p> <p>Pinkerton (1) 133:22</p> <p>place (7) 42:11;51:8,12,99;8, 10;130:15;148:17</p> <p>placed (3) 50:23;121:2;134:14</p> <p>plain (4) 132:3,19;144:8; 145:12</p> <p>plainer (2) 99:5,13</p> <p>plan (14) 42:5;54:8,10,13,17,18, 21,22,25;55:2,2,3;96:10; 145:1</p> <p>played (1) 144:7</p> <p>players (1) 126:4</p> <p>plea (4) 49:21,23;50:7;140:17</p> <p>plead (2) 57:15;91:8</p> <p>pleading (2) 33:7,9</p> <p>pleadings (1) 116:2</p> <p>please (6) 12:6;70:15;71:2; 91:20;106:5;109:9</p> <p>pleasure (1) 150:22</p> <p>pled (2) 49:5;57:7</p>	<p>Plummer (1) 52:16</p> <p>pm (2) 3:13;151:21</p> <p>pocket (4) 42:19;43:1,8;93:19</p> <p>point (13) 15:25;20:3;44:24; 50:7;54:6;93:8;97:21; 124:14;142:9,9;143:13; 148:6;149:8</p> <p>pointed (5) 81:14;101:25;114:15; 146:6,8</p> <p>points (1) 53:19</p> <p>poking (2) 86:20;89:17</p> <p>police (95) 21:13;22:16,23,24; 23:4,4,9,12,14;24:8,9,22, 23;25:5,8,11;26:22; 30:18;33:22,22;34:1; 37:24;40:10;41:15;42:6; 43:11,15;44:20;46:8,8, 10,18,20,20,21;47:1,11; 48:2,9;50:24;84:14; 85:1,12,19,20;86:8,13; 87:13;90:5,20;91:2; 92:11,21;93:3,5,10; 95:15;108:7,8;113:5; 115:7;123:7;125:19; 127:19;128:11,15,17; 129:4,11,12,19,23; 130:5,24;131:4;132:12, 14,18;133:1,8,24; 134:13,17,20;137:25; 138:25;139:1,3,15,17, 17,18,19;146:7;149:23</p> <p>policeman (1) 43:16</p> <p>policy (5) 83:21;129:7,13;130:4, 25</p> <p>poor (2) 93:18;130:20</p> <p>pops (1) 67:14</p> <p>portion (3) 122:11;136:10,10</p> <p>position (1) 112:1</p> <p>possess (4) 48:25;89:9;132:13; 139:12</p> <p>possession (10) 11:20;13:23;14:23; 44:19,21;47:15,17; 48:24;62:9;65:16</p> <p>possibilities (1) 41:10</p> <p>possible (7) 41:4,7,7;78:12;81:23;</p>	<p>117:11;146:15</p> <p>possibly (6) 50:23;53:23;55:21; 71:4;81:20;144:8</p> <p>post- (1) 49:7</p> <p>post-conviction (3) 49:15;59:13,15</p> <p>post-trial (4) 4:2;120:18;121:3; 151:11</p> <p>pot (5) 29:4;34:21;37:17; 54:22;91:2</p> <p>potheads (1) 31:18</p> <p>power (1) 126:6</p> <p>powers (5) 84:14;85:1,19;115:6; 133:1</p> <p>practice (7) 30:20;31:3,14,16; 48:4,5;125:1</p> <p>practiced (1) 11:14</p> <p>practicing (1) 7:8</p> <p>praise (2) 92:15;95:7</p> <p>precedent (2) 112:10,14</p> <p>precise (1) 39:1</p> <p>predecessor (1) 104:6</p> <p>prefer (1) 130:18</p> <p>prejudice (1) 59:13</p> <p>Preliminary (8) 3:14,15,17;5:11,13; 6:22;70:4;135:3</p> <p>prepared (1) 9:9</p> <p>prerogative (1) 85:12</p> <p>Present (5) 3:3,4;37:15;121:15; 141:25</p> <p>presentation (2) 83:21;139:25</p> <p>presentence (4) 65:19;66:4,11;67:10</p> <p>presentencing (1) 67:15</p> <p>presenting (3) 10:16;76:3,8</p> <p>presided (1) 77:25</p> <p>presiding (2) 92:11;95:3</p> <p>pressure (2)</p>	<p>122:18;123:6</p> <p>presume (1) 134:23</p> <p>pretrial (2) 8:25;52:10</p> <p>pretty (14) 10:14;17:4,18;37:25; 43:14;73:20;78:21,21; 79:25;116:24;117:19; 120:8;132:19,25</p> <p>prevent (2) 90:12;95:14</p> <p>previous (2) 74:25;82:19</p> <p>previously (4) 28:16;52:11;109:12; 125:19</p> <p>prices (1) 144:16</p> <p>primary (1) 40:22</p> <p>prior (10) 6:19;7:21;23:19; 33:20;42:8;49:12;52:18; 97:18;140:17;151:9</p> <p>priority (1) 9:3</p> <p>prison (6) 42:21;128:17;131:2; 140:16;141:2,9</p> <p>prisons (1) 91:15</p> <p>privately (1) 52:20</p> <p>privileges (2) 84:15;85:1</p> <p>pro (2) 3:5;120:7</p> <p>probability (4) 18:24;19:2,4;20:7</p> <p>Probable (7) 24:15;43:13;89:24; 133:4;144:4;145:13; 146:5</p> <p>probably (25) 6:14;20:10;22:2; 24:25;26:5,18;27:18; 30:14;48:15;51:25; 80:16,18;81:23;85:10; 95:25;96:1,11;98:21; 108:11;115:24;116:14; 117:14;128:16;134:5; 140:9</p> <p>probation (1) 63:5</p> <p>problem (7) 75:15;78:19;85:13; 86:1;101:22;106:22; 151:3</p> <p>problems (1) 86:12</p> <p>procedure (1) 4:18</p>	<p>procedures (1) 3:20</p> <p>proceed (2) 11:2;21:22</p> <p>proceeding (6) 76:21;110:20;119:20; 147:14;150:24;151:19</p> <p>process (2) 61:13;124:6</p> <p>proclaimed (1) 138:11</p> <p>proclamations (1) 134:2</p> <p>profit (2) 129:6,18</p> <p>Program (1) 66:13</p> <p>prohibition (3) 90:2;130:2,3</p> <p>promptly (1) 58:4</p> <p>pronounced (1) 142:13</p> <p>pronouncement (1) 141:21</p> <p>pronounces (1) 142:2</p> <p>proof (1) 10:1</p> <p>proper (4) 40:13;80:24,25;147:4</p> <p>proposal (1) 4:5</p> <p>proposed (5) 4:1,7,10;5:8;120:17</p> <p>prosecuted (2) 86:25;90:1</p> <p>prosecuting (4) 31:24;51:10;86:19; 128:24</p> <p>prosecution (4) 84:6,11;85:7;86:4</p> <p>prosecutor (31) 8:15,16,22;43:6; 46:15;47:5,10;53:16; 54:1;65:11,12;72:10; 80:12,20;81:1;82:24; 87:2;89:21,23;92:11,23; 94:17,20;105:17,22; 106:9,13,16;132:7,8; 140:22</p> <p>prosecutors (6) 89:15;106:21;127:4; 128:23;132:14;140:20</p> <p>Prosecutor's (1) 62:4</p> <p>prosperous (1) 40:5</p> <p>prove (8) 18:20;21:9;41:18; 110:22;111:12;123:3,4; 143:14</p> <p>proved (1)</p>
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<p>18:5 proven (4) 9:25;33:7;147:11; 148:25 provide (1) 77:10 provided (6) 38:21;39:22;45:14,14; 113:2;125:23 proving (3) 17:25;18:11;19:3 proviso (1) 33:2 Pruden (102) 3:3,14,15;4:9,17,19, 24;9:19,20;10:20;11:6, 10;12:2,4,7,13,16;13:2; 18:4;21:17,21;30:3; 33:5;57:11;59:1,2,3; 62:20;63:7,13,18,21; 64:2,7,13,16;67:8,25; 68:5,10,13,15;69:2,19; 70:8,12;72:20;75:7,15, 25;76:16;82:4;96:17,22, 25;104:22;107:25; 108:23;115:17;117:23; 118:5,10,12,16,20,22; 119:4,6,12,18,22;121:9, 10,16;122:5,24,25; 123:9,12;135:2,5,9,18, 21;136:12;142:20,21; 143:12,13,23;144:2; 145:22;146:1;147:17; 149:4,5,8,12;150:18,23; 151:11,12,14 Pruden's (2) 137:7;145:23 PSI (1) 68:4 public (2) 83:21;125:18 published (6) 60:20,21,25;61:1,1; 92:12 purchase (29) 11:23;15:7,18;16:23; 26:24;27:10;29:24; 32:25;36:15;38:6,22; 40:19;41:3;43:19;48:8; 50:4,4;53:25;54:3;92:3; 93:15,16;124:10,10,13, 13,14,15;134:11 purchase' (2) 15:9,10 purchased (5) 15:11;16:10;44:5,13; 113:4 purchases (1) 22:11 purchasing (3) 22:15;24:21;37:17 purported (1) 70:1</p>	<p>purpose (9) 36:3;48:2;89:4;99:25; 101:6,13;116:10; 134:13;146:19 purposes (3) 83:9;90:2;146:21 push (1) 127:3 put (15) 7:14;9:2;32:13;43:1,8; 45:11;51:22;56:21; 73:13;79:7;85:25;111:8; 122:1;127:5;140:5</p> <p style="text-align: center;">Q</p> <p>quash (2) 100:11;106:7 quashed (3) 99:23;106:1,6 question's (2) 61:21;108:3 quite (4) 85:23;90:18;127:7; 129:11 quote (1) 121:25</p> <p style="text-align: center;">R</p> <p>raise (3) 12:5;104:3;114:20 rampage (1) 87:2 random (1) 117:14 rare (2) 65:24;66:3 rarely (1) 4:25 re (2) 3:2;70:18 reach (4) 3:10;71:8,8;128:20 reached (1) 132:1 reaches (1) 137:18 react (2) 105:21;106:13 reaction (1) 106:1 read (10) 14:2;16:6;27:7;30:11, 16;32:22;112:6,18; 117:10,11 reading (3) 24:25;27:6;72:22 ready (1) 8:1 real (3) 19:7;36:10;51:4 reality (1)</p>	<p>30:6 realize (4) 50:4;76:1,4;94:18 realized (1) 39:21 really (49) 5:22;7:16;17:3;29:7; 37:21,22;38:11;41:10, 16,18;54:12;58:24; 59:16,25;60:10;76:2,5; 79:21;80:18;83:21;89:9; 13:93;13,21,23;95:18; 101:8,16;105:18,23,24; 113:7,15;116:1;117:9; 126:13,23;127:7,10,13, 21;128:8;130:19;138:4; 141:11,23;144:21,22; 145:19 re-arguing (1) 135:9 reason (22) 13:11;26:18;41:1; 49:9,10;50:13;57:25; 58:2,3;64:14;73:15; 77:7;81:22;95:15; 102:24;103:3,18;104:8; 105:8;117:14;120:12; 137:11 reasonable (5) 10:1;112:21;126:9; 133:8;137:19 reasoned (2) 72:11;73:2 reasons (3) 23:17;117:18;131:13 recall (14) 18:13;21:5;23:1;33:4; 37:18,19;45:2;60:10; 76:22;97:25,25;98:22; 120:3;143:4 receive (2) 7:21;97:22 received (1) 98:6 receiving (1) 98:25 recently (1) 49:14 recess (1) 123:19 reciting (1) 14:16 recommendation (1) 3:21 recommendations (1) 4:4 reconcile (1) 38:9 reconsider (1) 74:17 reconsidering (1) 73:14 record (30)</p>	<p>3:1,7;5:7,15;26:25; 35:9;36:4,15;41:24; 43:19;44:2,2;61:14; 69:20;83:14;103:15; 119:11,13;120:2; 122:10;123:16;135:16; 136:3,7,8,10,13;150:24; 151:13,16 recorded (3) 24:8;38:25;130:16 recorder (9) 35:6,22;36:24;38:25; 39:12,15;42:23;93:3; 113:3 recording (4) 24:6;36:6;44:8;145:3 refer (3) 71:22;97:12;147:23 reference (1) 85:24 referred (2) 69:16;77:6 reflect (1) 41:24 refreshed (1) 23:22 refused (1) 58:9 refute (1) 103:22 regard (2) 120:2;136:17 regarding (5) 11:25;52:18;72:2; 98:4;116:6 regularly (1) 4:15 rehearing (2) 87:20;114:6 reject (2) 4:8,8 rejected (1) 135:11 related (1) 71:23 relates (1) 136:14 relationship (4) 56:22,23;101:14; 148:24 relayed (1) 23:5 release (1) 49:8 relevance (9) 21:8;66:15;107:24,25; 122:24;123:9,16;137:9; 143:16 relevant (14) 11:13;79:23;80:1,2; 81:3,4;83:16;108:3; 113:10;137:12;146:14, 20,25;149:1</p>	<p>reliable (2) 25:15;26:1 relief (3) 49:15;59:13,16 relitigating (2) 147:3,22 reluctant (2) 32:9;34:16 rely (2) 40:13;112:10 remainder (1) 44:7 remanded (2) 59:11;61:8 remember (14) 18:25;21:4;22:3;28:8; 33:25;38:7,14,15;51:4; 77:1;81:25;96:12,19; 107:20 remembered (1) 38:16 removal (2) 57:22;58:1 remove (3) 59:13;61:9;67:21 removed (10) 50:1,8,13;52:14;57:6; 59:10;61:4,6;69:2;74:12 removing (2) 49:9;52:18 repeated (1) 113:6 repeating (1) 27:5 rephrase (1) 12:25 replied (1) 79:21 Report (7) 5:14;43:15;66:4; 69:16,22;70:25;71:21 Reporter (3) 61:18;118:17;123:18 represent (15) 14:17;98:2,14;99:22; 100:2,16,19,21;101:3,7, 12;105:25;106:11; 115:14;140:15 representations (1) 6:8 represented (8) 11:18;13:21;30:22,24; 39:2,4;55:7;75:22 representing (8) 17:2;18:23;49:23; 55:10,16;56:1;57:16; 119:14 reprove (1) 10:6 request (6) 44:1,1,3;94:15;97:7; 143:3 requested (3)</p>
--	---	---	--	--

3:12;43:20,25 requests (3) 61:18;148:16,21 requirement (1) 124:22 requires (1) 66:1 rescue (1) 142:12 resident (3) 72:14,18;73:1 resides (1) 99:9 resignation (1) 140:8 resolution (1) 4:7 resolved (5) 7:17;8:15;145:24; 146:9,9 respect (1) 141:20 respond (1) 21:18 responded (1) 77:17 respondent (19) 6:21;11:12;12:21; 13:21;16:22;17:24;18:7; 22:9;29:23;32:24;38:20; 43:20,25;44:17;47:14; 48:23;62:8,14;92:2 respondent's (2) 33:16;62:7 response (6) 13:12;78:10;79:20; 97:7;123:24;124:20 responses (3) 77:5;97:5,22 responsibility (2) 94:7;134:8 responsive (2) 57:12;59:2 rest (2) 44:14;146:18 restaurant (1) 35:23 restroom (1) 123:17 rests (1) 117:24 result (3) 11:23;15:7,18 retaliation (1) 72:3 retract (1) 33:6 retribution (14) 84:12;85:8;86:5,7; 88:5,8,12,20,21,24;89:2, 3,25;95:18 return (1) 126:10	returning (1) 126:17 reversible (1) 126:19 review (4) 10:10;87:19;136:10; 147:9 revoked (2) 97:18;103:24 reweigh (1) 147:16 rhetorical (3) 11:11;24:17;30:4 ridiculous (1) 111:18 right (124) 5:12;6:5,18;7:20,24; 8:5,10;9:10,15;12:6,12; 13:16,19;14:2;16:20,25; 24:18;27:18;28:6,8,11; 29:21;31:15;33:24;34:9; 35:13;36:23;37:7,10,12, 14;38:14,24;39:3,7; 41:22;42:8;43:17,17; 44:4;45:14;46:2,4,7; 47:20,23;50:3;52:4,19; 53:9;54:21;61:8;62:11; 63:22;64:23,24;66:10; 68:9;70:13,23;76:7,13; 77:9,16;79:25;81:16; 82:6;83:5;84:5,17;86:6; 87:11;88:16;89:5;92:7, 18,24;95:3;96:15;97:12, 15,20;98:17,21;102:23; 103:7;105:10;109:6; 110:8,10,14,18;114:8; 116:12;119:9,15;120:5, 10;121:14;122:8; 125:14;126:6;135:17; 136:1,16,21,23;137:6; 139:3,16;140:4,24; 141:4,21;142:5,10,18, 19;143:5,6;148:21; 149:10;150:19;151:18 rights (1) 60:6 risk (1) 148:18 road (2) 8:2;139:16 robbed (1) 55:25 robber (1) 134:5 Robbins (10) 65:2,6;66:9,12,20,25; 67:17;85:15;88:23;89:7 Robbins' (3) 67:14,19;68:19 Robert (1) 46:16 Roger (7) 34:25;38:24;39:4;	42:23;44:24;90:10,23 role (1) 45:22 rolled-up (1) 45:2 room (1) 31:20 roommate (1) 35:2 roundabout (1) 58:25 rule (10) 60:5;99:7,11;100:8; 101:17,19,25;135:13; 137:15;138:2 ruled (3) 110:12;135:14,16 rules (2) 69:11;73:22 ruling (7) 58:21;59:6,19;60:18; 112:23;148:20;149:3 rush (1) 75:13	4:12,21;5:3,10,14,20; 6:3,9,12,17,23;7:13,23; 8:11,18;9:6,13,17;10:17, 21,23;11:2,14,18,20,24, 25;12:5,11,14,20,20,23; 13:3;15:16;17:15;21:3, 7,23;24:16;27:3,17; 32:20;33:9,17;34:9; 48:16;54:9;57:13;60:1; 61:20;62:18,23;63:4,10, 15,19,22;64:10,20,23; 66:14;67:9;68:6,12,14, 16,24;69:9,15;70:3,7,9, 16;72:25;75:3,5,19,20; 76:2,13,18,21;77:6; 86:11;96:20;104:24; 105:20,24;107:23; 108:25;109:6;117:25; 118:1,4,18,21,23,24; 119:8,17;120:2,5,8,11, 19,23;121:1,4,22,25; 122:6,12,22;123:1,15, 22;124:2,23,24,24; 125:2,4,9,11,13,14; 126:18;129:7,10,16,21; 131:23;133:18;135:5,8, 15,19,23;136:2,16,19,22, 24;137:8;142:1,6,17,24; 143:5,6,7,17,19,24; 144:3;145:5;146:21; 147:1,25;148:4,7,19,23; 149:13;150:25;151:1,3, 15,17,20 schalk999@gmailcom (1) 125:12 Schalk's (5) 30:4;63:9;64:4,19; 130:11 schedule (2) 7:16;150:21 scheduled (5) 6:24;7:11;52:11;99:1; 109:12 scheduling (3) 3:8,9,10 scheme (5) 16:22;92:3;96:2,4,8 scheme' (3) 92:16;95:21;96:14 school (1) 8:2 scribbles (1) 10:23 se (2) 3:5;120:7 sealed (2) 68:22;69:6 search (1) 127:20 second (4) 6:22;40:25;99:11; 124:10 security (1)	108:10 seek (1) 59:15 seem (5) 30:19;40:5;84:12; 107:21;137:25 seemed (12) 19:21;28:23;35:7; 39:13;40:7,12,15;100:7; 107:9,15;140:23,24 seems (2) 30:20;85:14 selective (1) 146:17 sell (4) 24:1;34:4;41:18;130:7 selling (5) 14:3;30:17,21;124:18; 125:20 send (2) 126:18;140:8 sending (2) 101:17,19 sense (4) 117:1,7,21;141:23 sensible (1) 46:9 sent (12) 18:16;66:25;77:8; 97:23;98:3,15;100:9; 102:19;109:16,17; 110:1;128:2 sentence (5) 82:6,10,13,19;85:4 Sentencing (2) 63:4,6 separate (1) 67:12 serial (4) 39:22;40:23;41:13,14 serve (1) 139:17 served (1) 126:11 serves (1) 146:19 set (7) 3:6,8;7:22;52:6;54:23; 84:4;110:6 Seth (1) 3:3 setting (4) 22:16;24:21;48:8; 110:5 settle (1) 128:25 settled (1) 35:23 several (4) 44:20;46:10,18;47:3 shame (1) 141:15 Shawn (3)
		S		
		saddens (1) 91:16 sake (1) 111:15 sale (7) 36:6;41:7;42:7,10; 51:24;56:15;127:15 same (11) 41:25;51:9;55:10; 62:1;82:2;84:17,19; 88:16;109:23;118:16; 133:1 Saturday (2) 7:24,25 save (3) 63:7;140:16;141:16 saw (3) 31:17;80:13;95:25 saying (34) 14:6;18:24;34:4; 37:19,22;38:7;49:8; 55:6;60:10,11;68:6,12, 25;73:6;74:16,24;75:1; 81:12;82:24;83:7;84:3; 86:9;88:17;89:8;90:10; 103:11;104:14;112:16; 117:19;134:10;139:25; 144:12,20;145:9 scared (1) 141:11 scenario (1) 55:25 scenes (1) 86:21 Schalk (178) 3:2,5,10,11,11,17,19;		

23:23;122:14;148:8 sheet (1) 40:23 sheriff (23) 46:12;51:11;97:6,9, 18,23;98:8,19;100:9; 102:12;103:24;105:1; 106:19;108:9,20;109:15, 19;114:25;119:19; 138:17,18;140:5,7 sheriffs (1) 140:2 sheriff's (7) 97:17;109:23;150:1,6, 9,12,15 shirts (2) 85:17;89:12 short (6) 52:2;109:25;120:14; 122:15;131:2;142:22 shortly (2) 35:24;49:10 shot (2) 130:21;131:3 show (19) 9:11;13:3;17:12;30:3; 33:6;35:24;62:18;63:1; 64:1;77:3;83:21,21; 98:2,17;109:6;123:5,20; 137:6;138:23 showed (5) 31:6,7;37:5,14;98:13 showing (5) 7:2,21;66:24;109:18; 115:15 shows (1) 127:23 side (1) 103:3 sight (1) 127:18 signature (2) 13:11;98:22 significant (1) 35:2 similar (1) 109:19 simple (4) 107:12,14,16,19 simply (4) 26:12;103:17;113:19; 145:9 sincerely (1) 84:13 sister (9) 20:22;22:10,15,21; 24:20;26:9,20;27:8; 143:25 situation (1) 112:15 situations (1) 112:10 slave (1)	91:10 sleazy (1) 96:3 small (3) 14:4,11;125:16 smile (1) 17:12 smoke (2) 34:4;90:14 smoked (1) 90:9 smoking (4) 30:17,21;31:1,14 snafu (1) 3:9 so-called (1) 138:14 society (1) 91:13 sold (3) 15:25;16:13;125:16 sole (1) 134:12 solid (1) 58:12 somebody (22) 5:3;23:25;25:18,25; 26:15;33:25;41:18;43:4, 9;45:23;46:23;48:13; 66:17;89:4,24;93:6; 106:25;112:6;137:20; 138:4;139:8;140:5 somehow (9) 19:11;27:21;51:23; 74:24;111:23,24;115:6; 117:15;128:4 someone (15) 16:14;17:17;20:4,25; 22:11,22;24:6,23;35:17; 43:7,7;44:9,12,15;47:22 someplace (1) 35:22 sometimes (4) 45:18;91:11;137:16; 145:9 somewhat (1) 105:15 somewhere (2) 24:4;93:14 son (1) 22:4 soon (1) 136:20 Sorry (9) 12:13,14;38:13;72:20; 82:4,16;83:6;119:16; 143:22 sort (8) 55:11;60:18;67:6; 82:24;83:7,10;98:25; 146:16 sought (1) 47:14	sound (2) 96:3,14 sounded (1) 144:21 sounds (3) 5:21;33:8;61:10 sour (1) 128:17 source (1) 127:6 South (1) 125:4 speak (4) 22:21;61:18;116:17, 20 special (10) 23:13;33:24;64:24; 80:12,20,25;82:23; 85:19;94:20;131:16 specifically (5) 24:12;31:10;72:25; 85:18;114:22 speculated (1) 83:4 speculating (2) 83:2,12 speculation (4) 82:9,10,18;83:2 speech (1) 71:18 speedy (2) 49:8;57:24 spent (1) 32:3 spoke (8) 18:7;19:19;22:3,9; 23:24;29:23;32:24;38:5 spoken (2) 132:25;134:22 spokesman (1) 27:24 spot (1) 92:7 spur (1) 39:21 squad (2) 23:13;133:7 quelch (1) 145:15 standard (2) 10:1,4 standing (1) 100:13 stands (2) 26:18;34:14 start (5) 51:12;72:16;76:5,8; 95:23 Started (2) 46:12;99:5 starting (1) 147:19 starts (3)	76:6,10;97:14 stasis (2) 128:21;129:1 state (26) 12:18;25:12;39:20; 44:25;72:1;75:5,20,21; 77:24;78:7;85:2,13; 87:13;124:23;125:1; 126:12,15;128:9;132:17, 22;134:19;139:15; 142:1;143:7,8;145:24 stated (3) 79:12;97:5;139:2 statement (15) 15:17;22:20,20;43:11, 16,21;44:22;77:9;85:7; 86:3;103:22;124:9; 126:7,24;146:11 statements (5) 38:9;106:18;111:11, 15;120:14 states (2) 126:5;143:20 station (1) 134:13 status (1) 49:13 statute (9) 33:23;66:1;117:17; 132:2,19;133:3;137:5, 18,19 statutory (1) 131:24 step (1) 35:14 stick (3) 30:6;33:10;106:7 sticking (1) 40:14 still (20) 8:3;18:1;19:4,13;20:4, 11,14,22,25;22:7;38:4; 42:19;44:18;49:4;56:7; 71:16;82:7;84:22;92:6; 97:9 stipulate (2) 107:13;146:21 stood (1) 127:17 stop (1) 92:24 stopped (1) 32:14 stops (1) 139:18 stories (1) 72:9 story (4) 43:5;81:5,8;126:4 straight (1) 76:5 strangely (2) 72:11;73:2	street (9) 8:13;19:15,25;31:4; 41:25;90:4,13,24;125:4 stress (1) 101:7 stretch (2) 118:1;123:18 Strike (1) 149:19 strong (3) 104:13;105:15;141:3 stronger (2) 26:3,16 strongly (1) 138:25 stuck (1) 85:22 stuff (7) 19:11;112:4;113:15; 139:13,14;140:21; 144:17 stupid (1) 116:24 subject (5) 6:25;34:8;84:23; 96:15;104:10 subjects (1) 135:22 submit (1) 63:8 submitted (3) 11:16;69:17;76:25 submitting (1) 80:9 subpoena (8) 81:9;97:23;98:3; 99:23;109:10,16,20; 110:4 subpoenaed (1) 111:17 subpoenaing (1) 116:10 subpoenas (1) 110:1 subsection (3) 77:22;84:19;97:13 subsequent (2) 38:1;76:24 substitute (3) 15:9,11;104:20 succeed (3) 90:6;131:12,13 succeeded (1) 131:16 successful (4) 58:18;59:8;61:4; 147:10 succinct (1) 18:14 Sudano (2) 19:18;31:6 suddenly (1) 113:13
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<p>Sudono (1) 31:8 sue (1) 73:23 sufficient (2) 44:23;112:20 suggest (1) 29:19 suggested (4) 26:22;27:9;36:25; 56:20 suggests (1) 97:17 suit (1) 17:13 superior (2) 8:14;65:4 supplier (1) 29:17 support (2) 72:12;112:14 supported (1) 113:20 supporting (3) 82:9,17;83:1 suppose (4) 18:19;62:1;140:8; 151:4 supposed (7) 8:19;58:11;89:20; 104:14;108:11;131:11; 142:17 suppressed (1) 139:6 Supreme (26) 3:21,22;4:5,6,12,15, 16,19;5:1,25;13:14; 60:17;71:13,16;87:25; 88:10;113:25;132:1; 135:11,13,15,17;136:4, 8,9;137:1 Sure (24) 12:4,24;17:3,18;18:9; 19:19;25:13,19;30:11; 32:4;37:2;40:12;43:14; 85:25;98:5,21;99:4; 116:3;119:14;130:1; 134:6;143:10,13;145:18 surely (1) 138:3 surprise (2) 92:9,10 surprised (5) 35:7;39:14;40:20,21; 94:16 survive (1) 116:15 suspect (1) 19:13 suspended (2) 63:5;71:15 suspicious (1) 127:12</p>	<p>Sustained (2) 57:14;115:18 swear (2) 12:8;70:9 sworn (1) 48:18</p> <p style="text-align: center;">T</p> <p>tagged (1) 134:15 talk (16) 4:9;18:22;19:9;20:22; 24:2;35:4,16,16;69:20; 80:21,25;81:18;85:3; 106:22;137:16;150:20 talked (12) 18:20;19:20;20:6; 21:24;24:6,7;28:22; 34:23;38:8;79:11;80:12; 118:6 talking (11) 22:4;35:15;37:21; 74:21;82:8;84:18;96:12; 143:15,24;144:16;145:2 tape- (2) 35:5;93:2 tape-record (1) 23:25 tape-recorder (8) 35:20;36:2,11;38:22; 39:18;43:8;45:16;51:2 tape-recording (3) 23:23;54:22;144:15 targeted (4) 18:16,17;21:11; 122:17 Ted (1) 73:5 telephone (4) 5:16;17:9;53:7;125:7 telling (8) 23:15;29:3,4,5;80:10; 81:17,19;102:20 template (1) 10:15 tender (1) 68:13 tendered (1) 76:22 tendering (2) 64:3,17 tending (1) 72:12 tenuous (1) 78:21 term (2) 116:5;140:11 terms (2) 132:5;137:25 Terre (1) 9:4 testified (8)</p>	<p>25:9,25;41:20;43:4; 61:2;90:25;93:18; 113:14 testify (33) 12:16;25:12;43:7,9; 44:9,12,15;45:19;77:18; 78:6,7;79:14,20,21,24; 84:19,21;97:8;103:23; 104:11;105:19;107:1; 110:4,20;115:11,12,19, 21,21,23,23;122:18; 128:4 testifying (1) 122:19 testimony (14) 44:16;55:14;77:10; 91:4;104:21;111:2; 117:8,9;120:7;123:24, 25;146:4,16,18 Thanks (2) 67:22;118:4 that'd (1) 80:10 that'll (1) 151:10 theory (1) 72:13 thereafter (1) 49:11 there'd (1) 133:25 therein (1) 9:24 thinking (5) 14:15;34:12;80:16; 83:13,19 third (4) 99:3,4;103:9;148:18 thoroughly (1) 127:20 though (2) 43:4;98:1 thought (62) 5:22;7:13,16;17:17, 20;20:5;21:13;36:19; 40:4,9,12;41:17,23;46:9; 47:8;48:4;50:15,21; 51:13;53:23;61:23,24; 67:17;71:17,18;73:14; 74:8,12;79:8;81:6; 83:20;86:17;89:11; 93:18;100:5;103:5,6; 105:5,14;111:9,14; 114:19;115:5;117:18; 120:25;126:2;131:6,17; 132:23;137:13,15,15,24; 140:11;141:11;142:4,9, 10;144:9,10,17;145:5 thoughts (2) 33:20;80:3 thousand (2) 14:12;125:18 three (7)</p>	<p>8:25;41:10;63:4;92:9; 110:2,11;138:21 three-page (1) 109:22 threw (1) 95:5 thus (1) 148:17 til (3) 9:13;29:7;133:7 timeframe (2) 4:9;8:10 times (1) 11:13 titled (1) 97:13 today (11) 6:24;7:21,22;8:4,7; 55:14;69:15;72:2; 117:22;118:6;136:14 today's (2) 7:5,10 together (1) 32:22 told (32) 16:21;17:11;21:2; 24:23;25:13;26:17; 27:12,14,20;28:9,16; 29:8;32:2,4,4,5;34:19; 46:3;51:20;53:1;54:5; 60:6;86:22,24;92:2; 102:23;107:20;130:9,12, 13;144:5,25 took (10) 37:24;42:23;45:23; 52:11;53:14;58:9; 127:14;130:14;140:18; 144:6 top (7) 13:20;70:18;72:22; 82:14,15;92:10;136:5 tortures (1) 139:8 tough (1) 60:3 toward (1) 71:22 tradition (2) 133:21;134:8 traffic (2) 46:14;139:18 train (2) 133:22;142:3 trainee (1) 149:14 training (2) 23:14;149:24 transaction (5) 39:23;41:16;43:19; 44:2,3 transcribed (1) 122:4 transcript (8)</p>	<p>122:1,7,11;136:5; 143:9;144:22;150:24; 151:10 transcripts (2) 147:21;149:9 transfer (5) 71:4;87:25;88:15; 114:5;147:9 trial (51) 9:21;10:9;17:13;25:9, 12;28:5,15;29:7,10; 31:10;41:19;42:20;44:9, 10,11,12;45:17,22;49:6, 9,19;50:22,25;55:7; 57:24;58:1,3;59:11; 62:6;65:6,15;72:9;99:7; 105:22;111:2;113:6; 122:1,1;128:6;132:6,7; 139:20;141:22;144:19, 22;146:2,6,8;147:18,19; 148:1 tried (14) 43:8;45:6;46:7,8,18; 54:15;57:25;87:3,18; 90:4;93:6;95:14;108:5; 147:22 TROCKMAN (143) 3:1,17,23;4:14,22,25; 5:6,12;6:2,5,11,15,18; 7:20;8:5,17;9:5,10,15, 18;10:19,22,25;11:4,8; 12:2,5,8,12,15,18,22; 18:6;21:19,22;33:14; 34:7,14;57:14;59:5; 61:20;62:22,24;63:14, 24;64:9,11,15,21;66:16; 68:3,9,21;69:5,14,16; 70:5,13;72:19,24;75:6, 17,24;76:11,19;96:21, 23;97:2;104:25;108:2, 18,22;104:109:3;115:18; 117:24;118:3,8,11,14, 25;119:5,9,21,23;120:1, 6,10,12,20,24;121:9,14, 23;122:3,8,20,25; 123:10,13,20;124:3,25; 125:3,7,10,13;126:14; 129:3,9,14,18;131:21; 133:16;135:4;136:1,7, 17,21,23;137:6;142:5, 20,23;143:3,12;145:21, 23;147:15,20;148:3,5, 19;149:2,7,10;150:19, 25;151:2,6,13,15,18 trouble (15) 29:25;30:2;32:8;33:1; 37:16,23;38:7,8;56:2; 79:9;86:10;127:13; 128:14;131:10;141:1 true (8) 15:9;39:5;53:11;55:6; 65:20;70:10;111:16; 145:10</p>
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<p>trusted (2) 90:22;91:1</p> <p>truth (5) 12:9,9,10;111:12; 144:23</p> <p>try (12) 9:7;10:14;34:2;43:1; 48:11;59:3,25;106:6; 108:15;111:19,21;128:2</p> <p>trying (36) 6:9;19:24;21:3;32:18; 34:11;38:4,8;46:25; 47:7;54:7;60:13;61:14; 63:15;80:2;83:6,18; 85:16;86:10;88:4;89:9; 90:20;92:22;95:12; 106:25;107:4,5;115:20, 25;127:3,5;131:3; 136:24;140:14;141:16; 145:4;148:7</p> <p>Tuesday (1) 52:12</p> <p>turn (8) 28:19;48:9;70:15; 113:12,24;114:11,21; 143:1</p> <p>turned (6) 27:13;36:20;37:3,24; 105:14;130:25</p> <p>turning (2) 112:25;113:1</p> <p>twice (1) 4:20</p> <p>two (30) 3:13;7:3;26:10,23; 27:9;38:9;67:12;68:1; 69:2;72:15;73:3,6;74:5; 75:4,21;76:11;84:6,11; 92:9;106:17;110:15; 122:12,23;126:5;143:8, 9;145:9,10;147:23,24</p> <p>typically (2) 3:23;65:19</p>	<p>underhanded (1) 96:4</p> <p>underlying (2) 58:10;147:18</p> <p>understood (1) 111:13</p> <p>undoubtedly (1) 98:23</p> <p>Unfortunately (1) 142:21</p> <p>unit (1) 23:13</p> <p>University (1) 108:8</p> <p>unlawful (4) 11:19;13:23;14:23; 47:19</p> <p>unlawfully (2) 47:15,25</p> <p>unless (3) 11:4;71:20;85:18</p> <p>unnecessary (2) 105:19,23</p> <p>unrelated (1) 135:14</p> <p>Unresponsive (1) 59:1</p> <p>unsuccessful (5) 58:15,19,20,23;59:7</p> <p>unsupervised (1) 63:5</p> <p>untrue (1) 113:22</p> <p>up (39) 5:20;6:13;17:12; 22:16;23:10;24:21;35:2, 24;37:2,5,14;42:21; 43:6;48:8,18,20;51:8; 54:23;67:14;71:7;72:15; 73:4,8,12;74:9,14,16; 88:7,93;20;98:13;100:8; 117:5;120:13;121:10; 122:6;127:22;130:8,13; 142:3</p> <p>upon (6) 7:1,10;95:14;98:25; 136:14;147:2</p> <p>urban (1) 20:2</p> <p>use (17) 14:23;29:25;30:12,15, 18;33:2,18;34:12;39:8; 50:21,24;111:10; 123:17;133:8,9;134:16; 139:9</p> <p>used (9) 44:6,14;46:24;48:3; 95:24;96:9,10;116:4,8</p> <p>useful (5) 21:10;27:14;68:18; 105:15;128:9</p> <p>using (1) 31:1</p>	<p>usual (4) 30:20;31:3,14,16</p> <p>usually (2) 112:6;134:12</p>	<p>91:15</p> <p>warning (1) 71:18</p> <p>warrants (1) 139:18</p> <p>waste (2) 33:8;147:4</p> <p>Watch (1) 130:10</p> <p>way (38) 3:7;5:24;8:24;9:3; 28:18;30:20;32:12,13; 41:5;44:24;54:3;58:25; 59:7;62:20;75:3;78:24; 88:4,7,10,17;96:17; 106:12;107:19;116:23; 121:15;126:11,25; 127:17;129:25;133:12; 137:9;140:6;141:3,7,8, 17;142:13;145:11</p> <p>ways (2) 107:14;127:24</p> <p>Wednesday (1) 99:20</p> <p>weed (4) 32:13;34:22;36:5; 54:19</p> <p>week (4) 28:5;29:10;41:18; 42:20</p> <p>weekend (1) 53:14</p> <p>weeks (1) 69:17</p> <p>well-reasoned (1) 111:3</p> <p>weren't (11) 37:8;58:11;78:6;91:7; 93:5;112:4,5;113:7; 115:3;146:2;149:1</p> <p>What's (10) 44:21;62:18;63:16,16; 67:9;79:24;80:1;88:7; 101:22;126:3</p> <p>whenever (1) 89:23</p> <p>WHEREUPON (1) 151:21</p> <p>white (3) 34:4;128:5,7</p> <p>whole (12) 12:9;27:20;40:1;51:8, 12;92:4;117:21;125:21; 127:19;130:1;131:19; 148:12</p> <p>Who's (2) 34:24;128:21</p> <p>whose (5) 52:16;122:15;124:11; 147:1,3</p> <p>wide (1) 138:18</p> <p>Wilkins (2)</p>	<p>70:19,21</p> <p>willing (3) 22:22;23:3;24:23</p> <p>win (1) 139:25</p> <p>window (1) 132:20</p> <p>wired (1) 23:10</p> <p>wish (6) 4:3;6:6;120:15; 121:15;122:11;131:22</p> <p>within (12) 5:7;8:9;14:12;54:13; 57:25;58:1,3;60:6; 68:16;112:7,7;125:17</p> <p>without (10) 6:4;26:22;59:13; 61:12;74:18,19;79:11; 85:12;103:25;104:14</p> <p>witness (34) 12:14;19:21;56:14; 59:2,24;67:25;76:1,7,8, 24;77:11;78:12;79:7,19; 80:9;81:6;83:17;97:6; 99:22;100:3,20,21; 101:14;103:2,4,7; 105:22,25;106:14,20; 108:4;146:7,7,13</p> <p>witnesses (18) 53:24;72:8;77:11,13; 78:6;84:20;86:16; 100:16,19;103:8; 105:17;106:9,17;107:3; 112:5;113:21;120:4; 146:1</p> <p>witnesses' (2) 146:16,17</p> <p>woman (1) 29:8</p> <p>won (1) 58:18</p> <p>wonder (3) 85:20;121:4;139:3</p> <p>wondered (1) 78:22</p> <p>wondering (1) 37:23</p> <p>word (18) 19:15,17;29:25;30:12, 15;31:4,5;33:2;47:19; 57:1;90:24;94:24;95:21, 23;96:8;99:17;101:7; 116:8</p> <p>words (6) 21:4;39:8;40:9;92:16; 132:4,19</p> <p>work (1) 23:9</p> <p>worked (2) 134:7;136:3</p> <p>working (1) 125:19</p>		
U						
<p>Uh-oh! (1) 119:16</p> <p>ultimate (3) 67:5;69:1,11</p> <p>ultimately (1) 65:15</p> <p>unable (1) 8:18</p> <p>uncommon (1) 48:11</p> <p>under (20) 3:25;44:17;48:25; 52:12;53:14;77:21; 84:19,21,22;92:6;104:9; 117:17;122:18;123:6, 10;124:23;132:11; 133:2;145:10,11</p>	<p>unrelated (1) 135:14</p> <p>Unresponsive (1) 59:1</p> <p>unsuccessful (5) 58:15,19,20,23;59:7</p> <p>unsupervised (1) 63:5</p> <p>untrue (1) 113:22</p> <p>up (39) 5:20;6:13;17:12; 22:16;23:10;24:21;35:2, 24;37:2,5,14;42:21; 43:6;48:8,18,20;51:8; 54:23;67:14;71:7;72:15; 73:4,8,12;74:9,14,16; 88:7,93;20;98:13;100:8; 117:5;120:13;121:10; 122:6;127:22;130:8,13; 142:3</p> <p>upon (6) 7:1,10;95:14;98:25; 136:14;147:2</p> <p>urban (1) 20:2</p> <p>use (17) 14:23;29:25;30:12,15, 18;33:2,18;34:12;39:8; 50:21,24;111:10; 123:17;133:8,9;134:16; 139:9</p> <p>used (9) 44:6,14;46:24;48:3; 95:24;96:9,10;116:4,8</p> <p>useful (5) 21:10;27:14;68:18; 105:15;128:9</p> <p>using (1) 31:1</p>	<p>usual (4) 30:20;31:3,14,16</p> <p>usually (2) 112:6;134:12</p>	<p style="text-align: center;">V</p> <p>vague (1) 108:11</p> <p>Vagueness (2) 137:17;138:4</p> <p>various (1) 34:3</p> <p>venue (1) 101:24</p> <p>verdict (3) 126:10,17;146:10</p> <p>Verified (14) 10:13,15;13:6,13,20; 15:5,15;24:17;29:22; 47:13;63:16;91:18,23; 92:1</p> <p>version (1) 67:15</p> <p>versus (10) 75:5,20,21;142:1; 143:7,8;146:5,11,13,18</p> <p>view (1) 5:17</p> <p>violate (1) 85:12</p> <p>violation (4) 30:19;69:11;71:11; 73:21</p> <p>violations (1) 132:11</p> <p>voice (5) 35:22;36:24;39:11; 113:3;144:16</p> <p>Void (2) 137:17;138:4</p> <p>voluntary (1) 94:13</p> <p>volunteer (1) 93:13</p> <p>volunteered (3) 20:13;94:11;105:7</p>	<p style="text-align: center;">W</p> <p>wait (9) 11:5;23:6;60:23; 86:14,14;148:3;149:2,2, 2</p> <p>waived (2) 65:9,12</p> <p>waives (1) 52:23</p> <p>wants (9) 29:10;52:23;101:24; 121:11;140:5,7,8; 146:17,21</p> <p>war (1)</p>	<p>91:15</p> <p>warning (1) 71:18</p> <p>warrants (1) 139:18</p> <p>waste (2) 33:8;147:4</p> <p>Watch (1) 130:10</p> <p>way (38) 3:7;5:24;8:24;9:3; 28:18;30:20;32:12,13; 41:5;44:24;54:3;58:25; 59:7;62:20;75:3;78:24; 88:4,7,10,17;96:17; 106:12;107:19;116:23; 121:15;126:11,25; 127:17;129:25;133:12; 137:9;140:6;141:3,7,8, 17;142:13;145:11</p> <p>ways (2) 107:14;127:24</p> <p>Wednesday (1) 99:20</p> <p>weed (4) 32:13;34:22;36:5; 54:19</p> <p>week (4) 28:5;29:10;41:18; 42:20</p> <p>weekend (1) 53:14</p> <p>weeks (1) 69:17</p> <p>well-reasoned (1) 111:3</p> <p>weren't (11) 37:8;58:11;78:6;91:7; 93:5;112:4,5;113:7; 115:3;146:2;149:1</p> <p>What's (10) 44:21;62:18;63:16,16; 67:9;79:24;80:1;88:7; 101:22;126:3</p> <p>whenever (1) 89:23</p> <p>WHEREUPON (1) 151:21</p> <p>white (3) 34:4;128:5,7</p> <p>whole (12) 12:9;27:20;40:1;51:8, 12;92:4;117:21;125:21; 127:19;130:1;131:19; 148:12</p> <p>Who's (2) 34:24;128:21</p> <p>whose (5) 52:16;122:15;124:11; 147:1,3</p> <p>wide (1) 138:18</p> <p>Wilkins (2)</p>	<p>70:19,21</p> <p>willing (3) 22:22;23:3;24:23</p> <p>win (1) 139:25</p> <p>window (1) 132:20</p> <p>wired (1) 23:10</p> <p>wish (6) 4:3;6:6;120:15; 121:15;122:11;131:22</p> <p>within (12) 5:7;8:9;14:12;54:13; 57:25;58:1,3;60:6; 68:16;112:7,7;125:17</p> <p>without (10) 6:4;26:22;59:13; 61:12;74:18,19;79:11; 85:12;103:25;104:14</p> <p>witness (34) 12:14;19:21;56:14; 59:2,24;67:25;76:1,7,8, 24;77:11;78:12;79:7,19; 80:9;81:6;83:17;97:6; 99:22;100:3,20,21; 101:14;103:2,4,7; 105:22,25;106:14,20; 108:4;146:7,7,13</p> <p>witnesses (18) 53:24;72:8;77:11,13; 78:6;84:20;86:16; 100:16,19;103:8; 105:17;106:9,17;107:3; 112:5;113:21;120:4; 146:1</p> <p>witnesses' (2) 146:16,17</p> <p>woman (1) 29:8</p> <p>won (1) 58:18</p> <p>wonder (3) 85:20;121:4;139:3</p> <p>wondered (1) 78:22</p> <p>wondering (1) 37:23</p> <p>word (18) 19:15,17;29:25;30:12, 15;31:4,5;33:2;47:19; 57:1;90:24;94:24;95:21, 23;96:8;99:17;101:7; 116:8</p> <p>words (6) 21:4;39:8;40:9;92:16; 132:4,19</p> <p>work (1) 23:9</p> <p>worked (2) 134:7;136:3</p> <p>working (1) 125:19</p>

workplace (1)
22:4
works (1)
108:10
world (2)
68:25;133:19
worried (1)
66:22
worry (2)
139:4,9
worth (5)
44:6,13;67:4;93:21,22
wrestle (1)
133:5
writ (1)
83:24
write (6)
26:6;40:23,25;41:14;
97:11;112:8
writing (2)
67:11;98:22
written (1)
94:8
wrong (17)
14:9;33:22;44:21;
82:5;84:13;100:23;
101:1;112:3,4;113:17;
114:1,16,19,20;115:4;
116:12;139:16
wrote (11)
39:22;43:13;66:20;
73:11;89:8;96:1;98:19,
24;99:20;113:16;116:22

Y

y'all (1)
52:22
year-old (1)
43:2
years (4)
35:1;42:21;72:3;136:3
young (3)
22:4;26:10;138:18