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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA, ) Docket No. 03 CR 11  
)  
Plaintiff, )  
)  
v. ) Chicago, Illinois  
) April 23, 2004  
MATTHEW HALE, ) 9:00 o'clock a.m.  
)  
Defendant. )

VOLUME 13  
TRANSCRIPT OF PROCEEDINGS - TRIAL  
BEFORE THE HONORABLE JAMES T. MOODY, and a jury

APPEARANCES:

For the Government: HON. PATRICK J. FITZGERALD  
United States Attorney, by  
MS. VICTORIA J. PETERS  
MR. M. DAVID WEISMAN  
Assistant United States Attorneys  
219 South Dearborn Street  
Chicago, Illinois 60604

For the Defendant: DURKIN & ROBERTS, by  
MR. THOMAS ANTHONY DURKIN  
MR. PATRICK W. BLEGEN  
53 West Jackson Boulevard  
Suite 615  
Chicago, Illinois 60604

ALEXANDRA ROTH, CSR, RPR  
Official Court Reporter  
219 South Dearborn Street  
Room 1744-A  
Chicago, Illinois 60604  
(312) 294-0134

1 (The following proceedings were had in open court outside  
2 the presence of the jury:)

3 THE COURT: Can we talk about the request for Jon Fox?

4 MR. WEISMAN: Sure.

5 THE COURT: Do you have a transcript that each of you  
6 have approved of his testimony?

7 MR. WEISMAN: Yes, your Honor.

8 MR. BLEGEN: Yes.

9 THE COURT: Agree?

10 MR. BLEGEN: Right.

11 THE COURT: I intend to give that to them with the  
12 following instruction. Let me read it again. "Members of the  
13 jury, I have received a note from you that requests a  
14 transcript of the testimony of witness Jon Fox. In response I  
15 am furnishing you with a written transcript of his testimony.  
16 Keep in mind that you should consider this testimony together  
17 with all the other evidence. Do not consider it by itself, out  
18 of context. Consider all the evidence together as a whole."  
19 Entered today's date, April 23, 2004, my signature.

20 MR. BLEGEN: Judge, the only issue we noticed last  
21 night was that I think because of the different court  
22 reporters, they are not going to be -- pages are not in  
23 numerical order. For example, part of Fox's testimony ends at  
24 page 243, and the next segment starts out again at page 1.

25 So what we did was label -- we attached separate

1 volumes, Jon Fox 1, Jon Fox 2, Jon Fox 3, John Fox 4. So  
2 assuming they follow that, they shouldn't have a problem.

3 I just didn't want them to become confused by the page  
4 numbers.

5 THE COURT: All right. I will give it to the court  
6 security man to give to them.

7 MR. WEISMAN: That's fine with the government.

8 THE COURT: Do you want a copy of this?

9 MR. WEISMAN: Sure.

10 THE COURT: Next question. We are getting notes  
11 signed by Lucy Davenport. Just for the record, the jury list  
12 listed her as Lucy Moore. I believe it's Lucy Moore-Davenport  
13 she must have remarried or something. But Lucy Davenport is in  
14 fact Lucy Moore.

15 MR. WEISMAN: That's right.

16 THE COURT: Agreed?

17 MR. BLEGEN: Yes.

18 THE COURT: Just so the record is clear. Can I have  
19 the Jon Fox transcript please.

20 All right. Thank you very much. Anything else we  
21 need to do? Probably not, right?

22 MR. WEISMAN: We did what you had ordered us to do as  
23 far as Evola, Scruggs, and Elizabeth Fox.

24 THE COURT: Amend, I think Amend you are doing as  
25 well.

1 MR. WEISMAN: Right.

2 THE COURT: And Burnett?

3 MR. WEISMAN: We are going to have that one.

4 THE COURT: How was he introduced, Jimmy Burnett or  
5 James?

6 MR. WEISMAN: James, but Jimmy Burnett, one and the  
7 same. He is -- I think he is James Burnett.

8 THE COURT: How does it look on the transcript, James?

9 MR. WEISMAN: I don't have it with me.

10 THE COURT: I will put James. It's B-u-r-n-e-t-t? No  
11 E.

12 (Recess until 11:25 o'clock a.m.)

13 THE COURT: Why is it so hard to get a hold of you  
14 today? I have had this note for about a half an hour. We have  
15 been trying to get a hold of you.

16 MS. PETERS: We got the call ten minutes ago.

17 THE COURT: Another note. "Dear Judge Moody. May we  
18 have the transcripts of both the opening and closing statements  
19 of both sides? We know per page 6 of your orders that we  
20 cannot consider them evidence. We would like the statements as  
21 they will provide an outline to point us to evidence that we  
22 may consider -- that we may consider. Sincerely."

23 MR. DURKIN: Mark Hoffman.

24 THE COURT: Mark Hoffman. There is a post script.

25 "P.S. May we have all transcripts of Elizabeth Fox's

1 testimony."

2 I am really reluctant to give them opening and closing  
3 statements. I don't think it's appropriate.

4 MR. DURKIN: So would I.

5 MR. WEISMAN: I don't think that's --

6 THE COURT: Here is the response that I have prepared  
7 in your absence, while I was waiting for you. That's a dig, if  
8 you didn't get it.

9 "Members of the jury, I have received a note from you  
10 that requests a transcript of the testimony of witness  
11 Elizabeth Fox and the opening statements and final arguments of  
12 the attorneys. In response I am furnishing you with a written  
13 transcript of Ms. Fox's testimony. However, because opening  
14 statements and final arguments of the attorneys are not  
15 evidence, I will not provide those transcripts.

16 "Keep in mind that you should consider this testimony  
17 together with all the other evidence. Do not consider it by  
18 itself, out of context. Consider all the evidence together as  
19 a whole." Dated today with my signature.

20 Any objection?

21 MR. DURKIN: Do they ask for final arguments also?

22 THE COURT: Yes.

23 MR. DURKIN: I'm sorry. I only heard opening  
24 statements.

25 THE COURT: No, both. Any objection?

1 MR. WEISMAN: No objection by the government.

2 THE COURT: From the defense?

3 MR. DURKIN: Let me speak to Mr. Blegen.

4 THE COURT: Do you have Ms. Fox's testimony here?

5 It's been approved by both sides?

6 MS. PETERS: Yes.

7 MR. WEISMAN: I will double check.

8 MR. DURKIN: We agree.

9 THE COURT: Okay. Ms. Fox, it has been approved by  
10 both sides?

11 MR. BLEGEN: Yes.

12 THE COURT: Thank you. Would you hand it up, please.

13 I just request that you guys -- do you have a private  
14 number that we can get to?

15 MS. PETERS: He has our cell phone numbers.

16 THE COURT: We get voicemails.

17 MR. WEISMAN: I don't even want to admit but it's on  
18 right now. I don't have a voicemail.

19 MR. DURKIN: There is one thing I just want to make of  
20 record. I talked to Mr. Weisman about this earlier. And I  
21 will --

22 THE COURT: Can I get this to the jury and then come  
23 back?

24 MR. DURKIN: Sure.

25 (Brief pause.)

1 THE COURT: Okay. What is it, Mr. Durkin?

2 MR. DURKIN: Judge, let me tender to you Defendant's  
3 Exhibit 40, which is a letter I sent to Mr. Weisman this  
4 morning. I meant to do it yesterday. Attached to the letter  
5 is a memorandum that my partner Janice Roberts, who also served  
6 as my wife at times, made up regarding a conversation she  
7 overheard in the elevator Wednesday afternoon. She caught some  
8 unidentifiable people saying that Mr. Evola's testimony got  
9 much better on Monday because, quote, they worked with him and  
10 coached him over the weekend, end quote.

11 I just felt obligated to inquire of the government the  
12 obvious.

13 THE COURT: The government is the one that you are  
14 saying did that?

15 MR. DURKIN: No, no, I am not saying they did that.  
16 Ms. Roberts doesn't know who these people were. She didn't  
17 recognize them as anyone from the government. I just felt out  
18 of an abundance of caution that I should at least make inquiry  
19 of the government. They of course say they -- that's just not  
20 the case.

21 MR. WEISMAN: Judge, I can represent we had no contact  
22 with Mr. Evola once he hit the stand.

23 THE COURT: Anything else I need to do?

24 MR. DURKIN: No. I'd just like to make that -- file  
25 it with the clerk so that at least we --

1 THE COURT: I will make sure Gladys files it.

2 MR. DURKIN: -- made inquiry and the government  
3 represents they had nothing to do with that. And whoever those  
4 people were don't know what they are talking about.

5 THE COURT: Okay. Thank you so much.

6 MR. DURKIN: That's fine.

7 MR. WEISMAN: Thank you, your Honor.

8 Judge, do we get a copy of that order?

9 THE COURT: I don't know why not. Does that do it?  
10 Thank you.

11 (Brief pause.)

12 THE COURT: We have another question. It reads as  
13 follows: "Dear Judge Moody. We need your clarification of the  
14 word, in quotation, or, end of quotation, in the second  
15 proposition of Count No. 2. Does the government have to prove  
16 beyond a reasonable doubt that the defendant did all four,  
17 parenthesis, solicit, command, induce, endeavor to persuade,  
18 parenthesis, period. Or, underlined, does the government only  
19 need to prove one, underlined, of the four points? For  
20 example, if we believe the government proved that Matt Hale  
21 induced Tony Evola, does that satisfy the proposition?  
22 Respectfully."

23 MR. WEISMAN: Mark Hoffman.

24 Judge, I think the law is clear that it's an or.

25 THE COURT: What does it say? What does my



1 instruction say? I think it says "or."

2 MR. WEISMAN: It says "or."

3 MS. PETERS: That the defendant solicited, commanded,  
4 induced or otherwise endeavored.

5 THE COURT: I think "or" is, what's the words I want?

6 MS. PETERS: Disjunctive.

7 THE COURT: I think the law says that it's only one of  
8 the four.

9 MS. PETERS: I think that's -- I think you are  
10 correct, and I think that's what you should instruct them.

11 MR. DURKIN: That's the law.

12 THE COURT: Do you want time to look at it?

13 MR. DURKIN: Pardon me?

14 THE COURT: Do you want time to take a look?

15 MR. DURKIN: No one asked for that instruction. No  
16 one asked for that instruction.

17 THE COURT: Well, I think I need to help them.

18 MS. PETERS: I think the Seventh Circuit tells you  
19 that when they ask a question that can be answered, you do need  
20 to help them.

21 MR. WEISMAN: And that's what your instruction is. It  
22 says, second, the defendant solicited, commanded, induced or  
23 otherwise endeavored to persuade.

24 THE COURT: I understand that.

25 MR. WEISMAN: The instruction is there. They just

1 need clarification.

2 THE COURT: That's all they are asking for.

3 MR. DURKIN: Obviously that's what the law is. I  
4 prefer you not give it to them, but what can I say. If that's  
5 the law, you feel like you need to do it, I can't object to it.

6 THE COURT: Why don't I go prepare a response.

7 MR. WEISMAN: That would be great.

8 THE COURT: And you people just kind of hang around.

9 MS. PETERS: We are good at that.

10 (Brief recess.)

11 THE COURT: I am handing to counsel for both sides a  
12 copy of the note and the Court's response as agreed. I will  
13 read it into the record:

14 Members of the jury, I have received a note from you  
15 that says, we need your clarification of the word "or" in the  
16 second proposition of Count No. 2. Does the government have to  
17 prove beyond a reasonable doubt that the defendant did all  
18 four, solicit, command, induce, endeavor to persuade? Or does  
19 the government only need to prove one of the four points? For  
20 example, if we believe the government proved that Matt Hale  
21 induced Tony Evola, does that satisfy the proposition?

22 Let me respond by instructing you as follows: The  
23 word "or" is used in accordance with its everyday, ordinary  
24 meaning as allowing a choice between one or more different  
25 alternatives. Thus, the government is not required to prove

1 all four points in the second proposition; however, you must  
2 unanimously agree upon which point the government has proved  
3 beyond a reasonable doubt.

4 Keep in mind that you should consider what I have just  
5 said together with all the other instructions that I gave you  
6 earlier. All these instructions are important, and you should  
7 consider them together as a whole. Today's date, my signature.

8 Any objection?

9 MR. WEISMAN: None by the government.

10 MR. DURKIN: I do, Judge.

11 THE COURT: What's that?

12 MR. DURKIN: Well, we have given this some thought,  
13 and that's why I called your clerk and asked to see the copy.  
14 I think that they should just be instructed that "or" -- that  
15 the use of the term "or" is disjunctive. What I am  
16 concerned --

17 THE COURT: Then they are going to come back and say,  
18 what does disjunctive mean?

19 MR. DURKIN: Here is the problem I have: The note  
20 says in the last paragraph, or does the government only need to  
21 prove one of the four points? For example, if we believe the  
22 government proved that Matt Hale, quote, induced, end quote,  
23 Tony Evola, then there is a comma and these words are stricken  
24 out, do we need to focus on the other three conditions? Then  
25 that's stricken. It says, does that satisfy the proposition?

1 I am concerned about the last part of the question,  
2 does that satisfy the proposition, as if that's enough. And  
3 nobody submitted any definitions of induce or any of those  
4 other terms. And the concern I have is that if you will turn  
5 to instruction 20, the first entrapment instruction.

6 THE COURT: Yes.

7 MR. DURKIN: That also has the term "induced." In the  
8 second prong it has, or, two, that the defendant was not  
9 induced or persuaded to commit the offense by law enforcement  
10 officers or their agents.

11 And the concern I have is that if you answer, does  
12 that satisfy the proposition, that could read out the second  
13 prong of the entrapment instruction. And it's overly  
14 confusing. And in light of the fact that no such instruction  
15 was submitted, we did not argue on any of those prongs. And I  
16 just don't think it's appropriate to give an instruction that  
17 focuses -- that could very well confuse the whole issue.

18 We don't know whether this question -- I mean, if we  
19 believe the government proved that Matt Hale induced Tony  
20 Evola, does that satisfy the proposition? The answer to that  
21 is yes and no, you know. Yes, it could, but not if he was  
22 induced -- not if you find he was induced or persuaded by law  
23 enforcement officers or their agents

24 THE COURT: Are you done?

25 MR. DURKIN: And if you intend to give this

1 instruction rather than the instruction I recommend, then we  
2 move to reargue the case on that point because we were able --  
3 we relied on the instructions, and we did not -- we  
4 deliberately did not argue any of those points.

5 THE COURT: Are you done?

6 MR. DURKIN: Yes.

7 THE COURT: Any response?

8 MS. PETERS: Your Honor, the jury's question is  
9 specific to Count 2. I don't think that they are confused as  
10 to what induce means in government's instruction No. 20. And  
11 they asked -- when they did ask the question, does this  
12 prove -- does that satisfy the proposition, you don't answer  
13 that question. You are just telling them what the law is.

14 And I think we should -- you should -- and your final  
15 paragraph in which you tell them to keep this in mind, keep in  
16 mind you should consider all the instructions together as a  
17 whole I think takes care of Mr. Durkin's problem, and that you  
18 should give your answer as drafted.

19 THE COURT: Short response, sir?

20 MR. DURKIN: Could I have a chance just to reread your  
21 paragraph here, Judge?

22 THE COURT: Sure.

23 (Brief pause.)

24 MR. DURKIN: I will just stand on my previous comment.

25 THE COURT: Your request to reopen the case is denied,

1 and your objection is overruled. I am going to give the  
2 response that I have read into the record to the last question  
3 that has been asked by this jury.

4 Anything else?

5 MR. WEISMAN: Judge, we have two housekeeping matters.  
6 If you want to get that instruction --

7 THE COURT: Could you give this, please?

8 What's the rest.

9 MR. WEISMAN: Two housekeeping matters. First --

10 THE COURT: Is this brainy or is this just a little --

11 MS. PETERS: Brainy?

12 MR. WEISMAN: No.

13 THE COURT: My brain just walked out.

14 MR. WEISMAN: Mr. Durkin's question regarding the  
15 letter, Defendant Exhibit 40 regarding the letter --

16 THE COURT: The thing I just took upstairs?

17 MR. WEISMAN: Right. Mr. Durkin and I had a  
18 conversation. His wife did not observe any jurors talking  
19 about it. I just wanted the record to be clear.

20 MR. DURKIN: Right.

21 THE COURT: Agree to that?

22 MR. DURKIN: Yes. She went down the same elevator we  
23 have been instructed to go down. And she was aware of who the  
24 jurors were. There were no jurors.

25 MR. WEISMAN: Then the other true little housekeeping

1 matter is, can we disassemble our audio-visual system? They  
2 need the plasma screen.

3 MS. PETERS: I think if we just take -- in case they  
4 want to listen to a tape on this equipment, we can leave the  
5 audio equipment, but they need the plasma screen.

6 THE COURT: Who needs it?

7 MS. PETERS: Our office needs it for another  
8 courtroom.

9 THE COURT: What courtroom?

10 MS. PETERS: I don't know. Do you want me to find  
11 out?

12 THE COURT: I need to know who this Judge is.

13 MS. PETERS: It's in this building, but I am not sure  
14 who the Judge is.

15 MR. WEISMAN: Not as good a Judge as you.

16 THE COURT: I don't care.

17 MS. PETERS: But it's your courtroom for the day. We  
18 didn't want to mess with it.

19 THE COURT: That's fine.

20 (Trial recessed until 4:15 o'clock p.m. of the same day.)  
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25