

1
2 **IN THE UNITED STATES DISTRICT COURT FOR THE**
3 **WESTERN DISTRICT OF MISSOURI**
4 **CENTRAL DIVISION**

5 **UNITED STATES OF AMERICA,**) **Case No. 12-04043-01-CR-C-BP**
6) **Plaintiff,**) **Jefferson City, Missouri**
7 **v.**) **December 10, 2012**
8 **CHRISTOPHER CURTIS KELLEY,**) **Defendant.**
9 _____)

10 **TRANSCRIPT OF HEARING ON ATTORNEY REPRESENTATION**
11 **BEFORE THE HONORABLE MATT J. WHITWORTH**
12 **UNITED STATES MAGISTRATE JUDGE**

13 **APPEARANCES:**

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1 (Court in Session at 11:00 a.m.)

2 THE COURT: Good morning. We're here in the case of
3 *United States of America vs. Christopher Curtis Kelley*, Case No.
4 12-4043. Appearing on behalf of the United States is Assistant
5 U.S. Attorney Jim Lynn. And on behalf of Mr. Kelley is Troy
6 Stabenow. I asked Jackie to set up this conference based upon
7 some concerns that have been conveyed to me about Mr. Stabenow
8 and his representation of Mr. Kelley. Mr. Lynn, I am likely
9 going to be inquiring into attorney-client matters, so you'll
10 have to step out. But I would like to know what the Government's
11 position is with respect to the withdrawal of Mr. Stabenow as
12 counsel of record and whether or not the Government is prepared
13 to go to trial in January?

14 MR. LYNN: Your Honor, with respect to the counsel
15 issue, obviously we are not privy to the behind-the-scenes
16 discussions and events that occur there. So generally, my policy
17 would be to defer to the Court after you've had a full hearing on
18 this matter as to whether there exists a conflict sufficient to
19 disqualify Mr. Stabenow. As to the January trial date, we are
20 certainly ready to proceed to trial in January.

21 THE COURT: All right. All right. And in this case was
22 indicted on June 27th, is that -- yeah, that's correct. And then
23 -- all right, June 27th. So, it's about six months old.

24 MR. LYNN: Correct.

25 THE COURT: All right. Okay. Thank you very much for

1 your time.

2 MR. LYNN: Certainly.

3 THE COURT: If we need to -- anything additional from
4 you, we'll call downstairs. You can go on back down to your
5 office if you'd like.

6 MR. LYNN: Very well. Thank you.

7 THE COURT: All right.

8 (Government Attorney Exits Courtroom)

9 THE COURT: Okay. I would note for the record the case
10 is set for trial on January 7th, 2013. Who was case transferred
11 to, do you know? Was it Beth Phillips or Judge Wimes?

12 MS. PRICE: (Inaudible).

13 THE COURT: All right. It was assigned to Judge
14 Laughrey, but she's retired.

15 MS. PRICE: Judge Phillips.

16 THE COURT: Judge Phillips? Okay. The new District
17 Judge for the record is Judge Beth Phillips. And I thought it
18 was important that we have this discussion this morning, Mr.
19 Kelley, to find out, you know, what the concerns were. The only
20 thing I know in any detail is that apparently you want to get a
21 new attorney assigned to the case. And for me to do that, I
22 first need to find out what the issues are. But I should also
23 advise you up front that the case law is pretty clear that
24 certainly you don't have the right when you have appointed
25 counsel to have your choice of attorneys. I mean the court

1 assigns one to you. I assigned Mr. Stabenow to represent you in
2 this case because, first of all, he's an excellent lawyer who
3 probably has more federal criminal defense experience than
4 anybody in the Central Division, because he's in here every day
5 on different cases. He's tried a lot of cases. He knows what
6 he's doing. And from what I can tell from looking at the docket
7 report so far, he's done what I would consider a competent
8 attorney would do under the circumstances in this case. We've
9 had some evaluations done to kind of flesh out those issues. And
10 of course, you came back that you were fine to proceed. And so I
11 need to know what your concerns are. And, Mr. Stabenow, do you
12 want to talk first on this point or do you want --

13 MR. STABENOW: No, Your Honor. My only concern is
14 insofar as Mr. Kelley might raise certain issues, whether that --
15 whether his intent is to waive the attorney-client privilege.
16 And normally, even if my client makes accusations, I don't
17 consider it waived unless the Court has a particular interest in
18 stuff --

19 THE COURT: Right.

20 MR. STABENOW: -- because I trust the Court knows my
21 work history.

22 THE COURT: Right.

23 MR. STABENOW: But I did bring some materials in case
24 there's something raised --

25 THE COURT: Okay.

1 MR. STABENOW: -- that would require a waiver and a
2 response.

3 THE COURT: All right. Mr. Kelley, certainly I'm not
4 one to freely inquire into the attorney-client communications.
5 Those are confidential matters. And you understand that by
6 sharing discussions you may have had with Mr. Stabenow, you're in
7 effect waiving that as to at least this hearing. There are
8 people sitting in the back of the courtroom, I don't know who
9 they are. And are they family members?

10 MR. KELLEY: Yes.

11 THE COURT: Okay.

12 MR. KELLEY: And my girlfriend.

13 THE COURT: Do you have any objection if they're
14 present?

15 MR. KELLEY: No, not at all.

16 THE COURT: Okay. Jennifer is here from the Public
17 Defender's Office, so she's certainly not -- she wouldn't be
18 excluded from this type of a hearing as an employee of that
19 office. So, why don't you go ahead and tell me what's bothering
20 you.

21 MR. KELLEY: Okay. And I'm a little nervous.

22 THE COURT: That's okay.

23 MR. KELLEY: So, it might take me a minute.

24 THE COURT: Just make sure you speak into the -- pull
25 the microphone up close --

1 MR. KELLEY: Okay.

2 THE COURT: -- so that we can --

3 MR. KELLEY: Yes.

4 THE COURT: -- record everything accurately.

5 MR. KELLEY: Okay. I've made a copy of these documents
6 for you as well.

7 THE COURT: Okay. Have you shown them to Mr. Stabenow?

8 MR. KELLEY: Not yet, but I have made a copy for him as
9 well.

10 THE COURT: All right. Why don't you show those to him
11 first.

12 MR. KELLEY: All right.

13 THE COURT: And describe generally what those documents
14 are.

15 MR. KELLEY: Generally, it's a distillation of trouble
16 that I've had communicating with Mr. Stabenow and other issues.
17 And how would I put it? There are a lot of inconsistencies
18 between what Mr. Stabenow has said that he would do versus what
19 -- I mean, the difference between what's happened from what he
20 said he would do, to what has been done so far over, you know,
21 the several months that he's been assigned as my attorney.
22 It's --

23 THE COURT: Well, why don't you -- Mr. Stabenow, do you
24 want to read that before it's given to me just to --

25 MR. STABENOW: Yes, sir.

1 THE COURT: -- make sure there's nothing you want to
2 advise him on?

3 (Reviewing Documents)

4 MR. KELLEY: I've also --

5 THE COURT: I would likely take that document, most
6 likely, because it -- not having seen it yet, but there is a
7 chance I would seal it since I assume it involves discussions
8 you've had with your attorney, is that correct?

9 MR. KELLEY: Yes.

10 THE COURT: All right.

11 MR. KELLEY: Would you not like --

12 THE COURT: He's going to read it first --

13 MR. KELLEY: Okay.

14 THE COURT: -- and make sure that there's nothing in
15 there that could be harmful to you.

16 MR. KELLEY: Okay.

17 THE COURT: All right.

18 (Reviewing Documents)

19 MR. STABENOW: I'm done, Judge.

20 THE COURT: Okay. Is there anything in there that you
21 want to object to him providing, that might be harmful to his
22 criminal case?

23 MR. STABENOW: I think he's making a poor decision in
24 providing this because it will require the waiver of privilege
25 and for me to provide you documents, putting into context the

1 stuff that was chosen from prior e-mails.

2 THE COURT: Right.

3 MR. STABENOW: But insofar as that's his choice to make,
4 that's his choice to make.

5 THE COURT: That's up to you. You make the decision.

6 MR. KELLEY: I can provide you the e-mails from my
7 personal -- or my personal conversations with him to support
8 that.

9 THE COURT: Okay. Well, you understand that I may need
10 for -- to inquire of Mr. Stabenow of information concerning those
11 e-mails in order to make sure that I understand exactly what
12 happened or is happening, okay?

13 MR. KELLEY: Okay.

14 THE COURT: With that understanding, why don't you go
15 ahead and provide me with a copy of your written document there.

16 MR. KELLEY: Sure.

17 THE COURT: I am going to order that this matter, this
18 communication be sealed. I'm going to mark it as a court
19 exhibit. Thank you, sir. Do you have an exhibit -- we'll just
20 make it Court's Exhibit #1. I'm going to go ahead and read it.

21 MR. KELLEY: I'm sorry. Did you instruct me to read it?

22 THE COURT: No, I'm going to read it.

23 MR. KELLEY: Oh, okay.

24 THE COURT: So you won't have to read it.

25 (Court Reviewing Documents)

1 THE COURT: Okay. I've read the communication. And
2 let's start first with the concern about the DNA evidence
3 relating to human feces that was left in the library. It's my
4 understanding that that evidence was destroyed, is that correct,
5 Mr. Stabenow?

6 MR. STABENOW: Yes, Your Honor. I met with Mr. Kelley
7 on October 9th, and we discussed it. Later that day, I requested
8 that the poop be DNA tested. I e-mailed Mr. Kelley the next day
9 letting him know I had made that request through Mr. Lynn of the
10 U.S. Attorney's office.

11 THE COURT: Right.

12 MR. STABENOW: And it took them a while to get back to
13 me, because they were trying to look into who had preserved it or
14 where it had been preserved. And ultimately they had informed me
15 that it had been destroyed. I did not immediately call or notify
16 Mr. Kelley. That was during the approximately 3½ weeks I was
17 trying to meet with him that he kept skipping our meetings.

18 THE COURT: All right.

19 MR. STABENOW: And so I just kept that as one of the
20 facts to discuss with him the next time we met. We did meet in
21 November, I believe it was the 26th, speaking off the top of my
22 head. And we talked for about two hours at that time. I told
23 him that the feces had been destroyed. But I also communicated
24 to him my belief that that feces was of minimal value in his
25 case. The feces was found on the fourth floor and every single

1 fire in this case was on the first floor. And so the only area
2 that's going to matter in his arson trial is the area where the
3 fires were set, because those areas were captured on video. And
4 the only person going in or out of those rooms on video was Mr.
5 Kelley. So, in order for our defense to be successful, we have
6 to come up with an alternate explanation for how the fires could
7 have happened in those rooms and that our focus has to be on the
8 first floor. As I told Mr. Kelley, even assuming that we can
9 show the feces belonged to somebody else, the Government response
10 could be, well, some student went there and played a practical
11 joke before the library closed that night and nobody noticed.
12 It's not going to negate the arson cases unless we can deal with
13 the evidence on the first floor.

14 THE COURT: Right. Okay. Now, and I also would note
15 that there's certainly nothing that Mr. Stabenow can do about the
16 fact that the investigators destroyed that evidence or somebody
17 at the -- maybe when they cleaned it up, somebody threw it all
18 away. I'm not sure exactly what happened, but the fact that no
19 tests were done actually is to your benefit.

20 MR. KELLEY: I disagree. And I --

21 THE COURT: Well, and this -- there's nothing you can do
22 about the fact that the evidence no longer exists. There's
23 nothing that can be done about that.

24 MR. KELLEY: No.

25 THE COURT: It's gone. No tests can be performed when

1 they don't have the evidence.

2 MR. KELLEY: That's --

3 THE COURT: However, Mr. Stabenow, as your attorney, can
4 argue in the adverse inference that the Government did a very
5 poor investigation and by not preserving that evidence, that
6 creates reasonable doubt.

7 MR. STABENOW: And, Your Honor?

8 THE COURT: And so certainly you're able -- prepared to
9 make that argument?

10 MR. STABENOW: Yes, Your Honor. And in regards to the
11 video, the same thing applies. I've talked to Officer Rogers,
12 who was the officer in charge of copying over video. I met with
13 her on Friday, because I was informed last week that they had not
14 preserved all of the videos.

15 THE COURT: Right.

16 MR. STABENOW: And she told me that they -- what they
17 did is they -- she spent 14 hours that day reviewing their DVR
18 and she copied over to disk the parts that she thought people
19 would care about.

20 THE COURT: Right.

21 MR. STABENOW: And that's all she preserved. Now, as I
22 have --

23 THE COURT: So, the original recording was destroyed?

24 MR. STABENOW: The original recording was just written
25 over --

1 THE COURT: Okay.

2 MR. STABENOW: -- like any other DVR would be after a
3 period of a week or two.

4 THE COURT: Right.

5 MR. STABENOW: All of which proceeded Mr. Kelley being
6 charged by nine months.

7 THE COURT: So, that evidence is gone. The original
8 record of that is --

9 MR. STABENOW: It was gone before Mr. Kelley even had a
10 federal case.

11 THE COURT: Okay.

12 MR. STABENOW: And as I've instructed Mr. Kelley, you
13 know, if we choose to go to trial, I can certainly argue that,
14 you know, that creates an inference that they did not thoroughly
15 investigate the possibility of a third person.

16 THE COURT: Right.

17 MR. STABENOW: On the other hand, I've also communicated
18 to Mr. Kelley that Officer Rogers, you know, I didn't communicate
19 her name personally, because at the time I didn't know who it
20 was. But that law enforcement watched the video that day from
21 the time the office -- the library was locked until the moment
22 the police officers came into the cameras in response to the fire
23 call. And the law enforcement officers, in this case, Officer
24 Rogers, confirms that the only person she saw on any video camera
25 was Mr. Kelley. So, that is the evidence I expect the Government

1 to present at trial. Now, I can attack it. I can attack her
2 testimony.

3 THE COURT: Right.

4 MR. STABENOW: But she will be allowed to testify to
5 that fact.

6 THE COURT: Right.

7 MR. KELLEY: May I?

8 THE COURT: Yes.

9 MR. KELLEY: Thank you. On October 9th --

10 THE COURT: You can seated if you like.

11 MR. KELLEY: Okay.

12 THE COURT: That's fine.

13 MR. KELLEY: I audio recorded our first and November
14 22nd meeting, and I reviewed them yesterday. On October 9th, Mr.
15 Stabenow said that in the event that I did commit the alleged
16 crimes, then perhaps the feces -- how do I put this? This will
17 just take me a moment to think about it. Considering what I'm
18 already charged with, doing the DNA test of the feces would not
19 hurt. If it turned up to be someone else's, he agreed that it
20 would help the case, which is why he pursued it. When he said
21 that, he did not tell me that it was Mr. Lynn that he'd
22 corresponded with. He did not say when he corresponded with this
23 individual. And I when I directly asked him how he knew that the
24 evidence was gone, because I thought this was valuable, because I
25 do not believe myself to have left that piece of evidence there,

1 he simply refused to communicate it with me very directly. And
2 also on my audio recording of our November 26th meeting, he does
3 not address that the feces is gone. He simply says that he does
4 not care about it. So, I didn't learn about it being a non-issue
5 until I continuously asked him over e-mail.

6 THE COURT: Right.

7 MR. KELLEY: And even then he did not provide the
8 information regarding how he learned about any of it.

9 THE COURT: Well, it's all on the record now. I mean,
10 it's gone. The evidence is gone. There's nothing he can do
11 about that --

12 MR. KELLEY: No.

13 THE COURT: -- other than to point out to the jury -- a
14 jury if the case goes to trial, to point out to the jury that a
15 competent investigator would not have destroyed -- they would
16 have figured out, you know, they would have tried to retain that
17 evidence. I'm not sure exactly what the facts were. Did
18 somebody at the custodial staff or something clean it up or --

19 MR. KELLEY: It was collected --

20 THE COURT: Just go ahead.

21 MR. KELLEY: It was collected into evidence is my
22 understanding.

23 MR. STABENOW: It was not collected into evidence. That
24 was what was originally communicated to me as was it was
25 originally communicated to me an impression that there had been

1 fires on multiple floors. So, we had expected that if there was
2 fires on the fourth floor and there was feces present and we
3 could DNA test it and link it to somebody else, that would be
4 useful. It later came out during the course of our investigation
5 that there were no fires on the fourth floor --

6 THE COURT: Right.

7 MR. STABENOW: -- and that the feces had not been
8 preserved. It had been disposed of by campus security the same
9 night.

10 MR. KELLEY: My issue is that it was deficient
11 communication with me, because it was something that I've
12 hammered from the beginning was an important piece of evidence
13 that I -- he thought that we had it.

14 THE COURT: All right.

15 MR. KELLEY: I asked about it and he wouldn't tell me
16 about it when -- he would not communicate with me about evidence
17 that might have been exculpatory to me.

18 THE COURT: All right.

19 MR. KELLEY: That's --

20 THE COURT: Well, that issue is behind us now. We know
21 what happened to it. So, let's go to the tapes. Again, it's the
22 same -- the same issue is the original recording of the tape
23 which would have covered the entire time frame from -- what was
24 the period of time? Whenever the -- from the time that the
25 library closed until it opened?

1 MR. STABENOW: It was from 2030 hours until 0333 the
2 next day.

3 THE COURT: All right. So, the fact of the matter is
4 that the original tape is gone. The only thing that they
5 retained was the parts of the tape that allegedly depicts that
6 you were in the library after it was closed and near where the
7 fires were started. So, the only thing that Mr. Stabenow can do
8 at this point with that evidence is to again argue that an
9 adverse inference that, you know, the Government, the
10 investigator in this case should have kept the original tape.
11 They didn't do that. That creates reasonable doubt and a jury
12 shouldn't convict based upon that fact that they destroyed that
13 evidence. That's what a competent defense attorney would do.

14 MR. KELLEY: My issue again here is not with the
15 logistics of the case. But Mr. Stabenow has refused to provide,
16 in his words, he says I'm asking for detailed reports of every
17 interaction that I have with every other person regarding my
18 case. But I actually asked what is his context when he's been
19 interacting with the ATF. Has it been formal, informal? Has he
20 made any documentation of who he called or when? And when I
21 asked directly for who he's talking to, members of the
22 prosecution, members of law enforcement, he has not told me. And
23 that's my issue. It's not so much the dynamics of whether the
24 footage is gone or whether the evidence is gone, it's my
25 counsel's deficient communication --

1 THE COURT: Right.

2 MR. KELLEY: -- when directly asked about it.

3 MR. STABENOW: And, Your Honor, --

4 MR. KELLEY: So, this is going to be the first that I'm
5 hearing about, for example, Mr. Lynn.

6 THE COURT: All right.

7 MR. KELLEY: And if I have to bring him in front of you
8 for him to bring out this information, even though I've asked him
9 directly about it, I feel that that's deficient communication on
10 his part when I'm directly inquiring.

11 THE COURT: All right.

12 MR. STABENOW: Your Honor?

13 THE COURT: Mr. Stabenow.

14 MR. STABENOW: I've talked to him about Mr. Lynn in the
15 past. The reason I had the issue about the waiver of attorney-
16 client privilege as we started this today is that I've noticed a
17 pattern in my client's communications with me. He sends e-mails
18 that include lies and fraudulent misrepresentations of things
19 that have happened. And he says I'm deficient in my
20 communications with him. I had to spend three hours on
21 Thanksgiving night responding to one of his e-mails. He had
22 skipped our meetings for 3½ weeks that I had tried to arrange.
23 With no notice, he would just skip them. And then he sent me an
24 e-mail, for example, that day saying, I'm not casting any blame,
25 but due to scheduling conflicts, I've been deprived of meaningful

1 access to my attorney. As in this case, you know, he's saying
2 that I've never talked to him about Mr. Lynn and that I'm denying
3 a reasonable request just to know, you know, how I learned this
4 information. The actual context of his e-mails is that he
5 demanded that he be able to be physically present during all
6 interactions with anybody I had on his case whether it was law
7 enforcement or otherwise. And I told him that that is simply not
8 practical and I have no intention of hamstringing my ability to
9 work on any case by adopting such a procedure. Particularly, I
10 might note, when I can't even get the client to show up for a
11 month to talk to me, I'm not going to tell the prosecutor, well,
12 I can't talk to you until maybe three weeks from now. I have to
13 arrange to see if my client can be present for us to have a two-
14 minute conversation about video.

15 THE COURT: Right. Mr. Kelley, you should know that it
16 would be very unusual for an attorney in a criminal case to have
17 his client present in every conversation that he has when he's
18 investigating the case, when he's meeting with the prosecutor.
19 In fact, it's extremely rare, I don't think I've ever seen it.

20 MR. KELLEY: He is --

21 THE COURT: And I've been involved in criminal justice
22 in the federal system for 25, 26 years.

23 MR. KELLEY: He's misquoting me. And I requested to be
24 present during his interactions with the prosecution. And it's
25 my understanding that it is a right of a client. I may be wrong

1 in that. But in regards to the Thanksgiving incident, Mr.
2 Stabenow offered an e-mail to work over Thanksgiving in response
3 to the questions that I had for him.

4 THE COURT: Well, let me ask you, did you miss some
5 meetings that he had scheduled with you?

6 MR. KELLEY: I delayed them with advance -- and then
7 when he changed the premise of a meeting --

8 THE COURT: No, wait. Wait. Stop right there. Did you
9 miss meetings with your attorney?

10 MR. KELLEY: I notified him in each instance. And he
11 keeps harping on three weeks.

12 THE COURT: No. You're going too fast here. So, the
13 answer is you did miss meetings and you told him in advance you
14 couldn't meet. What were your reasons?

15 MR. KELLEY: One of them I was emotionally distressed.
16 And then on the second one, the premise of the meeting had
17 altered, because he said that he was obtaining new video footage
18 that he had reviewed, which we were going to discuss. And when I
19 asked him if he had, you know, he scheduled the meeting at an
20 hour and a half before, I mean, the meeting was supposed to take
21 place even though I had asked him over the weekend when our
22 meeting would be. Ninety minutes before he wanted the meeting to
23 take place, he e-mailed me to tell me to come down. And before
24 coming down, I e-mailed --

25 THE COURT: Were you working?

1 MR. KELLEY: No. I live in Columbia.

2 THE COURT: You had an hour and a half to get you and
3 you didn't make the meeting?

4 MR. STABENOW: Your Honor?

5 THE COURT: What?

6 MR. STABENOW: I had let him know that we would be
7 meeting sometime on Monday, but that it would be subject to the
8 trial I had last week.

9 THE COURT: Right.

10 MR. STABENOW: And I set aside four hours last Monday
11 night, the night before a trial -- a jury began on a man who was
12 facing mandatory life, to meet with my client. And he just kept
13 sending e-mails coming up with excuses of why he wanted to put it
14 off and then he just didn't show.

15 MR. KELLEY: He e-mailed me instead of calling me 90
16 minutes before he wanted -- even though I e-mailed him over the
17 weekend asking approximately what time do you think you'd be able
18 to meet. Ninety minutes before the meeting, he e-mails me
19 instead of calling. And so I don't even see it 90 minutes
20 before.

21 THE COURT: Well, your explanation at least on one of
22 the meetings, you were emotionally stressed, that's not -- Mr.
23 Stabenow doesn't have any control over that.

24 MR. KELLEY: No.

25 THE COURT: But you have a responsibility to make the

1 meetings that your attorney has set up with you. He's a very
2 busy guy. I know that, because I see him in court every day.
3 And so when he sets aside time to have meetings with you, you
4 need to make those meetings.

5 MR. KELLEY: He postponed meetings for three months
6 originally. It was between -- my release was on July 3rd and I
7 couldn't meet with him until October 9th. And then he kept --

8 THE COURT: Well, I find that you're at fault in not
9 attending the meetings. All right. Let's go on to the issue --
10 there's an issue in here that you raised on the Federal
11 Sentencing Guidelines. Mr. Stabenow, have you had a chance to
12 calculate what you believe the Federal Sentencing Guidelines will
13 be and communicate that with your client?

14 MR. STABENOW: Yes, of course, there's a range. You
15 know, however, in response to his claim that I was deficient in
16 not calculating them until October, as Your Honor knows, I've
17 done a number of these arson cases. I didn't need to calculate
18 his guideline range ahead of time to know the ballpark of where
19 we were.

20 THE COURT: Right.

21 MR. STABENOW: And it would have been premature for me
22 to guesstimate guideline ranges before I had investigated the
23 case and talked to my client. It's my policy to always calculate
24 the guideline range for the first time at a meeting with the
25 client where we discuss the evidence and where we identify

1 potential enhancements.

2 THE COURT: All right. Do you want to respond?

3 MR. KELLEY: I was surprised that three months had
4 elapsed before he had done that. But if that's normal, then we
5 can move on.

6 THE COURT: Have you provided him with what the
7 estimate, Mr. Stabenow?

8 MR. STABENOW: Yes. We've talked about it.

9 THE COURT: All right.

10 MR. STABENOW: And there is, as I said, there is a
11 range. And in regards to the three months, after I got my client
12 out on bond, I let him know that since he had raised the issue
13 that he didn't think he was competent the night of the
14 allegations, that what we needed to do was have him evaluated
15 right away and we did promptly contract for an evaluation.

16 THE COURT: Right.

17 MR. STABENOW: Did the evaluation. The evaluation was
18 completed in mid-September. And as I told him then, I had 25
19 hearings at the end of September, early October. It's the
20 biggest rush I've ever had. And I told him as soon as that's
21 cleared up, we can meet and I can then work much more thoroughly
22 on your case and following that, we did. We met on October 9th
23 and I worked 11 of the next 16 business days on his case.

24 THE COURT: I'll let the record reflect that I took
25 probably took 10 or 15 of those guilty pleas on different cases

1 and also handled several motions that you were involved with
2 during that period of time. I know that you were extremely busy.
3 All right.

4 MR. KELLEY: There --

5 THE COURT: Go ahead.

6 MR. KELLEY: There have also been -- some of our
7 meetings were delayed, because Mr. Stabenow thought that his
8 investigator Greg should be present. This was the case for our
9 October 9th meeting, and then Greg was not present at the meeting
10 even though the postponements until that date regarded all three
11 of us being able to meet together, Greg was not there. So, that
12 was part of additional postponements.

13 MR. STABENOW: And as I've advised Mr. Kelley, I make
14 the determination whether I think it's necessary for the
15 investigator to be present in a meeting or not. I don't think
16 Mr. Wills needs to be present at our meetings for what we're
17 working on right now. Now, you know, as we get closer to trial,
18 I mean, like I received new discovery today. And as Your Honor
19 knows, that's not uncommon in the federal system as we near
20 trial.

21 THE COURT: Right.

22 MR. STABENOW: You know, if those meetings require Greg
23 to be present, then we will, you know. And certainly it's always
24 preferable that he be there. But sometimes I have other things
25 for him to work on. And if I don't think it's valuable to the

1 investigation, then I have him go do those other things.

2 THE COURT: Well, and I don't think it's appropriate for
3 me to dictate to you how your resources in your office should be
4 utilized. I know Mr. Wills is a very -- extremely competent
5 investigator. And I'm sure that Mr. Stabenow, based on what I
6 know and have observed over the years with respect to his
7 representation of defendants in criminal cases, is that he's
8 utilizing Mr. Wills where appropriate in investigation of the
9 cases he's assigned to and presenting defenses to those cases. I
10 have no reason to doubt that if Mr. Stabenow tells me it wasn't
11 necessary for Mr. Wills to be present at that meeting, it wasn't
12 necessary.

13 MR. KELLEY: He told me it was and that was the premise
14 for a delay.

15 THE COURT: All right.

16 MR. KELLEY: So, it's a breakdown of communication again
17 where we delayed meetings based on his assertion that Mr. Wills
18 -- Wills? Wilson? Wills, I believe -- needed to be there. But
19 then it clearly was not the case once I arrived.

20 THE COURT: All right.

21 MR. KELLEY: So, it's a breakdown in communication as to
22 why we had delayed the meetings in the first place. He had not
23 informed me that the investigator would not be there, because I
24 specifically had hoped he would be there.

25 THE COURT: Well, okay. Let's move on to -- there is

1 two other issues here. One is a request for Mr. Stabenow to
2 provide you information on how to request substitution of
3 counsel. That's why we're here today. Mr. Stabenow notified the
4 Court that he needed to have a hearing on this issue which is the
5 normal and usual way that attorneys inform the court that there
6 might be potential problems with a client. And so that's a
7 purpose for this hearing. Second, there is a question concerning
8 you wanting to make a claim of ineffective assistance of counsel.
9 You can't raise the claim of ineffective assistance of counsel
10 prior to a finding of guilt in a case. That can only be raised
11 in a -- what's called a §2255, which is a post-conviction hearing
12 or process -- procedure that when a defendant is convicted in a
13 criminal case, they can claim, following their appeal, direct
14 appeal on that conviction, assuming the case is affirmed, the
15 conviction is affirmed on appeal, the next thing that can be
16 raised is a §2255 claim alleging that your constitutional rights
17 were violated. And one of the claims that's frequently raised is
18 ineffective assistance of counsel. But you can't raise that
19 until there's been a conviction, the case has been affirmed on
20 appeal and you want to claim that your attorney was ineffective
21 in violation of the Constitution. That's the only time you can
22 make that claim.

23 MR. KELLEY: Thank you for letting me know. I did not
24 know that. I was not informed.

25 THE COURT: And quite frankly, from what I've heard and

1 seen on the record here today, I don't think you have a valid
2 claim for ineffective assistance of counsel in any sense of the
3 word. I find that from what I'm hearing that Mr. Stabenow is
4 doing everything that I would expect a competent defense attorney
5 to do. And I'll just tell you right now you're, quite frankly,
6 in my opinion, you're fortunate to have him as your lawyer,
7 because he's one of the best criminal defense attorneys in the
8 Midwest. And you're nitpicking things from what I can see,
9 because he's not responding to every request that you have. He's
10 busy. I'll give you a chance to say anything else you want to
11 say. But I don't see any reason for substitution of counsel at
12 this point at all.

13 MR. KELLEY: In his investigation, I notified Mr.
14 Stabenow that, okay, here's the events as they are in my case.
15 The shirt that I'm wearing in the footage allegedly --

16 THE COURT: Uh-huh.

17 MR. KELLEY: -- is very clearly a brown shirt that
18 buttons.

19 THE COURT: All right.

20 MR. KELLEY: And the police confiscated my shirt,
21 shorts, shoes believing that the shirt, shorts and shoes that
22 they confiscated at the time that I went to the police following
23 the events, were the same clothes I was wearing on the night of
24 the incident. But the shirt and the shoes were different. Now,
25 in Mr. Stabenow's investigation, even though I told him that the

1 shirt that they have in evidence is blue and the shirt that, I
2 mean, there's a photo of that in our discovery that we've seen.
3 The shirt is clearly a blue-gray V-neck shirt. And the shirt in
4 the footage is brown with buttons. In his reports, he asserts
5 again that it is the exact same clothing that I was wearing on
6 the night of the incident. Now, I've plainly told him that that
7 this is inaccurate and I'm -- and it's a completely valid claim
8 because it's true. The police have the wrong shirt. It's not
9 the same one. And one is blue, one is brown. But he's saying
10 that he agrees that it is the same shirt. But it's, I mean, just
11 one look at it, they're very different. The same with the shoes.

12 THE COURT: Do you want to respond to that, Mr.
13 Stabenow?

14 MR. KELLEY: I mean, right here that it's exact.

15 MR. STABENOW: Yeah. Your Honor, this is the sort of
16 stuff that, you know, frankly, some clients I struggle with
17 sometimes, and this is one of those clients. Mr. Kelley doesn't
18 dispute that it's him on the videos. So, whether they described
19 his shirt as blue or brown, ultimately is that something I can
20 argue about a deficiency in the investigation at trial? Sure.
21 But he doesn't dispute he's the person on the videos in the
22 library. So, the color of the shirt is really not that
23 significant. Similarly, you know, you'll see in his written
24 submission to you today, he says that I'm refusing to file
25 motions. But he's asked me to file motions to suppress summaries

1 of people's statements. And I've told him that's not admissible
2 as evidence at trial. They actually have to subpoena and produce
3 the people and put them on the stand subject to my cross-
4 examination. And his response is, file the motions anyway,
5 there's nothing to lose by that.

6 THE COURT: Well, Mr. --

7 MR. KELLEY: That's not what I've said actually.

8 THE COURT: Mr. Kelley.

9 MR. KELLEY: Sorry.

10 THE COURT: Mr. Stabenow can only file motions that he
11 believes in good faith constitute a basis for suppression of
12 evidence. And based on what he's described to me would be
13 unethical or unprofessional of him to make -- file motions like
14 you're wanting to have filed.

15 MR. KELLEY: On the 28th, I believe he said that he had
16 not identified any pretrial motions that he was going to file.
17 And I have subsequently asked him, like, could you please tell me
18 what pretrial motions you might find -- this is this month, and
19 he's not responded to that.

20 MR. STABENOW: I -- I --

21 THE COURT: Just a minute. Go ahead.

22 MR. STABENOW: I agree with that, Your Honor. I have
23 found no valid pretrial motions to file in this case. That's not
24 to say that the Government did a perfect case or a perfect
25 investigation. But Mr. Kelley is operating under the false

1 belief that he will not -- and he will not accept correction of
2 this belief from me, that just because they did not do something
3 well in the case or made an error, does not give us a grounds to
4 file a motion to dismiss the Indictment or a motion to suppress
5 the rest of their evidence. And this is where you'll see from --
6 you have a little tiny snippet from one of my long e-mails, --

7 THE COURT: Right.

8 MR. STABENOW: -- this is not television. There are
9 rules that govern when I can file motions to suppress, when I can
10 file motions in limine, when I can file motions to dismiss. And
11 I can't just say, well, they made a mistake so make the case go
12 away. And Mr. Kelley keeps saying, well, if there's nothing to
13 lose, file a motion. But there is something to lose which is my
14 credibility with the court, my responsibility as an officer of
15 the court to only file meritorious motions and that is something
16 I will not compromise. And I've told him repeatedly, if we find
17 anything that warrants a continuance or a pretrial motion or even
18 some of these things are better -- are actually dealt with in
19 trial like hearsay objections, then I will pursue those things.
20 But I'm not going to say, well, the average case involves seven
21 pretrial motions so I'm going to create seven pretrial motions to
22 file in this case.

23 THE COURT: Right. Mr. Kelley, I'm -- what I've seen
24 here in this submission, I can't see any basis for him to file
25 any motions to suppress.

1 MR. KELLEY: I asked, along with the rest of that, for a
2 -- I admitted I don't understand. I don't have a law degree or
3 anything like that.

4 THE COURT: Right.

5 MR. KELLEY: So, I was doing research and I saw motions
6 that seemed pertinent so I asked him about them. Would this
7 pertain to this, would this pertain to this. And he's blowing it
8 out of proportion as if I'm demanding that he file motions that
9 don't exist, which isn't true.

10 THE COURT: Okay.

11 MR. KELLEY: I can again give you the full e-mails for
12 you to review and the audio recordings of our meetings.

13 MR. STABENOW: And, Your Honor, in this regard again, I
14 mean, I've probably sent 50 to 100 e-mails back and forth with
15 Mr. Kelley, some of which are five to ten pages long. I have
16 made offers that I know no panel attorney will do. For example,
17 I have offered that if he gives me one day notice, and I offered
18 this I believe on October 18th. If he gives me one day notice, I
19 will lay out for him relevant chapters of how to defend a federal
20 case form the Federal Defender's Office in San Diego, the
21 Sentencing Guidelines, the appropriate jury instructions, the
22 appropriate statutes, all of them for him to review in our office
23 so that he can bring himself up to speed on these issues. He
24 keeps making these requests. I'm uneducated. I don't know this
25 stuff. And every time I offer, well, come in and I'll set this

1 stuff aside. And I've even made clear, by the way, this is not a
2 replacement for my advice, this is a supplement to my advice in
3 response to your request to get smart, we will lay this stuff out
4 for you. And he's never taken advantage of that opportunity.

5 MR. KELLEY: I have.

6 MR. STABENOW: So, when he makes these repeated, you
7 know, requests that he then says constitute deficient
8 performance, you know, frankly, that's not getting us to where we
9 need to go, which is to deal with the evidence in this case and
10 make a decision of either I'm preparing for trial or I'm
11 preparing for a plea and to make a decision based on the evidence
12 as it exists. There's one other thing I want to deal with on the
13 record and that is, he keeps having this insistence that I
14 subpoena records or that I formally document demands for records.
15 And as I've instructed him the past, except for the context of
16 your voluntary scheduling order that the Government chooses to
17 comply with, because they want the Court to appreciate that
18 they're choosing to do that, we don't have a statutory right to a
19 lot of this evidence even now. Technically, the Government does
20 not owe us this evidence until ten days from trial. So, the
21 appropriate way to get this evidence is not to file motions or
22 subpoenas to the Government, it is to work with Mr. Lynn and
23 Agent Holloway whom, although they are not friends to our case or
24 my personal friend, I've never been to either person's house,
25 they are people with whom I have a professional working

1 relationship and whom I have never had refused to give me
2 evidence when I have made an appropriate request as I have been
3 doing in this case. Now, sometimes they don't it overnight. But
4 then again, since they don't even have a legal duty to do it
5 until ten days before trial, if I have to wait a week or two for
6 them to respond with evidence, I just gently remind them and then
7 I accept the evidence when they give it to me and I thank them
8 for their time.

9 MR. KELLEY: Regarding his investigation, and on October
10 9th, Mr. Stabenow said that he would pursue the footage. And
11 it's not until December 7th that even asks the people at Mizzou
12 for the footage. And I have no record, I have asked him what
13 he's done and he can't tell me what he's been doing between
14 December 7th and October 9th pertaining to his pursuit of the
15 footage. So, when I thought he was going to Mizzou and trying to
16 investigate independently of what the prosecution is providing, I
17 find there's nothing I can hold in my hand. There's nothing I
18 can read. There's nothing that he will relate to me regarding --

19 THE COURT: Well, let --

20 MR. KELLEY: Also I'd like to note that he just threw
21 this packet at me. He's hostile to me as indicated in the
22 comments on page 6 where he said -- where I asked, and the tone
23 of my e-mail which again, I can provide in my full.

24 THE COURT: I disagree that he threw the document at
25 your. For the record, he placed the document next to you on the

1 table. And let me just state for the record that Mr. Stabenow
2 has no duty to respond immediately to whatever your inquiries may
3 be. He's a very busy lawyer. He gets to them when he can. He
4 budgets his time appropriately from what I've observed to
5 investigate his cases. I'm just going -- I've heard enough on
6 this issue, on this point, your request for substitution of
7 counsel. I find that there is no basis for substitution of
8 counsel at all. I handle these types of hearings all the time.
9 It seems to me that you should start working with Mr. Stabenow to
10 try to prepare your defense or decide whether or not you're going
11 to enter a plea. There's no basis for me to appoint new counsel.
12 Of course, you're free to hire your own attorney and try to get
13 an attorney to represent you, but that's going to cost you money.
14 Under the law you have no right, when you receive appointed
15 counsel, to decide whether or not you get new counsel. That's a
16 decision for the Court. I find, for the record, I find that Mr.
17 Stabenow is doing an extremely competent job in representing you
18 from what I can see. He has given you good advice. He has
19 explained why he hasn't filed any pretrial motions to suppress
20 evidence. I find those explanations are reasonable. And based
21 upon a solid foundation on what the law is and what his
22 obligation is to do, to defend people in criminal cases and I'm
23 going to deny your request for substitution of counsel. The case
24 is set for trial on January 7th of 2013. I suggest that you
25 start preparing for trial.

1 MR. STABENOW: Your Honor, there are two other things I
2 wanted to make a record of briefly. The first is, as Your Honor
3 knows, and I wanted this on the record. It is part of my
4 responsibility to my client, after I've investigated a case and
5 made an assessment of the facts for and against us, to advise
6 them how I think things will go at trial, how I think things will
7 be presented at trial, what I think their odds are at trial and
8 what my own personal interpretation of the evidence is. As I've
9 informed Mr. Kelley, he has a right to competent representation,
10 not necessarily representation that believes he's innocent. I
11 don't believe he's innocent. Nevertheless, at trial, I am
12 totally prepared to argue that he's not guilty and to attack all
13 of the deficiencies in the Government's evidence. There is a
14 separation between my duty of what I tell my client and what I
15 say in front of a jury. And those two things can often be quite
16 dissimilar. And that is the nature of being a professional
17 defense attorney.

18 THE COURT: Right.

19 MR. STABENOW: You have to be able to do those two
20 things. The other thing I would say is, Your Honor, we need to
21 deal with the scheduling of the trial. My understanding, from
22 speaking to Mr. Kelley before this, is one of the reasons he
23 wanted to ask for replacement of counsel is that he wanted a
24 delay to investigate his recent diagnosis of autism, to see how
25 that would affect the trial. I've looked into the issue. I've

1 spoken to a forensic psychologist about it. I've done research
2 about it. I've looked into the medicines he was on. I don't
3 believe there is anything that would warrant a continuance at
4 this point. But I don't want to leave the courtroom and
5 immediately have the issue of he's wanting a continuance for that
6 and I'm telling him it's not meritorious and then we have to come
7 back into court on that issue a couple of days from now.

8 MR. KELLEY: I no longer desire that particular
9 continuance and I don't feel that I'm incompetent to stand trial
10 based on this.

11 THE COURT: Okay. All right. Thank you.

12 MR. KELLEY: Uh-huh

13 THE COURT: Okay. Well, Mr. Kelley, you know, Mr.
14 Stabenow is not going to get in court and say he thinks you're
15 guilty at trial. He's going to do his best to defend you. I
16 don't have any doubt about that. He's going to present any
17 meritorious defense that you have on your behalf and he'll do a
18 very good job of it. He'll argue -- it sounds like he's already
19 figured it out. He's got some stuff -- he has some things to
20 work with based on the fact that the Government did not preserve
21 the DNA evidence and also did not preserve the original tapes.
22 He'll argue that to the jury as an adverse inference and to
23 enforce his argument that there is reasonable doubt in the case.
24 And I wouldn't expect him to do anything else. I mean, that's --
25 he knows what he's doing, he's a good lawyer. And instead of

1 wasting all this energy, you know, having conflicts with your
2 counsel, you need to work with him. And you're looking at some
3 serious -- you know, you're facing some serious time here and you
4 better start working with him. Anything else you want to say?

5 MR. KELLEY: I was -- well, I --

6 THE COURT: I realize this is stressful for you.
7 Anybody facing this kind of a charge would be stressed out.

8 MR. KELLEY: Uh-huh.

9 THE COURT: But, you know, he is your advocate. He
10 wants to help you, but you've got to be willing to work with him.

11 MR. KELLEY: I don't trust him.

12 THE COURT: Well, --

13 MR. KELLEY: I can't check on what he's been working on
14 my case. That's my issue. And I also feel again that he's been,
15 for lack of a better -- oh, no. Like page 6, where he said, "I'm
16 your attorney, not your servant," when I made a reasonable
17 request. I feel like that's unnecessarily hostile to me.

18 Perhaps there's an animism that I don't understand the root of
19 it, because I feel like I'm asking, I mean, I'm asking reasonable
20 questions and making reasonable expectations and that's the
21 difficulty and that and the communication, there's communication
22 difficulties that's the heart of the matter to me.

23 THE COURT: Well, there's nothing that I can do about
24 your perception of what kind of a job he's doing for you. That's
25 something you're going to have to deal with yourself. From what

1 I can observe as, you know, kind of an independent observer, he's
2 doing everything that I would expect a lawyer to do representing
3 somebody faced with the kind of charges that you're facing. And
4 so that as far as, you know, my weighing the situation between
5 you and him and how he's representing you, I think that he's
6 doing a very good job on your behalf. Mr. Stabenow, I assume
7 you're still willing to work with Mr. Kelley and to try to do the
8 best you can for him at trial?

9 MR. STABENOW: Your Honor, I'm always willing to do that
10 with all my clients. I mean, I am frustrated by Mr. Kelley,
11 although he is not the first client who has caused me
12 frustration. And as you know, I have routinely had clients come
13 in and say things like, I did it, help me get off. And I go in
14 and I argue they're not guilty. I understand Mr. Kelley that's
15 not -- I understand that's not Mr. Kelley's position.

16 THE COURT: Right.

17 MR. STABENOW: I am willing to work with him. I am
18 willing to go to trial. I am ready for trial. Part of the
19 reason I have not wanted to do continuances and part of the
20 reason I have danced delicately on some of these evidentiary
21 issues is, for example, Mr. Kelley wants the DNA, that poop DNA
22 tested, but he's told me there was a tin found out -- right
23 outside the window that they believe is the fire accelerant at
24 the start of the case. He said, well, don't let them test that
25 because that might link me to the crime. So, I can't say to the

1 prosecutor, I want everything tested in a written motion, because
2 then they're going to test everything. They're going -- if they
3 notice something I left out, they're going to think it's peculiar
4 I left that out and then they will test that and --

5 THE COURT: Right.

6 MR. STABENOW: I mean, this is a delicate dance. And I
7 think Mr. Kelley does not understand that it is a delicate dance.
8 I will do everything I can to either get him acquitted. Or if
9 that does not work, get him the lowest possible sentence. But it
10 is important that he be focused on that goal, too, not trying to,
11 you know, see something he sees on television and fabricate an
12 issue. And it has happened in his e-mails that he has
13 misrepresented our prior meetings or he's misrepresented
14 situations or he's written things in a way that would lead people
15 to draw bad conclusions. That does cause me some concern going
16 forward, because I need to be focused on his case, not spending
17 all my time documenting what didn't happen in this case.

18 THE COURT: Right.

19 MR. KELLEY: If you're interested, I do again have the
20 meetings in full audio recorded and the e-mails as well. So, if
21 you wanted to check those and compare his claims versus mine,
22 that would be something we could do.

23 THE COURT: It sounds me like, you know, he's trying to
24 help you and you're the problem, not him.

25 MR. KELLEY: But I believe that if you listen to it and

1 read all of the e-mails, that you could see it from my
2 perspective, because I have nothing against him in this regard.
3 But, of course, that would be his angle that he's being effective
4 and I feel otherwise, so we disagree on that.

5 THE COURT: Well, I find that Mr. Stabenow is being very
6 effective in his representation of you. I disagree with that
7 statement. I'm suggesting to you that you should start -- quit
8 wasting all this energy fighting with your lawyer and try to help
9 him do his job and prepare your defense. So, I'm going to deny
10 the request. The case is set for trial on January 7th. And I
11 wish you the best of luck in that case. And what I'm going to
12 do, Mr. Stabenow, is I'm going to order that this transcript be
13 sealed, as well as the communication that I received from your
14 client.

15 MR. STABENOW: Yes. I think that's vital. Thank you,
16 Your Honor.

17 THE COURT: And that, of course, if there would be an
18 ineffective assistance claim at a later time, post-conviction,
19 assuming there's a conviction, I don't know if that's going to
20 happen or not, that, in that event I would, upon request, unseal
21 this transcript. All right. Anything further?

22 MR. STABENOW: No, Your Honor.

23 THE COURT: All right. Mr. Kelley?

24 MR. KELLEY: Thank you for your time.

25 THE COURT: All right. Thank you.

(Court Adjourned at 12:01 p.m.)

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

/s/ Lissa C. Whittaker
Signature of Transcriber

August 26, 2013
Date