

cc. Received 1/31/95 v. 2:43 a.m.
Anna R. Spudis

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF:

MM DOCKET NO. 93-176

SIERRA VISTA, ARIZONA

DOCKET FILE COPY ORIGINAL



DATE OF ARGUMENT: January 20, 1995 VOLUME: 3
PLACE OF ARGUMENT: Washington, D.C. PAGES: 246 - 291

FREE STATE REPORTING, INC.
Court Reporting Depositions
D.C. Area (301) 261-1902
Balt. & Annap. (410) 974-0947

I N D E X

1		
2		<u>PAGE:</u>
3	<u>Oral argument of:</u> Mr. Schattenfield	248
4	<u>Oral argument of:</u> Mr. Zauner	269
5	<u>Rebuttal of:</u> Mr. Schattenfield	287
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25	Argument began: <u>10:00 a.m.</u>	Argument Ended: <u>10:56 a.m.</u>

P R O C E E D I N G S

1
2 MR. MARINO: The Review Board will hear oral
3 argument in the Sierra Vista, Arizona proceeding and then
4 Docket No. 93-176. Mr. Schattenfield, I'm going to assume
5 that you're going to argue for Richard Richards, and would you
6 come to the podium?

7 MR. SCHATTENFIELD: Thank you very much.

8 MR. MARINO: Mr. Zauner, you're arguing for the
9 Mass Media Bureau this morning?

10 MR. ZAUNER: Correct.

11 MR. MARINO: Okay.

12 MR. SCHATTENFIELD: May it please the Board, my
13 name is Thomas Schattenfield, as we've said before. I
14 represent Richard Richards through my law firm Aaron, Fox,
15 Kittner, Plotkin & Khan (phonetic sp.) and I'm here today to
16 argue against the intemperate initial decision which Judge
17 Sippel issued in this matter. I'll go through a short summary
18 of the facts, I'm sure you know them. But Mr. Richards was --

19 MR. MARINO: You've got some static in the
20 background, Mr. Schattenfield. Would you please keep your
21 voice up?

22 MR. SCHATTENFIELD: Yes. Well, in the morning I
23 can't keep my -- it's lucky I'm talking here. Anyhow,
24 Mr. Richards was convicted of growing approximately 38
25 marijuana plants 36 of which were on federal property. He was

1 sentenced to five years probation, seven months house arrest,
2 substance abuse testing and he forfeited his -- the ranch and
3 his home upon which the ranch is where he grew his produce and
4 earned his living. The value of that property was estimated
5 about \$1 million.

6 Since undergoing his mandatory testing he's been
7 clean. This started in July of 1992 and he has fulfilled his
8 responsibilities with regard to ceasing the use of the illegal
9 drug marijuana canibalis I think it's called, cannibas,
10 cannibas, not cannibalis, and he has complied in all respects
11 with his probation. Mr. Richards is not, and I repeat not, as
12 my good friend Mr. Sippel would have you believe a Colombian
13 drug lord. He's not a member of the Medellin conspiracy, he
14 was growing 38 plants.

15 I'm not going to burden the Board with our
16 arguments, you have our pleadings, our briefs both of which
17 ours and the Mass Media Bureau's which I believe set out the
18 problem before you, but I would like to make a couple of
19 remarks and I would hope that you would ask me questions in
20 the areas that concern you. And I miss Mr. Blumenthal because
21 I could have used him today. That's not Mr. Blumenthal.

22 MR. MARINO: He used to be here.

23 MR. SCHATTENFIELD: Yes, that's right.

24 MR. MARINO: But go ahead.

25

 MR. SCHATTENFIELD: And I used to be there.

1 MR. MARINO: And he would not have let you go this
2 far, I guarantee you that. But go ahead. We're --

3 MR. SCHATTENFIELD: I could use that this morning.
4 It's too early. If we believe the Mass Media Bureau's
5 position, a drug offense -- a conviction for a drug offense no
6 matter how minor, how serious, they're all treated in --
7 everybody who's convicted of a drug offense dies, his
8 license --

9 MR. MARINO: Drug offense or drug-trafficking?

10 MR. SCHATTENFIELD: Huh?

11 MR. MARINO: Drug offense or drug-trafficking?

12 MR. SCHATTENFIELD: Well, I don't have a drug
13 offense, I have a drug-trafficking -- an alleged drug-
14 trafficking.

15 MR. MARINO: Well, is there a drug --

16 MS. GREENE: An admitted drug-trafficking --

17 MR. SCHATTENFIELD: Well --

18 MS. GREENE: -- on the basis of the plea.

19 MR. SCHATTENFIELD: Absolutely, absolutely, there's
20 no question about that. But the trafficking, and I'm not
21 going to go into his representation in the court, he was
22 growing 38 marijuana plants 10 of which were transplanted
23 plants of a friend of his who was an attorney in beautiful
24 downtown Sierra Vista and he was going to return them to him.
25 Now, if you have an illegal substance even though you don't

1 | sell it and you share it with somebody, that is called
2 | distribution, it's not trafficking, it was distribution. I
3 | don't think they call --

4 | MR. MARINO: Well, the present -- when the
5 | Commission adopted its policy statement it quoted the
6 | president who used the concept of drug-trafficking and
7 | associated it with also criminal enterprise.

8 | MR. SCHATTENFIELD: Yes, yes, all of those things,
9 | and certainly if you follow the language in all the
10 | pronouncements drugs are no good. We shouldn't have them, we
11 | should obliterate them. But the Congress in its infinite
12 | wisdom in adopting the Drug Abuse Act made certain
13 | distinctions between the seriousness --

14 | MS. GREENE: Well, the argument here as I
15 | understand it is basically once there's a drug-trafficking
16 | offense is it per se disqualifying --

17 | MR. SCHATTENFIELD: That's, that's what --

18 | MS. GREENE: -- or to what degree do we look at the
19 | extenuating circumstances.

20 | MR. SCHATTENFIELD: That's exactly right.

21 | MS. GREENE: And did the judge go too far in
22 | drawing conclusions from what he saw as circumstantial
23 | evidence in this case. And we're perhaps handicapped all of
24 | us because the record is really as I understand it, and
25 | correct me if I'm wrong, the record is his plea and his

1 testimony as to what was really behind that.

2 MR. SCHATTENFIELD: Yes. Yes. Plus, well, that
3 hearing went off on various strange and wondrous grounds.

4 MR. MARINO: What supports --

5 MR. SCHATTENFIELD: Go ahead.

6 MR. MARINO: -- on that point, what supports your
7 flat statement that he did not intend -- he was going to sell
8 this marijuana? And you've got a flat statement in your brief
9 with no citation following it. What supports that?

10 MR. SCHATTENFIELD: I think we do have citations.

11 We --

12 MR. MARINO: What's the citation? His testimony?

13 MR. SCHATTENFIELD: His testimony. There was
14 nobody else. Who else is going to testify as to his
15 intentions? I mean, he did not -- his testimony is a) I'm a
16 heavy user of marijuana. The price of marijuana rose to a
17 level which became prohibitive. He then decided in 1991 to
18 grow his own. While he was growing his own a friend of his
19 asked him to grow 10 plants for him, the friend brought him
20 the plants, he planted them. And the distribution involved
21 here is the 10 plants which he was growing for his friend
22 which he was going to give back. Now, whether that's
23 distribution I'm not sure. As I started to say --

24 MS. GREENE: Well, it's technically from the -- it
25 has to be from the statutory perspective. He certainly

1 | agreed --

2 | MR. SCHATTENFIELD: Oh, yes.

3 | MS. GREENE: -- in his plea that he was growing
4 | with intent to distribute. The question is and what the judge
5 | seemed to be concerned about as I read the initial decision is
6 | whether there is evidence on the record that he may have
7 | actually intended to distribute to more than the friend -- to
8 | the category that seems to be of concern in the Williamsburg
9 | County case, the egregious shock to the -- kind of conduct
10 | where you have a systematic devotion to a criminal enterprise.
11 | I think the argument here is whether what he did falls within
12 | that construct and whether there's sufficient evidence of
13 | mitigation. And what is of some concern if you would about
14 | it, the mitigation seems basically to be that he stopped the
15 | conduct that was the cause for the criminal offense and the
16 | counterargument is he stopped the conduct because he had no
17 | choice if he wanted to stay out of jail and has he really --
18 | does he really intend to stop the conduct. And what we don't
19 | have a lot of precedent to help us answer is how much time
20 | needs to pass before we can accept a revision in his conduct
21 | as indeed a showing that it's not such a current offense and
22 | he's not likely to do it again and get into the same kind of
23 | trouble again. And if you could --

24 | MR. SCHATTENFIELD: It's true.

25 |

 MS. GREENE: -- give us some enlightenment on that.

1 MR. SCHATTENFIELD: I'd love to give you some
2 enlightenment on that, but you have the same record I do. He
3 has not used marijuana since December 31, 1991. He tested
4 clean ever since then. Well, actually the tests started
5 months later but he, he has tested clean.

6 How long that goes I can't tell you, Ms. Greene. I
7 don't think he should be held hostage to the fact that if his
8 renewal came up six years from now that the six years would
9 have been all right but since his renewal came up now after,
10 after one year it's not all right. I think you got to look at
11 all the factors in this case.

12 MR. MARINO: Well, you started to tell us that
13 Congress has made gradation of offenses --

14 MR. SCHATTENFIELD: That's right, yes.

15 MR. MARINO: -- and that this is at the lower end
16 of the scale?

17 MR. SCHATTENFIELD: Yes.

18 MR. MARINO: What's at the upper end?

19 MR. SCHATTENFIELD: Thousand -- well, a thousand
20 marijuana plants are more the upper end, the middle ground
21 is --

22 MR. MARINO: And what's the penalty for that?

23 MR. SCHATTENFIELD: I've got it here.

24 MR. MARINO: Life imprisonment?

25 MR. SCHATTENFIELD: No, no, no.

1 MS. GREENE: More years.

2 MR. SCHATTENFIELD: I've got the statute here, you
3 want me to get it?

4 MR. MARINO: No, no. I'm just -- go ahead.

5 MR. SCHATTENFIELD: The penalties decrease as the,
6 as the crime goes down. The, the second level is 100 plants
7 or more and the third level is 50 or less which is as I was
8 working on this -- I don't know what happens if the guy had
9 75, I had nobody to ask. But 50 or fewer is the lower end.
10 The reason for the differentiation according to the cases is
11 that it is presumed that if a person is growing less than 50
12 he is not trafficking for profit.

13 MR. MARINO: And that's federal law that we're
14 bound by? You cited a court case but --

15 MR. SCHATTENFIELD: Yes, Webb -- I think it's the
16 Webb case.

17 MS. GREENE: Well, there's not a presumption about
18 that as I understand.

19 MR. SCHATTENFIELD: Yeah. Webb holds that over 50
20 plants, likely operator is -- the operator is trafficking.
21 The corollary to that would be under 50 it is not likely that
22 he would be trafficking.

23 MS. GREENE: So it's a question of presumption
24 sounds like.

25

MR. SCHATTENFIELD: Yes, I agree.

1 MS. GREENE: And that's a cut-off as to what --

2 MR. SCHATTENFIELD: I agree.

3 MS. GREENE: -- presumption you apply. There are a
4 couple of things that are troubling in this case because it
5 seems that --

6 MR. SCHATTENFIELD: I have no trouble at all,
7 Ms. Greene.

8 MS. GREENE: Well, the Commission seems to be
9 saying through its series of policy statements that a serious
10 drug-trafficking offense is essentially per se not
11 disqualifying. And if the offense doesn't fall within that
12 category then you're really applying the character policy
13 statement which is looking to the relevance between the
14 conduct and the Commission's concern about being able to rely
15 on its licensees and the need to have truthful licensees, and
16 there are a couple of things that are troubling in the factual
17 background in this case. One is that Mr. Richards apparently
18 understood that growing the marijuana was not a condoned
19 activity and therefore chose to do it on federal land in order
20 to hide the fact that this marijuana was his to try to save
21 the ranch as it was which raises a question as the judge
22 pointed out of the deception. And the second question, and
23 this is one where the record is somewhat difficult, is the 100
24 plants that he and his friend dropped into the river shortly
25 before he was caught because as you set forth the hierarchy of

1 offenses certainly that 100 plants puts him into a very
2 different category. And what do we know about those 100
3 plants?

4 MR. SCHATTENFIELD: What we know about those 100
5 plants -- from the surface. One --

6 MR. MARINO: What do we know?

7 MR. SCHATTENFIELD: What we know on the surface
8 from what's there. If -- this was before he was arrested, the
9 100 plants.

10 MS. GREENE: Shortly before he was arrested.
11 Couple of --

12 MR. SCHATTENFIELD: Well, yes, but he didn't know
13 he was going to be arrested -- if it was a day before he
14 didn't know he was going to be arrested. He -- if in fact he
15 was engaged in a criminal conspiracy to become a drug lord,
16 why would he have thrown those plants away when he did before
17 he knew he was going to be arrested? He explained where they
18 came from. He, he didn't want them. Now, whether -- what the
19 motivation was I don't know, but those were dumped in a river
20 before he was arrested in this case and I -- and you ought to
21 focus on he was not arrested in this case for any drug
22 violation. He was arrested at the, at the instance of his
23 then girlfriend who, it's not in the record, who was upset
24 with him and domestic violence ensued and that's why he was
25 arrested. There are all kinds of plots going on there and who

1 put her up to it and whether the Park Service wanted that
2 land, but that's not in the record either. Suffice is to say
3 that the domestic-violence charges were dropped and they're --
4 I don't know if they're in the record in the materials that
5 were exchanged, they certainly were exchanged but I don't
6 think they got in the record. The character of his woman and
7 what she did and how she recanted, that's all in papers you
8 don't have.

9 MS. GREENE: The only reference to any kind of
10 domestic violence is the footnote in the judge's opinion about
11 an incident that he considered irrelevant and there seems to
12 be no dispute on that point of his opinion.

13 MR. SCHATTENFIELD: That's right.

14 MR. MARINO: Mr. Schattenfield, I'm troubled a
15 little bit by your argument that somehow the judge is
16 collaterally enhancing the judge's finding -- the district
17 court judge's findings in this case.

18 MR. SCHATTENFIELD: Oh, yes.

19 MR. MARINO: Is that true or is this evidence --

20 MR. SCHATTENFIELD: Oh, yes.

21 MR. MARINO: -- this evidence in aggravation or
22 mitigation?

23 MR. SCHATTENFIELD: Let's go back to the ledgers
24 which they got in the search warrant, ledgers which were,
25 which were --

1 MR. MARINO: Is it agreed that they're 15 years
2 old?

3 MR. SCHATTENFIELD: Give or take. All he could
4 agree was somewhere between 15 and 14, it was right in there.
5 Had nothing to do with this offense and he -- based on that
6 they should never have been introduced in evidence. They
7 should not have been allowed. That had nothing to do with
8 this offense. Then based on that and Mr. Richards' testimony
9 he presumes --

10 MR. MARINO: How about the scales?

11 MR. SCHATTENFIELD: What about the scales?

12 MR. MARINO: Are you arguing that those aren't
13 relevant either because they were before the district court
14 judge and he took that into account in making his findings?

15 MR. SCHATTENFIELD: I'm arguing certainly that and
16 I'll get to that. He had scales -- testified about the
17 scales. He was a collector of scales. Now, that might sound
18 ludicrous, but that's a fact. And he was -- he also testified
19 that he used the scales in his farming enterprises.

20 MR. MARINO: Maybe just as ludicrous that he was
21 working for DEA.

22 MR. SCHATTENFIELD: Well, not really, not really.
23 A man could have a social conscience even though he smokes
24 marijuana.

25

MR. MARINO: But I'm saying the same analogy. I

1 must say that it is -- it doesn't ring true that you have all
2 those scales because you're a collector of scales, and then
3 what goes with it?

4 MR. SCHATTENFIELD: What?

5 MR. MARINO: Paper.

6 MR. SCHATTENFIELD: What paper?

7 MR. MARINO: Wasn't there some kind of wrapping
8 paper and sealing wax?

9 MR. SCHATTENFIELD: Well, there were sealers.
10 He --

11 MR. MARINO: Sealers.

12 MR. SCHATTENFIELD: -- he packaged his produce. I
13 don't know how --

14 MR. MARINO: Well, besides his testimony is there
15 anything we can take official notice to support that, that
16 garlic gets sold by the gram?

17 MR. SCHATTENFIELD: Well, certainly it is.

18 MR. MARINO: Or will we go only on his testimony?

19 MR. SCHATTENFIELD: Well, I think you go on his
20 testimony, but go to the supermarket and you'll see it.
21 That's how you package it. You put them in glassine bags and
22 then -- and you ship it to market.

23 MR. MARINO: And you seal them?

24 MR. SCHATTENFIELD: Yeah -- you want them to be
25 fresh. You wouldn't want old garlic would you?

1 MR. MARINO: How about the pager, how about the
2 pagers? Aren't those notoriously used by drug-traffickers?

3 MR. SCHATTENFIELD: At 14th and U. Who was he
4 going to get in touch with there? He owned one farm of 42 or
5 82 acres, number one. He was farming acreage spread out in
6 the area, and he had -- the pagers were available but they
7 weren't licensed to him. When I get him I get him on a pager.
8 You can't call him. He's out on the farm working so that's
9 how you get him. And, you know, at 14th and U that's what you
10 do. In Sierra Vista where there's nothing, who's he going to
11 call? His supplier or his customers? You don't do that.

12 MS. GREENE: What you're arguing is essentially all
13 of the paraphernalia that was identified in the judge's
14 decision as having been picked up during the search had a
15 farming use as well as a marijuana use, or had a marijuana
16 use use as opposed to a marijuana sale use? Are you saying --

17 MR. SCHATTENFIELD: Could be used for marijuana,
18 but there is absolutely no evidence anywhere that he ever sold
19 this stuff. You don't need scales to weigh what you're
20 smoking. And he smoked it. He readily -- he, he was
21 forthright with that. He didn't say I just started last week,
22 he had a habit. He stood up and said, "I had a habit, I was
23 wrong. I saw the light," which seems to bother my friend
24 Mr. Sippel. But, you know, I'm not going to comment about
25 that. Some people --

1 MR. MARINO: Well, he didn't see the light until
2 after he was convicted.

3 MR. SCHATTENFIELD: He saw the -- that's --

4 MR. MARINO: He had been born again in the '80s and
5 he was convicted in the '90s.

6 MR. SCHATTENFIELD: No, no. He saw, he saw the
7 light with respect to the use not after he was convicted,
8 before that.

9 MS. GREENE: After he was arrested.

10 MR. SCHATTENFIELD: Huh?

11 MS. GREENE: Some months after he was arrested.

12 MR. SCHATTENFIELD: Well, after, after he was,
13 after he was charged, but he was not convicted at that point.
14 And I'll tell you something else as an old AUSA. I looked at
15 this record and what they did and he -- he's got a hell of a
16 case against his, his attorney out there. What happened there
17 is unconscionable I think.

18 MS. GREENE: Are you referring to the loss of his
19 property?

20 MR. SCHATTENFIELD: Everything. He was not
21 adequately represented, but that's not --

22 MS. GREENE: But that's not in this record and
23 that's --

24 MR. SCHATTENFIELD: -- that's not, that's not, not
25 before you, not before --

1 MS. GREENE: And nothing has gone on on that basis
2 for us to reach any conclusions.

3 MR. SCHATTENFIELD: Correct. At any rate --

4 MR. MARINO: Yes, go ahead.

5 MR. SCHATTENFIELD: I forgot where I was. The one
6 thing I think that subsumes all of this, I really do, is the
7 provision in the Drug Abuse Act that the judge in his
8 discretion can recommend denial of federal benefits.

9 MR. MARINO: Was the judge aware of the fact that
10 he had a broadcast license?

11 MR. SCHATTENFIELD: Yeah.

12 MR. MARINO: He was?

13 MR. SCHATTENFIELD: Yes.

14 MR. MARINO: How do you establish that in the
15 record?

16 MR. SCHATTENFIELD: Well, the way I establish it, I
17 think if you look at our Mass Media -- at our Exhibit 28 he --
18 his order was he's not going to take away his federal benefits
19 and leave it to the FCC to do.

20 MR. MARINO: He indicates -- I'm sorry, how did you
21 phrase that? How did he phrase it?

22 MR. SCHATTENFIELD: I don't want to paraphrase the
23 judge, I'm very leery about that, but I will read it.

24 MR. MARINO: Sure.

25 MR. SCHATTENFIELD: I think it's 28. "It's ordered

1 | that the court's sentence in the above-captioned matter is not
2 | intended to affect the defendant's ability to apply for or
3 | receive federal benefits including but not limited to the
4 | federal benefit of owning and operating television stations
5 | licensed by the Federal Communications Commission."

6 | MR. MARINO: So, if the judge had thought that this
7 | was such a dastardly -- if he was the type of person that
8 | President Bush was concerned about, he might have recommended
9 | lifting his broadcast license?

10 | MR. SCHATTENFIELD: Certainly. Certainly.

11 | MR. MARINO: He left it -- but he left it open to
12 | the FCC, or he left it open for the applicant to apply --

13 | MR. SCHATTENFIELD: Sure. Sure.

14 | MR. MARINO: -- and the FCC to, to work its will.

15 | MR. SCHATTENFIELD: Well, he had no authority not
16 | to. I mean, he -- all he can do is recommend, the FCC can do
17 | whatever it wants. He can't control the FCC --

18 | MR. MARINO: And it was within his --

19 | MR. SCHATTENFIELD: -- as we can see why I'm here
20 | today.

21 | MR. MARINO: And it was within his discretion to
22 | decide on that?

23 | MR. SCHATTENFIELD: Yes.

24 | MR. MARINO: It's not something he's compelled
25 | either way by the sentencing guidelines, for example?

1 MR. SCHATTENFIELD: It's, it's -- I think it's
2 21 U.S.C. -- what is it?

3 MR. MARINO: The statute that you --

4 MR. SCHATTENFIELD: 842 -- I think it's 842 but I'm
5 not --

6 MR. MARINO: The statute quotes --

7 MR. SCHATTENFIELD: Yes. Yes.

8 MR. MARINO: -- the judge in his discretion may
9 recommend that the federal privileges be --

10 MR. SCHATTENFIELD: That's right.

11 UNIDENTIFIED PARTY: Mr. Schattenfield, your time
12 is nearly expired. I just wanted the record --

13 MR. SCHATTENFIELD: I haven't even started yet.

14 MR. MARINO: Expired? My watch says 20 minutes and
15 46 seconds, but shall we give some time for -- I'm sorry,
16 Ms. Greene, you had --

17 MS. GREENE: I wanted to ask whether you wanted to
18 reserve any of your time for rebuttal. We didn't ask you
19 earlier.

20 MR. SCHATTENFIELD: Yeah, I would like to.

21 MR. MARINO: Do you want to sum up?

22 MR. SCHATTENFIELD: Yes.

23 MR. MARINO: One question. I do want to make one
24 statement.

25 MR. SCHATTENFIELD: Sure.

1 MR. MARINO: I mean, you accuse the judge of bias.
2 I'm going to take that with a grain of salt and say that
3 that's hyperbole because if you really thought this judge was
4 biased you should have followed the Commission's procedure
5 and --

6 MR. SCHATTENFIELD: No, no, I think you're taking
7 bias the wrong way.

8 MR. MARINO: Okay.

9 MR. SCHATTENFIELD: By bias I meant I think he has
10 a feeling about drugs --

11 MR. MARINO: Yeah.

12 MR. SCHATTENFIELD: -- and also about, about born-
13 again religion.

14 MR. MARINO: And second, both you and Bureau
15 counsel I think sandbagged him in not telling him that you
16 both were aware of the fact that in fact this gentleman had
17 cooperated with the DEA.

18 MR. SCHATTENFIELD: That was part of the record.
19 That was part of the record.

20 MR. MARINO: He was told?

21 MR. SCHATTENFIELD: Well, certainly. It was in our
22 record. That was his testimony, which --

23 MR. MARINO: No, no, no. That it had been
24 corroborated by the DEA officer and you both knew it but
25 neither one of you apparently told the judge.

1 MR. SCHATTENFIELD: Well, we put it in the
2 evidence. It was our feeling that if there was any
3 counterevidence and knew my friend Mr. Zauner had talked to
4 him, I can't say well, Mr. Zauner talk to --

5 MR. MARINO: Well, why couldn't you -- instead of
6 playing the procedural games that are played, but couldn't you
7 both stipulate that Your Honor we can tell you that we're both
8 aware of the fact that the DEA -- that a DEA officer has
9 corroborated his testimony that he cooperated with the DEA?

10 MR. SCHATTENFIELD: Mr. Marino, with hindsight
11 you're right.

12 MR. MARINO: I agree.

13 MR. SCHATTENFIELD: But at the time I did not think
14 there would be any question about that.

15 MR. MARINO: Okay. I withdraw. I was just putting
16 it in the context of accusing the judge of bias.

17 MR. SCHATTENFIELD: No, I -- my point is, it was my
18 feeling that a person would have to be off the wall to be
19 before the FCC and say I cooperated with the DEA which I knew
20 with the knowledge that he hadn't because my friend Mr. Zauner
21 there is not going to sit on his hands, you know. I --

22 MR. MARINO: Then in fairness he's trial counsel,
23 he was there too. He didn't think that it was necessary to
24 stipulate.

25

MR. SCHATTENFIELD: No.

1 MR. MARINO: Thank you.

2 MR. SCHATTENFIELD: I'm done?

3 MR. MARINO: How much time --

4 MS. GREENE: Well, are you going to reserve any
5 of --

6 MR. SCHATTENFIELD: I'll take -- I'm a
7 suppliant -- at this point I'm a suppliant, I'll take
8 whatever you give me. And I want you to know that as pay for
9 this I get 25 pounds of carrots.

10 MR. MARINO: The procedures, we -- just for the
11 record --

12 MR. SCHATTENFIELD: I was going to bring you
13 carrots -- I decided against it.

14 MR. MARINO: -- have procedures now been worked out
15 for the CBA so that in indigent cases pro bono representation
16 is available? I didn't know there wasn't --

17 MR. SCHATTENFIELD: I think the FCBA has such a
18 committee. It did not come to us I don't think through the
19 FCBA, it might have. We took it --

20 MS. GREENE: Well, I'm not sure it's really
21 relevant in the --

22 MR. SCHATTENFIELD: No, but it's interesting.

23 MR. MARINO: Thank you.

24 MR. SCHATTENFIELD: Thank you.

25 MS. GREENE: Thank you.

1 MR. MARINO: Mr. Zauner?

2 MS. GREENE: Mr. Zauner, from reading your reply
3 brief I get the sense that there isn't a huge amount of
4 difference of opinion between you and Mr. Schattenfield except
5 as respects to the ultimate resolution.

6 MR. ZAUNER: I think that's probably correct in a
7 sense. I felt that many of the things that were in the
8 initial decision were probably not necessary to be in the
9 initial decision.

10 MS. GREENE: Such as?

11 MR. ZAUNER: I tend -- well, I tend to see this
12 case as a very straightforward matter of an individual who was
13 charged with a criminal enterprise who pled guilty and was
14 convicted and that we should not go behind that conviction.

15 MR. MARINO: Mr. Zauner --

16 MR. ZAUNER: Except --

17 MR. MARINO: -- you just mentioned the magic word
18 criminal enterprise, and then we have drug-trafficking. But
19 there are terms of art. In the sentencing guidelines it's
20 made very clear of what we're dealing with here. First, under
21 Chapter 2, "Offense conduct," there are offense involving
22 drugs and that's one category. The very next category which
23 is also mentioned is "Offenses involving criminal enterprises
24 and racketeering." Now, I mean does this qualify as either
25 involving criminal enterprises or racketeering?