

1 And I'm going to also require Mr.
2 Titus to make a better showing in terms of how
3 he can't afford to do this. That means we've
4 got to know what the costs are going to be for
5 the witness to testify and throw in some
6 expenses for air flight and that type of
7 thing.

8 MR. SCHONMAN: Your Honor?

9 ADMIN. JUDGE SIPPEL: Maybe he has
10 frequent flyer points. I don't know.

11 MR. SCHONMAN: I'm just really
12 concerned about the blurring of a deposition
13 with testimony at the hearing.

14 We would expect to take his
15 deposition out in the Seattle area. And then
16 at the exhibit exchange, his direct written
17 testimony would be provided to us. And we
18 would decide based on his direct, written
19 testimony whether we want to call him for
20 cross examination at the hearing.

21 I would anticipate that we would,
22 but I can't say for sure that we would.

1 ADMIN. JUDGE SIPPEL: No.

2 MR. SCHONMAN: But like any other
3 case -- and this case is typical of any case
4 that we try here -- we would have the
5 opportunity to review his direct testimony.
6 I'm just concerned about blurring the
7 distinction between a deposition and testimony
8 at trial. They are two different things --
9 two different purposes.

10 ADMIN. JUDGE SIPPEL: Well, that's
11 true. But a deposition can be used for any
12 purpose under the rules. But as a general
13 proposition, everything that you say is
14 absolutely true.

15 But if the person that was asking
16 for this type of relief, or somebody like
17 Sprint, Nextel -- something like that -- I
18 would agree with you. But this person is
19 saying, look, I want to do it. But it's going
20 to be an economic hardship for me to do it.

21 MR. SCHONMAN: This is why I
22 inquired about the type of expert witness.

1 ADMIN. JUDGE SIPPEL: We're going
2 to get to that.

3 MR. SCHONMAN: If he's an expert
4 witness who is intimately familiar with Mr.
5 Titus, maybe that person has to be in the
6 Seattle area. Perhaps there's an expert
7 witness in the Washington area who's an expert
8 in whatever area Mr. Marshall has in mind. I
9 don't know what he has in mind.

10 ADMIN. JUDGE SIPPEL: All right.
11 Well -- all right. In other words, it's
12 premature. And you're going to reserve your
13 objection. But you don't have to object yet,
14 because we haven't gotten all the
15 preliminaries down yet. We don't even know
16 whether or not he's going to be able to find
17 an expert that Mr. Titus can afford. Just the
18 fee alone could rule it out, I suppose.

19 As I say, I'm going to require if
20 we go forward with this, or I'm going to
21 seriously consider this further, we're going
22 to require some financial statements and that

1 type of thing coming in as to why he can't
2 afford to get him down here. Him being the
3 expert.

4 Let me back away a little bit now,
5 Mr. Marshall, and let's hear from you. And
6 let's start with the question Mr. Schonman has
7 about what would be the purpose of the expert.

8 MR. MARSHALL: Your Honor, I would
9 like, respectfully, to decline to divulge my
10 thinking on that subject.

11 We don't yet know that we are
12 going to call an expert witness. We don't yet
13 have a particular expert witness in mind, so
14 of course we can't reveal the testimony. And
15 I believe that the attorney work product
16 privilege protects my thinking on this
17 subject.

18 ADMIN. JUDGE SIPPEL: All right.
19 Well, okay.

20 It's not going to be a plea --
21 it's not going to be insanity or something
22 like that? Right? I mean, this is going to

1 be some kind of a psychologist or some kind of
2 a therapist, occupational therapist or
3 something. In the generics, is that what
4 we're talking about?

5 MR. MARSHALL: You're right, Your
6 Honor. It's not going to be any sort of
7 insanity information. But beyond that, I'd
8 like to rely on the attorney work product
9 privilege.

10 ADMIN. JUDGE SIPPEL: You can.

11 All right. So we're premature on
12 this.

13 MR. SCHONMAN: Your Honor, I think
14 at some point, we have to bring discovery to
15 a close. We have to wrap it up and set dates
16 for a hearing.

17 What I'm hearing now is although
18 the case was designated back in January, here
19 it is nine months later and we still don't
20 know who we're going to call, what we're going
21 to do, who we can depose. For a case of this
22 nature, I would have hoped that we could have

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1 wrapped up discovery by this time.

2 The Bureau's been making every
3 effort. We have travel plans ready to go to
4 Seattle next week. We would anticipate that
5 that would be the conclusion of our discovery.
6 But I think it's troublesome, at least, for
7 Mr. Marshall at this point not to know whether
8 he's going to do one thing or the other. This
9 just delays the ultimate hearing.

10 MR. MARSHALL: Your Honor, may I --

11 ADMIN. JUDGE SIPPEL: Go ahead.

12 MR. MARSHALL: Last week, when I
13 talked to Mr. Schonman and Mr. Knowles-Kellett
14 on the phone, we discussed the need that I
15 have and that Mr. Titus has to receive the
16 documents that they intend to use against him.
17 And I think it came as a surprise to Mr.
18 Schonman to learn that we didn't already have
19 the police reports concerning Mr. Titus. We
20 don't.

21 When Mr. Titus was prosecuted in
22 1993, I believe he -- are you all still there?

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1 ADMIN. JUDGE SIPPEL: We're all
2 here.

3 MR. MARSHALL: Are you still
4 there?

5 ADMIN. JUDGE SIPPEL: Yes.

6 MR. MARSHALL: Sorry. It's just
7 that it was quiet on the other end of the
8 line, and I was worried --

9 ADMIN. JUDGE SIPPEL: Well, we're
10 listening. We're listening.

11 MR. MARSHALL: I apologize. I
12 appreciate your respectful silence.

13 What I was saying that in 1993,
14 when Mr. Titus was prosecuted, his counsel
15 then received the police reports, on the basis
16 of which he was prosecuted. But we have
17 learned, not at all to my surprise, that his
18 counsel no longer has police reports he
19 received in 1993. Those have gone to the
20 shredder.

21 And under Washington State law,
22 Mr. Titus is not entitled to go to the police

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1 department and get another copy. In fact, he
2 wasn't even entitled to get a copy in 1993.
3 Only his counsel for the criminal case was
4 entitled to get a copy.

5 I wouldn't have been entitled
6 representing him before an FCT proceeding to
7 get police reports from the police department
8 in 1993.

9 So our ability to plan our defense
10 is severely hampered because we don't know
11 what offense we're defending against. We
12 don't know what the evidence against Mr. Titus
13 is.

14 As Mr. Schonman said in reading
15 his status report this morning, this is one of
16 the subjects for this morning's discussion.
17 I believe he's proposing, and I believe it's
18 in part of what we talked about last week,
19 that you would authorize him to provide, in
20 advance of Mr. Titus' deposition, copies of
21 the police reports about which they plan to
22 question him at his deposition. That would

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1 solve this problem and enable us to get about
2 planning his defense.

3 Until then, I can't make the
4 decisions that Mr. Schonman is complaining to
5 you that I haven't yet made.

6 ADMIN. JUDGE SIPPEL: Well, let me
7 ask you this. Are you saying that you can't
8 make the decision about an expert until you
9 receive the police reports? Or that you can't
10 make that decision until you receive the
11 police reports and your client is deposed?

12 MR. MARSHALL: It is the former,
13 Your Honor. I'm saying the former.

14 ADMIN. JUDGE SIPPEL: So all you
15 need is the police reports. And then you can
16 put those together with whatever else you're
17 thinking about, discuss it with Mr. Titus and
18 make a decision?

19 MR. MARSHALL: When I say police
20 reports, I'm assuming that that's all the
21 evidence -- that that contains all the
22 evidence that the Enforcement Bureau intended

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1 to use against Mr. Titus. If there's other
2 evidence, then we need that as well, of
3 course. But I understand from Mr. Schonman's
4 conversation with me last week that the police
5 reports are at least the heart of it.

6 ADMIN. JUDGE SIPPEL: Yes. Well,
7 I would expect the Bureau counsel to be very
8 candid in that regard.

9 MR. SCHONMAN: Your Honor, may I
10 comment, please?

11 ADMIN. JUDGE SIPPEL: Yes. Let me
12 just finish my statement.

13 I don't have any reason to
14 believe, based on your status report that
15 there's anything else out there besides police
16 reports that you're having difficulty getting
17 from the Bureau. That's -- but let's go. Go
18 ahead, Mr. Schonman.

19 MR. MARSHALL: You were speaking
20 to me, Your Honor, earlier?

21 ADMIN. JUDGE SIPPEL: Yes, I was
22 -- well, I was speaking in general. But, yes,

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1 more to you. Yes, sir.

2 MR. MARSHALL: Well, I'm assuming.
3 I'm not sure that Mr. Schonman told me that it
4 was only police reports. He may have said
5 that.

6 Whatever evidence they have
7 against Mr. Titus, that's what we need to see
8 in order to plan how to defend against that
9 evidence.

10 ADMIN. JUDGE SIPPEL: Okay. Well,
11 let me qualify what I said.

12 What you're saying in your report
13 is that Mr. Titus is to receive copies of the
14 documents concerning him, and especially
15 police reports that the Enforcement Bureau
16 holds. So that's what flagged it for me. So
17 you did have a more general reference to
18 documents.

19 Let Mr. Schonman wade into this
20 now from his position.

21 MR. SCHONMAN: Your Honor, I would
22 like to just comment that I think Mr. Marshall

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1 may have inadvertently mischaracterized my
2 reaction during our phone conversation last
3 week.

4 We are aware, and have been aware
5 for some time, that Mr. Titus possesses or has
6 access to very few documents. We very early
7 on in discovery issued a request for documents
8 on Mr. Titus. And his response was he has
9 none.

10 And after a volley of pleadings,
11 including an order on a motion to compel, he
12 produced just a few pages of documents.

13 So we're fully aware of the dearth
14 of documents that he has.

15 In terms of Mr. Titus' request for
16 documents, he filed a document request on the
17 Bureau, and we appropriately opposed it
18 because there's no such thing as a request for
19 documents on the Commission other than through
20 a FOIA. We've never received a FOIA request
21 from Mr. Titus.

22 Now, in addition, Mr. Titus has

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1 never requested the Bureau to prepare a
2 protective order involving any of the
3 documents that are the subject of his informal
4 request now. It was at our urging that we
5 prepare a protective order. And it was only
6 recently that we commenced this process.

7 What we're willing to do is enter
8 into a protective order so that the documents
9 that we provide voluntarily to Mr. Titus don't
10 go beyond the bounds of this particular
11 hearing proceeding. But that process only
12 recently started. And it was started by the
13 Bureau, not by Mr. Titus.

14 ADMIN. JUDGE SIPPEL: Well, all
15 right. I've gone back and I've read the
16 Enforcement Bureau's objections to the Titus
17 request and the supplemental answers after Mr.
18 Titus filed a motion to compel. It seems to
19 me that the Bureau is acting very much in good
20 faith and wants to do this. We're not going
21 to get hung up with a FOIA request.

22 MR. SCHONMAN: I would also add

1 that the police reports relate to the criminal
2 activities of Mr. Titus. The man is fully
3 aware of his criminal history. These reports
4 are likely not to shed any new light for him.
5 So it puzzles me how Mr. Marshall is unable to
6 determine what witnesses he'd like to call or
7 what case he'd like to present at this late
8 stage.

9 He filed interrogatories. That
10 is, Mr. Titus filed interrogatories on the
11 Bureau. And the Bureau provided the names of
12 every individual it had spoken to.

13 I don't know that Mr. Titus has
14 spoken to any of those individuals.

15 But our universe of persons who we
16 intend to call to testify at the hearing will
17 come from that list of persons whom we
18 disclosed in response to his request for
19 interrogatories.

20 ADMIN. JUDGE SIPPEL: Well --

21 MR. SCHONMAN: I mean, we've been
22 pursuing discovery. And I get the feeling

1 that the Law Offices of David Marshall have
2 just been sitting back and hoping that the
3 trial never takes place. At some point, we've
4 got to bring this to a close.

5 ADMIN. JUDGE SIPPEL: Well, it's
6 going to be brought to a close. I have a
7 motion to compel the incident interrogatories.
8 I've got pleadings filed into August from both
9 sides on discovery.

10 So I mean, I don't think you're
11 painting quite an accurate picture of how this
12 case has proceeded. It's not proceeded as
13 quickly as it should have probably. That's
14 true.

15 I'm probably partially at fault
16 also. I mean, I should have been riding herd
17 on this a little bit better. But I'm assuming
18 that you've got a summer -- the month of
19 August is generally a slow month in
20 Washington. And I'm trying to accommodate
21 people's vacation plans and stuff like that
22 too. This is not an O.J.-type of case. I

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1 mean, we're going to get to the merits.

2 MR. SCHONMAN: But Your Honor, my
3 concern is that at this late stage, nine
4 months into discovery, to hear from Mr.
5 Marshall that he's not sure who he's going to
6 call, who he's going to rely on, and not
7 giving us an indication of who we might depose
8 of his witnesses, it's pretty late in the game
9 to engage in that.

10 ADMIN. JUDGE SIPPEL: Well, I can
11 set some dates at the end of this. I can set
12 some firm dates, and we can get this case
13 maybe back on track. Not that it's gotten off
14 the track, but we can get better focused.

15 But I'm trying to make rulings.
16 Obviously, I can't force Mr. Marshall's hand
17 with respect to an expert now.

18 You're absolutely right, Mr.
19 Schonman. It's going to reach a point, and
20 it's going to reach a point quite soon that
21 that's not going to be an option for him and
22 Mr. Titus. And Mr. Titus should be told that.

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1 I mean, he has to make a fish or cut bait
2 decision.

3 And if I'm going to make decisions
4 on whether or not he's going to come here to
5 Washington based on a plea of almost -- well,
6 if it's going to be too much of a burden
7 financially, I'm going to have to see some
8 proof on that. Now, whether Mr. Titus wants
9 to go through that too, again, that's up to
10 Mr. Marshall and Mr. Titus.

11 It certainly is more efficient it
12 seems to me to spend the time and effort on
13 getting ready for trial than trying to wrestle
14 with decisions in terms of how we're going to
15 set the table.

16 This is becoming, I would think,
17 pretty expensive to Mr. Titus. And he hasn't
18 come close to having his day in court yet.

19 Let me see what we can do. We're
20 finished with the expert question now, except
21 for me setting a date at the end of the
22 conference in terms of when you're going to

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1 have to fish or cut bait, Mr. Marshall.

2 MR. MARSHALL: Your Honor, could I
3 ask something before we --

4 ADMIN. JUDGE SIPPEL: Sure.

5 MR. MARSHALL: -- before we say
6 we're completely finished with that?

7 ADMIN. JUDGE SIPPEL: Sure.

8 MR. MARSHALL: Are you making a
9 decision today that we would be able to
10 present the expert through a video deposition
11 at the hearing?

12 ADMIN. JUDGE SIPPEL: No. I'm
13 open to it. But I haven't made a decision
14 yet, because I think Mr. Schonman is right.
15 I don't know -- and for good reason on your
16 part -- I don't know what the nature of this
17 testimony is going to be, whether or not it's
18 going to help me make a decision in this case.
19 I don't know anything about the qualifications
20 of a possible expert.

21 And I haven't seen the Rule 26(b)
22 statement that counsel and I are entitled to

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1 before it's necessary to take discovery.

2 MR. MARSHALL: Right.

3 ADMIN. JUDGE SIPPEL: So, it's
4 premature. That's the point.

5 But I'm going to have to give you
6 a date and say, look, by such-and-such a date
7 you either come in and with a showing that:
8 (a) you want this witness; (b) you're prepared
9 to absorb all the expenses that we're talking
10 about, that is, you're going to pay the expert
11 obviously to appear at a deposition. We're
12 not going to pay for that.

13 MR. MARSHALL: Of course.

14 ADMIN. JUDGE SIPPEL: Okay. And
15 you're going to pay for a video recording.
16 And you're going to give me financials on your
17 client to show me that he can't afford to pay
18 for whatever the expenses are to get the
19 witness here to Washington for a day.

20 MR. MARSHALL: Right.

21 ADMIN. JUDGE SIPPEL: Now, if you
22 do all that, then I'm in a position to say up

1 or down about the video. And of course, then
2 I've got to hear the responses from the other
3 side.

4 Now that kind of a process is
5 going to set this case back a bit.

6 MR. MARSHALL: Right. The
7 financials, providing a financial statement
8 from my client, that part is easy, Your Honor.

9 The other part of the procedure is
10 difficult and may be -- well, I'm concerned
11 about whether it will be feasible at all for
12 Mr. Titus, because in order to provide, for
13 example, the statement under Rule 26(b), we
14 have to engage the expert and pay some fees
15 right there. And yet without knowing what
16 that person -- well, let me back up a step.

17 If we fly someone to Washington
18 for a hearing, we're looking at paying that
19 person really for two days; one day for
20 travel and one day for hearing. So the
21 expense for a professional is going to be
22 enormous, at least enormous in terms of Mr.

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1 Titus' research --

2 ADMIN. JUDGE SIPPEL: Well, he's
3 not going to charge you an expert's fee the
4 day that he's flying in, is he? I mean, you
5 have to pay his per diem or whatever that is.
6 But you're not going to pay him as an expert
7 while he's on the plane, are you?

8 MR. MARSHALL: Well, I don't think
9 it's going to be the same rate as testimony.
10 But it's going to be -- we're certainly going
11 to have to pay for the fact that this person
12 would not be able to be in his or her office
13 doing other work on that day. So, it becomes
14 very expensive. And that's why I'm asking you
15 to decide today that we could present the
16 testimony through video deposition in the
17 process you outlined.

18 And depositions are established
19 for two purposes. Discovery is one of the
20 two. The other is perpetuation of testimony.
21 I'm asking you to rule this morning that we
22 could perpetuate the testimony.

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1 ADMIN. JUDGE SIPPEL: Well, I'm
2 open to what you're saying. But I'm not
3 prepared -- and this is the first time it's
4 been presented to me as well. And I'm not
5 prepared to rule just right now. And I've
6 given you an explanation as to why.

7 This is not a Greenspan witness.
8 I mean, you don't have to pay this guy -- I
9 can't -- it's hard for me to accept the fact
10 that you can't shop around a little bit in
11 Seattle and find somebody who is sympathetic
12 to your client's situation and wouldn't jump
13 at the chance of testifying in a case like
14 this. These cases don't come around that
15 much.

16 And his fee, certainly you're
17 going to have to pay him. But the fee, unless
18 your client is financially desperate, and
19 obviously this license is extremely important
20 to him, it's just hard for me to accept the
21 fact that this is going to be too costly on
22 the basis of what you're telling me now. You

1 may be right.

2 But right now, I'm going to give
3 you time to go and pursue this further. And
4 I told you what you're going to have to do to
5 get this thing to go your way. As I say, I'm
6 still reserving the right as to whether or not
7 I'm going to allow you to proceed with
8 deposition only, and not have to call this
9 witness in.

10 When I see this deposition, or
11 hear this deposition, or read this deposition,
12 I may feel that he has to come in. Mr.
13 Schonman may say well, he's all for just using
14 the deposition. And I may say, well, I'm not
15 all for doing that. So we just don't know.
16 I don't know. And I'm not going to commit
17 myself ahead of time.

18 I'm going to give you a date. Why
19 don't we get the date right now? How long is
20 it going to take you to give me a firm
21 commitment that you definitely want expert
22 testimony and that you're prepared to do all

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1 the things we're talking about?

2 MR. MARSHALL: Your Honor, I would
3 like to have three weeks from the date that I
4 receive from the Enforcement Bureau the
5 evidence that it intends to use against Mr.
6 Titus.

7 ADMIN. JUDGE SIPPEL: Well, that's
8 no good. That's way too long.

9 MR. SCHONMAN: Your Honor, we can
10 tell you, the universe of documents that the
11 Bureau has is very limited.

12 ADMIN. JUDGE SIPPEL: Less than
13 100 pages?

14 MR. SCHONMAN: Clearly. Three
15 weeks would be excessive.

16 ADMIN. JUDGE SIPPEL: Look, I can
17 have Mr. Schonman fax these things to you
18 within 24 hours. And you should be able to
19 tell me by the end of next week as to what you
20 and Mr. Titus are going to do.

21 MR. SCHONMAN: Your Honor, what we
22 need to do is work out an arrangement with the

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1 protective order for these documents, because
2 these documents are police records that
3 contain concededly sensitive information --
4 nonpublic sensitive information about Mr.
5 Titus.

6 ADMIN. JUDGE SIPPEL: But they're
7 just going to his lawyer. We haven't touched
8 it as far as evidence yet. It's just going
9 between you and the lawyer.

10 MR. SCHONMAN: Yes. But we
11 assured the police department that we would
12 get assurances from anyone we gave the
13 documents to that they would be used only for
14 purposes in this hearing.

15 What we like to do, in recognition
16 of those assurances, is to enter into a
17 protective order. We've drafted one. We've
18 circulated a draft to the Law Offices of David
19 Marshall. And --

20 MR. KNOWLES-KELLETT: We e-mailed
21 it to him yesterday afternoon. He probably
22 hasn't had a chance to review it yet.